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Prof. (Dr.) Sri Krishna Deva Rao

Executive Editor
Prof. Jeet Singh Mann

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**Centre for Transparency and Accountability in Governance,
National Law University, Delhi**

**INTERNATIONAL JOURNAL OF TRANSPARENCY AND ACCOUNTABILITY IN
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Prof. (Dr.) Sri Krishna Deva Rao

Vice-Chancellor, National Law University, Delhi

Executive Editor

Prof Jeet Singh Mann

Director, Centre for Transparency and Accountability in Governance,
National Law University, Delhi

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Published by

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All queries' regarding the journal and subscriptions should be mailed to:

Executive Editor,

International Journal of Transparency and Accountability in Governance,
Centre for Transparency and Accountability in Governance,
Room no. 209, Academic Block, National Law University, Delhi
Sector 14, Dwarka, New Delhi- 110078
E-mail ID: ctag@nludelhi.ac.in;jsmann@nludelhi.ac.in
Tel. No: 011-28034255 FAX No: 011-28034254

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FROM THE EDITOR'S BUREAU

Accountability and Transparency are the two sides of the same coin named Good Governance. A democratic form of government can only be successful, if the government in its various facets is accountable to its people and works with a collective aim of the welfare of the state. The pious Constitution of India is the supreme document which governs the functioning of the government; the governance has to be within the Constitution's ambit. The Constitution of India has been given by the people of India themselves, so the people of India have a right to know how the government is functioning. Therefore it is the duty of the government to be accountable to its people. Transparency keeps any government's corruption level in check; thus, the importance of accountability and transparency in any government can't be disregarded.

The current edition of the 'International Journal of Transparency and Accountability in Governance' has focused on combating corruption and governance-related issues. The journal also covers corruption explicitly in medicine and during elections, among other good governance challenges.

The article "Interdisciplinary analysis of corruption" explains corruption from the beginning and tries to define it, including its various ambit, i.e., money, power etc., its types, and causes. It also touches upon the electoral system's deficiencies and opines that the Fundamental Rights of vulnerable groups have been continuously and systematically violated in certain aspects. The article further raises questions on corruption in public management and what the people and authorities collectively and individually can do to overcome the menace. The next article, titled 'Corruption and malpractice in trade of medicine and medical equipment, writes specifically about corruption in the field of medicine, which was already existing but came to light during the global pandemic; the author shares his personal experience in this regard, giving us valuable insight on what the actual customer faced during the trying times. The article titled 'Electoral Malfeasance, corruption and unfair practices: A concern for Indias, Election Integrity' focuses on corruption and how it affects the electoral politics in the world's largest democracy, the legal provisions already in place to combat the evil and the lacunae's which need to be cured like amending the Foreign Contribution Regulation Act and controlling further the political funding. The article titled 'The Tenth Schedule- Rethinking political corruption, defection and the law in India' talks about political defection and corruption, how the lucrative offers

induce defection and anti-defection laws which came into force after the famous case of *KihotoHollohan v. Zachillhu*.

The next set of Articles speaks about the Right to Information, the biggest tool the country recently got in the year 2005 to ensure an accountable government, and the government that is accountable to its people will always be transparent in its functioning. The article titled 'Right to information & income tax administration: Transparency & Whistle-blowers protection' talks about the Right to information in the Income-tax Act, 1961 and all the nuances that need to be addressed as the income tax administration is a repository of huge information of all the taxpayers, so the article talks about the need to strike a balance between the right to privacy and the information that should come in the public domain. The next article is on State Information Commission Haryana, wherein the performance of the said authority in terms of various parameters is scrutinised and analysed so as to point out the deficiencies and rectify them to increase the overall performance to reach the objective for which the authority came into existence.

The last set of articles talks about the recent fund that was introduced, the PM Cares Fund, its nature, allocations etc. The article is titled 'A Legal Scrutiny of Prime Minister Cares Fund', wherein there is a comparison with the already existing PMNRF and also the legal aspect of the PM Cares Fund. The next article is titled 'Government Contracts; Loot of Largesse: Indian Panorama', wherein there is an in-depth analysis of Article 299 of the Constitution of India. It discusses the constitutional framework of government contracts in a mixed economy and its impact.

Finally, the Centre for Transparency & Accountability in Governance is grateful to all the authors for contributing to this journal. We are thankful to Prof. (Dr.) Sri Krishna Deva Rao, Vice-Chancellor, NLU Delhi, for providing his precious time and consistent support for this journal. I would like to express my appreciation to Associate Editor Prof. Zeng Hong, Professor of Law, Beijing Normal University China, for his synergistic suggestions for this journal. I would also take this opportunity and express my humble gratitude to the advisory board of editors, Prof. Guihong, Professor of Law, Law School, Beijing Normal University, Beijing, China, Mr. Toby Mendel, President, Centre for Law and Democracy, Canada, Prof. BT Kaul, Former Chairperson, Delhi Judicial Academy, Delhi, Prof. Yun Zhao, Henry Cheng Professor in International Law, Head, Department of Law, The University of Hong Kong, Mr. Venkatesh Nayak, Head RTI Division, CHRI and Prof. S Sachidanandham, Visiting Professor NLU Delhi for providing their expert opinions and inputs for the content

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Prof Jeet Singh Mann

Executive Editor, IJTAG

Centre for Transparency and Accountability in Governance

CORRUPTION AND MALPRACTICES IN THE TRADE OF MEDICINES AND MEDICINAL EQUIPMENT

*Subhash Chandra Agrawal**

Abstract

This Article speaks at length about corruption and malpractices in the trade of medicines which existed for a long time but came to light during the pandemic and more so during the second wave. The author also shares his personal experience, making the article more insightful and realistic. The pricing of the branded and generic medicines has been exorbitantly high as their trade margins have increased. The Competition Commission of India and the Central Information Commission have taken note of it and issued serious directives which haven't been implemented to date, even the World Health Organisation has condemned the over-pricing of essential drugs. The National Pricing Authority has turned a mute spectator to the issue at hand. The author suggests a fixed formula should be adopted to calculate the authorities' profit margin on the drugs. The author also suggests other pertinent changes in manufacturing medicines, maintaining their quality, which, if implemented, will reduce the wastage of medicines considerably, ensuring that every person gets the medicine when in need

1. INTRODUCTION

Medicines are an essential part of healthy living. The quality of medicines and their affordability must be ensured at all times to provide safe & effective health care and reduce the overall cost of health care. The World Health Organisation has also condemned the high pricing of medicines in India. Regulatory bodies such as the Central Information Commission, Competition Commission of India, and Niti Aayog have also independently taken note of the exorbitant pricing of not only branded drugs but also essential and generic medicines.

The quality medications exported to other countries are far superior to what is used in India for its consumers. The variety offered is also much more in other countries, especially the

*Writer is RTI consultant holding Guinness World record for most letters published in newspapers, Contact: 1775 Kucha Lattushah, Dariba, Chandni Chowk, Delhi-110006, Mobile: +91-9810033711 & +91-9910033711, E-mail ID: subhashagrawal1950@gmail.com, subhashchandraagrawal@gmail.com, <https://www.facebook.com/SubhashAgrawalRTIactivist>, Twitter @subhashrti

USA. The quality of the medicines should be identical for Indian consumers to what is exported outside.

Apart from the malpractice of quality and affordability, other malpractices have come to light during the pandemic. The issue regarding the wastage of medicines also needs to be highlighted to reduce the waste so that the ones in actual need can also get the medicines. This paper provides some valuable and easy-to-implement suggestions in this regard. Pertinent suggestions regarding reducing the cost of medicines and encouraging charitable chemists such as the one opened by the Sikh Community in the Bangla Sahib Gurudwara are also provided.

2. EXORBITANT PRICING OF THE MEDICINES

2.1. Decision By The Central Information Commission

On intervention by the author of research-paper, the Central Information Commission (CIC), in its order dated 01.10.2018, in the matter of SP Manchanda v. National Pharmaceutical Pricing Authority,¹ decided to recommend as under:

“Keeping in view the facts of the case and the submissions made by both the parties, it was observed that the larger issue relating to the price structure and extraordinary heavy trade margins on the medicines, especially generic medicines was yet to be addressed by the Respondent. The Respondent (NPPA) present at the hearing expressed its inability to intervene in this matter as the subject matter pertaining to the Union Health Ministry, which also had a catalytic role to play in checking the menace of overpricing of essential drugs and excessive trade margins. The Commission, therefore, recommends to M/o Health and Family Welfare / D/o Pharmaceuticals / NPPA to initiate a coordinated attempt to address the above issue to promote greater transparency for the benefit of a common man within a period of 02 months from the date of receipt of this order under intimation to the Appellant and the Commission.”

The decision of the CIC wasn't even directory; it was recommendatory in nature and was issued in the public interest. But the irony is that National Pharmaceutical Pricing Authority (NPPA) challenged even CIC recommendations in Delhi High Court to vide

¹SP Manchanda v. National Pharmaceutical Pricing Authority, Second Appeal No. CIC/NPPAT/A/2017/152869-BJ.

WP(C) 10366 of 2019 and CM No. 42777 of 2019. Challenging the CICorder for its recommendations rather than studying the suggestions recommended by the CIC in its order exhibits the mindset of the decision-takers. It is noteworthy that the CICorder was for a co-ordinated attempt to study the suggestions by all the concerned stakeholders, including the Union Ministry of Health & Family Welfare, Director of Pharmaceuticals and NPPA since the Directorate of Pharmaceuticals and NPPA work under ministries other than the Union Ministry of Health & Family Welfare and such CIC required a co-ordinated attempt of these three agencies/ministries. All the suggestions put before CIC have been regularly taken through government-portals www.pgportal.gov.in (Public Grievance Portal of the government) www.helpline.rb.nic.in (Portal on President's Website) and 'Write To Prime Minister'(Portal on Prime Minister's website) apart from directly emailing to higher authorities and 'Mygov.in' but of no avail. The suggestions put before CIC are discussed in detail in subsequent paragraphs.

2.2. Competition Commission Of India (CCI) Policy-Note On High Trade-Margins Of Medicines

Just after CIC, through its verdict dated 01.10.2018 in filenumber CIC-NPPAT-A-2017-152869 noted malpractices in drugpricing and other aspects, the Competition Commission of India (CCI) in its policynote also pointed to unreasonably high trade-margins as a reason for exorbitant drug-prices highlighting the role of intermediaries in increasing² the prices of medicines, sharing the note with Union Ministry of Corporate Affairs, Union Ministry of Health, Department of Pharmaceuticals and Niti Aayog for further action.

For the first time, two authorities, CIC and CCI, noted that drugmanufacturers were taking advantage of non-coordination between several concerned Union Ministries and authorities concerning the pricing of medicines. The Union government should take serious note of the current issue. Otherwise, the popularity of e-pharmacies offering heavy discounts on medicines may practically prove to be disastrous for the retail- chemists, as they'll be forced to make a shift to other businesses and medicines needed during emergency conditionsand cannot wait for the supply of medicines through e-pharmacies.

²CCI points at "unreasonably high margins" for high drug price, Times of India (24/10/2018), available at <https://timesofindia.indiatimes.com/india/cci-points-at-unreasonably-high-margins-for-high-drug-prices/articleshow/66351000.cms>, last seen on 10/03/2022

2.3. NITI Aayog Also Proposed To Link Prices Of Essential And Non-Essential Drugs With A New Index

Even NITI Aayog, in the year 2018, proposed to link prices of all drugs - essential and others - with a new index. Presently only 17% of medicines are regulated under the index under the essential category. It was also reported that the central government, while accepting the NITI Aayog proposal, decided to bring new curbs on drugprices, including the non-essential ones. But any such curb is not present on non-essential and generic medicines.

2.4. World Health Organisation Establishes India Having Exorbitantly MRP Of Medicines

Even World Health Organization (WHO) established that even essential drugs in India with the lowest printed Maximum-Retail-Price (MRP) are exorbitantly priced over manufacturingcost, followed by abnormally high trade-margin between ex-factory price and MRP³.

A study conducted by Indian Express in 2018 revealed that five chemistshops around the premier Post Graduate Institute of Medical Education and Research (PGIMER) at Chandigarh were selling a particular medicine with prices ranging from Rs.255 to Rs.1550.

2.5. NPPA Mute Spectator To Extra-Ordinary Heavy Trade Margins On Generic Medicines

Generic medicines are an economical substitute for branded medicines. But it was shocking to note the extra-heavy trademargins in Generic Medicines available at the wholesale medicinemarket of Bhagirath Palace in Delhi. A box containing 20 strips of ten tablets each of Vogliboz-0.3 tablets marketed by Knoll Healthcare Pvt. Ltd. with a printed Maximum Retail Price (MRP) of Rs.100 each (MRP of the complete box is Rs. 2000) was available with the distributor at just Rs. 250 meaning a profit of a whopping 700% for the retailer. A box of 300 tablets of Lipvas-10 (Atorvastatin) manufactured by Cipla Limited with a total MRP of Rs.1837.20 was available at Rs. 300. A box of 20 strips of ten capsules each with MRP Rs. 114 per strip (Total MRP Rs. 2280) of Pantosec DSR marketed by Cipla Limited was available at a wholesaler at just Rs. 550 meaning thereby a trade-margin of 315%. Even

³ Madhu Agrawal, *Even WHO finds essential drugs in India priced much higher than manufacturing cost*, Dialogue India (18/04/2019), available at <http://dialogueindia.in/even-who-finds-essential-drugs-in-india-priced-much-higher-than-manufacturing-cost/>, last seen on 10/03/2022

wholesalers are at liberty to earn huge by offering just a 20-percent discount on printed MRP of Generic Medicines. The same is the case with thousands of generic medicines manufactured by various companies.

A probe is necessary to find out if there exists some unholy nexus between NPPA and concerned private players which is not letting NPPA direct the marketers of Generic Medicines to reduce the printed MRP on Generic Medicines, which may not be above net total trademargins of say 30% inclusive of distributor, wholesaler and retailer which exists for branded medicines. Extra-ordinary trademargins running into hundreds of percent leave open space for bribery since governments are the biggest purchasers of Generic Medicines for their hospitals and dispensaries.

I was admitted to two reputed private hospitals in the year 2020 and 2021 (the second time due to covid-19), and I noted that many generic medicines provided by these hospitals were billed at MRP, thus making these private hospitals also privy to these exorbitantly high profits running in several hundred percent as explained above.

The central government once considered colour-coding generic medicines to distinguish vegetarian and non-vegetarian foodproducts. But even steps like printing the name of a generic chemical on branded medicines in fontsize double that of a branded name, separate shelves for generic medicines in chemistshops and making it compulsory for medical practitioners to print the name of the corresponding generic chemical in legible writing together with the name of branded medicines earlier announced by the government have not yet been implemented. All these steps should have been implemented in practice to promote the sale of generic medicines with very low ex-factory prices compared to branded medicines.

But even if all these steps are followed in practice, nothing will improve because printed Maximum-Retail-Price MRP on generic medicines is almost equal to MRP printed on corresponding branded medicine. The bitter fact is that generic medicines have printed MRP eight times the wholesale price at which main distributors sell these to retailchemists.

Government should cap maximum trademargins for all medicines, including non-essential and generic medicines, to make these available to the general public at really economical

prices. Price-revision of any medicine must be allowed only once a year, say on the First of January, unless approved as a special case by NPPA⁴.

2.6. NPPA Ignores Regular Price-Increase Of Medicines And Heavy Price-Difference On Same Branded Medicine

Shockingly, there is a regular priceincrease of many medicines like *Colaspa*, with its price revised upwards after every two months or so in the year 2018, with NPPA not having any check on such money-minting by drug companies. Rather medicines are put in some categories where NPPA has price-check only in the category having very few essential medicines. But since medical practitioners usually prescribe medicines from other categories also, there should be a mechanism whereby drugcompanies may be allowed to have some basic profitmargin on all types of drugs irrespective of their categorization. The system should be for a once-in-a-year price-revision of any medicine in a fixed month, say in January or April every year. Even branded medicines from renowned companies are priced with heavy differences depending on the popularity of the brand name of the medicine, like Calmpose and Valium-5. However, both have Diazepam as basic salt but are priced differently with a heavy difference.

2.7. Claim By Drug-Manufacturers For Tax-Deduction On Gifts Exposes Over-Pricing Of Medicines

Madras High Court once directed the Income Tax Department to submit details of claims made by pharmaceuticalcompanies towards taxdeductions for gifts made to doctors, names of those doctors and penalties paid by these companies for drugoverpricing.

Observations made by the Court made it clear that the pharmaceuticalcompanies overprice the drugs where prices of the same medicine differ multiple times according to the popularity of brandnames owned by different pharmaceutical companies.

2.8. Complete Ban Necessary On Commission Received By MedicalPractitioners From Testing Centres And Hospitals

It is common knowledge that pathological laboratories, investigating centres, and even hospitals pay commission to medical practitioners, which not only increases the cost of

⁴ Taj Pharma, *Generic medicines from India, Says Top Generic Drug Manufacturing company — Taj Pharmaceuticals Ltd*, Medium, available at <https://tajpharmaceuticals.medium.com/generic-medicines-from-india-57494720d9b9>, last seen on 10/03/2022

medical treatment for desired ones, but otherwise also harm users of medical services. Medical Practitioners insist that medical tests must be done from pathological laboratories or medical centres directed/ordered/advised by them. Medical Practitioners even get hefty commissions from private hospitals on the total bill amount forcing them to unnecessarily recommend to patients that they need to be admitted to the hospital without needing to be hospitalized.

2.9. Allowing Chemists To Sell Generic Substitutes Without Study Will Make Chemists Mint Money

Way back in the year 2017, the central government was reportedly planning to allow pharmacists to substitute allegedly cheaper generic medicines against the branded ones prescribed by the doctor in case of the patient accepted such a change. But while doing so, the government closed its eyes to the bitter fact of generic medicines being at times sold with margins of several hundred percent on generic medicines with Maximum-Retail-Price (MRP) being equal to or even higher than the branded medicines of the same composition. As such, allowing generic substitutes would have made chemists mint profit margins in hundreds of percent⁵ and would not have benefited general consumers.

3. OVER SALE AND WASTAGE OF MEDICINES

Wastage of medicines in every household is a common phenomenon. To curb this menace, various NGOs even started medicine banks wherein consumers could deposit unused medicines to be useful to others. This served a dual purpose of reducing the overall bio-wastage, which is hazardous for health if not treated/disposed of properly and increased availability for those in emergent need. The NGOs also provided these medicines for free so that even the poor could buy them. This is a temporary solution; the problem's root cause needs to be figured out and eliminated so that wastage and overselling can be prevented.

3.1. Packing Of Medicines Requires To Be Regulated To Prevent Over Sale Of Medicines

It has been observed that drug manufacturers in India have gradually started introducing 15 tablets or capsules per strip rather than the usual 10 just to mint extra money and profit. Usually, chemists sell a complete strip of the medicine rather than cutting the strip for

⁵ Madhu Agrawal, *Generic Medicines Put Patients At Disadvantage*, The Navhind Times (14/12/2017), available at <https://thenavhindtimes.in/article/letters-to-the-editor-910#:~:text=Generic%20Medicines%20Put%20Patients%20At%20Disadvantage>, last seen on 10/03/2022

desired less tablets. The rest of the tablets or capsules, after taking the prescribed dose for limited days, practically becomes a total waste for the consumers. NPPA should regulate packing formula in true metric spirit by ensuring packs of medicines in packs of 1, 2, 5, 10, 20, 50, 100, 200, 500 or 1000 tablets, capsules, milligrams or millilitres and thereafter in multiples of 1000. The regulatory authority may seek exemption from such packing formula for dose-wise administration. This will also prevent another anti-consumer practice of some commonly advertised medicines for cough and the common cold, tablets being packed in strips of eight because consumers usually judge the price of such medicines per strip without realising that the strip has a lesser number of tablets than usual ten⁶.

