

India

I. Brief Introduction to the Legal System of India

The Legal System of India is divisible into the law governing the State and the law by which the State governs or regulates the conduct of its members. While laws governing contractual relationships between private parties such as torts, property and criminal law fall in the second category and are popularly referred to as Private Law; Constitutional and Administrative laws, popularly referred to as Public Law, fall under the first category and seek to govern the State. India has a written Constitution which declares that India is a sovereign, socialist, federal, democratic republic. The Indian Constitution, which is the supreme law of the country, divides India's governance structure into three independent, institutional components: the legislature, the executive, and the judiciary.

The legislative branch, the Parliament of India, is bicameral. The lower House is designated as the "House of the People" or the Lok Sabha, and the Upper House as the "Council of States" or the Rajya Sabha. The two houses along with the President constitute the Parliament, which is a deliberative and a legislative body. Its functions are multifarious and are divisible under the following heads: (i) legislation, (ii) control of public finance, (iii) deliberation and discussion, (iv) control of the executive, (v) removal of certain high officials, and (vi) the constituent function. Changing and complex socio-economic problems constantly demand new laws, and, thus, making laws is Parliament's major pre-occupation. The Constitution of India allows for states to have either a unicameral or bicameral legislature. In a state with a bicameral legislature, the lower house is called the Legislative Assembly or Vidhan Sabha and the upper house is called the Legislative Council or Vidhan Parishad. It promulgates statutory laws for the state. The only real limit on the law-making power of the legislature is the Constitution of India and its entrenched provisions.

The executive branch, which is responsible for the daily administrative matters of the State, is headed by the President of India. The executive has been bestowed with quasi-judicial powers and promulgates rules and regulations (i.e. administrative regulations) pursuant to the authority and power given to it under constitutional law or statutory law.

India derives most of its judicial framework from the British legal system and is a common law country. The Courts in India follow a hierarchal pattern with the Supreme Court of India being the apex court, followed by High Courts in the States across India and numerous other subordinate courts. The Supreme Court of India adjudicates constitutional issues and also acts as the final court of appeal in certain civil and criminal matters. It has exclusive original jurisdiction which extends to any dispute between the Government of India and one or more states. Decisions of the

Supreme Court are considered law of the land and are binding unless overruled by a larger bench of the Supreme Court.

Each state or group of states has its own High Court, which is the final court of appeal in civil and criminal matters in that jurisdiction and also exercises extraordinary jurisdiction in the field of Constitutional law. High Court decisions are binding to the extent of their respective state jurisdiction. Finally, each state is divided into judicial districts presided by the District and Sessions Court. The lower courts are the Courts of Chief Judicial Magistrate that are presided over by the Magistrates of 1st and 2nd Class and have jurisdiction over criminal matters. Courts of Munsif, Sub-judges, Civil judges are the set of other lower courts deciding civil matters.

Apart from the hierarchy of regular courts, the Constitution of India also makes provisions for special Tribunals to aid in the administration of justice.

II. India's Anticorruption Law

Anti-bribery law

While India has had anticorruption laws since 1860, when the Indian Penal Code (IPC) was enacted, a special statute dealing with this subject specifically was formally enacted in the form of The Prevention of Corruption Act 1947. Thereafter, to consolidate and amend the law relating to prevention of corruption and to make the anticorruption laws more effective by widening their coverage and by strengthening the provisions, The Prevention of Corruption Act, 1988 ("POC Act") was enacted, which holds the field today.

Foreign officials

We note at the very outset that at present the POC Act does not extend to bribery of foreign officials directly, and deals, primarily with bribery of public servants in India. Having ratified the United Nations Convention and given the current climate, the Government of India is looking to overhaul the anticorruption framework in India. In consonance with Article 16 of the UN Convention, the Indian Government has prepared a Bill titled Prevention of Bribery of Foreign Public Officials and Officials of International Organizations Bill, 2011. This Bill provides a mechanism to deal with bribery among foreign public officials and officials of public international organizations. The Bill is still to be statutorily recognized and notified.

Receipt of illegal gratification; facilitation payments

The word "bribery" is not specifically defined in the POC Act; however Chapter III (Sections 7 to 16) of the POC Act makes it an offence for any "public servant" to accept, obtain, or agree to accept or attempt to obtain any gratification other than legal remuneration, as a motive or reward for doing or forbearing to do any official act

or for showing favor or disfavor in any official act.¹ Equally, it is an offence for a public servant to obtain a valuable thing, without consideration, or for consideration which he or she knows to be inadequate from a person who has to transact some business with or through such public servant.² The element of *mala fide* intention of the public servant is a key element to constitute any offence under the POC Act.

The term “public servant” is defined in the POC Act and includes any person who holds an office by virtue of which he or she is required to perform any public duty. “Gratification” under the POC Act is not restricted to pecuniary gratification or gratification estimable in money but covers, also, any other form of gratification. As such therefore facilitation or grease payments, “speed money,” lavish gifts, entertainment of public servants are all prohibited under the POC Act. Importantly, amounts involved by way of payment (of bribes) are irrelevant for purpose of violation under the POC Act.

An intermediary who may receive gratification as a motive or reward for the purpose of inducing a public servant by corrupt or illegal means³ or by the exercise of personal influence⁴ is also liable for punishment under the POC Act.

