

# Excerpts from 2<sup>nd</sup> Administrative Reforms Commission (ARC) Report

## 3

## LEGAL FRAMEWORK FOR FIGHTING CORRUPTION

## 3.1 Evolution of the Anti-Corruption Laws in India

3.1.1 In the pre-independence period, the Indian Penal Code (IPC) was the main tool to combat corruption in public life. The Code had a chapter on 'Offences by Public Servants'. Sections 161 to 165 provided the legal framework to prosecute corrupt public servants. At that time the need for a special law to deal with corruption was not felt.

3.1.2 The Second World War created shortages which gave opportunity to unscrupulous elements to exploit the situation leading to large scale corruption in public life. This situation continued even after the war. The lawmakers concerned about this menace, felt that drastic legislative measures need to be taken. Hence the Prevention of Corruption Act, 1947 was enacted to fight the evils of bribery and corruption.

3.1.3 *The Prevention of Corruption Act 1947:* This Act did not redefine nor expand the definition of offences related to corruption, already existing in the IPC. Similarly, it also adopted the same definition of 'Public Servant' as in the IPC<sup>38</sup>. However the law defined a new offence - 'Criminal misconduct in discharge of official duty' - for which enhanced punishment (minimum 1 year to maximum 7 years) was stipulated. In order to shift the burden of proof in certain cases to the accused, it was provided that whenever it was proved that a public servant had accepted any gratification, it shall be presumed that the public servant accepted such a gratification as a motive or reward under Section 161 of IPC. In order to prevent harassment to honest officers, it was mandated that no court shall take cognizance of offences punishable under Sections 161, 164 and 165 without the permission of the authority competent to remove the charged public servant. The Act also provided that the statement by bribe-giver would not subject him to prosecution.<sup>39</sup> It was considered necessary to grant such immunity to the bribe-giver, who might have been forced by circumstances into giving a bribe. If this immunity was not provided, all complainants would become liable for punishment, which would deter them from giving complaints against any public official who accepted a bribe.

3.1.4 The Criminal Law (Amendment) Act, 1952 brought some changes in laws relating to corruption. The punishment specified under Section 165 of IPC was enhanced to three years

<sup>38</sup> Section 2, The Prevention of Corruption Act, 1947

<sup>39</sup> Section 8, The Prevention of Corruption Act, 1947

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instead of the existing two years. Also a new Section 165A was inserted in the IPC, which made abetting of offences, defined in Sections 161 and 165 of IPC, an offence. It was also stipulated that all corruption related offences should be tried only by special judges.

*3.1.5 Amendments in 1964:* The anti-corruption laws underwent comprehensive amendments in 1964. The definition of 'Public Servant' under the IPC was expanded (The Santhanam Committee had also recommended an expanded definition of the term 'Public Servant'). The CrPC was amended to provide in camera trial if either party or the court so desires. The presumption which was available under Section 4 of The Prevention of Corruption Act, was extended to include offences defined under Sections 5(1) and 5(2). The definition of 'criminal misconduct' was expanded and possession of assets disproportionate to the known sources of income of a public servant, was made an offence. Section 5(A) was amended so as to empower the State Governments to authorize officers of the rank of Inspectors of Police to investigate cases under the Act (earlier, this could be done only with the approval of the Magistrate (The Santhanam Committee recommended this). Police officers, competent to investigate cases under the Act, were empowered to inspect bankers' records, if they had reasons to suspect commission of an offence under the Act (This power is available under Section 94 CrPC, but only after a case has been registered. This was also one of the recommendations of the Santhanam Committee).

*3.1.6 The Prevention of Corruption Act, 1988:* This Act received Presidential assent on 9<sup>th</sup> September, 1988. It consolidates the provisions of the Prevention of Corruption Act 1947, the Criminal Law Amendment Act, 1952 and some provisions of IPC. Besides, it has certain provisions intended to effectively combat corruption among public servants. The salient features of the Act are as follows:

- a. The term 'Public Servant' is defined in the Act. The definition is broader than what existed in the IPC.
- b. A new concept – 'Public Duty' is introduced in the Act.
- c. Offences relating to corruption in the IPC have been brought in Chapter 3 of the Act, and they have been deleted from the Indian Penal Code.
- d. All cases under the Act are to be tried only by Special Judges.
- e. Proceedings of the court have to be held on a day-to-day basis.
- f. Penalties prescribed for various offences are enhanced.

- g. CrPC is amended (for the purposes of this Act only) to provide for expeditious trial {Section 22 of the Act provides for amended Sections 243, 309, 317 and 397 of CrPC}.
- h. It has been stipulated that 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.<sup>40</sup>
- i. Other existing provisions regarding presumptions, immunity to bribe-giver, investigation by an officer of the rank of DySP, access to bank records etc have been retained.

### 3.2 The Prevention of Corruption Act, 1988

#### 3.2.1 Defining Corruption

3.2.1.1 The Prevention of Corruption Act does not provide a definition of 'Corruption'. Interestingly, Finland, which is the least corrupt nation according to the Transparency International's Corruption Perception Index also does not have any formal definition of corruption in its laws. Even the United Nations Convention against Corruption does not provide a definition of corruption. It lays down in Article 5, some preventive anti-corruption policies and practices. They are:

1. *Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.*
2. *Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.*
3. *Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.*

*States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this Article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.*

<sup>40</sup> Section 19(3)(b); The Prevention of Corruption Act, 1947



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3.2.1.2 The Prevention of Corruption Act, 1988, lists offences of bribery and other related offences and the penalties from Sections 7 to 15. These offences broadly cover acceptance of illegal gratification as a motive or reward for doing or forbearing to do any official act, or favouring or disfavours any person; obtaining a valuable thing without consideration or inadequate consideration; and criminal misconduct involving receiving gratification, misappropriation, obtaining any pecuniary advantage to any person without any public interest, or being in possession of pecuniary resources or property disproportionate to his known sources of income. Attempts to commit such offences and abetment are also listed as offences, in keeping with the principles usually applied in criminal law. The accent is thus on consideration, gratification of all kinds and pecuniary advantage.