3.2. Magnifying Glass Needed To Read Name Of Medicine On Medicine-Strip

In an emergency, I recently purchased four tablets cut from a strip of ten of the medicine Zolfresh-5. But I was shocked to see that the name of the medicine printed on the side of the cut-strip was printed in such tiny letters that I had to use a magnifying glass to confirm the name medicine. It is possible that the entire strip of the tablet must have printed the name Zolfresh-5 once in easily readable font size. But a problem arises in the case of remaining tablets to be used later in need when the cut-strip is left either without the name of the medicine or the name printed in unreadable font size.

It should be made compulsory to print the name of the medicine on a complete strip over every tabletcapsule. Moreover, the print-emboss name of the medicine individually on each tablet capsule should also be made compulsory. Alternatively, a system can be formulated wherein the name of the medicine is printed all over the background of the packing foil, with all other details printed in a darker tone over the packing foil with the name of medicine all over the strip in the background like once used to be for Crocin⁷. Likewise, manufacturing and expiry dates of medicines should be repeatedly printed on the back side of the medicinestrip to cover even cut-away portions of part-strips.

4. PATHOLOGICAL LABORATORIES SHOULD BE REGULATED

Presently there is a flood of SMSs on mobilephones offering a complete package of so many bloodtests further reduced to just rupees 599 that too with a facility to collect bloodsamples

⁶ Madhu, *Drug Manufacturers adopting anti-consumer Practice of inducing 15 tablets per Strip*, Odishabarta (22/01/2021), available at <https://odishabarta.com/drug-manufacturers-adopting-anti-consumer-practice-of-inducing-15-tablets-per-strip/>, last seen on 10/03/2022

⁷ Madhu Agrawal, *Magnifying glass needed to read name of medicine on medicine-strip*, Dialogue India (30/08/2018), available at <https://dialogueindia.in/magnifying-glass-needed-to-read-name-of-medicine-on-medicine-strip/>, last seen on 10/03/2022

from residences or workplaces of desired ones. But these SMSs do not give details and addresses of laboratories where bloodtests are to be conducted. Such messages are circulated on socialmedia also.

Such offers do not come from recognised & government-approved laboratories or normal pathological laboratories that are looting the public. Union Ministry of Health and Family Welfare should probe into the matter. Those offering such economical packages should be directed to give details of laboratories in SMSs with the compulsion to have a proper website of such laboratories.

Union Health Ministry should also develop software to be compulsorily used by all recognised and approved laboratories including in hospitals, government or private. Every consumer giving samples of blood, urine, stool etc. should be given a unique ID and changeable password whereby a complete record of tests conducted, including those done in the past, may be available from the website of the concerned laboratory with a click of a mouse.

A reputed pathological laboratory in Delhi, also covering other cities, has dual pricing for medicaltests. Charges for ordinary patients are much higher than those from Central Government Health Scheme (CGHS) cards. At least such dual pricing must not be allowed in healthservices for pathological and biochemical tests and blood tests.

5. THE QUALITY OF GENERIC MEDICINES MANUFACTURED IN INDIA FOR EXPORT AND DOMESTIC MARKET SHOULD BE THE SAME

This is a huge problem in not only the pharmaceutical sector but in other sectors, wherein sub-standard products are left for Indian consumers to consume, and all the quality products are exported. BJP MP Bhartruhari Mahtab raised the issue of generic drugs in Lok Sabha on 19.07.2019, rightly demanding an inquiry to find out the efficacy of generic drugs, quoting a bookstudy that Indian drug manufacturers were producing quality generic medicines for US and European countries with sub-standard generic medicines being marketed in the domestic market.

5.1. Export Of Generic Medicines Should Be Encouraged

Companies exporting generic medicines should be checked and required to file affidavits that generic medicines for domestic and foreign markets are of the same quality⁸.

It is time that India sets yet another milestone like it did in producing corona-vaccine by promoting their export. Exporting world-class generic medicines will provide the country with adequate foreignexchange and reputation because Indian generic medicines areworld-class andmore economical than foreign-branded medicines, of which the major part is the royalty of drug-manufacturing companies.

5.2. Premium Products Made For Export By Indian Companies Should Also Be Available In Market

It is quite often that reputed Indian companies, at times, make special premium products only for export and not for Indian markets. The reason may be that such premium products may be costlier than those made for Indian markets. Such premium products should also be made for Indian consumers even if they cost more. Separate brandnames can also be given for such premium products presently for export-only in case these are made available for the Indian market.

Recently, I saw black tablets in Hajmola - New Pack purchased in the USA for 1 dollar 99 cents. It was very tasty. But it could not be found anywhere in Delhi, includingin wholesale markets. Indian manufacturing company Dabur India should also introduce this product to the Indian market, even if it is at a premium price.

5.3. Why Are Some Medicines Banned Years Later In India Than In Other Countries?

Union Health Ministry in the year 2018 banned 328 Fixed-Dose-Combination drugs out of a total of 349 recommended to be banned by Chandrashekhar Kokate Committee, with six being allowed with a restricted sale. The central government should have publicized a complete list with their respective brandnames.

Banned medicines included commonly advertised popular medicines like *Sardon* and Vicks-Action-500, which remained household names in India for many decades. Surprisingly,

⁸ Madhu Agrawal, *Quality and prices of generic medicines*, All Rights (22/07/2019), available at <https://www.allrightsmagazine.com/quality-and-prices-of-generic-medicines/>, last seen on 10/03/2022

medicines considered harmful are banned in India years after they are banned in foreign countries with further delay by money-minting drug-manufacturing companies obtaining a stay from courts. Surprisingly, courts grant easy stay-orders even on such aspects, which should require medical experts only to be presiding as judges to decide on such stay-orders. There should be at least some accountability on judges as well, at least on such life-affecting matters.

Union Health Ministry should take an immediate decision on the matter once they are banned in other countries rather than delaying in wait of reports of committees formed for studying the matter. Action is necessary against celebrities advertising popular medicines without having knowledge about the advertised medicines. There should be a total ban on advertisements of medicines in view of a recently imposed ban on commonly advertised medicines.

6. COMPUTERISATION IN THE MEDICAL PROFESSION SHOULD BE COMPULSORY

6.1. High Court's Order Imposing Fine On Doctors For Poor Handwriting Is A Welcome Step

Lucknow bench of Allahabad High Court in 2018 imposed a fine on three doctors for illegible handwriting on injury reports submitted before the High Court. Central and state governments must take a clue from the High Court order and issue necessary directives that at least new-generation medical practitioners may issue computerised prescriptions. An exemption may be for aged ones not familiar with using computers.⁹

Odisha High Court on 13.08.2020 advised doctors to write legible prescriptions in capital letters and directed the government to issue a circular. Rather, it should be mandatory nationwide for new-age medical practitioners to issue prescriptions directly from the computer after storing patients' medical history in their computers. Many medical practitioners, especially in lower-income localities, give their own-prepared medicinal syrups and powder capsules without letting patients know about the medicines. In the emergency era of 1975-1977, such unhealthy practice was effectively checked by making all medical practitioners compulsorily maintain a record of each patient visiting them and also

⁹ Subhash Chandra Agrawal, *Welcome High Court order imposing fine on doctors for poor handwriting*, Dialogue India (08/10/2018), available at <https://dialogueindia.in/welcome-high-court-order-imposing-fine-on-doctors-for-poor-handwriting/>, last seen on 10/03/2022

binding them to compulsorily give a copy of prescription of prescribed medicines even though given by the medical practitioner. Medical discipline should be restored for the larger public interest. However, aged practitioners who are not aware of computer technology may be exempted from a compulsory issue of computerised medical prescriptions.¹⁰ The system will enable practitioners to send medical alerts about banned medicines through e-mail to their regular patients.

Union Health Ministry should take the initiative to develop three different types of software, one each for hospitals, medical practitioners and pathological laboratories where every patient gets a unique registration number by any private or government hospital, medical practitioner and pathological laboratory, so that complete past medical history of a patient for that particular hospital, medical-practitioner and pathological-laboratories may be readily available, if possible, even by the opening website through unique ID and password. All prescriptions and medical reports may thus be printed through computers eliminating the system of hand-written prescriptions or medical reports.

Personal data records, including contact details and all other available information, like blood group, medical insurance, treating physician-surgeon, etc., should also be registered in a computer database. The system will enable pathological laboratories to maintain patients' past medical history on computers. The system will add to a regular clientele of pathological laboratories, which can offer membership discounts for their regular customers and other business-promotional activities.¹¹

The system will be useful for states like Delhi, where patients are provided free medicines and tests in government hospitals under the Delhi government. Then there will be no need to get prescriptions photo-copied or slips prepared manually for medicines or investigations by additional staff deployed for the purpose.

6.2. Massive Irregularities In Wholesale Medicine-Market

Bhagirath Palace in Delhi is the biggest wholesale market for the sale of medicines; where nowadays, branded medicines are sold in retail with discounts ranging from 20 to 25 percent on printed Maximum-Retail-Price (MRP) for branded medicines. Many traders sell

¹⁰ Madhu Agrawal, *Computerisation of medical records*, The Free Press Journal (02/06/2019), available at <https://www.freepressjournal.in/analysis/letters-to-the-editor-62>, last seen on 10/03/2022

¹¹ Ibid

medicines without any cash memo or invoice, while the genuine ones sell only through computer-generated cashmemos and invoices.

If cash-memo is demanded, then erring dealers give a computer-generated paper written as ROUGH ESTIMATE (see attachment) without any dealer details. Such a system of not issuing proper and accounted cash-memo or invoice results in selling left-out billing to private hospitals or others to evade Income Tax and GST where the purchaser of such bills (without the actual purchase of medicines) for claims false Input-Tax-Credit (ITC). Moreover, such a system creates chances of sale of spurious branded medicines. The concerned tradeassociation declined to issue a circular to its members when advised by the area GST inspector.

Delhi Government and the Union Ministry of Health and Family Welfare should initiate stringent measures against such malpractice, which is dangerous for the national economy and public health to create fear psychology amongst the wrongdoers. Area GST inspector should issue an official warningletter along with a copy of this submission and enclosure with a direction to circulate these along with necessary warning-advisory to its memberdealers.

7. VEGETARIAN CELLULOSE CAPSULES SHOULD REPLACE NON-VEGETARIAN GELATIN CAPSULES

Drugcompanies reportedly approached Prime Minister's Office (PMO) in the year 2017 against the governments-move to replace gelatine capsules mainly used in medicines with cellulose capsules on the plea that it would cost heavily to drugmanufacturers both as an investment in plants and as increased cost of inputs.

With the Supreme Court ruling in 2013 against labelling medicines according to green and red dots indicating their being with vegetarian or non-vegetarian ingredients, it is advisable to have vegetarian capsules to respect the sentiments of the majority of people who prefer to be vegetarian. Even a particular religious section has reservations about using parts of pigs being consumed. It is noteworthy that gelatine is obtained from processed bones, skins, and tissues of animals, including pigs, while cellulose capsules are of synthetic origin.

The argument that having cellulose capsules will increase dependence on China for inputingredients is baseless because drugcompanies should feel themselves duty-bound for indigenous manufacture of such ingredients. Bulk production of cellulose capsules once

made mandatory, will decrease production-cost at a time when presently just two-percent of capsules are made of vegetarian cellulose. In contrast, the majority, 98percent, is made from non-vegetarian gelatine.

8. EDUCATIVE GOVERNMENT-ADS NECESSARY ON HEALTHY DRINKS, HEALTHY FOOD AND COSMETIC SURGERY

Reports were circulating in the media, with the opinion of medical experts about artificial healthfood and cosmetic surgery being possible reasons behind the cardiac arrest responsible for the sudden untimely death of Bollywood superstar Sridevi (54) on the night of 24.02.2018 in Dubai. The fashion of artificial healthfood is nowadays increasing fast, especially among youngsters, to the extent that even many chemists have turned their shops to sell these products exclusively. Fast lifestyle has made affording one's switch to costly gyms from the natural walk for exhibiting health-consciousness in a status-conscious society. The trend of cosmetic surgery for looking beautiful and fit is also increasing simultaneously.

Union Health Ministry should set up an expert committee to study the after-effects of artificial healthfood and cosmetic surgery. Only certified healthfood with minimal or no harmful sideeffects should be permitted to be sold and advertised. Ministry should also put on its website complete details about permissible artificial healthfoods with names of manufacturers and permissible doses, and associated sideeffects and dangers. Usually, gym owners, under the influence of manufacturers of such products, make their clients consume such products. A strict warning should be issued for selling artificial health products only on the prescription of registered medical practitioners. Government should publicise natural walking on lines of yoga to discourage youngsters' addiction to the gym.

9. NECESSITY OF ACT OF BALANCING BETWEEN ONLINE SALE OF MEDICINE AND THOSE AT RETAIL STORES

A 24-hour strike call was given by The All-India Organization of Chemists and Druggists on 28.09.2018 when about 8.5 lakh chemist shops throughout the country were to be closed against government-decision to permit e-pharmacies providing discounts ranging from 15-30 percent on medicines. The decision of the Union Health Ministry was apparently justified to relieve the general public. But its sideeffects could be equally harmful when chemists switch to other businesses because of heavily reduced sales. Medicines are

emergency needs where life cannot wait for online booked medicine delivery, thus necessitating the existence of chemist shops.

Already some agencies are offering a 20-percent discount with an additional 20-percent accumulated bonus on home-delivery of medicines irrespective of quantity required being small. The biggest wholesale medicine market in India, Bhagirath Palace in Chandni Chowk, has virtually converted into a retail-market offering a 20-percent discount on branded medicines, even for a single strip of medicine. Even in retail markets in colonies, chemists offer discounts ranging from 10-15 per cent without even being asked by consumers.

But such hefty discounts are possible in big cities with only a direct distributor network of pharmaceutical companies. Excessive trade margins are necessary for trade-network in smaller cities and rural areas. Union Health Ministry should restrict that e-pharmacies may execute orders only say above rupees 2000. The sale of medicines wholesale should be allowed only in bulk quantities with complete boxes. In any case, it should be ensured that retail chemists survive to prevent shifting their business to some trade other than medicines.

10. EXCLUSIVE ACCESS TO FREE HEALTH CARE FACILITIES TO RESIDENTS OF DELHI

Medical treatment for patients, coming not only from any part of the country rather from any part of the world, in emergency-wards of Delhi Government must be humanly provided. But it is totally illogical to burden tax-payers of Delhi to provide free medical facilities and medicines in Out-Patient-Departments (OPD) of hospitals of the Delhi Government. There are reports that messages are given at religious places of neighbouring states about the free availability of medicines, including costly ones in hospitals, by the Delhi Government. Even hospitals of the Central Government in Delhi do not provide absolutely free medical facilities like MRI and medicines to OPD patients.

People from outside Delhi come specially to avail such free facilities in OPDs of hospitals under the Delhi government, causing an extra-ordinary rush of non-Delhi residents at OPDs of hospitals under the Delhi government, depriving Delhi residents of unique facility of free medicines and costly investigations with the majority of patients in OPDs being from outside Delhi. Aadhar-cards with Delhi addresses should be compulsory for patients visiting OPDs of hospitals under the Delhi government.

Since people do not care about costly freebies like free medicines, provision should be to charge the cost of generic medicines and then be reimbursed back in bankaccounts linked with Delhi Aadhar-cards in a manner in which subsidy-part of LPG works, which is first charged at the time of LPG delivery, and later reimbursed back in Aadhar-linked bank-accounts.

11. EYE-WASH PUNISHMENT TO MEDANTA HOSPITAL (GURUGRAM) FOR OVERCHARGING MEDICINES

Health Department of Haryana Government in the year 2018 suspended the licence of one of the three pharmacies of Medanta Hospital (Gurugram) just for one week as symbolic eye-wash punishment for over-charging medicines. It will not affect the health of big private hospitals in any manner because the hospital, even during the seven-day closure of its one pharmacy, will easily manage hospital-working with its other two pharmacies where licences are not suspended.

Such symbolic punishments for big lapses by ultra-rich private medical establishments clearly represent some big deals for meaningless punishment. An enquiry should be ordered, and the person guilty should be punished for imparting such meaningless punishment to big private medical tycoons. Real punishment could be a directive to sell medicines and other items by all the hospital pharmacies without profit for one year. Since branded medicines are easily available in markets at discounts ranging from 10-20 percent, with generic medicines having even much more trademargins, hospitals, in general, should be directed to sell medicines and other items at a fixed profitmargin rather than at maximum-retail-price (MRP) with proper checks that hospitals may not create new firms of their own to establish medicine-supply done from outside hospitals rather than from their own pharmacies.

12. SUGGESTIONS

Based on my knowledge and personal experience following are some suggestions that are not only easy to implement but also will go a long way in curbing the malpractices prevalent in the pharmaceutical industry.

12.1. A Fixed Formula For Profit-Margin On Medicines Should be Adopted

National Pharmaceutical Pricing Authority (NPPA) in the year 2019 slashed prices of nine anti-cancer drugs by up to 87%. Likewise, earlier in 2019, margins were capped for 73

drugs. The big question is, firstly, why drug companies were allowed to mint money in past with government-agency like NPPA in existence, and secondly, why such price-slashing is not done for all drugs in one go with even World Health Organization (WHO) adversely commenting on high-profit margins on medicines in India. Moreover, since cancer patients are also to be provided medicines for other diseases, price-slash only on cancer medicines would not offer desired maximum relief, which could be possible only through a fixed formula for trade margins on all essential and non-essential medicines apart from only cancer-related medicines.

12.2. Make Medicines Available At Maximum Discount At All Hospitals

Central and state governments should open retail shops of medicines in all government hospitals where normal people may get medicines with maximum possible discounts. Profit margin, rather than discounts offered, at these shops should be fixed because cheaper-considered generic medicines have, at times, the abnormally high gap between ex-factory price and printed Maximum-Retail-Price (MRP). The relatively maximum gap between ex-factory price and MRP should be fixed for all medicines, i.e., branded and generic medicines alike, to avoid traders taking undue advantage of an extraordinarily huge gap between ex-factory price and MRP on generic medicines. This practice should be adopted in private hospitals as well because these hospitals make hefty profits in providing medical services; therefore, it is illogical to allow them further profiteering through heavy profit margins on medicines. I know from my experience by two times being hospitalized in two different private hospitals in Delhi in the years 2020 and 2021 (last time due to corona) that they provide even generic medicines with abnormal profit margins of several hundred percent to the admitted patients.

12.3. Opening No-Profit-No-Loss Basis For Sale Of Medicines In All Government Hospitals In Delhi

Delhi Sikh Gurudwara Management Committee (DSGMC) opened the first-ever no-profit no-loss shop of generic medicines at Gurudwara Bangla Saheb in New Delhi to benefit the public where generic medicines usually have printed Maximum-Retail-Price MRP, which is even ten times the distributor-price. Delhi Government should encourage DSGMC to open more such shops at different Gurudwaras of Delhi and in all government hospitals (Central or Delhi) in Delhi by providing adequate space for such shops on hospital premises. It is better to have two such shops in each hospital, one for generic medicines and the other for

branded ones. If DSGMC or some other religious/charitable organisations like Rotary International agrees, Delhi Government and Delhi Development Authority (DDA) can provide space for opening medicineshops on a no-profit-no-loss basis in markets in different parts of the city. Even corporates in the private and public sectors can be approached for such noble causes through funds available to them under Corporate-Social-Security (CSR).