Sanctions

Penalties that can be imposed for the above stated offences under the POC Act are imprisonment for a term not less than six months and extendable to five years and fine. The POC Act does not prescribe the amount of fine that can be imposed on an offender. However, the IPC, which is the general Penal Code for India, stipulates that where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.⁵

Abetment of a bribe: providing illegal gratuity

One of the criticisms of the POC Act has been the fact that it does not directly indict a bribe giver, although it does hold him or her liable for the offence of abetment of bribery. Historically, this has been explained by observing that generally the bribe giver is a victim at the hands of the public servant who in turn is the perpetrator of the crime with the bait of bureaucratic excesses on his or her side. However, Section 12 of the POC Act prescribes the punishment for abetment of offences of bribing a public servant and includes within its sweep both private persons and public functionaries. The term “abet” is not defined in the POC Act and reference

¹ Section 7 of the POC Act.

² Section 11 of the POC Act

³ Section 8 of the POC Act.

⁴ Section 9 of the POC Act.

⁵ Section 63 of the Indian Penal Code, 1860

needs to be made to the exhaustive definition provided in the IPC.⁶ The penalty under the POC Act for the offence of abetment ranges from imprisonment for a term not less than six months extendable to five years and fine.

⁶ See: Central Bureau of Investigation vs. V.C. Shukla JT 1998(2) S.C. 172 @ pp. 196, 197. Section 107 of the Indian Penal Code, 1860 - "Abetment of a thing". The Indian Penal Code stipulates that a person is said to abet the doing of a thing, who – First – instigates any person to do that thing; or Secondly – engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing; or Thirdly – intentionally aids, by an illegal omission, the doing of that thing. When a person willfully misrepresents or conceals a material fact which he / she is bound to disclose and voluntarily causes or procures, or attempts to cause or procure, a thing to be done, he / she is said to instigate the doing of that thing

Defense

There is no defense in India to an act of corruption.

Books and records

The provisions of the Companies Act make it mandatory for a company to maintain books of accounts⁷ which can be inspected by the Registrar of Companies, the Central Government, or the Securities and Exchange Board of India. An Audit can also be issued by the Central Government if it feels that the affairs of the company are not in consonance with sound business principles or prudent commercial practices⁸. The affairs of the company can be inspected and an investigation can be initiated by the Government if the Registrar is of the opinion that the business of the company is being carried out for a fraudulent or unlawful purpose or if the Registrar is of the opinion that the information or books and records disclosed by the company do not represent a full and fair statement.⁹ Willful falsification of accounts, with the intent to defraud by a servant, clerk or officer of a company is a punishable offence attracting punishment of imprisonment up to seven years and/or a fine under Section 477-A of the IPC.

Other relevant laws

Knowingly delivering a false account or statement under the Income Tax Act, 1961 is an offence punishable with rigorous imprisonment and fine under the IT Act¹⁰. Further, falsifying an account book for tax evasion is also an offence punishable with rigorous imprisonment and fine¹¹.

Apart from the legislations mentioned above, there may also be violations, on account of acts of bribery, of other statutes such as the Prevention of *Money-Laundering Act*, Central Sales Tax Act, Customs Act, Foreign Exchange Regulation Act, among others depending on the nature of a company's business and the act complained of.

III. Assessment

At present, India is witnessing a sea change in its approach to the issue of corruption. Between 2011-2012, a number of high-profile corruption scandals galvanized the anticorruption movement into action, resulting in wide-spread protests,

⁷ Section 209 of the Companies Act, 1956

⁸ Section 233-A of the Companies Act, 1956

⁹ Section 234 of the Companies Act, 1956

¹⁰ Section 277, IT Act

¹¹ Section 277A, IT Act

increased enforcement activity, and legislative proposals in Parliament. Several criminal cases were registered against those people accused in the scams, including companies and government employees. Given the climate and the anti-corruption movement in India, the Government constituted a ten-member Joint Committee of Ministers and civil society activists to draft an effective Jan Lokpal (Ombudsman) Bill¹² which aims to create an effective and autonomous anticorruption agency independent of the government.

In addition to the Prevention of Bribery of Foreign Public Officials and Officials of International Organizations Bill, 2011, other laws in the making for combating corruption in India are: (a) a law for the protection of whistleblowers, i.e. The Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2010; and (b) laws for criminalizing bribery in the private sector, viz. Indian Penal Code (Amendment) Bill, 2011. Multiple administrative legal reforms have also been undertaken in the recent past such as The Delhi (Right of Citizen to Time Bound) Delivery of Services Act, 2011¹³ enacted in September 2011, which seeks to end corrupt practices by making timely delivery of basic services a statutory right.

India is not a member of either GRECO or the IACA. Transparency International ranks India 94 on its 2012 Corruption Perceptions Index.

IV. Text

- a. The Constitution of India
- b. The Prevention of Corruption Act, 1988
- c. The Indian Penal Code, 1860
- d. The Companies Act, 1956
- e. The Income Tax Act, 1961

¹² See "Drafting of Lokpal Bill Requires Legal Expertise." *Andra Headlines* (last accessed Nov. 23, 2011) (available at <http://www.andhraheadlines.com/national/drafting-of-lokpal-bill-requires-legal-expertise-3-81900.html>).

¹³ See Republic of India. Legislative Assembly of the National Capital Territory of Delhi. *Delhi (Right of Citizen to Time Bound Delivery of Services) Act, 2011*. (available at <http://www.delhi.gov.in/wps/wcm/connect/8e0b1a8046929ac58a8fde0956274163/ESLA-ACT.pdf?MOD=AJPERES>).