3.2.1.3 However, experience of the past decades shows that such an indirect definition of corrupt practices is paradoxically restrictive and a whole range of official conduct, detrimental to public interest, is not covered by strong penal provisions. In particular, there are four types of official conduct which cause immense damage to public interest, which do not explicitly constitute violation of criminal law.

3.2.1.4 The first and possibly the most important of these is gross perversion of the Constitution and democratic institutions, including, wilful violation of the oath of office. Constitutional functionaries have sometimes been found to indulge in such constitutional perversion out of partisan considerations or personal pique. In most such cases, there may be neither illegal consideration nor pecuniary advantage, nor any form of gratification involved. In some of those cases, the Supreme Court held individuals holding high office guilty of gross misconduct amounting to perversion of the Constitution. In such cases, except public opinion, political pressure and dictates of the conscience of the individual, there are no legal provisions to punish the perpetrators.

3.2.1.5 The second such class of offences is abuse of authority unduly favouring or harming someone, without any pecuniary consideration or gratification. In such cases, often partisan interests, nepotism and personal prejudices play a role, though no corruption is involved in the restrictive, 'legal' sense of the term. Nevertheless, the damage done by such wilful acts or denial of one's due by criminal neglect have profound consequences to society and undermine the very framework of ethical governance and rule of law.

3.2.1.6 Third, obstruction or perversion of justice by unduly influencing law enforcement agencies and prosecution is a common occurrence in our country. Again in most such cases, partisan considerations, nepotism and prejudice, and not pecuniary gain or gratification, may be the motive. The resultant failure of justice undermines public confidence in the system and breeds anarchy and violence.

3.2.1.7 Finally, squandering public money, including ostentatious official life-styles, has become more common. In all such cases, there is neither private pecuniary gain nor specific gain or loss to any citizen. There is also no misappropriation involved. The public exchequer at large suffers and both public interest and citizens' trust in government are undermined.

3.2.1.8 It is generally believed that all these four types of wilful abuse of office are on the increase in our country at all levels and need to be firmly curbed if we are to protect public interest and our democratic system. Otherwise, public servants – elected or appointed – will be seen not as custodians of public interest and sentinels of democracy but as opportunists working for personal aggrandizement and pursuing private agendas while occupying public office.

3.2.1.9 There is therefore need for classifying the following as offences under the Prevention of Corruption Act:

- Gross perversion of the Constitution and democratic institutions amounting to wilful violation of oath of office
- Abuse of authority unduly favouring or harming someone
- Obstruction of justice
- Squandering public money

#### 3.2.1.10 Recommendation:

- a. The following should be classified as offences under the Prevention of Corruption Act:
  - Gross perversion of the Constitution and democratic institutions amounting to wilful violation of oath of office.
  - Abuse of authority unduly favouring or harming someone.
  - Obstruction of justice.
  - Squandering public money.

#### 3.2.2 Collusive Bribery

3.2.2.1 In any corrupt transaction, there are two parties - the bribe-giver and the bribe-taker. The offence of bribery can be classified into two categories. In one category the bribe giver is a victim of extortion, he is compelled to pay for a simple service, because if he does

not submit to the extortionary demands of the public servant, he ends up losing much more than the bribe. The delays, harassment, uncertainty, lost opportunity, loss of work and wages - all resulting from non-compliance with demands for a bribe - are so great that the citizen is sucked into a vicious cycle of corruption for day-to-day survival. Besides, there is another category of cases where the bribe-giver and bribe-taker together fleece society, and the bribe-giver is as guilty or even more guilty than the bribe-taker. These are cases of execution of substandard works, distortion of competition, robbing the public exchequer, commissions in public procurement, tax evasion by collusion, and causing direct harm to people by spurious drugs and violation of safety norms. These two categories of corruption are also termed as 'coercive' and 'collusive' corruption respectively. With the rapidly growing economy, cases of coercive corruption are on the increase, and, at times, these often assume the magnitude of 'serious economic offences'.

3.2.2.2 Chapter III of the Prevention of Corruption Act lays down various offences and penalties. Section 7 makes acceptance of illegal gratification by a public servant for doing any official act an offence. Though giving bribe is not separately defined as an offence, the bribe-giver is guilty of the offence of 'abetment' and is liable for the same punishment as the bribe-taker.<sup>41</sup> Section 24 of the Act, however, provides immunity from prosecution to a bribe-giver if he/she gives a statement in a court of law that he/she offered bribe. However, the Prevention of Corruption Act does not differentiate between 'coercive' and 'collusive' corruption.

3.2.2.3 Systemic reforms are very effective in combating coercive corruption. Besides, even though the general conviction rate in cases of corruption is low, it is observed that the rate of conviction in cases of coercive corruption is more than in collusive corruption. The reason for this is, the bribe-giver is also the victim and because of the immunity provided to him under Section 24 of the Prevention of Corruption Act, he often comes forward to depose against the bribe-taker. Besides, the 'trap cases' by the vigilance machinery are quite effective in such cases. The same is not true for 'collusive' corruption. Getting conviction in these cases is extremely difficult as both, the bribe-giver and the bribe-taker collude and are beneficiaries of the transaction. The negative impact of collusive corruption is much more adverse and the government and often the society, at large, are the sufferers.