Presently medicine-shop AMRIT at All India Institute of Medical Sciences AIIMS (New Delhi) gives just a 15-percent discount on branded medicines; otherwise, available between 20 and 25 percent discount in retail shops at Bhagirath Palace (Delhi). If wholesaletraders may be allowed to offer a bid for opening shops in governmenthospitals at the maximum discount possible, they will rush to bid, thus addition providing extra earnings to Delhi Government from the bidamount.

12.4. Bring All Private Hospitals With Land Provided At Subsidised Lease/Cost Under RTI Act

The land is provided by stategovernments to renowned private hospitals known for minting money by having very high and exorbitant charges not only for medicalservices but also allowing them heavy profiteering on medicines. Evidently, providing land at subsidised cost/lease is substantial governmentfunding making all such private hospitals accountable to the public under provisions of section 2(h) of the Right-To-Information (RTI) Act, 2005. All such hospitals should be directed to *suo-moto* declare themselves as publicauthorities defined under section 2(h) of RTI Act, 2005, or else pay the marketprice of land provided to these hospitals.

12.5. Provide Government-Land For Exclusively Charitable Hospitals Rather Than To Private Hospitals

Delhi Sikh Gurudwara Management Committee (DSGMC) needs a big round of applause for opening in New Delhi on 07.03.2021, not only the biggest but also the most ultra-modern, totally free hospital for kidneydialysis with five-star facilities and free food for both patients and their attendants with the hospital not having a cash-counter at all. Setting up and running a hospital will be funded through a corporate-social-responsibility (CSR) fund mandatory for all companies and Ayushman Bharat Yojna of the Government of India and voluntary contributions.

Delhi government should provide land to DSGMC and other religious or charitable organisations. They may be willing to build more super-speciality hospitals for different diseases on which DSGMC opened the hospital for kidneydialysis.

12.6. Government-Hospitals Being Looted Through Non-Medicinal Consumables

Till now total non-effectiveness of the National Pharmaceutical Pricing Authority (NPPA) under the Union Ministry of Petrochemicals, was responsible for chances of bribery in the supply of generic medicines because of extra-ordinary high printed Maximum-Retail-Price MRP on these, which at times was even ten times the distributor-price in wholesale medicine market of Bhagirath Palace (Delhi). NPPA does care for grievances lodged repeatedly at various portals, including www.pgportal.gov.in , www.helpline.rb.nic.in , and at the portal of the Prime Minister.

But now, it has been noticed that even other consumables used in hospitals also had printed MRP way higher than the wholesale price at which these are available in the wholesale market of surgicalgoods at Bhagirath Palace (Delhi). A box of 200 Accu-Check single-use lancing devices with printed MRP of rupees 2200 was available only at rupees 400 only.

It is for the Union Ministry of Health & Family Welfare and also the Department of Consumer Affairs at Central Government to seriously look into the matter and ensure that MRP on all medicines and other consumables used in hospitals may have a maximum profitmargin over the ex-factory price or import-price.

12.7. Products Of Indian Medicines Pharmaceuticals Corporation Limited Should Be Popularised

Indian Medicines Pharmaceuticals Corporation Limited, in District Almora (Uttarakhand), is a premier company under the Union Ayush Ministry for producing Ayurvedic medicines at economical prices with reliable purity and quality. But its products are not seen anywhere in the market except at the government-dispensary of the Delhi government. There is also not a complete range of products, especially pain-relief oil is always out of stock. Even the company's website is not working so that the desiring ones may be able to know its complete productrange and addresses of distributors and dealers.

Union Ayush Ministry should ensure proper working of Indian Medicines Pharmaceuticals Corporation Limited, with its website properly functioning and also showing the addresses of distributors and dealers for its entire product range. Suppose the company does not have a network of distributors and dealers. In that case, it should immediately appoint them so people may benefit from an economical and reliable range of Ayurvedic medicines.¹²

12.8. Revive Government-Owned Indian Drugs And Pharmaceuticals Limited (IDPL) On Big Scale

Central and state governments are bulk buyers of medicines to be used in their hospitals and dispensaries. Indian Drugs and Pharmaceuticals Limited (IDPL) was a government-owned premium drug-manufacturing company known for providing quality medicines at a cost much below the famous branded medicines. For example, Calmod was its own brand name for sleeping pills with salt diazepam (5 mgs) as a cheaper substitute sold at a fractional cost of popular branded medicines sold under the trade name Calmose and Valium-5.

12.9. Union Government Should Study Utility Of Cow-Urine For Medicinal Use

Videos were viral on social media wherein it has been claimed that extracts of cow-urine can be a successful medicine against coronavirus. Also, our ancient Sanskrit literature is full of Ayurvedic medical literature.

The Union government should immediately set up an expert group from concerned ministries to study the utility of cow-urine for medicinal values. Also, ancient Sanskrit literature should be analysed for advanced study in the field of Ayurveda.

If India finds coronavirus medicine, then India can once again lead the global world in providing a treatment to till now fast-spreading fatal coronavirus.

¹² Subash, *Products of Indian Medicines Pharmaceuticals Corporation Ltd. should be Popularised*, Odishabarta (10/05/2021), available at <https://odishabarta.com/products-of-indian-medicines-pharmaceuticals-corporation-ltd-should-be-popularised/>, last seen on 10/03/2022

13. CORONA MENACE

13.1. Arrest Of BlackMarketers Of Remdesivir In Delhi

Intelligence and investigation agencies arresting three persons in Delhi on 26.04.2021 for Remdesivir injection should be complimented for their commendable job, which, if further investigated, can expose a number of misdeeds in the biggest wholesale medicinemarket of Asia, namely Bhagirath Palace in Chandni Chowk at Delhi.

Bhagirath Palace, till about some decades back, was a purely posh residential colony of Old Delhi with very huge and spacious residential buildings which subsequently illegally converted into a big wholesale commercial hub for so many commodities including medicines, surgical goods, electrical and electronics goods only because of high-level corrupt nexus of politicians, police and civic body with hardly any resident left in the colony-turned-market. Every building with its multiple floors now has many small shops, including medicines.

Hard remand of those arrested and complete search of their stocks and computers could reveal the truth about the sale of duplicate-spurious-fake medicines. Employees of arrested culprits should also be taken into custody, making them approvers who could further expose malpractices prevailing in the market. But it seems no such concrete steps were taken because the arrested ones could be seen carrying on their business as usual within a week after their arrest. Office-bearers of the concerned marketassociation should have felt duty-bound in the larger publicinterest to know about the prevailing malpractices of some of their members. They must have volunteered themselves to assist investigating agencies. But since no proper investigation was evidently carried out with the early release of culprits, office-bearers of the market association also ignored the matter. Otherwise, office-bearers could provide bitter truth about their market if compelled to reveal malpractices in the trade.

The arrest of a goldsmith could likewise reveal malpractice of gold being sold-purchased without an account. Reports indicate that arrested goldsmiths were assisting blackmarketers with Remdesivir injection, and victims were being harassed into selling their gold to arrange a heavy price for Remdesivir injection.

13.2. Faulty Pricing Policy Of Corona-Vaccination

The pricing policy of corona-vaccination with private hospitals getting these at exorbitant prices from vaccine-manufacturing companies as compared to earlier that too with heavy price-difference between that of Covishield and Covaxin respectively at rupees 780 and 1410 per dose as against rupees 150 uniformly for both will make people rush towards Covaxin in government-provided free-centres rather than towards Covishield. It will result in free slots of Covaxin at governmentcentres booked instantly. Otherwise also, since only experts in handling mobile phones and computers can register through Apps and websites, free slots of Covaxin will be grabbed by those leaving ordinary people to have inferiorly priced Covishield.

The initial system of providing corona-vaccination free at governmentcentres and rupees 250 in private hospitals were working smoothly, with even walk-in facilities feasible at all centres for all agegroups with the first or second dose. The new system will develop a craze for Covaxin and will deprive ordinary people of much demanded Covaxin.

13.3. Uncertainty In Corona-Vaccination With Desiring Ones Not Being Provided Covaxin And Sputnik As First Dose In Delhi

There had been postponement after postponement in providing much-awaited Sputnik as corona-vaccination, with a large number of youngsters eagerly awaiting the introduction of Sputnik. Also, the huge pricedifference between two indigenously developed Covaxin and Covishield has made Covaxin as a preferred choice amongst youngsters and others. But Covaxin is being provided only as Second Dose in Delhi, with most youngsters avoiding Covishield in waiting for Sputnik or Covaxin as the second choice. An announcement by the central government for approval of Moderna and the likelihood of Pfizer also coming to India has further confused youngsters to wait for these US-produced popular vaccines.

Such a confused governmentpolicy for coronavaccination may cause significant harm to youngsters and other remaining ones in case any third coronawave comes to India. Central Government should urgently and immediately ensure the immediate introduction of Sputnik since it has already reached India. Likewise, efforts should be made so that the central government may be in a position to announce the exact date of introduction of Moderna and Pfizer coronavaccines to remove all confusion. Central Government should also ensure adequate supply of Covaxin in Delhi in a manner that First Dose of Covaxin may be available in sufficient quantity with walk-in facility including also at government-

centres like was done in the initial phase of corona-vaccination. Those requiring vaccination must be provided with a choice between Covaxin and Covishield free of cost at governmentcentres apart from at private hospitals.

13.4. Curb On Room-Rent, Consumables And Medical-Services For Covid Patients In Private Hospitals Should Be Made Permanent

Delhi witnessed a second but more serious wave of the corona. But the Delhi government did not take adequate steps to prevent big loot by some private hospitals by charging unchecked exorbitantly daily roomrents and medical services in their private wards. Huge money was charged in the name of consumables which in practice cannot be verified by a patient in covid-isolation in private wards. Many private hospitals made other loot by giving patients generic medicines on printed Maximum-Retail-Price (MRP). At the same time, it is well known that MPR printed on generic medicines is, at times, the distributor's price.

During the first corona-wave in 2020, the Delhi government imposed an upper limit on roomrents for covid patients in private wards. But it was not done during the second but more serious corona-wave. Delhi government should permanently impose an upper limit of daily roomrent for covid patients in private wards, which may include the cost of medicalservices and consumables. In the regretful policy of the central government, where the National Pharmaceutical Pricing Authority (NPPA) does not fix an upper-profitlimit for generic medicines, the Delhi government should direct private hospitals to provide generic medicines at some reasonable profit rather than on printed MRP.

Such steps are necessary to be permanently followed even after the corona crisis is over to benefit the mute category of middle-income people. Consultancycharges of senior consultants should be uniform for all because public-sector insurancecompanies approve consultancycharges of visiting consultants according to permissible roomrent in mediclaims.

Private hospitals may charge according to their wish for suites comprising of more than one room,used mainly by affording ultra-rich. However, there should be a curb on the number of private suites in a hospital according to the availability of private rooms to prevent private hospitals from developing more private suites than private rooms for extra profitability.

13.5. Preventive Rather Than Curative Steps Necessary To Prevent Corona-Spread In Delhi

Increasing beds including in Intensive Care Units (ICUs), ventilators and all other medical facilities planned by central and Delhi governments are simply eye-wash curative steps for treating corona-affected people of Delhi, which will remain grossly insufficient till real preventive measures are taken to prevent corona-spread in Delhi.

The real cause is an uncontrollable crowd all over the city in markets, roads and footpaths for which only and only cause is all-over encroachments in the city which make markets, roads, and footpaths congested. Otherwise, the city has very wide roads with footpaths, but these encroachments make all these overcrowded. But political rulers avoid touching law-breaking encroachers because these are real vote-banks with law-abiding citizens being in the minority. A 1975 emergency is urgently required to remove all types of encroachments all over Delhi. But the unfortunate situation is that politicians even opposed the Supreme Court order to remove encroachments on the sides of the railtrack.

Delhi Government should permanently adopt a five-day week policy having all markets uniformly closed on Saturdays and Sundays with the imposition of night-curfew and weekend-curfew part of citylife. The step will not affect the economy and business except for entertainment institutions, including bars and restaurants, because shoppers will shop on the rest of the five weekdays. Delhi Government has already taken an excellent step to close such markets where social distancing could not be practically maintained.

Above all, Delhi Government should request Central Government to legislate Population-Control-Bill for Delhi on the lines of the Uttar Pradesh Government because the ever-increasing population of city infrastructure is also one of the leading causes of corona-spread.

RIGHT TO INFORMATION AND INCOME-TAX ADMINISTRATION: TRANSPARENCY & WHISTLEBLOWERS PROTECTION

Mritunjaya Sharma, IRS and Prof. Kanwal D.P. Singh¹³

Abstract

An informed citizenry is a sine qua non for the progression of any society. Transparency and fairness in the government's decision-making process bring accountability on the part of decision-makers. The Income-tax administration is a repository of huge information about the taxpayers and the third-party information collected under provisions of the Income Tax Act, 1961. The department must maintain a balance in disclosing the information sought vis-à-vis the larger public interest of privacy of individuals or entities. The aim of the research paper is to study the relevance of the Right to Information Act 2005 and the existence of requisite transparency and accountability in the Indian Income Tax Administration. The paper will also look into mechanisms in the Income Tax Administration and analyse its effectiveness. The methodology adopted shall aim to look into existing policies and procedures in light of judicial decisions. Finally, suggestions shall be made for a progressive, fair, accountable, and transparent tax administration.

Keywords: the right to information, income tax, transparency, whistle-blowers

1. INTRODUCTION

Transparency in government functioning is changing the tone and volume of the state-citizen interaction across boundaries. Taxation being an essential sovereign function undertaken for development, sets out the contours for growth in the economy. The Department should play the role of an enabler for the development of a responsive, fair, and accountable government and support the facilitator role of the State to enable citizens to get access to information, including the relevant information collected by its revenue

¹³ Central Board of Direct Taxes, New Delhi and Legal aid Centre, University School of Law and Legal Studies, Guru Gobind Singh Indraprastha University, New Delhi

departments. Illustrative of this is the *Proactive Disclosure*¹⁴ of the Income Tax Department in India under the Right to Information (RTI) Act of 2005.

Information held is power; therefore, it should empower society and not empower bureaucracy against the public. The proactive disclosure requirements under the RTI Act are primarily neglected by many public authorities. A study¹⁵ by PwC found that governments of various States in India have largely failed to take sufficient measures to ensure observance of the proactive disclosure provisions and that even where such information is seen proactively disclosed, it is either incomplete or outdated.¹⁶ The Supreme Court, in its landmark judgment in the case of *Maneka Gandhi v. Union of India*,¹⁷ held that the freedom of speech and expression has no limitations regarding geographic boundaries but can be subject to restrictions. There is extensive judicial thought and guiding standards around this issue. Instead of subtracting the citizens from the administrative set-up¹⁸, the RTI has innovatively brought about affirmative mainstreaming of the citizenry as active contributors.

The research paper in the coming paragraphs shall discuss provisions for access to information as provided under the Income Tax Act 1961 and trends of how information is provided by the income tax administration. Taxpayer's charter and whistle-blower protection mechanism under the act shall also be discussed. Finally, the researchers shall analyse the reforms required and suggest a way forward.

2. RTI AND THE INCOME-TAX ACT 1961

A non-obstante clause (which generally starts with the words 'Notwithstanding anything contained') is a legislative tool normally used to provide an overriding effect to any provision of a particular law over other provisions of that law itself or other operational

¹⁴*Right to Information: Proactive Disclosure*, Income Tax Department, <https://www.incometaxindia.gov.in/Pages/right-to-information/proactive-disclosure.aspx>, last seen on 15/06/2021.

¹⁵ Nancy Roberts & Alasdair Roberts, *A Great and Revolutionary Law? The First Four Years of India's Right to Information Act*, 70 *Public Administration Review* 925, (2010), available at <https://www.jstor.org/stable/40927109>, last seen on 15/06/2021.

¹⁶ Varsha Khanwalker, *The Right to Information Act in India: Its Connotations and Implementation*, 72 *The Indian Journal of Political Science* 387, (2011), available at <https://www.jstor.org/stable/i40104382>, last seen on 16/06/2021.

¹⁷*Maneka Gandhi v. Union of India*, AIR 1978 SC 597

¹⁸Ketki Tara Kumaiyan and MunniPadalia, *Right to information: The new age social software*, 74 *The Indian Journal of Political Science* 61, (2013), available at <https://www.jstor.org/stable/i24701020>, last seen on 16/06/2021.

laws in the country to avoid conflict with any divergent provisions¹⁹. The non-obstante clause in section 22 of the RTI Act is framed on similar lines and includes the circumstances which are opposite or inconsistent with the provisions of the RTI Act and does not include the provisions in other laws which are comparable to it. The Income-tax Act, 1961 also has Section 138²⁰, which provides that the non-obstante clause of the RTI Act will not apply to the Income-tax Act, whose provisions are not contradictory with the provisions in the Income-tax Act. Therefore, if information about any taxpayer is required, provisions of section 138 of the Income-Tax Act are to be invoked rather than the RTI Act.

Section 138 of the Income-tax Act 1961 provides that authorities shall furnish information to officers and organisations related to taxes, cess and foreign exchange²¹. The first part of this section authorises the Central Board of Direct Taxes or other authorities specified by it to furnish information and includes authorities like Central & State Tax authorities and the Enforcement Directorate. It also authorises the Income-tax authorities to share information in public interest with other notified government authorities.

Information shall be provided in the public interest²² or to enable the officer or organisation(s) to perform functions under the law. Public interest is a vague concept²³ and is not defined in any Right to Information legislation. Since it is not an objective concept, it differs from nation to nation, as per their governmental structure, politico-socio-economic situation, and complex developmental positions. The following points are considered while deciding the 'public interest' as stated under section 138 of the Income-tax Act:

- a. Individual's Privacy: Under the RTI Act, anybody may obtain the information, which inter-alia includes the Income Tax Returns of others. But mostly, it may hinder an individual's privacy, and, in such conditions, disclosure of information becomes controversial. The Income-tax Department is retaining the information of its taxpayers in a fiduciary capacity and not as a repository of information.
- b. Investigation: When any case is under investigation, the information cannot be given until that matter is settled to maintain administrative secrecy.
- c. Third-party information: According to section 2(n) of the RTI Act, 2005, 'the third

¹⁹Sebastian M. Hongray v. Union of India, (1984) 3 SCR 544.

²⁰Section 138 of Income tax Act 1961 talks about disclosing information about taxpayers.

²¹Section 138 (1)(a)(i), Income tax Act 1961.

²²Section 138(1)(a)(ii), Income tax Act 1961.

²³Anshu Jain, *Good governance and right to information: A perspective*, 54 Journal of the Indian Law Institute 506, (2012), available at <https://nludelhi.ac.in/UploadedImages/150093bc-dde8-4e2f-abf6-bd63c71ec0f6.pdf>, last seen on 16/06/2021.

party' means a person other than the citizen requesting information and includes a 'public authority', which means that the term 'third party' includes anyone other than the applicant or the respondent. The applicant seeking third-party information from the Income-tax Department has to demonstrate the element of larger public interest to enable the concerned Public Information Officer to share or deny such information. Before parting with any such information, the Department generally provides an opportunity to the third-party seeking objections, if any, on the information sought by the applicant.

The CPIO in the Income-tax Department has to consider the above relevant factors before deciding on each application from the private persons under the RTI Act. The information sought by the public authorities notified by the CBDT is shared directly. In contrast, approval of the Commissioner is sought for sharing information to larger public interest with the other authorities without the intervention of the RTI Act. The existing provision in the Income-tax Act is found to be working efficiently in consonance with the provisions of the RTI Act. Any amendments are currently not deemed appropriate.

An application needs to be made to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner in the prescribed form for any information.²⁴ It is also stated that the Central Government is empowered by notification to direct that information or document may not be furnished.²⁵ A non-obstante clause has been inserted in the last portion of the section, which authorises the Central government to prohibit sharing of any information or document except as authorised in such notification. An example of the notified authorities is the Central Bureau of Investigation, wherein an officer of the rank of Superintendent has been notified to seek relevant information directly from the jurisdictional officer of the Income-tax Department under the provisions of section 138 of the Act.

Section 138 of the Income-tax Act is a special provision, while the RTI Act is a general legislative enactment. The general maxim is '*Generaliaspecialibus non-derogant*', which says that general things will not be derogated from special items.²⁶ In other words, if a provision exists in the Income-tax Act for addressing a special situation such as sharing of information, then notwithstanding any other general law provisions, the provision of the Income-tax Act shall prevail. Therefore, the RTI Act is not directly applicable for obtaining

²⁴ Section 138(1)(b), Income Tax Act, 1961.

²⁵ Section 138(2), Income Tax Act, 1961.

²⁶ Girdhari Lal Nannelal v. CST (1977) 109 ITR 726.

information on Income-tax proceedings. However, the Income-tax Department has duly made the proactive disclosure²⁷ of the information to be published as per the provisions of section 4(1)(b) of the RTI Act, 2005, which comprehensively furnishes the particulars of organisation, function, and duties. Moreover, as held by the Hon'ble Supreme Court in the case of LIC of India v. D. J. Bahadur &Ors,²⁸ provides that both special and general law can coexist if they are not repugnant to each other, the condition true for both the RTI and Income Tax Act, concerning disclosure or sharing of information.

2.1. Trends of the details sought under the RTI from the Income-Tax Administration

The Income-tax department is a public authority covered under the RTI Act, with all its provisions binding and applicable to the department. Various information is sought from the Income-tax administration under the RTI Act, which ranges from seeking copies of the tax returns filed by a certain person, a copy of an investigation report on tax evasion petition, Income and wealth of the applicant's father-in-law; to making requests for issuance of tax notice for filing faulty Form 16 and information regarding own statement given by the informant. A diagrammatic percentage analysis²⁹ made from the data collated from the department's official website regarding the details asked from the Income-tax Department under RTI Act is as under:

Category of RTI Application	Number of applications received	Percentage out of total RTI Applications
Income Tax Returns	24	20
Trust	5	4
Search	13	11
Informant Reward	3	3
Tax Evasion Petitions	13	11
Policy decisions	5	4
Misc.	5	4
Procedural matters	10	8
Service-Related Matters	38	32
Full Bench Tax Decisions	2	2
Total	118	100

²⁷ Supra 13.

²⁸ The Life Insurance Corporation Of India v. D. J. Bahadur &Ors., 1980 AIR 2181, available at <https://indiankanoon.org/doc/791872/>, last seen on 05/11/2021.

²⁹ *Right to Information*, Income Tax Department, available at <https://www.incometaxindia.gov.in/pages/right-to-information.aspx>, last seen on 15/06/2021.

Table 1: Compiled from details of RTI Applications available on the CBDT website (2006-07)

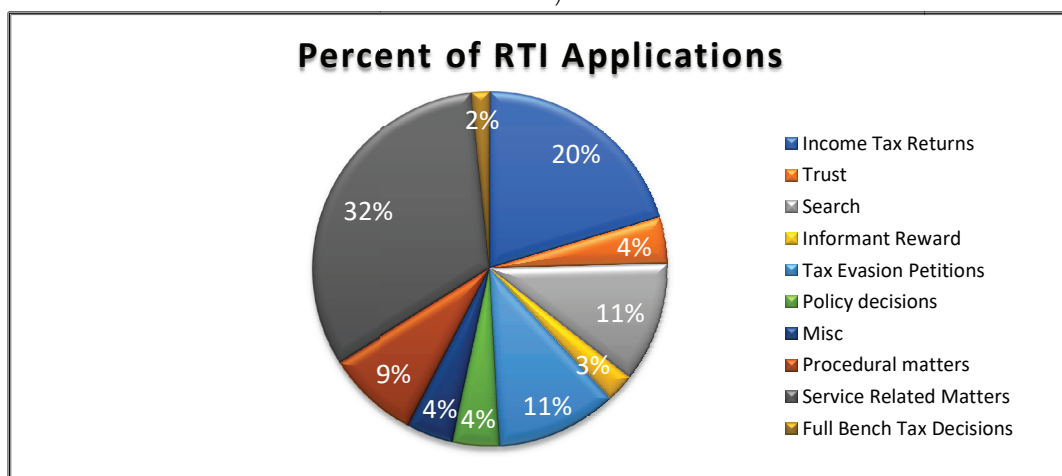


Figure 1: Diagrammatic representation of Table 1

The data relates to 2006~2007, and no other data is available on the CBDT website. Out of the above data of 118 cases, part or full information is seen to have been disclosed to the applicants by the Department in 19 cases (around 16% of the total cases).

In a famous RTI case of *Farida Hoosenally v. Chief Commissioner of Income Tax*³⁰ during the initial years of commencement of the RTI Act³¹, the Chief Commissioner of Income Tax, Mumbai, decided that information given by taxpayers cannot be disclosed to a third person. It was held that sharing information in the public interest is not permissible on the grounds that financial and other information is given to the department in good faith. Making information provided to the Income-tax Department available to third parties could hamper the department's investigational efforts, as also endanger taxpayers' life, etc. The applicant had filed an application under the RTI Act, seeking some financial details of a third-party film director. The request was rejected for the first time on the ground that income-tax assessment work is an action by a public authority, and every action by a public authority is in the public interest. Hence, there is no basis for not disclosing such an assessment. The case was restored back to the Chief Commissioner of Income Tax, Mumbai, by the Hon'ble Central Information Commission (CIC) on an appeal filed by the applicant. The Chief Commissioner of Income-tax was directed by the CIC to consider the application afresh for providing relevant copies of the assessment orders, if any, as the documents were not regarded as exempt under section 8(1) of the RTI Act; however, the information officer again passed the order denying third party information to the applicant. The decision of the

³⁰ Being one of the early test cases in the Income Tax Department in 2006 for the then newly enacted RTI Act.

³¹ Appeal No. 22/IC(A)/2006 F.No. 11/52/2006-CIC.

CPIO was based on the reasoning that, on the one hand, the information sought is not seen to be serving any larger public interest, while, on the other, it may endanger the privacy & life of the taxpayer who has furnished his financial information to the Department as a statutory requirement. The Department is also holding this information in a fiduciary capacity, and the same could not be shared without seeking objections from the third party.

Section 24 of the RTI Act exempts certain agencies from the disclosure of information, and the same was upheld by the Hon'ble CIC in the case of *Pritpal Singh Chandhok v. DGIT*³², stating that the exemption provided to the Director-General of Income Tax (Investigation) under section 24 is absolute and it cannot be diluted on the plea that the information as requested by the appellant was even otherwise accessible to him under section 132(9) of the Income Tax Act and in that case, the appellant should access that information under the Income Tax Act and not under the RTI Act.

In another landmark case of *Escort Ltd v. Rakesh Kumar Gupta*,³³ decided by the Hon'ble Delhi High Court in 2014, it held that the disclosure of information asked had no visible element of larger public interest and it may, therefore, unnecessarily invade the privacy of individuals. Therefore, a balance has to be maintained between the right to privacy and the right to information, keeping in mind the end sought to be achieved especially for both these essential constitutional rights. The respondent, claiming to be an informant of the Department, wanted to interfere with the Income-tax assessment proceedings on the utilisation of the information submitted by him. Hon'ble High Court held that the scrutiny assessment orders couldn't be shared with the respondent, more so when he has not raised any allegations of corruption against the assessing authorities. The taxation authorities are primarily observing income and application of the charitable institutions for charitable purposes, and medical relief is charitable purpose per-se as per the I.T. Act, 1961; and any violations by them for free treatment, etc. primarily falls for enforcement and action under the domain of relevant departments of State Government. Further, assessment proceedings were under appeal and not finalized, and sharing such information may also jeopardise the appellate proceedings as well.

However, in the case of *George C.M v. ITO (Udaipur)*³⁴, Hon'ble CIC, while taking into consideration the precedence, held that there is a larger public interest in the matter of disclosing the sought information in respect of 'Catholic Diocesan Society of Udaipur' since

³²*Pritpal Singh Chandhok v. DGIT* (2008) CIC/AT/A/2008/00083 (Central Information Commission).

³³*Escort Ltd v. Rakesh Kumar Gupta, W.P. (C) 202/2010*, decided on 24.11.2014 by the High Court of Delhi.

³⁴*George C.M v. ITO (Udaipur)* (2020) CIC/DGIT/A/2019/108256 (Central Information Commission).

it is engaged in charitable purpose which demands a greater degree of transparency and accountability, as tax exemptions are being claimed from the government. It is not the case where information about an individual is being asked for. If the tax benefits are being claimed on the premise of being a charitable institution, there is no harm in disclosing its income tax returns keeping in view the larger public interest. However, income tax returns of individual members need not be disclosed since it has the trappings of distinct personal information. In this case, the applicant sought the details of the registration and Income Tax Returns filed by the Society, which is a public charitable organization. CPIO held that I.T. Returns are distinct from scrutiny assessment orders, and for greater transparency and accountability, the Returns of a public charitable organization could be shared in the larger public interest.

In the case of *Mr. Pawan Kumar Saluja v. ITO (New Delhi)*³⁵, the applicant primarily sought the details of the bank accounts of his wife available with the Income-tax department. The Hon'ble Information Commission, after considering the factual matrix of the case, decided that in the absence of any larger public interest in the matter, the appellant is not entitled to ask for information concerning bank account details and income-tax returns of his wife, which is exempted under Section 8(1)(j) of the RTI Act, 2005.

In contrast, in the case of *Ms. Amrita Chatterjee v. Income Tax Officer (Bengaluru)*³⁶, the applicant sought the details of the income-tax returns of her husband. The Hon'ble Information Commission, in its decision, denied such request stating that in the absence of any larger public interest in the matter, the appellant is not entitled to seek the details of the Income Tax Returns filed by the third party, Mr. Suman Chatterjee, which is exempted u/s 8(1)(j) of the RTI Act, 2005. However, Commission, while considering the aspect of marital discord between the husband and wife vis-à-vis her right of maintenance, opined that the CPIO should consider providing only the numerical figure(s) of the 'gross annual income' of her husband as per the available records.

The above discussion illustrates a consistent, transparent, progressive, and holistic approach adopted by the Income-tax Department in deciding the RTI applications as per the provisions of the RTI Act 2005 and Income-tax Act 1961.

³⁵Pawan Kumar Saluja v. ITO (New Delhi) (2021) CIC/CCITD/A/2019/120284.

³⁶Amrita Chatterjee v. Income Tax Officer (Bengaluru) (2021) CIC/CCITB/A/2019/121513.

2.2. Citizen's Charter and Transparency

Taxes are paid as a price for a civilized society with some form of government in place aiming for progress, development, and protection of human rights. Tax evaders shift this burden to the compliant members of the community and, in turn, transfer their due responsibility towards the nation as well. The community principles require a transparent and fair modulation of responsibilities under the taxation system. The expected behavioural standards are set by the government after they undergo a long-drawn process from the formulation of the law, giving an underlying purpose to the way they are administered and finally as interpreted by the courts. Citizen Charter is an instrument representing structured effort as part of the government's commitment towards its people concerning the service standards, accessibility to information, discussion, grievance redressal, and responsiveness for the taxes paid. This includes the presumption of the government from its people for achieving the targets of the government or organization.³⁷

In the fast-changing times wherein the efficiency, capability, and effectiveness of the government institutions are under challenge, the state institutions need to pitch for higher performance. The citizen charter has the potential to become instrumental in encouraging the aims of a receptive and accountable government, which contributes toward the advancement of service delivery standards. This will help in shaping the organisations and offer a changing work culture clubbed with higher satisfaction amongst staff, thereby enhancing the comfort for the citizens who interact with these organisations. The fundamental constituent of any significant citizen charter is a cogent statement of a vision that implies the final direction in which the government intends to proceed.³⁸ The clarity in the vision would enable the government to prepare and plan the final deliverables. The widening process for explaining vision with a participative interface with citizens will show the path to a vision that is far more acceptable and enjoys collective support, which may not otherwise have been possible.

The mission statements, on the other hand, provide the determined objectives which drive the institutions in sync with their vision. Specificity in such statements enables the institutions to inch towards their goal. The effectiveness of citizen charters increases when

³⁷ *Citizens Charters - Historical Background*, Department of Administrative Reforms and Public Grievances, available at <https://darpg.gov.in/citizens-charters-historical-background>, last seen on 05/11/2021.

³⁸ *Citizen's Charter*, Government of India, available at <https://goicharters.nic.in/public/website/home>, last seen on 06/11/2021.

the organisational aims, vision, mission, and objectives align with the identified service standards. The services available must be listed comprehensively, which are available under one departmental umbrella. Few charters also provide information regarding 'we endeavour,' or 'service delivery standards,' or 'our expectations,' or 'services offered', etc.

2.2.1. The Taxpayer's Charter of the Income Tax Department

The Citizen's Charter of the Income-tax Department is a declaration of its Vision, Mission, and Standards of Service Delivery. This charter was issued on the 24th of July 2010,³⁹ revisiting the earlier charter issued in July 2007. It was updated in the year 2014, specifying stringent service delivery standards. In the preparation of this charter, consultations were held with various stakeholders. The charter reflects the best endeavour of the Department inter-alia for protecting the privacy of the taxpayers and laying out service delivery standards. This shall bring in greater transparency and accountability in the working of the Department and reduce taxpayer grievances (e.g., refunds), which often lead to RTI applications and other complaints. Recently, a new Taxpayers' Charter⁴⁰ was launched by Prime Minister on August 13, 2020,⁴¹ which also seeks to provide for the privacy and confidentiality of taxpayers. The disclosure of information can be made only by due process of law and authorisation. It also mandates the provision for the mechanism to lodge a complaint and their prompt disposal. It is a statement of commitment and summarises what course of action is to be followed in events of deficiencies of service or performance that are below the standards enumerated. It has been made as means of accountability and provides for a robust feedback mechanism with future policy orientation being set by this information exchange.⁴²

It needs to be noted that the Taxpayer's Charter is not legally enforceable and, therefore, is non-justifiable. Nevertheless, it is an instrument for facilitating the services to taxpayers and other citizens with specified delivery standards, quality, and timeframe in a committed manner.

³⁹ *Citizen Charter, Income Tax Department*, available at http://www.mchrddi.gov.in/87fc/service%20day/Citizens_Charter_Income_Tax_Department.pdf, last seen on 06/11/2021.

⁴⁰ *Here's what gov't's Taxpayers' Charter promises and expects from income tax payers*, ET Online, available at <https://economictimes.indiatimes.com/wealth/tax/heres-what-govts-taxpayers-charter-promises-and-expects-from-income-tax-payers/articleshow/77520217.cms>, last seen on 18/06/2021.

⁴¹ *Transparent Taxation - Honouring the Honest*, Press Information Bureau, available at <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1645472>, last seen on 06/11/2021.

⁴² *Taxpayer's Charter, Income Tax Department*, available at <https://www.incometaxindia.gov.in/Documents/taxpayer-charter.pdf>, last seen on 06.11.2021.

These Citizen Charters are in the form of statements of commitment. They are explicit in detailing what is to be expected and what course of action to be followed in events of deficiencies of service or performance that are below the standards enumerated. They are also necessary means of accountability in that it provides for a robust feedback mechanism with future policy orientation being set by this information exchange. They are a very powerful medium for enforcing transparency in the functioning of these departments/agencies. Though not legally enforceable, this will mirror their performances and will be the voice for any abuse of authority or deficiencies in standards of performance.

2.3. Whistle-blower Protection in the Income-Tax Administration

A whistle-blower⁴³ is the one who discloses any information on any wrongdoing going on inside any organisation. Mainly, the disclosure points out malpractice pointed out by some employee or group of employees of an organisation or even an independent outside third party, raising such concern in good faith in a *bonafide* manner, demonstrating the information about ongoing illegal activity and is based on material facts and evidence and not merely on conjectures and surmises. The terms 'disclosure' and 'whistle-blower' have been consistently given the maximum possible publicity to make people aware of their meaningful use. The Whistle Blowers Protection Act, 2014, applies only to public servants⁴⁴ and provides a mechanism to receive complaints relating to the disclosure of any allegation of corruption or wilful misuse of power or willful misuse of discretion against any public servant. On the one hand, it provides machinery to examine allegations of corruption and abuse of power while, on the other, protecting everyone who exposes the alleged misconduct or unlawful activity in public offices. This Act can be used by public-spirited persons intending to make such disclosures, including to the Central Vigilance Commission. The Act was published in the Official Gazette on 12th May 2014, and however, as mandated by section 1(3) of the Act, the Government has not notified the date from which it shall come into force. An amendment to this Act proposed and passed in Lok Sabha in 2015 subsequently lapsed in Rajya Sabha after the dissolution of Lok Sabha in 2019.⁴⁵ Later the government stated that the existing provisions of the 2014 Act are adequate and further Amendments are not needed. Besides it, a whistle-blower window is provided under the

⁴³ *Whistleblower*, Britannica, available at <https://www.britannica.com/topic/whistleblower>, last seen on 06/11/2021.

⁴⁴ Preamble of the Whistle Blowers Protect Act [Act No. 17 OF 2014].

⁴⁵ *The Whistle Blowers Protection (Amendment) Bill, 2015*, PRS India, available at <https://prsindia.org/billtrack/the-whistle-blowers-protection-amendment-bill-2015#:~:text=The%20Whistleblower%20Protection%20Act%2C%202014,offences%20by%20a%20public%20servant,> last seen on 06/11/2021.

Public Interest Disclosure Policy instituted by the DoPT, with CVC as the recipient of such complaints. These efforts of the Government seek to provide & fix accountability and usher in transparency in the working of its public servants, which is also a common aim of the RTI Act.

The Directorate of Income Tax Intelligence and Criminal Investigation is the agency empowered for whistle-blower protection under the Income-tax department. A 'Whistleblower Complaint Window' has been provided on the official website of the Income-tax department meant for the use of the Indian Revenue Service Officers, wherein they can register their complaints against their fellow officers or officials after securely logging in to the portal. While maintaining secrecy, such registered complaints are investigated by the department based on the evidence provided by the complainant, and appropriate corrective action is undertaken against the erring officials. It has empowered the officials in the department to blow the wrongdoing without concern about the disclosure of their identity. This has, in effect, brought the desired levels of fairness and transparency in the working of the department and has primarily been found working satisfactorily.

2.4. Reforms in the Income-Tax Administration and the Issue of Transparency

The present-day government has declared a policy to refrain from retrospective tax amendments and the recent Taxation Laws (Amendment) Act, 2021, and is a welcome step in this direction to settle long-drawn Vodafone and other taxpayer disputes. Transparent systems or procedures encompass open discussions, right-to-information legislation, budgetary accountability, audits, and adequate financial disclosures. It means when we speak about a transparent government, we say that citizens can freely see through its decision-making process and working style to understand the mind of the public officials transacting governmental business.