3.2.2.4 The Commission is of the view that 'collusive' corruption needs to be dealt with by effective legal measures so that both the bribe-giver and the bribe-taker do not escape punishment. Also, the punishment for collusive corruption should be made more stringent. In cases of collusive corruption, the 'burden of proof' should be shifted to the accused.

<sup>41</sup> Section 12 of The Prevention of Corruption Act

3.2.2.5 The basic principle of our criminal justice system is that every person is presumed to be innocent till he/she is proved guilty. In other words, the burden of proving the charges lies totally on the prosecution. However, the Indian Evidence Act itself provides certain exceptions to this principle. For Example, Section 113A of the Indian Evidence Act provides that *“When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband”*. Similarly, Section 13(1)(e) of the Prevention of Corruption Act stipulates that a public servant is said to commit the offence of criminal misconduct if he/she cannot satisfactorily account for the property in his/her possession, which is disproportionate to his/her known sources of income. It is therefore implied that the burden is on the accused public servant to justify his possessions in relation to the sources of income. Also Section 20 of the Prevention of Corruption Act stipulates that if it is proved that the accused public servant has accepted any gratification, the court is under an obligation to presume that the gratification was for a reward as mentioned in Section 7 and the burden of proof shifts to the accused.

3.2.2.6 Section 7 of the Prevention of Corruption Act, therefore, needs to be amended to provide for a special offence of ‘collusive bribery’. An offence could be classified as ‘collusive bribery’ if the outcome or intended outcome of the transaction leads to a loss to the state, public or public interest. In all such cases if it is established that the interest of the state or public has suffered because of an act of a public servant, then the court shall presume that the public servant and the beneficiary of the decision committed an offence of ‘collusive bribery’. The punishment for all such cases should be increased to 10 years.

#### 3.2.2.7 Recommendations:

- a. Section 7 of the Prevention of Corruption Act needs to be amended to provide for a special offence of ‘collusive bribery’. An offence could be classified as ‘collusive bribery’ if the outcome or intended outcome of the transaction leads to a loss to the state, public or public interest.
- b. In all such cases if it is established that the interest of the state or public has suffered because of an act of a public servant, then the court shall presume that the public servant and the beneficiary of the decision committed an offence of ‘collusive bribery’.



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- c. The punishment for all such cases of collusive bribery should be double that of other cases of bribery. The law may be suitably amended in this regard.

## 3.2.3 Sanction for Prosecution

3.2.3.1 Section 19 of the Prevention of Corruption Act provides that previous sanction of the competent authority is necessary before a court takes cognizance of the offences defined under Sections 7, 10, 11, 13 and 15 of the Act. The objective of this provision is to prevent harassment to honest public servants through malicious or vexatious complaints. The sanctioning authority is expected to apply his/her mind to the evidence placed before him/her and be satisfied that a prima facie case exists against the accused public servant. Although the intention of this provision is clear, it has been argued that this clause has sometimes been used by a sanctioning authority to shield dishonest officials. There have also been cases where there have been inordinate delays in grant of such sanction. There have also been instances where unintentional defects in the grant of sanction has been used by the accused to challenge the sanction and have it set aside, thus nullifying the entire proceedings. The Commission has examined various aspects related to sanctions and is of the view that there are some areas requiring improvements, and this would need some amendments to the Law. These are dealt with in the following paras:

3.2.3.1.1 *Dispensing with sanction in cases where public servants have been trapped red-handed or in cases of possessing assets disproportionate to their known sources of income:* There are a number of cases of public servants being caught red handed while demanding/accepting bribes. The omnibus protection given under Section 19 of the Prevention of Corruption Act sometimes comes in the way of bringing corrupt public servants to justice as often the sanction is delayed or denied. The intention of the legislation appears to be to provide adequate protection to public servants in the discharge of their legitimate official duties. This objective can well be served if this provision is limited to such cases where the alleged misconduct is directly connected with the discharge of official duties. Such a protection is not required for offences which are basically based on the direct evidence of:

- 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.

Therefore, there is a case for excluding the protection given in the above mentioned circumstances.

3.2.3.1.2 *Validity of sanction for prosecution:* It has been found that sanctioning authorities are often summoned to adduce evidence on the sanction they had given, and this takes place several years later. A number of cases are discharged/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 adduced in the trial!

The objective of Section 19 of the Prevention of Corruption Act was to prevent prosecution without sanction of the competent authority. In many such cases, the issue of the validity of sanctions gets raised after the prosecution has adduced all evidence. This is not fair to the sanctioning authority who may have given this sanction several years earlier. It is also not fair to the accused who has undergone a major part of the prosecution process, particularly if the sanction is found to be untenable. Moreover, it has also been noted that sanctioning authorities are often not able to attend the court because of other official preoccupation and this also contributes to delay in concluding trial.

The Commission feels that there is need for amending the Prevention of Corruption Act to ensure that sanctioning authorities are not summoned as witnesses and if a trial court desires to summon the sanctioning authority, it should record the reasons for doing so. This should be at the first stage, even before framing of charges by the court.