An opaque government would be prone to corruption, misconduct, and extraneous influences as there is no public watch over such decision-making. The democratic institutions invariably stand on a well-informed citizenry having access to relevant information, enabling them to participate effectively in public life and help in the determination of the government spending priorities, get equal access to justice, and fix the accountability of the public servants. Any incomplete access to information would lead to the proliferation of corruption, undermining the common public interest in favour of a few

others.⁴⁶ Accountability is an obligation that demonstrates and takes responsibility for the performance of given commitments and desired results. Taxpayer-friendly and accessible measures and services not only help in bringing, maintaining, and strengthening their confidence but also improve their overall voluntary compliance and willingness to contribute lawful taxes to the government. In the last few years, the tax administrations have been providing easily accessible information and taxpayer services with the use of latest state of the art technology that gives full-time online services without any manual interventions.

The tax administration dictates the tax policy in any country, and over time the government has understood the same and has now focussed reforms on it.⁴⁷ Capacity building of the tax administration remained the central theme of the reform apart from the introduction of the latest information technology tools, improved taxpayer services, independence, and reorganisation. These reforms are aimed at changing the tax administration organisation structures from the tax type to core functions and tax segmentation.

Recently, a large number of revenue authorities have provided unique functionalities to taxpayers ranging from registration, e-filing, and payment of online taxes to e-assessments at the time and place convenient to them. Call centres and Aayakar Seva Kendras have been established across the major towns of the country. This has ensured the delivery of quality service along with the cutting of the operational costs for the government. These higher tactical aims and objectives are prerequisites for the free flow of information, instructions, and directions from the existing hierarchical structures.

Tax reforms pertain to changes in existing tax policies which include reforming tax processes, clear, effective deadlines for amendments under tax laws, examination of options for such reforms, detailed tax reform research, and political facets of new tax reforms. Further, in this direction, the Prime Minister of India, on August 13, 2020,⁴⁸ launched a team-based faceless tax assessment (called Audit in developed nations) of ITRs to provide transparency and technology-driven governance. This seeks to do away with the human

⁴⁶ *Impact of RTI Act on Corruption*, NLU Nagpur, <https://cic.gov.in/sites/default/files/IMPACT%20OF%20RTI%20ACT%20ON%20CORRUPTION.pdf>, last seen on 06/11/2021.

⁴⁷ *Compliance Risk Management: Managing and Improving Tax Compliance*, OECD, available at <https://www.oecd.org/tax/administration/33818656.pdf>, last seen on 06/11/2021.

⁴⁸ *Faceless Assessment is a Tax Assessment System designed for the 21st century*, Ministry of Finance, [https://pib.gov.in/PressReleasePage.aspx?PRID=1648814#:~:text=26%20August%202020-,A%20National%20e%2DAssessment%20Centre%20\(NeAC\)%20and%20a%20network,on%2013th%20August%202020.](https://pib.gov.in/PressReleasePage.aspx?PRID=1648814#:~:text=26%20August%202020-,A%20National%20e%2DAssessment%20Centre%20(NeAC)%20and%20a%20network,on%2013th%20August%202020.), last seen on 06/11/2021.

interface and conduct a faceless assessment. The scheme's key features include the selection of the assessment unit/ jurisdiction only through the system using data analytics and artificial intelligence in an automated manner. There is an establishment of 'National e-Assessment Centre' and 'Regional e-Assessment Centres' for identifying points or issues. 'The above scheme is presently running successfully, and around one lakh cases have already been finalized out of more than two lakh cases assigned under this scheme so far. This will also bring down the compliance costs for the taxpayers and therefore is an excellent step for progressive taxation policy as recommended by the international agencies. The CBDT also introduced the faceless first tax-appeal scheme in September 2020⁴⁹ as a continuation of the government initiative for fairness and transparency to eliminate physical human interaction. The tax administration also launched a web-based tax evasion reporting portal in January 2021⁵⁰ to facilitate ordinary citizens in lodging complaints about tax evasion and Benami transactions.

Income-tax Department maintains an E-Nivaran portal for the resolution of public grievances which are otherwise not resolved directly. The CBDT monitors the redressal of such grievances in an ongoing manner. Centralized Public Grievance Redress and Monitoring System (CPGRAMS)⁵¹ is another web-based central complaint portal maintained by the Directorate of Public Grievances, working under the Department of Administrative Reforms and Public Grievances of the Government of India. A strict disposal timeline for disposal of such grievances is provided by the government and has become an effective tool for transparency, accountability, and fairness not only for the Income-tax Department grievances but for the Union government in general.

The services to the taxpayers have not only gained importance and momentum, but the tax administration has also started focussing on taxpayer awareness and education, thereby reducing the compliance burden and embracing a customer-friendly approach. These efforts have started bearing fruits which is evident from the tax collections going up by leaps and bounds. Autonomy for the tax administration is an essential ingredient and is one of the reform features which provides the needed flexibility and work conditions. In enhancing taxpayer services by the promulgation of service standards, transparency is enhanced,

⁴⁹ *Faceless Scheme*, Income Tax Department, available at <https://www.incometaxindia.gov.in/Pages/faceless-scheme.aspx>, last seen on 06/11/2021.

⁵⁰ *CBDT launches e-portal for filing complaints regarding tax evasion/Benami Properties/Foreign Undisclosed Assets*, Ministry of Finance, <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1688038>, last seen on 06/11/2021.

⁵¹ Available at portal <https://pgportal.gov.in/>.

leading to greater accountability. From an analysis of its objective and the resultant implementation, reforms in the income tax department have sought to strengthen taxpayer rights in its dealings with governmental agencies through various conveniences and by promoting access to information.

3. FINDINGS AND SUGGESTIONS

Factual and information-based decision-making would significantly change our social, economic, and political prospects. Right to information and access to information are the basic principles that can empower the wheels of progress in a knowledgeable and participatory democracy.

In the context of the Revenue departments, the endeavour to encourage reciprocated taxpayer-friendly behaviour and compliance will improve accountability and responsiveness. The taxpayers have to directly or indirectly indicate their genuine expectations from the tax administration and, in return, have to support and contribute towards the fiscal goals set by them. The tax administration also has to reciprocate by laying down a clear connection between the tax collections and their spending and also show the achievements in terms of targets to receive taxpayer support. Awareness amongst taxpayers and transparency in the tax administration are the basic building blocks for significant public engagement to build mutual trust and respect. In developing nations, the taxpayer's trust in the tax administration is relatively low due to discriminatory implementation of taxation laws and more so with the additional opaque tax structures collecting taxes without any accountability towards payers. In the absence of truthful information disclosures to the taxpayers in a transparent manner, they carry the worst of the assumptions about the misuse of their hard-earned money paid as tax to the tax authorities.

Information can influence human behaviour, and this is also true with respect to compliance with tax regulations. The social norms in society have a significant impact on human behaviour, and citizens generally avoid doing the things which lead to any sort of social disapproval. Reciprocation is one of such strongest human behaviour wherein people try to repay the behaviour received by them. People will normally extend cooperation in contributing toward the common good in society when the large size of the population is doing the same. An established system of risk detection and punishment would send a ripple effect on truthful people sending a message that honesty pays.

Healthy information exchange between tax administrators and taxpayers will enhance public trust in the tax administration. The integrity, reliability, and trustworthiness of a tax administration have an all-encompassing effect. The people who repose faith and trust in their tax administration are doubtful to indulge in tax evasion activities. A fair and judicious decision of a tax administrator would have great receptivity and acceptability in the minds of the taxpayers. A positive and taxpayer-friendly attitude of the tax authorities goes a long way in building this relationship. A helpful, understanding and respectful tax administration would command more confidence from the taxpayer. An increase in mutual trust between the taxpayer and tax administration is mutually reciprocated by the enhancement in compliance. Access to information, besides being an empowerment tool for the taxpayers, is a powerful medium to enforce compliance in the tax administration. Revenue optimisation is better served by a regime that is open to interaction and exchange of information. Information access is an indispensable tool for the empowerment of any society and its citizens. The people sitting at the power echelons have the dual responsibility of service to the nation, along with providing encouragement and information to the citizens to participate in the decision-making process and governmental actions.

The objective of securing information under the law is served by the provisions contained in the Income-tax Act itself. Further, even under the Income-tax Act, the right to get information is subject to reasonable safeguards. Even when the RTI Act was not passed, the information under the I.T. Act was being asked for and given, and no problems in this regard had been mentioned in the past. The information provided by taxpayers to the Income-tax Department, by and large, concerns their functioning and cannot be of public interest. Making it applicable to one and all would amount to an unwarranted invasion of the privacy of individual taxpayers and would harm their interests without serving any public purpose. Besides, it would be a breach of confidence reposed in the tax department if the information given is disclosed to all and sundry in violation of the privacy of the individuals. Hence, instead of generating litigation on this issue, it would be appropriate to put the Direct Tax law in the Second Schedule of the RTI. The citizens have the right to know about the activities of their government, how their tax payments are being spent, and the criteria adopted for the allocation of public resources. The corrupt practices flourish under the impenetrable closed-door darkness extended by the public authorities, redtape, and unaccountable behaviour of the government. Any progress in throwing the light information on such closed doors will bring public scrutiny and help in eliminating corrupt practices. Some global best practices are analysed as a tool for incorporating and improving

the regime of the right to information persisting in India. While the efficacy of this legislation is beyond question, in the examination of the above best practices from across the globe, this revolutionary legislation would still require certain amendments to be effective in being an instrument to usher in the ideal of *Swaraj* that the fathers believe in. In these practical examples and the research materials, we have the tools.

The RTI Act also needs further streamlining in the correct direction. Any information retained by any person or authority in confidence shall stand protected as considered imparted in a fiduciary capacity. The judicial courts would not entertain pleas to disclose such information as that may lead to a breach of trust and good faith. The principle of equity also says that the person receiving such information in confidence shall not take any undue advantage and must not use it adversely without prior consent. However, absolute privacy cannot be claimed as a right that may allow one person to conceal every piece of information from all governmental institutions forever. On the other hand, it should not permit the revenue departments to disclose such privileged income and personal wealth information to third parties merely because such information is shared with the department as a statutory obligation. Autonomy is not a quantifiable or limited right and is all-pervasive in the legal framework. A rationale approach would only be the guiding principle in all such cases before the revenue departments administer the taxation laws. The other necessary conditions before considering any disclosure of the information would be the adequate application of mind, larger public interest, reduction in arbitrariness, minimisation of whims and fancies, and absence of arbitrary conduct of the tax administrators. The RTI Act has unquestionably provided a leap forward in modern democratic India and may need fine-tuning, lucidity, and greater articulation for meeting the dual objectives of information disclosure and protection of the privacy of the citizens.

Taxpayers are using the Right to Information Act in connection with their income-tax matters, like refunds, appeal effect, rectifications, and to ascertain material on record, search and seizure proceedings, etc. The Department has maintained a conservative view within the provisions of the RTI Act to disclose the information, especially to third parties, to maintain the balance between privacy and larger public interest. The large rejection rate is primarily due to applicants seeking third-party information without any public interest and such information, which is not maintained by the Department. Leaving such criticism aside, the Right to Information Act, 2005 is a major step forward in the evolution of democracy and transparency in the Government. It is a very effective tool to correct administrative

wrongs or lethargy. The modality of seeking information is simple. There is a time limit for providing information. Delay, denial, or obstruction in giving information is punishable. NGOs and Courts encourage the use of this Act. It helps them seek justice and render justice. Some Government departments have set up helplines to inspire, educate and assist people in making use of the RTI Act. Taxpayers should freely, fearlessly, and extensively use it in connection with their income-tax matters. Asking for information is their right. The Right to Information Act, 2005, has put the process of reform of tax administration in the hands of taxpayers themselves. The website of the CBDT should be consistently updated to provide information about RTI every year, this would go a long way in increasing transparency by the department. This is an ongoing continuous process where the Income-tax Department has travelled for around 16 years since the enactment of the RTI Act. This Act has definitely made the Department more taxpayer-friendly, open, transparent, and responsive than ever before, and it is believed to be raising its standards consistently.

A LEGAL SCRUTINY OF PRIME MINISTER CARES FUND

Dr. Nitesh Saraswat and Ms. Mekhla Gupta⁵²

Abstract

PM CARES Fund was introduced as a public charitable trust in India in March 2020, following the Covid-19 pandemic. This fund has been in the headlines due to its gloomy and pragmatic approach. The government introduced this fund as a saviour to fight off the distress caused by the COVID-19 pandemic. However, the fund came into the limelight due to insecurities and panic caused by the public due to the non-availability of funds and the non-accountability during the Covid-19 pandemic. This fund has been accepted by the nation with the democratic features along with it. Its contingent partners and all the exemptions are instituted along with it. In this article, researchers will analyse and will do legal scrutiny of all the aspects related to its history, origin and utilization etc., keeping in mind the transparency and accountability to be adhered to by the government while using the public fund. Researchers will discuss the irregularities attached to it and will make an attempt to suggest some fruitful legal ways to make use of the PM Care fund in a more effective manner for the benefit of society. Researchers will use the secondary data available through recent newspapers, articles, case studies and Judicial interventions.

Keywords: PM Cares fund, Covid-19, Pandemic, State, Scrutiny, Transparency, Accountability, Scrutiny,

1. INTRODUCTION

“Your friendship is our honour; your dreams are our duty. India's capacity may be limited, but our commitment is without limits. Our resources may be modest, but our will is boundless”.

- Prime Minister of India, Shri. Narendra Modi

⁵²Assistant Professor Law Centre II, Faculty of Law, University of Delhi and Law Centre II, Faculty of Law, University of Delhi.

1.1. The Need For An Institution Of PM Cares Fund

1.1.1. Origin Of A Deadly Virus

Corona Virus, which is referred to as COVID-19, is a highly infectious disease that has its origin in the SARS-CoV-2 virus. The virus has spikes in the shape of a crown on its outer surface. It is minuscule (65-122nm) in diameter and also has a presence of single-stranded RNA (Ribonucleic Acid), which serves as its nucleic material, with size differing from 26 to 32kbs in length.⁵³ The illness created by the virus has a variety of effects, from mild to severe respiratory problems. The virus has the potential to spread from an infected person's mouth or nose in small particles when they cough, sneeze, speak, sing or breathe. The particles have different ranges, from larger respiratory droplets to smaller aerosols. Various other symptoms developed by the virus are dry cough, high fever, rashes on the skin, and also, in certain cases, fatigue.⁵⁴ The virus is dreaded and has a typical mutating characteristic. The present mutations are the Delta variant and Omicron variant which is highly infectious and have posed a serious threat to the whole world. As a result, we are facing another pandemic wave across the globe, reporting lakhs of cases per day. The world has been hit by three waves in the respective years 2020, 2021, and 2022. The governments of all the nations around the world are designing and developing rapid responses to this variant of COVID-19.

1.1.2. Government's Response to the Virus

- The first case of COVID-19 in India was reported on January 30, 2020, and since then, the number of cases has continued to rise, especially during the second wave of the pandemic from March to June 2021. 27.2 million COVID-19 cases as of 25 May 2021 were reported.
- The major reason for the high spike in cases was the fact that India is a highly populated country with 84 million people living in extreme poverty, so the absence of adequate funds for the medical sector, lack of medical equipment, illiteracy, etc., gave a boost to the deadly virus.

⁵³ The Committee for the coordination of Statistical Activities, *How Covid -19 is changing the world: a Statistical Perspective*, available at <https://unstats.un.org/unsd/ccsa/documents/covid19-report-ccsa.pdf>, last seen on 04/02/2022.

⁵⁴ *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, Centre for Disease Control and Prevention, available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html>, last seen on 01/12/2021.

- Since the country was suffering from such a miserable pandemic situation, the authorities felt obliged to serve their nation. The government responded by imposing a strict national lockdown which was extended several times. Due to strict lockdowns all over the country, the poor people witnessed a hard blow, and thus it was evident that financial assistance from Government was required to stabilize the country.⁵⁵
- The Government responded by creating a national fund whose primary task is to deal with the kind of emergencies like the COVID-19 pandemic so that the necessary aid could be extended to those who are in immediate need. This was done under the scheme of the '*Prime Minister's Citizen Assistance and Relief in Emergencies Fund*.' (PM CARES FUND).
- Also, the Respective Government of all the countries has put up their efforts by developing self-tests and medications for the use of the common man in pursuance and under the guidance of the World Health Organisation (WHO).
- Scientists and doctors around the world have developed a vaccine for the virus, which is now proved to be a breakthrough in fighting the pandemic.
- Medical help was extended by the Centre and the States, and India had the highest case tally in the world. Many States Govt. extended the programs for the distribution of basic essentials. Example- The Uttar Pradesh Govt. reported a monetary help of Rs. 50,000 to the various indigenous group of people⁵⁶. Delhi Govt. extended the rationing of basic essentials to the poor and indigenous people.

2. INTRODUCTION TO PM CARES FUND

The fund was constituted basically to receive voluntary contributions from individuals or various organizations, which shall be used to extend help and aid to the affected people because of the havoc created by COVID-19. There is no provision for the allocation of funds from the budget. Some Provisions which were made declared that the donations to PM CARES Fund would receive 100% exemption under Income Tax Act, 1961 and Foreign Contribution Regulations Act, 1976. A separate head of account was created for getting

⁵⁵Rimesh Pal & Urmila Yadav, *COVID-19 Pandemic in India: Present Scenario and a Steep Climb Ahead*, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7350042/>, last seen on 03/12/2021.

⁵⁶Abhishek Mishra, *UP govt announces Rs 50,000 as financial assistance to kin of Covid-19 victims*, available at <https://www.indiatoday.in/india/story/up-govt-announces-rs-50-000-financial-assistance-kin-of-covid-victims-1865910-2021-10-18>, last seen on 02/12/2021.

foreign donations. Additionally, the donations by the corporate sector were considered Corporate Social Responsibility (CSR) under the Companies Act, 2013.⁵⁷

2.1. The Fund Was Created As A Public Charitable Trust With Certain Objectives:

- To attempt and support help of any sort connecting with general wellbeing or in any sort of crisis and misery, including the creation or up-gradation of medical services, other essential frameworks, subsidizing pharmaceutical facilities or research.⁵⁸
- To extend monetary help through instalments in cash or make such different strides as might be considered significant by the Board of Trustees to the impacted populace⁵⁹.

2.2. PM Cares Fund- The Machinery

The PM CARES FUND is operated by the Chairperson (ex-officio), who is the Prime Minister, along with the Minister of Defence, Minister of Home Affairs, and Minister of Finance, Government of India, as ex-officio Trustees of the Fund. The Prime minister, who is the Chairperson, has the power to nominate three trustees who are illustrious people from different areas like health, science, social work, law, public administration etc. Every trustee shall act in a pro bono capacity.⁶⁰

2.3. Similarities With PMNRF⁶¹

The PM Care Fund has its roots in the Prime Minister National Relief Fund, which was instituted by Mr. Jawaharlal Nehru, the then Prime Minister of India. Both funds have many resemblances, which we can gather through their objects and usage. The most significant similarity to both the funds is that the expenditure incurred did not require any special assent from Parliament. Both Funds have a similar nomenclature starting with 'Prime Minister' signifies the right of the Prime Minister that the fund could not be utilized without the Prime Minister's assent. The Auditors are also the same for both the funds M/S

⁵⁷*About PM Cares Fund*, PM Cares, available at https://www.pmcared.gov.in/en/web/page/about_us, last seen on 03/12/2021.