3.2.3.1.3 *Sanctioning authority for MPs and MLAs:* Section 2 (definition) of the Prevention of Corruption Act does not explicitly include MPs or MLAs. This issue, whether elected representatives are public servants or not, came up for determination before various courts. The Supreme Court in *P.V. Narasimha Rao v. State (CBI/SPE)* held as follows:

*"We think that the view of the Orissa High Court that a member of a Legislative Assembly is a public servant is correct. Judged by the test enunciated by Lord Atkin in Mc. Millan v Gust and adopted by Sikri, J. in Kanta Khaturia case, the position of a Member of Parliament, or of Legislative Assembly, is subsisting, permanent and substantive; it has an existence independent of the person who fills it and it is filled in succession by successive holders. The seat of each constituency is permanent and substantive. It is filled, ordinarily for the duration of the legislative term, by the successful candidate in the election for the constituency. When the legislative term is over, the seat is filled by the successful candidate at the next election. There is, therefore, no doubt in our minds that a Member of Parliament, or of a Legislative Assembly, holds an office and he is required and authorized thereby to carry out a public duty. In a word, a Member of Parliament or of a Legislative Assembly is a public servant for the purposes of the said Act".*

The National Commission for Review of the Constitution (NCRWC) recommended as follows:



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*"A second issue that was raised in this case concerned the authority competent to sanction prosecution against a member in respect of 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. It would, therefore, stand to reason that sanction for prosecution should be given by the Speaker or the Chairman, as the case may be.*

The Commission is of the view that the Authority for according sanction for prosecution under Section 19 of the Prevention of Corruption Act, should be stipulated in case of elected representatives. This Authority, in case of Members of Parliament should be the Speaker or Chairman, as the case may be. A similar procedure may be adopted by State Legislatures.

3.2.3.1.4 *Protection to those persons who have ceased to be public servants at the time of taking cognizance of the offence by the court:* Section 19(1) of the Prevention of Corruption Act reads as follows:

*"No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,*

- (a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;*
- (b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;*
- (c) in the case of any other person, of the authority competent to remove him from his office."*

An issue has arisen whether such sanction would be necessary in case the accused is no longer a public servant on the day of taking of cognizance by the court. The Supreme Court has held that where the accused had ceased to be a public servant on the day the court took cognizance of the offence, the provisions of Section 6 (Prevention of Corruption Act, 1947) would not apply and the prosecution against him will not be vitiated by the lack of a previous sanction by the competent authority.

The objective of this provision was to provide protection to the public servant from malicious prosecution, and his/her status at the time of the commission of the alleged offence is relevant rather than his/her status at the time of taking cognizance of the offence by the court. The interpretation given by the courts may lead to a situation where a person who superannuates, or resigns from service would not get the protection of this provision, even if the alleged offence was committed while he/she was in service. Therefore, the law should be amended so that retired public servants can also get the same level of protection, as a serving public servant.

**3.2.3.1.5 Expediting sanctions:** It has been represented to the Commission that many a time there is substantial delay in obtaining sanction for prosecution from government, with the result that corrupt officials are often not brought to book. The Commission is of the view that the procedure for granting sanction, where government is the competent authority, needs to be streamlined so that there is no delay in processing such cases. The Commission would like to recommend 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<sup>42</sup>. 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.

#### 3.2.3.2 Recommendations:

- a. Prior sanction should not be necessary for prosecuting a public servant who has been trapped red-handed or in cases of possessing assets disproportionate to the known sources of income.
- b. The Prevention of Corruption Act should be amended to ensure that sanctioning authorities are not summoned and instead the documents can be obtained and produced before the courts by the appropriate authority.
- c. The Presiding Officer of a House of Legislature should be designated as the sanctioning authority for MPs and MLAs respectively.
- d. The requirement of prior sanction for prosecution now applicable to serving public servants should also apply to retired public servants for acts performed while in service.

<sup>42</sup> Section 19(1) stipulates that sanction should be provided by the authority competent to remove the accused public servant. This would necessitate an amendment to Section 19.

- e. In all cases where the Government of India is empowered to grant sanction for prosecution, this power should be delegated to an Empowered Committee comprising the Central Vigilance Commissioner and the Departmental Secretary to Government. In case of a difference of opinion between the two, the matter could be resolved by placing it before the full Central Vigilance Commission. In case, sanction is required against a Secretary to Government, then the Empowered Committee would comprise the Cabinet Secretary and the Central Vigilance Commissioner. Similar arrangements may also be made at the State level. 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.

### 3.2.4 Liability of Corrupt Public Servants to Pay Damages

3.2.4.1 While corrupt acts of a public servant are liable for punishment under the Prevention of Corruption Act, there is no civil liability for the wrong doer nor is there a provision for compensation to the person/organization which has been wronged or has suffered damage because of the misconduct of the public servant. The Constitutional Review Committee had 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 (para 6.17).

3.2.4.2 The Supreme Court did impose exemplary damages in cases of improper allotment of petrol pumps<sup>43</sup>. However, this order was later reversed in a Review Petition<sup>44</sup> in which the Court held that though exemplary damages could be awarded against public servants it was not justified in these cases. The Commission is of the view 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 so caused, and in addition, should be made liable for damages. This may be provided by insertion of a chapter in the Prevention of Corruption Act. 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. It should also be ensured that adequate safeguards are provided so that bona fide mistakes should not end in award of such damages, otherwise public servants would be discouraged from taking decisions in a fair and expeditious manner.

<sup>43</sup> (1996) 6 Supreme Court Cases 593

<sup>44</sup> (1999) 6 Supreme Court Cases 667

## 3.2.4.3 Recommendation:

- a. In addition to the penalty in criminal cases, the law should provide that public servants who cause loss to the state or citizens by their corrupt acts should be made liable to make good the loss caused and, in addition, be liable for damages. This could be done by inserting a chapter in the Prevention of Corruption Act.

## 3.2.5 Speeding up Trials under the Prevention of Corruption Act:

3.2.5.1 The average time taken by trial courts in the disposal of cases has increased over the years. At the end of 1996, the number of cases pending trial were 8225 whereas at the end of the year, the number of cases pending trial rose to 12703. In the year 2005 the number of cases registered were 3008, 2162 cases were chargesheeted and in 2048 cases, trials were completed. (These figures pertain to cases taken up by the State Anti-Corruption Wings, extracted from 'Crime in India' published by the National Crime Records Bureau).

3.2.5.2 A major cause of delay in the trial of cases is the tendency of the accused to obtain frequent adjournments on one plea or the other. There is also a tendency on the part of the accused to challenge almost every interim order passed even on miscellaneous applications by the trial court, in the High Court and later, in the Supreme Court and obtaining stay of the trial. Such types of opportunities to the accused need to be restricted by incorporating suitable provisions in the CrPC. It may also be made mandatory for the judges to examine all the witnesses summoned and present on a given date. Adjournments should be given only for compelling reasons.

3.2.5.3 In order to ensure 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.

3.2.5.4 The experience with the trial of cases under the Act, has been disappointing in spite of the provisions which were considered as path-breaking at the time. Although the judges trying corruption cases under the Prevention of Corruption Act have been declared as Special



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Judges, they have been saddled with numerous other non-corruption cases with the result that trials in corruption cases get delayed.

3.2.5.5 The Commission feels that there is need to fix a time limit for various stages of trial in corruption cases. This could be done through an amendment to the CrPC. More importantly, the existing provisions for conducting trials on a day-to-day basis should be meticulously adhered to.

#### 3.2.5.6 Recommendations:

- a. A legal provision needs to be introduced fixing a time limit for various stages of trial. This could be done by amendments to the CrPC.
- b. Steps have to be taken to ensure that judges declared as Special Judges under the provisions of the Prevention of Corruption Act give primary attention to disposal of cases under the Act. Only if there is inadequate work under the Act, should the Special Judges be entrusted with other responsibilities.
- c. It has to be ensured that the proceedings of courts trying cases under the Prevention of Corruption Act are held on a day-to-day basis, and no deviation is permitted.
- d. The Supreme Court and the High Courts may lay down guidelines to preclude unwarranted adjournments and avoidable delays.

### 3.3 Corruption Involving the Private Sector

3.3.1 According to the Bribe Payers Index 2006 of Transparency International, businesses from India, China and Russia, who are at the bottom of the index, had the greatest propensity to pay bribes. This raises the issue of how corruption in private bodies should be dealt with.

3.3.2 Corruption in the private sector does not come under the purview of the Prevention of Corruption Act. However, if the private sector (or any person engaged by them) is involved in bribing any public authority then he/she is liable to be punished for the offence of abetment of bribery under the Prevention of Corruption Act. A large number of public services, which were traditionally done by government agencies, are being entrusted to non-government agencies. In such cases, persons engaged by the private agency replace the role of erstwhile public servants. It is therefore necessary to bring such agencies within the fold of the Prevention of Corruption Act. Also, a large number of Non-Governmental Organizations receive

substantial aid from government. As these agencies spend public money it would be desirable that persons engaged by such organizations be deemed to be public servants for the purpose of the Prevention of Corruption Act.

3.3.3 Article 12 of UN Convention against Corruption, to which India is a signatory, however, deals with corruption in the private sector:

1. *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.*
2. *Measures to achieve these ends may include, inter alia:*
  - (a) *Promoting cooperation between law enforcement agencies and relevant private entities;*
  - (b) *Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State;*
  - (c) *Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities;*
  - (d) *Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licenses granted by public authorities for commercial activities;*
  - (e) *Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure; and*
  - (f) *Ensuring that private enterprises, taking into account their structure and size,*



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*have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures.*

3. *In order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention:*
  - (a) *The establishment of off-the-books accounts;*
  - (b) *The making of off-the-books or inadequately identified transactions;*
  - (c) *The recording of non-existent expenditure;*
  - (d) *The entry of liabilities with incorrect identification of their objects;*
  - (e) *The use of false documents; and*
  - (f) *The intentional destruction of bookkeeping documents earlier than foreseen by the law.*
4. *Each State Party shall disallow the tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offences established in accordance with articles 15 and 16 of this Convention and, where appropriate, other expenses incurred in furtherance of corrupt conduct.*

3.3.4 The Prevention of Bribery Ordinance (PBO) of Hong Kong deals specifically with corruption in the private sector. For example, Section 9 of PBO safeguards the interests of private companies by protecting employers from employees who are corrupt. Section 9 also prohibits an agent from soliciting or accepting an advantage without his principal's permission when conducting his principal's affairs or business.