⁵⁸*Home*, PM Cares Fund – Official Website, available at <https://www.pmcared.gov.in/en/>, last seen on 03/12/2021.

⁵⁹ Ibid.

⁶⁰Supra 55.

⁶¹ Prime Minister's National Relief Fund

SARC Associates Chartered Accountants and no authority of CAG over the audit. Both were set up as trusts⁶².

2.4. Exceptions To PM CARES Fund

Contributions to the PM CARES Fund are eligible for a 100% deduction under section 80G of the Income Tax Act. Also, the limit on the deduction of 10% of gross income does not apply to the Fund. Another booster which was added for the citizens, to the effect that donations were given by them to the fund till June 30, 2020, will be eligible to claim deductions from income tax during the financial year 2019-2020⁶³.

3. DONATIONS TO THE PM CARES FUND

The fund had a sum of Rs. 2.25 lakhs initially, as per reports on its official website, and after five days of the institution, it managed to collect a massive amount of Rs. 3,076.62 crore, according to a record explanation disclosed by the trustees to the asset.⁶⁴ The fund also received donations from various platforms like government bodies, corporations, celebrities, and individuals.⁶⁵ And an aggregate of Rs. 9,677.9 crore (\$1.27 billion) were contributed to the Prime Minister's Citizen Assistance and Relief in Emergency Situations (PM CARES) during the COVID-19 pandemic.⁶⁶

3.1. Details Of The Relevant Data:

- Rs. 4,308.3 crores were donated by government organizations and staff of different offices. At least Rs. 438.8 Crores has been deducted as one day salary of government employees.⁶⁷
- Corporate Social Responsibility Funds (CSR) of at least Rs. 5,369.6 crore were donated by private companies, industry bodies and social organisations.

⁶²Byjus, *Difference between PMNRF and PM CARES Fund in India*, available at Differences between PMNRF and PM CARES Fund in India | Comparisons, and Similarities (byjus.com), last seen on 04/01/2022.

⁶³ Hindustan Times, *PM CARES fund: The tax benefits for individuals and corporate, all you need to know*, available at PM CARES fund: The tax benefits for individuals and corporate, all you need to know - Hindustan Times, last seen on 18/12/2021.

⁶⁴*DONATION FAQs*, PM Cares, available at <https://www.pmcared.gov.in/en/web/page/faq>.

⁶⁵ The Economic Times, *PM CARES Fund got Rs 3,076 crore in just five days, according to the account statement*, available at <https://economictimes.indiatimes.com/news/economy/finance/pm-cares-fund-got-rs-3076-crore-in-just-five-days-according-to-the-account-statement/articleshow/77890927.cms?from=mdr>, last seen on 28/12/2021.

⁶⁶ As per analysis collected by IndiaSpend. AnooBhuyan, Prachi Salve.

⁶⁷ AnooBhuyan & Prachi Salve, *PM CARES received at least \$1.27 Bn in donations—enough to fund over 21.5 Mn Covid Tests*, available at <https://www.indiaspend.com/pm-cares-received-at-least-1-27-bn-in-donations-enough-to-fund-over-21-5-mn-covid-19-tests/> last seen on 10/01/2022.

- There were huge donations from private entities such as Larsen and Toubro, Reliance Industries and Cure Fit, which contributed a sum of Rs. 150 Crores, Rs. 500 Crores and Rs. 5 Crores, respectively.
- A total sum of Rs. 10 Crores has been donated by gas cylinder delivery agents, schoolteachers, non-teaching staff etc. across the country.⁶⁸
- A 30% of salary cut for a year was promised by the head and members of NITI Aayog, the Centre's policy think-tank, to be donated to the PM CARES.
- The government of India asked diplomats to mobilize donations from foreign countries, an amount of Rs. 39.68 lakh was collected in foreign currency for PM CARES Fund⁶⁹. Further, a sum of Rs. 22 Crores was pledged by two foreign companies⁷⁰.
- There were also other sources of money such as PMNRF⁷¹, Chief Minister's Relief Fund, State Disaster Management Authority Funds and Rs. 7,855 crores which were put aside by the members of the parliament.⁷²

3.2. International Aid Received By India

India began getting foreign aid on April 27, and its distribution began for the states with high caseloads and to provincial clinical centres. Niti Aayog CEO Amitabh Kant, who heads the gathering of secretaries in coordination with the private area, NGOs, and worldwide associations for the pandemic response, expressed: "99.6% of items were delivered." The foreign aid additionally involved more than 1 million rapid antigen test packs, 9.5 million Favipiravir, and 2.2 million Mediol. India likewise got 8 million Remdesivir doses. Oxygen generating plants were sent by countries like Canada, UAE and Qatar, and Indonesia.⁷³ A detailed data of the foreign aid received by some countries: -

3.2.1. USA

The U.S. Government, through USAID, allotted more than \$226 million in COVID-19 help to India, including almost \$150 million to help India in the subsequent covid wave and more

⁶⁸ Ibid.

⁶⁹ The Economic Times, *PM Cares Fund got Rs. 3,076 Crore in just five days, according to the account statement*, available at <https://economictimes.indiatimes.com/news/economy/finance/pm-cares-fund-got-rs-3076-crore-in-just-five-days-according-to-the-account-statement/articleshow/77890927.cms?from=mdr>, last seen on 28/12/2021.

⁷⁰ FairFax Financial Holdings and Rosobronexport

⁷¹ Supra 59.

⁷² Id.

⁷³ Hindustan Times, *India got 33 mn items as foreign aid for Covid*, available at <https://www.hindustantimes.com/india-news/india-got-33mn-items-as-foreign-aid-for-covid-govt-data-101624128569959.html>, last seen on 08/12/2021.

than \$55 million in emergency supplies. Since March 2020, USAID has supported in excess of 15,000 healthcare facilities for COVID-19 and also helped in the training of 250,000 healthcare workers, which in turn benefitted 65 million Indians. USAID provided more than \$40 million to support India's COVID-19 immunization program. As of November 2021, almost 2,000,000 Indians have been immunized through USAID upheld immunization destinations.⁷⁴

3.2.2. Russia

Two Russian flights carrying oxygen concentrators, ventilators, medicines and other essential medical equipment were sent to India.⁷⁵ Russia also sent 22 tonnes of medical supplies to India to help India against the second wave of the pandemic. A total of 20 oxygen production units, 75 ventilators, and 2,00,000 packs of medicines were sent.⁷⁶

3.2.3. UAE

The Saudi Government helped India by shipping 80 metric tonnes of liquid oxygen as the country was running low on supplies due to an unprecedented spike in coronavirus cases. This process of shipping oxygen was done by the services provided by the Adani Group and Linde.⁷⁷

3.3. World Organizations

- **United Nations agencies**, including UNICEF and the World Health Organization, sent various aid like personal protective equipment kits, oxygen concentrators, diagnostic testing systems, and other supplies to India's frontline health care workers to fight the second wave.
- **The Association for India's Development**, a Maryland-based charity that partners with non-profits in India, sent its volunteers to distribute food and protective equipment in most of India's 29 states.

⁷⁴US AID From The American People, *Bolstering India's Response To Covid-19*, available at <https://www.usaid.gov/india/coronavirus>, last seen on 08/12/2021.

⁷⁵NDTV, *Russian flights with humanitarian aid land in India*, available at <https://www.ndtv.com/india-news/covid-19-russian-flights-with-emergency-humanitarian-aid-land-in-india-2424121>, last seen on 10/12/2021.

⁷⁶The Indian Express, *Russia sends 22 tonnes of Covid relief material to help India fight Covid-19*, available at <https://indianexpress.com/article/india/russia-sends-22-tonnes-of-covid-relief-material-to-help-india-fight-covid-19/>, last seen on 10/12/2021.

⁷⁷The Economic Times, *Saudi Arabia to ship 80 metric tonnes of oxygen to India to meet growing demand*, available at <https://economictimes.indiatimes.com/news/international/saudi-arabia/saudi-arabia-to-ship-80-metric-tonnes-of-oxygen-to-india-to-meet-growing-demand/articleshow/82242897.cms?from=mdr>, last seen on 08/12/2021.

- **Americares**, a nongovernmental organization based in Connecticut which specializes in emergency medical response work, has delivered P.P.E., ventilators, and other medical equipment and also started initiatives to educate people on how to prevent the spread of the virus.⁷⁸

4. ALLOCATION OF THE PM CARES FUND

- A significant portion of the fund, Rs. 3,100 crores were allocated to buy lifesaving devices like ventilators, to aid migrant workers, and for vaccine development, as disclosed by the Prime Minister's Office.⁷⁹
- A sum of Rs 2,000 crore was distributed to all states and union territories to help fight the Covid-19 pandemic.
- Another Rs. 1,000 crores were remitted for the State's Welfare, especially for migrant workers to help them provide accommodation, food, medical treatment and transport. State-wise allocation of funds was determined on the population, positive covid-19 cases and a 10% share split for all states.⁸⁰
- The aid of Rs. 1,000 crores were sanctioned to start-up industries engaged in the development of vaccines.⁸¹ The money was spent under the supervision of the Principal Scientific Advisor.
- PM Cares Fund aided the installation of 1,000 Pressure Swing Adsorption oxygen plants which involved the supply and commissioning of the plants, management fee, and annual maintenance contract.⁸²
- The fund procured 1.5 Lakh Oxygen Concentrators for State Government-run hospitals and primary health centres. DRDO⁸³ developed 1.5 units of the 'Oxycare' system at the cost of Rs. 322.5 crore.⁸⁴
- Rs. 2,200 crores were aided towards the vaccine development for the safety of the medical staff, doctors and front-line workers who were fighting for the protection of the nation.⁸⁵

⁷⁸Mike Ives, *How to help India Amid the Covid Crisis*, available at <https://www.nytimes.com/article/india-covid-how-to-help.html>, last seen on 09/12/2021.

⁷⁹Special Correspondent, *Coronavirus | PM CARES makes first allocation*, available at <https://www.thehindu.com/news/national/coronavirus-pm-cares-makes-first-allocations/article31576545.ece>, last seen on 28/12/2021.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Supra 62.

⁸³ Defence Research and Development Organisation.

⁸⁴ Dhaval Patil, *PM Cares Fund - Putting false claims to rest*, available at PM Cares Fund: Putting false claims to rest-Blogs News, Firstpost, last seen on 06/12/2021.

- The PM CARES will contribute a sum of Rs. 10 lakhs for each child who was orphaned due to Covid. This corpus aids monthly financial support in the name of a child from 18 years of age for the next five years to take care of his personal requirements during higher education. Alongside with free medical coverage under Ayushman Bharat for 18 years.⁸⁶
- In October 2021, the PM inaugurated 35 pressure swing adsorption (PSA) Oxygen plants established under PM Cares Fund across 35 states and union territories in an event at AIIMS, Rishikesh. A total of 1224 PSA Oxygen plants have been funded under the PM Cares Fund, which commissioned providing an output of over 1,750 MT oxygen per day that helped in overcoming the burden of oxygen shortage in the country.⁸⁷

Overall, comment upon, the Fund has strived to reach its objectives which were to assist with healthcare emergencies, whether it was funding or providing grants.

5. SCRUTINY OF THE PM CARES FUND

The PM CARES Fund has played an extremely prominent part in the journey of fighting the pandemic, but still, there has been a lot of speculation about the Fund allocation and nature of the fund, which was levelled by the opposition parties and various NGOs and non-governmental offices on the ground of lack of transparency which is sine a qua non for proper utilization of the fund. We intend to scrutinize every reason which makes the use of this fund opaque. The official website of the PM CARES fund mentions the Fund as a dedicated fund to fight the distress caused by COVID-19, a public charitable trust under the name of 'The Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund. It has been registered as a Public Charitable Trust. The trust deed of PM CARES Fund was enrolled under the Registration Act, 1908, in New Delhi on 27th March 2020⁸⁸. In December 2020, a trust deed was published on the official website, which added a clause that the Fund was a private entity, not a public authority which exempts it from the Right to Information Act 2005, documentation, and scrutiny by representative authorities. It was

⁸⁵ Ibid.

⁸⁶ The Indian Express, *PM announces aid, free education for covid orphans; pension for employees' next of kin*, available at <https://indianexpress.com/article/india/centre-to-help-children-left-orphaned-by-covid-with-education-loan-7335686/>, last seen on 11/12/2021.

⁸⁷ Business Standard, *Modi inaugurates 35 PSA oxygen plants established under PM Cares Fund*, available at https://www.business-standard.com/article/pti-stories/modi-inaugurates-35-psa-oxygen-plants-established-under-pm-cares-fund-121100700434_1.html, last seen on 08/12/2021

⁸⁸ Supra 55.

claimed that the trust neither intends nor is owned, controlled and established by the Government of India⁸⁹.

5.1. PM Cares Fund - A State Or Not?

- The dilemma which persists is whether the PM CARES Fund is a 'State' or not? Under Article 12 of the Indian Constitution. To clarify this, various cases and PIL, and RTIs were filed. One such plea was raised in the case of *SamyakGangwal v. PMO*⁹⁰, which was allowed by a bench consisting of Chief Justice of Delhi High Court Justice D. N. Patel and Justice Jyoti Singh. The petitioner filed a writ petition with a prayer to bring PM CARES FUND under the ambit of 'State' and to declare it a public authority. The petitioner had a concern that there is no transparency, and it is using the domain name 'Gov.', a state emblem, formed basically to extend assistance to citizens of India, and all the main functionaries were ministers of high portfolios. This raised various contentions in public about accountability⁹¹.
- The PMO responded with an affidavit stating that the Trust is on an honorary basis and doesn't take any funds from the Consolidated Fund of India. The allegations of accountability were responded to by expressing that all the payments made to the Fund are audited by an auditor, a chartered accountant drawn from the panel created by the Comptroller and Auditor General of India (CAG).
- Also, it was contended that irrespective of the fact whether PM CARES Fund is declared State or not, it was not permissible to disclose third-party information.⁹²

5.2. Nature of Fund - Private or Public?

Another significant question contended by Mr. Shyam Divan⁹³ was, "*How could higher authorities go out of their purview and do something which is not constitutional?*".

Another question was raised "*under what authority the Centre has exempted the donations from the ambit of tax if it is a private fund?*"

⁸⁹*Trust_Deed.pdf*, PM Cares, available at https://www.pmcared.gov.in/assets/donation/pdf/Trust_Deed.pdf, last seen on 09/12/2021

⁹⁰*SamyakGangwal v. Central Public Information Officer Prime Minister Office & Ors*, W.P.(C) 3430/2020.

⁹¹The Economic Times, *HC To hear on Dec 10 pleas to declare PM CARES Fund 'State' Public authority under RTI Act*, available at pm cares fund: HC to hear on Dec 10 pleas to declare PM CARES Fund 'State', public authority under RTI Act - The Economic Times (indiatimes.com), last seen on 14/12/2021.

⁹²The Economic Times, *HC prepones hearing on pleas to declare PM CARES a 'State' Public Authority under RTI Act*, available at <https://economictimes.indiatimes.com/news/india/hc-prepones-hearing-on-pleas-to-declare-pm-cares-fund-a-state-public-authority-under-rti-act/articleshow/87363577.cms>, last seen on 16/12/2021

⁹³Senior Advocate of Delhi High Court

Alongside that, the Fund is additionally viewed as inside the domain of Corporate Social Responsibility (CSR) use.

It was expressed that there were several calls made by government bodies to contribute a part of the salaries to the fund, of which crores of rupees were delivered to a few state legislatures.

There was the denial of providing additional documents related to the Fund, stating that the Fund was not a public authority. There were contemplations by the Public which are still not put to rest⁹⁴.

According to various petitioners, the Fund was undoubtedly sold as a public fund, unlike the other similar fund Prime Minister's National Relief Fund.

One such plea was raised by Mr. Vikram Tongad⁹⁵ regarding the information about the fund. His application was denied like others by the Supreme Court's perception that "*unpredictable and unfeasible requests under the Right to Information (RTI) Act for the revelation of one and all data would be counterproductive*". Additionally, the Union Ministry of Corporate Affairs expressed that, as indicated by Section 2(h) of the Right to Information Act, 2005, the Fund isn't Public Authority. Section 2(h) of the Right to Information Act 2005 states that 'public authority is "*a request by the Government to build up the body/foundation and that the public authority should possess and control the body.*"⁹⁶ The above clause was put henceforth to prove that the fund is not a public authority, so it is out of the purview of public authority.

5.3. Prime Minister Tag On PM Cares Fund

Public Interest Litigation was filed that the use of the National Emblem, Government Flag, and Prime Minister should be removed as it infringes the arrangements of the Constitution of India and is in violation of the Emblems and Names (Prevention of Improper Use) Act, 1950. The Fund has been persistent with the fact that it is a private fund, so the use of all national figures is Unconstitutional.⁹⁷

⁹⁴The Economic Times, *No Factor to show PM Cares Fund private in nature :Delhi High Court told*, available at <https://economictimes.indiatimes.com/news/india/no-factor-to-show-pm-cares-fund-private-in-nature-delhi-high-court-told/articleshow/86814276.cms>, last seen on 18/12/2021.

⁹⁵Environmentalists and Conservationists

⁹⁶Amrita Nair, *PM CARES Fund: Why we should lift the veil to demand accountability*, available at <https://www.theleaflet.in/pm-cares-fund-why-we-should-lift-the-veil-to-demand-accountability/>, last seen on 19/12/2021.

⁹⁷The Economic Times, *HC seeks centres response on plea seeking deletion of Prime Minister tag from PM Cares Fund trust*, available at <https://economictimes.indiatimes.com/news/india/hc-seeks-centres-response-on-plea>

5.4. No Auditing By CAG

Foreign contributions should be managed under the Foreign Contribution Regulation Act (FCRA), 2010. The Fund has been excluded from the ambit of the foreign contribution regulation act by a sanction of the Home Ministry. If there is such an exemption, it should be under the audit mandate of the Comptroller and Auditor General of India (CAG). On the contrary, the Fund serves as an exception to both things, one being the foreign contribution regulation exception and the other being audited by a private body instead of CAG.⁹⁸

5.5. Retrospective Amendments For Corporate Social Responsibility (CSR) Exemptions

The Government made the revision which was finished by the Ministry of Corporate Affairs to the Companies Act 2013, which permitted CSR exclusions to the assets, even those that were not set up by the Government of India. The change was made with review impact and covered all such Funds made before the revision. The Ministry of Corporate Affairs reported in March 2020 that gifts made to the Fund would be counted as statutory Corporate Social Responsibility. It was also revealed by the Washington Post that the exemptions were created from the retrospective effect on the request of Bhaskar Kulbe, the advisor to Prime Minister Narendra Modi⁹⁹.

5.6. Purchases Of Ventilators And Quality Concerns

As per the official site of the PM CARES Fund, it was stated there was a necessary allocation of funds for the supply of ventilators. However, issues were raised by the various government-appointed clinical evaluation groups about the sub-standard ventilators. It was a matter of great concern, and along with that, additional data was procured, which stated that two indigenously manufactured ventilator models had failed trials, and orders were given to the start-ups that did not know about manufacturing ventilators.

seeking-deletion-of-prime-minister-tag-from-pm-cares-fund-trust/articleshow/86967491.cms, last seen on 20/12/2021

⁹⁸Priscilla Jebaraj, *PM CARES Fund gets FCRA exemption without meeting pre-condition of CAG audit*, available at <https://www.thehindu.com/news/national/pm-cares-fund-gets-fcra-exemption-without-meeting-pre-condition-of-cag-audit/article32584371.ece>, last seen on 22/12/2021.

⁹⁹Gaurav Noronha, *Govt clarifies on company's contributions to PM CARES Fund above CSR limit*, available at [PM cares fund : Govt clarifies on company's contributions to PM CARES Fund above CSR limit \(indiatimes.com\)](https://www.indiatimes.com), last seen on 23/12/2021

Several states reported such frauds. For example, Lok Nayak hospital¹⁰⁰ complained that the ventilators did not supply the required amount of oxygen to the patients. It was reported by various state governments to the central authorities like the civil hospital in Ahmedabad about not improper functioning of ventilators. It was also mentioned by the Rajasthan State Government about defective ventilators.

Amidst all the defective equipment complaints, pressure was created on the hospitals to use them. On 16 July 2020, BJP pioneer Mr. Prabhakar Shinde¹⁰¹ requested the Municipal Commissioner from Mumbai to make a lawful move against authorities who were not utilizing ventilators provided by PM CARES fund.¹⁰²

5.7. Quality Check Of Ventilators

The PM CARES reserve declared its first distributions on May 13, including an amount of ₹2,000 crores to buy 50,000 "Made in India" ventilators "for enlarging the framework to handle COVID-19 cases the nation over". Two firms that supplied the orders, natively made ventilators for COVID-19 treatment supported by PM-CARES, have failed a clinical assessment by the Health Ministry's specialized board, as indicated by data received through the information sought under the Right to Information (RTI) Act.¹⁰³

6. SUBORNATION AND PM CAFRES FUND- LINKAGE?

- Silence can be the biggest enemy, especially in a controversial situation. The same has happened with the PM CARES Fund, which has attracted attention since its formation. There has been speculation made by the public, and that is a significant reason for various RTI, CASE, and PETITIONS.
- As stated by the PMO, the fund is a public charitable trust¹⁰⁴ and not a public authority under the RTI act.
- Sonia Gandhi, the leader of the opposition Congress Party, recommended, at a very initial stage, that there is no need for the creation of another fund. It could be transferred to the already existing PMNRF.

¹⁰⁰Hospital situated in Delhi

¹⁰¹ Municipal Corporator belonging to BJP, last seen on 24/12/2021.

¹⁰²*PM CARES Fund*, Wikipedia, available at https://en.wikipedia.org/wiki/PM_CARES_Fund, last seen on 24/12/2021.

¹⁰³Priscilla Jebaraj, *Coronavirus | Ventilators from firms funded by PM CARES fail trials*, available at <https://www.thehindu.com/news/national/coronavirus-ventilators-from-firms-funded-by-pm-cares-fail-trials/article32416810.ece>, last seen on 24/12/2021

¹⁰⁴Supra 55.

- There were speculations made against the usage of the fund; when the sudden lockdown was imposed by the Govt., there were thousands of migrant labourers who had to move walking on foot to their distant homes. So, it led to ambiguity in public about the non-usage of the fund. One of the members of Parliament tried to rebrand it by terming it as 'PM doesn't care'.
- An activist, Anjali Bhardwaj sent an RTI request to the ministry regarding ventilators; the response showed much less allocation than the actual number presented on the site. She also revealed that two of the firms which received it didn't ask for the ventilators in the first place.¹⁰⁵
- Some also connected the allocation of Funds as vote bank politics as there was more allocation given to the states who had elections nearby. For example, Bihar hospital beds.
- One such speculation was also made by PDP President Mehbooba Mufti, who alleged that *"However, corruption today is at its peak. It is now done in a sophisticated way like the PM Cares Fund. What is it, if not corruption, when you don't want to give an account of money that you hold as a prime minister?"*¹⁰⁶.
- Another party member TMC's Mahua Moitra¹⁰⁷, also said in the parliament session that "they should 'stop lying' about welfare measures taken by the fund. The Fund is not even answerable to the parliament even though the majority of the fund is collected by the public, more than 70% of the total corpus"¹⁰⁸.
- "Providing tax exemptions to funds is done in an official capacity by the ministers. This is harming the democratic nature as no fund can receive any kind of fund without the appropriation from the parliament and whether the ministers are working in an official capacity or private capacity for the Fund is still ambiguous".

The decisions in these cases are still pending on the issue of whether the fund should be considered as a state or not. Also, it is a critical matter because all activities of the PM Office could be of national significance, and it should be amenable to the Right to Information Act as also defined by section 2(f),2(j), which expresses that data with public

¹⁰⁵Harish Tyagi, *India: why secrecy over Narendra Modi's coronavirus relief fund damages democracy*, available at <https://theconversation.com/india-why-secrecy-over-narendra-modis-coronavirus-relief-fund-damages-democracy-144897>, last seen on 25/12/2021.

¹⁰⁶ Press Trust Of India, *Corruption is now done in sophisticated way like PM Cares Fund, says PDP chief Mehbooba Mufti*, available at <https://www.newindianexpress.com/nation/2021/nov/08/corruption-is-now-done-in-sophisticated-way-like-pm-cares-fund-says-pdp-chiefmehbooba-mufti-2381000.html>, last seen on 26/12/2021

¹⁰⁷ MP and candidate of the AITC party.

¹⁰⁸Supra 104

authorities as anything which exists, in any structure with public power. General society can access such data through assessment, acquiring ensured duplicates, electronically or through notes.¹⁰⁹

7. LEGAL PERSPECTIVE

The institution of PM is one of the supreme institutions of India. PM CARES was an initiative started by the PM, so the public, when not assured by the data provided by the Government officials and PMO, turned to the judicial resorts and judicial review to gain certain transparency. This led to a surge in the cases, the caseload skyrocketed as courts handled 3.64 crores of cases. Many RTIs were filed to get the information, but all were put to rest by saying that to ensure transparency, the audited report was put on the official website of the trust along with the details received by the trust.

7.1. Petitions Were Filed Before Court

- One Petition was raised by SamyakGangwal¹¹⁰ under the case law *SamyakGangwal vs Central Public Information Officer, Prime Minister's & Ors*¹¹¹ demanding that PM CARES Fund is a 'State' as all the features using the domain name 'gov', PM's photograph, state emblem is only legal once it's a public authority. The solicitor had additionally recorded an RTI to proclaim PM CARES Fund as public power. Specialist General Tushar Mehta¹¹², who addressed PMO, had gone against the appeal, expressing that it was not viable and that he would document a reaction clarifying why it ought not to be engaged.
- Another such application was filed by Saket Gokhale¹¹³ against Shree Pradeep Kumar Srivastava, PMO, and other officials managing PM Cares Fund to the Supreme Court, asking to clarify details about the stance of the PM CARES Fund and its linkage with the Government. Also, the allocation of the Funds for the sanctioned projects. The PMO has replied that they function on an honorary basis and that the Fund is functioning with transparency and auditing. The audited report is also made available on the website with the allocation of Funds made.¹¹⁴

¹⁰⁹NDTV, *PM CARES Fund A "Sophisticated Way Of Corruption": Mehbooba Mufti*, available at <https://www.ndtv.com/india-news/pm-cares-fund-a-sophisticated-way-of-corruption-mehbooba-mufti-2603292>, last seen on 25/12/2021.

¹¹⁰ Advocate in Delhi High Court.

¹¹¹Supra 88

¹¹²Solicitor General of India

¹¹³Social Activist, Maharashtra.

¹¹⁴BBC NEWS, *Coronavirus: Secrecy surrounds India PM Narendra Modi's '\$1bn' Covid-19 fund*, available at <https://www.bbc.com/news/world-asia-india-53151308>, last seen on 05/01/2022

- Additionally, in August 2020, the Supreme court of India dismissed an appeal recorded by the Centre for Public Interest Litigation, seeing that the Government was allowed to make moves between the PM CARES and to National Disaster Response Fund at its caution. A dismissal of a plea by Manohar Lal Sharma¹¹⁵ was made as saying that he misconceived the issue at hand.

The above petitions are still pending.¹¹⁶

7.2. Landmark Judgments

- The Supreme Court in 2013, on account of *Thalappalam ser. Coop. Bank Ltd. v. Province of Kerala*¹¹⁷ gave the judgment that "control" in Section 2(h)(d) of the Right to Information Act alludes to command over the administration and issues of the body by the public authority. If we allude to a similar judgment, PM CARES Fund is equivalent to it is constrained by every one of the great authorities of the Government devoted to the country's government assistance while high officials are its legal administrators, PM CARES would soundly fall inside the holding of the great court.¹¹⁸
- Likewise, in *Indian Railway Welfare Organization (IRWO) v. D.M. Gautam and Anr. (2010)*¹¹⁹, where the IRWO's board consisted of ex-officio authorities from the Ministry of Railways, the Delhi High Court held that the presence of government authorities made the body an administration body. In a similar position, the PM of India is fundamentally the ex-officio executive of the Fund.
- Right to Information was placed under Articles 19 and 21(Fundamental Rights) by the Supreme Court in *S.P Gupta v. President of India (1981)*¹²⁰. Right to Information is a tool for the public to hold the government accountable and to establish a system of checks and balances. Therefore, any denial of this information would deceive the public and also be an infringement on the world's largest democracy¹²¹.

¹¹⁵ Litigator and PIL Activist.

¹¹⁶ First Post, *Parliament Monsoon Session: Centre, Oppn trade fire on PM CARES Fund; RS passes bill to punish attacks on health workers*, available at <https://www.firstpost.com/india/parliament-monsoon-session-centre-oppn-accuse-each-other-of-corruption-in-ls-rs-passes-law-to-punish-attacks-on-health-workers-8832481.html>, last seen on 04/01/2022.

¹¹⁷ *Thalappalam ser. Coop. Bank Ltd. v. Province of Kerala*, (2013) 16 SCC 82, 2013 (12) SCALE 527

¹¹⁸ Amrita Nair, *PM CARES Fund: Why we should lift the veil, to demand accountability*, available at <https://www.theleaflet.in/pm-cares-fund-why-we-should-lift-the-veil-to-demand-accountability>, last seen on 08/01/2022.

¹¹⁹ *Indian Railway Welfare Organization (IRWO) v. D.M. Gautam and Anr.*, W.P.(C) No. 8219 of 2009 & CM No. 4976 of 2009 (Delhi High Court, 03/05/2010)

¹²⁰ Supreme Court in *S.P Gupta v. President of India*, AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365

¹²¹ Supra 100

- In the case of *A.R. Antulay vs R.S. Nayak & Anr* (1988), The judiciary can only interpret laws, and in doing so, it cannot expand or reduce the jurisdiction of a court. In this scenario, the consent of a court is immaterial as the judiciary cannot surpass the legislative decision-making. Along with the power to create and enlarge jurisdiction, the legislature has also been vested with the power to confer a right of appeal or take away the same from a particular court. The Parliament alone can do it by law, and no court, whether superior or inferior or both combined, can enlarge the jurisdiction of the court or divest a person of their rights of revision and appeal¹²².

8. CONTINGENT ASPECTS OF THE FUND

The PM CARES Fund shares similar characteristics to many existing funds, so that's been a cause of much controversy.

- Prime Minister's National Relief Fund (PMNRF) was set up in 1948 to give help and alleviation to survivors of catastrophic events, calamities, and Riots. PMNRF is fundamentally worked by the Prime Minister's Office, and it additionally has the exclusion from Income Tax 1960. It had certain drawbacks, such as non-closure of the Funds and names of donors. It needed a restructuring so that it could work effectively. Another such Fund is the National Disaster Response Fund (NDRF) Which was established in 2005 under the Disaster Management Act of 2005¹²³. A drawback of this Fund was the non-acceptance of private donations.
- There were many separate states created by the Chief Ministers.¹²⁴ Different relief funds for various state governments have also appealed for donations.
- There has been a ton of help given to the world to battle this pandemic from different global associations like IMF World Bank. The IMF provided financial assistance and debt to countries that were hardest hit and lacked funds to deal with COVID. By and large, the IMF is presently making about \$250 billion, a fourth of its \$1 trillion loaning limit, accessible to part nations.
- The World Bank has made many moves to assist non-industrial nations with reinforcing their pandemic reaction by expanding illness reconnaissance, additionally further

¹²²Oshika Banerji, *A.R. Antulay v. R.S. Nayak & Anr: a legal analysis*, available at *A.R. Antulay v. R.S. Nayak & Anr: a legal analysis* - iPleaders, last seen on 21/12/2021

¹²³*PM Cares Fund Covid19 PM Modi NDRF*, available at <https://www.indialegalive.com/pm-cares-fund-covid19-pm-modi-ndrf/>, last seen on 31/12/2021

¹²⁴Prabash K Dutta, *PM Cares vs PMNRF: What is the fuss about?*, available at <https://www.indiatoday.in/news-analysis/story/pm-cares-vs-pmnrf-what-is-the-fuss-about-1712468-2020-08-18>, last seen on 31/12/2021

developed general wellbeing mediations, and assisted the private area with proceeding to work and support occupations.

- Since the beginning of COVID-19, the world bank has submitted more than \$157 billion to battle the effects of the pandemic. UNICEF started ACT-A Supplies Financing Facility ("ACT-A SFF"). The Facility provides aid to low-and pay nations' by giving well-being supplies: inoculation-related supplies, COVID-19 diagnostics, and COVID-19 therapeutics.¹²⁵
- The World Bank's leading group of chief chiefs endorsed credit for \$500 million programsthat were fundamentally to help India's most extensive casual work for the area and make a guide for the continuous pandemic and its casualties. World Bank financing since the beginning of the COVID pandemic stands at \$1.65 billion¹²⁶.

Amidst all the aid provided by the funds in India and by the international arena still, the government felt the need to introduce another fund to curb the pandemic. The government has failed to convince the Indian public that creating a new fund was distinct from the earlier ones. There have been answers by the government relating to the PM CARES fund, which allows the prime minister to appoint experts as advisors and allows judicious allocation of the funds but still, there is no clarification on it as the trust deeds are not out there in the public domain. Now the matter is put to the resort as the Supreme Court has dismissed the petition seeking transfer of funds or merger of PM Cares Fund with the PMNRF¹²⁷. This ruling formally upholds the separate identity of the PM Cares Fund.

9. CONCLUSION

PM CARES FUND, a tool that helped India to overcome and sustain the most distressing situation where millions of people were on the verge of death because of Covid19. For such a densely populated country like India, it was impossible to fight without domestic help. It was also quite impossible just with the aid of the international arena only. The assistance provided by the world can be said to be a proud moment for all the citizens. We express our gratitude towards our Prime Minister, who has built immensely profound relations in the

¹²⁵ World Bank, *World Bank Approves \$500 Million Program to Protect India's Informal Sector Workers*, available at <https://www.worldbank.org/en/news/press-release/2021/06/29/world-bank-approves-500-million-program-to-protect-india-s-informal-sector-workers>, last seen on 01/01/2022.

¹²⁶World Bank, *World Bank Group's Operational Response to COVID-19 (coronavirus) – Projects List*, available at <https://www.worldbank.org/en/about/what-we-do/brief/world-bank-group-operational-response-covid-19-coronavirus-projects-list>, last seen on 01/01/2022.

¹²⁷The Print, *PM-CARES not a Govt of India fund, it functions with transparency: Centre to Delhi HC*, available at <https://theprint.in/judiciary/pm-cares-not-a-govt-of-india-fund-it-functions-with-transparency-centre-to-delhi-hc/738524/>, last seen on 02/01/2022

global zone. It fills our hearts with pleasure that we belong to a country that shares its leadership with the great leaders of the world. It was not only the international help that has been there; the domestic help was also signed by all the corporates, celebrities, government officials, daily working staff, NGOs, non-profit organizations, and last but not least, the Indian public who has come out with open arms and helped the fellow mates of the country showing the true meaning of fraternity. We being a democratic country, our leaders thought to battle it out, we needed to be strong internally. With this aim in mind, they took out a resort by creating and opening PM CARES FUND. The current status of the Fund is that it is a public charitable trust, as mentioned by the official site, but it is under the domain of PM, which is a public figure, and also the usage of the national emblem is unconstitutional according to the statements made by the government it is regarded as a private fund. The ambiguity should be cleared soon by the government, and also, it is not presently under the purview of the Right to Information; this is a hindrance for all the public as there is no transparency of the use of the fund, and it is included as a State under Article 12 of the Indian Constitution. The exemption from the auditing of CAG is also sceptical for the donors. There is never any doubt about the intentions of the leaders, but being a democratic country, the public wants to be included in every decision and seeks transparency; that is why we have been asking for accountability.

9.1. Propositions

Certain propositions which can be followed by the government to make the model more accountable and transparent are put forward: -

- PM CARES Fund, whether declared as a state under Article 12 or not, shouldn't matter as the government shouldn't be hesitant to provide any information related to funding allocation as, basically, the money in the Fund is the money of the public.
- The official website should make the fund allocation more transparent and accessible to the public; it would be more democratic and will ensure more donations to funds as due to the controversies attracted now, many people refrain from donating money
- Use of the money from PMNRF should be included in the PM CARES Fund. Using the money efficiently is integral and judicious.
- The government can also make another team to check the functioning of the Fund and a team who can help the nation with necessary data and, along with that, if we can aid with a helpline number which should be accessible to everyone.

- Recently the Fund is not functioning properly as it is not accepting foreign donations, so for any discrepancies like these, there should be a technical team working on it 24*7, and the payment methods should be made easier and accessible by everyone.
- There should be auditing appropriately done by the CAG as transparency and accountability is the basic right of the public in any democratic country.
- The fund should disclose all the legal documents which distinguish it from PMNRF. So, the need for the PM CARES Fund could be explained to the public.

9.2. Alternative Model

Transparency and accountability to the fund are of utmost priority to the public, so it is proposed that we can also create a new fund by merging both the funds (PMNRF and PM CARES Fund) so that the money can be put together and can be used wisely as having different funds which serve the same purpose. The fund should be made a statutory body as this can help solve the significant problem of accountability. There can be a similar team for the funds; the cabinet ministers, along with the state CM, can also be included in the administrative body of the Fund to make it more transparent and accountable. The involvement of representatives of the states will also make it transparent and accountable. The leaders of opposition parties should also be included in the team so that it could be free from any kind of bias or corruption. The data can be provided on the official site of the fund, which accepts every kind of donation. It should have no provision for involuntary donation made to the fund, which is done by the non-consent of the donor. Also, it should not provide any kind of back door tax exemptions because it is a fund for the victims hit by pandemics of any kind in the future, such as the present COVID-19. Along with these, all-foreign donations to the fund should be regulated by the Foreign Contribution Regulation Act. It should also be present under the ambit of the right to information, as the public should have full authority to know where and how their money has been utilized. The allocations done from the fund should provide specific details and should be subject to visiting the places where the fund allocated has been used judiciously in the proper manner or not. There should be a provision of feedback from the public at large. The most important part is the auditing by the CAG. If we incorporate this kind of model, we can save India, which is again fighting with the third wave, the virus is mutating, and the nation is witnessing a surge in the cases, so this is the perfect time if we will adopt all these measures in the newly created Fund then the world and the nation can get good support as then people will contribute in it fearlessly and endure it.

Though Prime Minister Narendra Modi categorically stressed that transparency reduced corruption when he said that.

“While transparency reduces corruption, good governance goes beyond transparency in achieving openness. Openness means involving the stakeholders in the decision-making process. Transparency is the right to information while openness is the right to participation.”

- Prime Minister Narendra Modi.