3.3.5 In India, the Companies Act, 1956 provides the statutory framework which governs the internal processes of a Company. The Company is a juridical person whose internal processes are determined by the Companies Act and its Articles of Association. In case of non-compliance, the penal provisions are invoked against the Company and its officers in default. The Companies Act, 1956 contains penal provisions against criminal offences by companies and their directors and officers. Though the offence of corruption or bribery is not specified under the Companies Act, 1956, instances of wrong doing by

Companies and their officers are addressed through the mechanisms of Accounts and Audit (Section 211), Inspection under Section 209A, Technical Scrutiny of Balance Sheet (Section 234), Investigation under Section 235/237 or Section 247, special audit under Section 233A, reference to Company Law Board (CLB) under Section 388B etc. Besides, Companies are required to have audit committees of the Board of Management to look into various aspects related to financial propriety. The Commission feels that corruption in the private sector should be addressed by effective enforcement of 'Regulations on Corporate Governance'.

3.3.6 The Commission is further of the view that corruption within the private sector should be tackled through the effective enforcement of existing laws and regulations. Bringing the activities of the entire private sector within the fold of the Prevention of Corruption Act is neither desirable nor practical. ('Serious Economic Offences' is dealt with later in this Chapter in para 3.7)

#### 3.3.7 Recommendations:

- a. The Prevention of Corruption Act should be suitably amended to include in its purview private sector providers of public utility services.
- b. Non-Governmental agencies, which receive substantial funding, should be covered under the Prevention of Corruption Act. Norms should be laid down that any institution or body that has received more than 50% of its annual operating costs, or a sum equal to or greater than Rs 1 crore during any of the preceding 3 years should be deemed to have obtained 'substantial funding' for that period and purpose of such funding.

#### 3.4 Confiscation of Properties Illegally Acquired by Corrupt Means

3.4.1 Prosecution and subsequent conviction of corrupt public servants has not been commensurate with the extent of corruption. As mentioned earlier, the level of proof required and the procedural hurdles have ensured that a large number of corrupt public servants are not convicted. Even worse, they often flaunt their ill-gotten wealth with impunity. It is necessary that apart from criminal prosecution, the corrupt public servant should also be denied the ownership of his/her ill gotten wealth.

3.4.2 The Prevention of Corruption Act provides for confiscation of assets of public servants in excess of their known sources of income. However, the provision has proved inadequate because such forfeiture is possible only on conviction for the relevant offences.

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At present, for attachment and forfeiture of illegally acquired property of public servants the provisions of the Criminal Law Amendment Ordinance, 1944 are invoked. Under this Ordinance, there is a provision for interim attachment of the property illegally acquired. The Special Judge is empowered to do so based on an application by an authorized person. Depending upon the outcome of the criminal case, the attached property is either forfeited or released.

3.4.3 Another shortcoming in the existing provisions is that the procedure for attachment can start only after the court has taken cognizance of the offence. In actual situations, this may be too late as the accused may get enough time to hide or adjust his/her ill gotten wealth. Moreover, under the existing provisions, the State or the Union Government has to authorize the filing of a request seeking attachment. This could also be time consuming.

3.4.4 In the case of DDA v Skipper Construction Company (private limited), the Supreme Court observed:

*"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".*

3.4.5 The Law Commission in its 166<sup>th</sup> 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."*

3.4.6 In the same Report, the Law Commission had suggested enactment of a law for forfeiture of property of corrupt public servants and a Bill titled 'The Corrupt Public Servants (Forfeiture of Property)' was annexed. The Report is pending consideration of the Government since February 1999. The relevant provision of the Bill reads as follows:

*"where any person holds any illegally acquired property in contravention of the provisions of sub-section (1), such property shall be liable to be forfeited to the Central Government in accordance with provisions of the Act".*

3.4.7 Under the draft Bill, a public servant is prohibited from holding any 'illegally acquired property', and it is provided that such property shall be liable to be forfeited to the

government. Powers of forfeiture are proposed to be given to the Competent Authority (CVC). The provisions of the proposed Bill regarding forfeiture are in addition to the provision relating to conviction for a minimum period of seven years, which may extend up to fourteen years. The provisions of the proposed Bill apply not only to the public servant but also to every person who is a “relative” of the public servant or an “associate” of such person or the holder of any property which was at any time previously held by the public servant, unless such holder proves that he was a transferee in good faith for adequate consideration. It is also stipulated in the draft Bill that the burden of proving that the property sought to be forfeited has not been acquired illegally, is on the accused public servant. As the proceedings would be of a civil nature, the level of proof would not be as stringent as in a criminal trial.

3.4.8 The Commission notes that the Jammu and Kashmir Legislature has passed ‘The Prevention of Corruption (Amendment) Act, 2006’. This Act provides for seizure and forfeiture of properties of a public servant that have been acquired by acts of omission and commission which constitute an offence of criminal misconduct under Section 5 of the Prevention of Corruption Act. The initial powers of seizure have been given to the Investigating Officer. However, the seizure order made by the Investigating Officer has to be placed before a ‘Designated Authority’ within 48 hours for confirmation or otherwise. The Designated Authority is notified by the State Government and is an officer not below the rank of Secretary to Government. An appeal against the order of the Designated Authority lies with the Special Court. The Special Court if satisfied about such seizure, may order forfeiture of such property. Thus, the scope of the Jammu and Kashmir Prevention of Corruption (Amendment) Act 2006, is somewhat limited as compared to the draft Bill suggested by the Law Commission. Moreover, the Act of Jammu and Kashmir provides for confiscation only on conviction.

3.4.9 The Commission is of the view that for confiscation of the property of a public servant convicted for possession of disproportionate assets, the law should shift the burden of proof to the public servant who is convicted. The presumption, in such cases, should be that the disproportionate assets found in the possession of the public servant were acquired by him through corrupt means and a proof of preponderance of probability should be sufficient for confiscation of property. These requirements are adequately met in the draft Bill proposed by the Law Commission.

#### 3.4.10 Recommendation:

- a. The Corrupt Public Servants (Forfeiture of Property) Bill as suggested by the Law Commission should be enacted without further delay.



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3.5 Prohibition of 'Benami'<sup>45</sup> Transactions

3.5.1 The Law Commission, in its 57<sup>th</sup> and 130<sup>th</sup> Reports, had recommended enactment of a legislation prohibiting Benami transactions and acquiring properties held Benami. A law entitled The Benami Transactions (Prohibition) Act, 1988 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. Section 3 of the Act prohibits Benami transactions while Section 4 prohibits the acquirer from recovering the property from the Benamidar.

3.5.2 Section 5 of the Act permits acquisition of property held benami. It states

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

3.5.3 Unfortunately, in the last 18 years, Rules have not been prescribed by the government for the purposes of sub-section (1) of Section 5, with the result that the government is 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 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.

## 3.5.4 Recommendation:

- a. Steps should be taken for immediate implementation of the Benami Transactions (Prohibition) Act, 1988.

## 3.6 Protection to Whistleblowers

3.6.1 Whistleblowers play a crucial role in providing information about corruption. Public servants who work in a department/agency know the antecedents and activities of others in their organization. They are, however, often unwilling to share the information for fear of reprisal. There is a very close connection between the public servant's willingness to disclose corruption in his organization and the protection given to him and his/her identity. If adequate statutory protection is granted, there is every likelihood that the government would be able to get substantial information about corruption. The term "whistleblowing" itself is a relatively recent addition to our lexicon. In the United States, in the post-Watergate era, after the trials and tribulations of Daniel Ellsberg, the man who "blew the whistle" on the so called

<sup>45</sup> 'Benami' is a Hindi word meaning 'without name'. It is commonly used to denote immoral transfers of property in names of others or even fictitious names, with an intention to escape from certain laws.

“Pentagon papers”, whistleblowing has not only been protected by statute but is also encouraged as an ethical duty on the part of the citizens. Furthermore, after the spectacular collapse of Enron and WorldCom, the US Congress passed the Sarbanes-Oxley Act of 2002, granting sweeping protection to whistleblowers in publicly traded companies. Anyone retaliating against a corporate whistleblower can now be imprisoned for up to 10 years<sup>46</sup>.

#### Box 3.1: The Whistleblowers

Manjunath Shanmugam working with Indian Oil Corporation (IOC) 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 19<sup>th</sup> November, 2005 allegedly at the behest of corrupt petrol pump owners.

Satyendra Dubey, working with the National Highways Authority of India (NHAI), exposed the rampant corruption in construction of roads. He was also found dead on 27<sup>th</sup> November, 2003.

3.6.2 Laws providing such protection exist in the UK, the USA, Australia and New Zealand. 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 Whistle blowers Protection Act, 1984 of USA are legislations providing protection to whistleblowers. All these laws generally provide for preserving the anonymity of the whistleblower and safeguarding him/her against victimization within the organization.

3.6.3 The Law Commission in its 179<sup>th</sup> Report has proposed a Public Interest Disclosure (Protection of Informers) Bill, which provides protection to whistleblowers. The Bill has provisions for providing safeguards to the whistleblowers against victimization in the organization. It also has a provision that the whistleblower may himself seek transfer in case he apprehends any victimization in the current position. In order to ensure protection to whistleblowers, it is necessary that immediate legislation may be brought on the lines proposed by the Law Commission.

#### 3.6.4 Recommendation:

- a. Legislation should be enacted immediately to provide protection to whistleblowers on the following lines proposed by the Law Commission:
  - Whistleblowers exposing false claims, fraud or corruption should be protected by ensuring confidentiality and anonymity, protection from victimization in career, and other administrative measures to prevent bodily harm and harassment.
  - The legislation should cover corporate whistleblowers unearthing fraud or serious damage to public interest by willful acts of omission or commission.

<sup>46</sup> Source: Raghu Dayal-“Whistleblowers need to be protected”-ET: 26-12-06



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- Acts of harassment or victimization of or retaliation against, a whistleblower should be criminal offences with substantial penalty and sentence.

## 3.7 Serious Economic Offences

3.7.1 Economic Offences, called frauds in common parlance (the term itself has been defined in the Indian Contract Act<sup>47</sup>) have become a matter of concern because of an increasing trend both in terms of size and complexity. This worrying trend has its roots in the rapid pace at which the Indian economy is growing and the financial sector is diversifying. The impact of some of these crimes is widespread and can cause much damage to the economy seriously affecting the public at large and sometimes even becoming a threat to national security. These economic offences include tax evasion, counterfeiting, distorting share markets, falsification of accounts, frauds in the banking system, smuggling, money laundering, insider trading and even bribery. In a world of increasing financial activity, with new instruments for such activity and new technology to facilitate it, the present laws are not adequate to combat new economic crimes.

3.7.2 There are a large number of laws governing economic offences. These include the Indian Penal Code (IPC); the Banking Regulation Act, 1949; the Companies Act, 1956; the Customs Act, 1962; the Income Tax Act, 1961; the Essential Commodities Act, the Conservation of Foreign Exchange and the Prevention of Smuggling Activities Act, the Foreign Exchange Management Act, the Prevention of Food Adulteration Act, the Indian Patents Act etc. In a large number of these Acts, investigations are carried out by the police. Some states have also established Economic Offences Wings to guide such investigations. In respect of some Central Laws, investigations are taken up by designated agencies under the law. The Central Bureau of Investigation also takes up cases by way of referral by other authorities or on directions by the government or the courts. It is generally felt that the punishment provided under the existing laws is not enough of a deterrent; as a result these offences have become a high gain low risk activity.

## Box 3.2: The Need for a Serious Frauds Office

Investigations into the recent stock market 'scam' have underscored the limitations of a fragmented approach in our enforcement machinery. Though a number of agencies investigated the highly publicised fraud, none really got the holistic picture of what really happened. The chances of effectively punishing the fraudsters, in such a situation, are very slim.

Financial frauds in the corporate world are very complex in nature, and can be properly investigated only by a multi-disciplinary team of experts; there are limits to what even gifted amateurs can achieve, especially when they do not have a common platform and different enforcement agencies concerned play a lone hand from their respective turfs. There is a need to provide for a more concerted approach, perhaps by creating an office along the lines of the Serious Fraud Office (SFO) in the United Kingdom.

Source: Report of the Committee on Corporate Audit and Governance (Naresh Chandra Committee, 2002)

<sup>47</sup> Section 17 of the Contract Act defines fraud as follows: "Fraud means and includes any of the following acts committed by a party to a contract, with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract: (a) suggestion as a fact, of that which is not true, by one who does not believe it to be true; (b) active concealment of a fact by one having knowledge of belief of that fact; (c) a promise made without any intention of performing it; (d) any other fact fitted to deceive; (e) any such act or omission as the law specifically describes to be fraudulent".

3.7.3 Of late, economic offences, have been drawing more attention because these are being used to fund criminal and even terrorist activities. In 1993, the N.N. Vohra Committee had revealed the powerful nexus between those who violated the economic laws, politicians and government functionaries, which resulted in protection of large-scale economic crimes. That Committee had also pointed out that in those cases, which became public, only nominal action was taken against the offenders.

3.7.4 Developed countries have responded to the challenge of such offences by constituting a specialized machinery to deal with serious economic crimes. In England and Wales, the Serious Frauds Office (SFO) was formed in April 1988, in response to the need for a unified organisation for the investigation and prosecution of serious fraud cases. The Office is headed by the Director who is appointed by and accountable to the Attorney General. This office has multi-disciplinary teams with expertise in law, accountancy, investigation etc. Investigations are led by Case Controllers who are generally experienced lawyers. The SFO derives powers under the Criminal Justice Act, 1987, and also prosecutes its own cases, without having to refer to the Crown Prosecution Service (CPS). It needs to be mentioned that the Criminal Justice Act, 1987 does not define 'serious fraud'. The Director of the SFO is empowered under Section 1(3) of the Act to "investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud".

3.7.5 In New Zealand, the Serious Fraud Office (SFO) constituted under the SFO Act, detects, investigates and prosecutes cases of serious fraud. The SFO Act, 1990 gives the SFO powers to obtain evidence during the course of its investigations. The SFO is headed by a Director who is empowered to investigate serious frauds. In determining what constitutes a serious fraud, the Director has to consider- (a) The suspected nature and consequences of the fraud; (b) The suspected scale of the fraud; (c) The legal, factual, and evidential complexity of the matter; (d) Any relevant public interest considerations.

3.7.6 The Mitra Committee Report (The Report of the Expert Committee on Legal Aspects of Bank Frauds 2001) submitted to the Reserve Bank of India pointed out that criminal jurisprudence in India based on proof beyond doubt was too weak an instrument to control bank frauds. The Committee recommended a two-pronged strategy for systemic reforms through strict implementation of Regulator's Guidelines and obtaining compliance certificates. Second, a punitive approach by defining scams as a serious offence with the burden of proof shifting to the accused and with a separate investigative authority for serious frauds, and special courts and prosecutors for trying such cases was recommended. The Committee suggested the creation of a Statutory Fraud Committee under the Reserve Bank of India. It also recommended a legislation called "The Financial Fraud (Investigation, Prosecution, Recovery and Restoration of Property) Bill, 2001." In its proposed draft,

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provisions have been made for constitution of a Financial Fraud Enquiry Committee and a Bureau of Investigation of Financial Fraud. An amendment has been suggested in the I.P.C. by insertion of a new chapter XXIV containing Sec.512 and 513(a). The proposed Section 512 defines 'Financial Fraud' to mean and include "any of the following acts committed by a person or with his connivance, or by his agent, in his dealings with any bank or financial institution or any other entity holding public funds:

- the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- active concealment of a fact by one having knowledge or belief of the fact;
- a promise made without any intention of performing it;
- any other act fitted to deceive;
- any such act or omission as the law specially declares to be fraudulent provided that whoever acquires, possesses or transfers any proceeds of financial fraud or enters into any transaction which is related to proceeds of fraud either directly or indirectly or conceals or aids in the concealment of the proceeds of financial fraud, commits financial fraud."

3.7.7 The proposed Section 513(a) provides for punishment for financial fraud. Following the Davie Committee Report of England, Explanation (2) to the proposed Section 513(a) provides guidelines for classifying serious financial frauds. Thus, "if and only if, the case:

- involves a sum exceeding Rs. Ten crores; or
- is likely to give rise to widespread public concern; or
- its investigation and prosecution are likely to require high specialized knowledge of financial market or of the behaviour of banks or other financial institutions; or
- involves significant international dimensions; or
- in the investigation of which there is requirement of legal, financial, investment and investigative skills to be brought together; or
- which appear to be complex to the regulators, banks, Union Government or any financial institution;