But the fact that his government argued against it and justified the opaqueness regarding the public audit by CAG. Against all odds still, the central government is not ready to bring it under the purview of CAG and the Right to Information Act

THE TENTH SCHEDULE-RETHINKING POLITICAL CORRUPTION, DEFECTION AND THE LAW IN INDIA

Dr. Chaitra V and Ms. Renuka Joseph¹²⁸

Abstract

As the country continues to witness unethical defections and mass resignations by the sitting legislators to oust the democratically elected governments for better ministerial posts, personal and financial interest, or other related considerations. It is time to rethink the defection law to combat political corruption. The present study critically examines the anti-defection law in India. It seeks to explore implementable solutions to tackle the evil of political corruption stemming from defections. In conclusion, this would lead to some concrete suggestions for further deliberations.

Keywords- Political Corruption, Anti-Defection law, Tenth Schedule, Constitution, India

1. INTRODUCTION: POLITICS OF DEFECTION AND CORRUPTION

Politics, business and bureaucracy, are dominant risk areas for corruption. Out of these, political corruption needs to be tackled first in a country which seeks to succeed and prosper. In the words of U.C Agarwal, the retired Central Vigilance Commissioner, “*the top has to be clean to make the lower levels clean.*”¹²⁹ The decades-old issue of political defection (sitting legislators switching to another political party) creating political imbalance continues to haunt India's robust democracy despite the anti-defection law being in place since 1985. As the country recently witnessed the unethical defections and resignations by the legislators who brought down the elected governments for personal & financial gains, ministerial posts or other related considerations, it is time to rethink the defection law in India to fight political corruption. The Tenth Schedule to the Constitution, popularly referred to as the ‘Anti-Defection Law’, provides that the elected members of the house, who voluntarily give up the membership of the party or vote contrary to the direction of their political parties, will face disqualification.¹³⁰ The disqualified member cannot hold a ministerial post/ any other remunerative post in the house until the expiry of the term of

¹²⁸Assistant Professor, School of Law, Christ (Deemed to be University), Bengaluru And Assistant Professor School of Law, Christ (Deemed to be University), Bengaluru Research Scholar, NLSIU, Bengaluru

¹²⁹Pardeep Sachdeva, *Combating Political Corruption: A Critique of Anti-Defection Legislation*, 50 The Indian Journal of Political Science 157, 157 (1989).

¹³⁰Schedule 10, Paragraph 2 (a) and 2 (b), the Constitution of India.

his office or his re-election wherein he is declared elected, whichever is earlier.¹³¹ This law, plainly, has a noble vision to create deterrence for political defections and thus provide stability to political parties and the elected government. However, this disqualification is applicable to the legislators switching the party individually but not collectively. The critics have questioned its purpose in impeding the phenomenon of political defections. The anti-defection law has also invited criticisms from various factions alleging the suppression of dissent, thus violating the freedom of expression¹³² of the elected legislators and reducing the accountability of the government. However, the advocates of this law maintain that the elected legislators who are identified by their party and party ideologies should remain in the party and adhere to the party directions, thus respecting the mandate of the electorate, which also has been the essence of the Tenth Schedule. Nonetheless, the recent development of the practice of mass resignation by the elected legislators from their membership either to bring down the elected government and subsequently get re-elected in the by-election under a different party or to reduce a government to a minority has raised serious questions about the efficacy of the anti-defection law in India.

The essence of a parliamentary democratic system is the accountability of the government to the legislature. In India, the Prime Minister and the Council of Ministers are collectively responsible to the Lok Sabha. Similarly, the Chief Minister and Council of Ministers of the State are accountable to the elected State Legislative Assembly. Dr. B R Ambedkar, in his opening speech on the draft Constitution in the Constituent Assembly, observed that

*“The Parliamentary system differs from a non-Parliamentary system in as much as the former is more responsible than the latter, but they also differ as to the time and agency for assessment of their responsibility. In England, where the Parliamentary System prevails, the assessment of the responsibility of the executive is both daily and periodic. The daily assessment is done by members of Parliament, through questions, resolutions, no-confidence motions, adjournment motions and debates on Addresses.”*¹³³

¹³¹Art. 361(b) & 164(1B), the Constitution of India.

¹³²Art. 105 & 194, the Constitution of India.

¹³³ Constituent Assembly debate by Dr. B.R. Ambedkar, *Opening Speech*, Lok Sabha (04/11/1948) available at http://164.100.47.194/Loksabha/Debates/Result_Nw_15.aspx?dbsl=144&ser=&smode=

But, in reality, this accountability of the Government in the form of a no-confidence motion is a debatable issue. On the other hand, it is argued by the critics that the anti-defection law prevents the legislators from holding the government accountable for its actions.¹³⁴

The present study critically examines the anti-defection law in India. It seeks to explore implementable solutions to tackle the evil of political corruption and defections. In conclusion, this would lead to some concrete suggestions for more deliberation.

2. EVOLUTION OF ANTI-DEFECTION LAW IN INDIA

Along with the other measures to weed out corruption in the country, in pursuance of the recommendation of the Santhanam Committee Report on Prevention of Corruption (1964), the Central Government published a comprehensive code of conduct for ministers. This code obligated the ministers to declare and furnish information with regard to their assets, liabilities and businesses, the ministers and their family members every year. However, this code was served more in the breach than in compliance.¹³⁵

The country witnessed the worst form of political corruption after the 1967 general elections, which also sparked the infamous phrase, *Aaya Ram, Gaya Ram*. There were nearly 500 defections that year alone, and more than 118 defectors became ministers or ministers of State.¹³⁶ This led to the idea of deliberation of the introduction of a law to combat defections. The main rationale for the introduction of such a law is that candidates customarily contest elections by using their political parties as a platform for their campaigning and present themselves before the electorate as having the same ideology as that of the party they belong to, which could also be seen in the party manifesto. Consequently, an ordinary voter is very likely to cast his vote for the candidate on the basis of the party policies and ideologies the candidate supports and advocates, in addition to the latter's personal qualifications. A legislator is therefore obligated to adhere to the promises made by his party during the elections. Hence, if a member defects from his political affiliations, it should attract disqualification from the house.¹³⁷

¹³⁴Roshni Sinha and Prachi Kaur, *Anti-Defection Law – Intent and Impact*, PRS Legislative Research, available at https://prsindia.org/files/parliament/discussion_papers/Anti-Defection%20Law%20Intent%20and%20Impact_0.pdf.

¹³⁵Supra 126.

¹³⁶Karnataka Legislative Assembly, *General information relating to Parliamentary and other matters*, Fifteenth Assembly, Bulletin, Part 2, available at http://www.kla.kar.nic.in/assembly/bulletin/bulletin_67_2019.pdf.

¹³⁷*KihotoHollohan v. Zachillhu and Ors.* AIR 1992 SC 309.

The beginning of the 'Anti-Defection' law regime in India can be dated back to the year 1967, when a private member's resolution was moved in the Lok Sabha by Shri P. Venkatasubbaiah. In view of this, the Lok Sabha unanimously passed a resolution on 8th December 1967, wherein the matter was referred to a high-level committee consisting of representatives of political parties and constitutional experts.¹³⁸ Thus, a high-powered Committee on Defections was established by the Government under the chairmanship of the then Union Home Minister, Shri Y.B. Chavan, which included other distinguished members such as Jayaprakash Narayan, H.N Kunzru, C.K Daphtary, Mohan Kumara Mangalam, M.G Setalvad etc.¹³⁹ On 18th February 1969, the committee submitted its report in the Lok Sabha, which recommended the establishment of a committee composed of members of the Parliament as well as the State Assemblies to formulate a 'Code of Conduct for political parties to address the issue of defections.'¹⁴⁰ The Committee further recommended that a defector should be debarred from the House for a period of one year or until such time he/she resigned his seat and got re-elected.¹⁴¹

The Constitution (Fifty-second) Amendment Act, 1985 introduced anti-defection law with the objective of combating the evils of political defections that tends to undermine the very foundation of democracy.¹⁴² It provided for the disqualification of the members of the Parliament and state legislative assemblies on the grounds of defection. However, it excused disqualification in case of a split by one-third of members.

The Constitution (Ninety-first Amendment) Act, 2003 was passed in response to severe criticism and constant demands by various factions to strengthen the Anti-defection law under the Tenth Schedule.¹⁴³ The Act deleted the provision regarding exemption from disqualification in case of a split by one-third of members from the Tenth Schedule. It also provided that a member of either House of Parliament or of a State legislature belonging to any political party who is disqualified under para 2 of the Tenth Schedule shall also be disqualified to be appointed a Minister or hold a remunerative political post.¹⁴⁴ The Act also

¹³⁸ Supra 126.

¹³⁹ G.C Malhotra, *Anti-Defection law in India and the Commonwealth (2005)*, 7 (Eleventh Edition), Rules of Procedure and Conduct of Business in Lok Sabha (Rule 382) available at https://eparlib.nic.in/bitstream/123456789/58674/1/Anti_Defection_Law.pdf, last seen on 08/07/2021.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² The Constitution (52nd Amendment) Bill, 1985.

¹⁴³ The Constitution (91 Amendment) Bill, 2003.

¹⁴⁴ The Constitution (91 Amendment) Act, 2003.

lays down that the total number of ministers in the Central Council of Ministers shall not exceed 15 per cent of the total strength of the Lower House.¹⁴⁵

3. ANTI-DEFECTION LAW- AN ANALYSIS AND CRITIQUE

The subject of this paper comes down to one inevitable question: Whether the Anti Defection law in India has contributed to combating the evil of political corruption. India has continued to witness unethical defections and resignations by the legislators in bringing down the elected governments for personal & financial gain, ministerial posts and other similar considerations without facing the risk of disqualification under the Tenth Schedule. This is because para 4 of the Tenth Schedule protects an elected member from disqualification of the membership of the house when at least two-thirds of the members of his original political party have agreed to merge with another political party, and he, along with the other members of the original party consequently merged with another political party or decided to function as a separate political party. The critics of the anti-defection law have questioned the inapplicability of the disqualification provisions to legislators who resort to mass defections. Not long ago, states like Telangana, Goa, Karnataka and the UT of Pondicherry witnessed the mass walkout of two-thirds of elected members from their party to another political party without any instances of a merger of political parties.¹⁴⁶ However, the careful reading of the phraseology used in Para 4, "*where his original political party merges with another political party,*" indicates that the protection against disqualification is available to the elected members only when their original party has merged with another political party. This makes it clear that the question is not about the inadequacy of laws preventing mass defections, but the problem lies in the faulty understanding of the law.

Articles 164 (1B), 75 (1B), and 361 B of the Constitution of India read together to provide that a disqualified member under the Tenth Schedule cannot hold a ministerial post/ any other remunerative post in the house until the expiry of the term of his office or his re-election wherein he is declared elected whichever is shorter. This implies that a member of the house (both Parliament and State legislative assemblies) who is disqualified under the Tenth Schedule cannot be admitted to a ministerial or any remunerative post in the new council of ministers that would be formed subsequent to the trust/confidence vote in the legislative assembly/ Lok Sabha, as the case may be. This is to create a deterrence for political defections and provide stability to political parties and the elected government.

¹⁴⁵Ibid.

¹⁴⁶ PDT Acharya, *India's Politicians Have Turned the Anti-Defection Law on Its Head*, The Wire, available at <https://thewire.in/politics/anti-defection-law-telangana-congress>, last seen on 08/07/2021.

However, to circumvent the anti-defection law and evade the disqualification provision, the elected legislators in recent times are using the tool of resignation/ mass resignation either to bring down the elected government and subsequently get re-elected in the by-election under a different party or to reduce a government to a minority. This has raised serious questions about the efficacy of the anti-defection law in India. Surprisingly, the drafting committee and lawmakers failed to anticipate the use of resignation as a tool to deceive the spirit of the Tenth Schedule of the Constitution of India. The resignation of an elected member pursuing their own personal/political interests fails to attract the disqualification provision under Para 2 of the Tenth Schedule.

In Papua New Guinea, resignations by the elected member are accepted as valid only when the political party has breached its own constitution or when the party has been declared insolvent.¹⁴⁷ However, the constitution of India does provide for the scrutiny of a member's resignation as it shall not become effective until accepted by the Speaker or the Chairman, as the case may be.¹⁴⁸ The Speaker or the Chairman would be justified in refusing the resignation if he is satisfied after inquiry that such resignation is not voluntary or genuine.¹⁴⁹ In recent years, the conduct of the speaker (usually from the ruling party) has been criticised for delaying the process of disqualification and resignation of members of the house. The National Commission to review the working of the Constitution, 2002 (hereinafter referred to as NCRWC) highlighted the issue of increasing partisan role of speakers while adjudicating the matters related to disqualification under Schedule X

“What has been even more disconcerting is that some of the Speakers have tended to act in a partisan manner and without a proper appreciation – deliberate or otherwise – of the provisions of the Tenth Schedule.”¹⁵⁰

On the other hand, the law does not lay down a timelimit for the presiding officer (Speaker or Chairman) to decide on a disqualification application/ the resignation of a member of the house. There were various observations and recommendations made by different committees and commissions appointed in the past in regard to bringing reforms to the Tenth Schedule. It recommended that instead of the Speaker or Chairman of the House, the President (in case of MP's) and the Governor (in case of MLA's) must be empowered to

¹⁴⁷ Supra 136.

¹⁴⁸ Art. 190 (3) (b), the Constitution of India.

¹⁴⁹ Ibid.

¹⁵⁰ National Commission to Review the Working of the Constitution (NCRWC), Government of India, Paragraph 19.2, Vol. 2, 2002 available at <http://lawmin.nic.in/ncrwc/ncrwcreport.htm>, last seen on 8/7/2021.

decide the legal issue of disqualification, who shall act on the advice of the Election Commission.¹⁵¹ However, the Supreme Court in the KihotoHollohan case¹⁵² held that the decision of the speaker is subject to judicial review, which serves as a check and balance on the powers of the speaker/chairman. More recently (July 2021), the Supreme Court, in a three-judge bench led by the CJI, adjourned the plea to specify time limits and to further issue guidelines for speakers regarding the disqualification of the defecting member as it was the prerogative of the Parliament. However, in a three-judge bench judgement (January 2021), the Supreme Court had held that the Speaker should decide on disqualification petitions of the defecting members within three months except for the existence of an extraordinary circumstance.¹⁵³

Alternatively, the NCRWC had suggested deliberating the repeal of the anti-defection law altogether as it failed to fulfil its purpose except to legalise and institutionalize group defections.¹⁵⁴ At this juncture, it is pertinent to note that countries like the UK, Canada, and Australia have no laws or rules to deal with defections, as there is no restriction on party members to switch their party affiliations. The defecting member or members sit separately from their party members, and when a member decides to cross the floor and sit with another party, his new party whip determines the seating arrangement for him.¹⁵⁵ This perceptible absence of laws in other countries questions the existence of anti-defection laws in India. Nevertheless, the introduction of the Tenth Schedule to the Constitution tried to bring the concept of political morality to our Constitution. The 170th Report of the Law Commission also remarked that *“the idea of disqualifications on the basis of defection was a right one; the provision relating to ‘split’ has been abused beyond recall.”*

The phraseology used in regard to grounds of defection in Para 2 of Schedule X *“if he has voluntarily given up his membership of such political party”*¹⁵⁶ or *“if he votes or abstains from voting in such a house contrary to any direction issued by the political party to which he belongs”* have

¹⁵¹Committee on Electoral Reforms (1990), Government of India, available at <http://lawmin.nic.in/ld/erreports/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.pdf>, last seen on 8/7/2021; See Supra 147; See also 170th Law Commission of India Report

¹⁵²Supra 134.

¹⁵³KeishamMeghachandra Singh v. The Hon'ble Speaker, Manipur Legislative Assembly and Ors. (2020) SCC OnLine SC 55.

¹⁵⁴Supra 147 at paragraph 19.4

¹⁵⁵ Supra 136

¹⁵⁶Supreme Court in Ravi S Naik v. Union of India AIR 1994 SC 1558 held that the words “voluntarily given up his membership” are not synonymous with “resignation” and have a wider connotation. A person may voluntarily give up his membership of a political party even though he has not tendered his resignation from the membership of that party. Even in the absence of a formal resignation from membership an inference can be drawn from the conduct of a member that he has voluntarily given up his membership of the political party to which he belongs.

invited criticisms from various factions alleging the suppression of dissent, thus violating the freedom of expression, freedom of vote and conscience of a member. It relates to the issue of disqualifying a legislator for any disagreement with his political party and a vote against the party's instructions on any matter. This is likely to create an atmosphere of undue influence on the members of the house. However, in *KihotoHollohan v. Zachillhu*, the Supreme Court has clarified

“That the provisions of the Tenth Schedule do not suffer from the subverting democratic rights of elected members of Parliament and the Legislatures of the States. In India, the freedom of speech of a member is not an absolute freedom. The provisions of the Tenth Schedule do not purport to make a member of a House liable in any ‘Court’ for anything said or any vote given by him in Parliament or State Legislature. It cannot be said that Article 105 or 194 of the Constitution is a source of immunity from the consequences of unprincipled floor crossing. Thus, it is constitutionally valid.”¹⁵⁷

The NCRWC had recommended redefining the term defection and applying it only to critical issues where the life of the elected government is in danger, i.e., voting concerning a finance bill or relating to a no-confidence motion.¹⁵⁸ In this regard, the Supreme Court, too, in the *KihotoHollohan* case, observed:

“That the disqualification imposed by Clause 2(1)(b) of the Tenth Schedule must be read in such a way that it does not unduly impinge upon a member's freedom of speech, which would be possible if the clause were limited to its scope by taking into account the intent underlying the amendments contained in the Tenth Schedule, namely, to curb the evil or mischief of political defections. A direction given to its members by a political party which may entail disqualification pursuant to subsection 2(1)(b) should be limited to a vote of confidence or no confidence in the government or where the motion under consideration relates to an issue which was an essential policy and program of the party on the basis of which it addressed the electorate.”¹⁵⁹

¹⁵⁷Supra 134

¹⁵⁸Supra 147 at paragraph 19.3.

¹⁵⁹Supra 134.

In *Balchandra L. Jarkiholi v. B.S. Yeddyurappa*¹⁶⁰, Justice N. Kumar of the High Court observed

“That an act of expressing no confidence in the party-formed government, with a particular leader as chief minister, would not also amount to a voluntary act of abandoning the party's membership. The desertion of the leader and the government is not synonymous with the party being deserted.”

The study of various committee reports and court judgments calls for redefining the term defection in the anti-defection law in India. For instance, in Papua New Guinea, the anti-defection law mandates that the members of Parliament who get elected by using a political party name must vote in compliance with their party's position on important matters, including the election of a Prime Minister, the budget, votes of no-confidence and constitutional amendments.¹⁶¹

4. CONCLUSION AND SUGGESTIONS

The Tenth Schedule to the Constitution undoubtedly has a noble vision to deter political defections and political corruption. However, an important issue that remains to be settled is what constitutes defection. The various eminent committee reports and apex court judgments recommended redefining the term defection and applying it only to crucial matters such as voting in relation to a finance bill, confidence motion or no-confidence motion. The resignation of an elected member pursuing their own personal/political interests fails to attract the disqualification provision under Para 2 of the Tenth Schedule. Taking a cue from the practice prevalent in Papua New Guinea, resignations by the elected member should be accepted as valid only on legitimate grounds, such as when their political party has breached its own constitution or when the party has been declared insolvent. In other cases, the disqualification provision under the Tenth Schedule should be made applicable to the elected member resorting to resignation or mass resignations. The phraseology used in Para 4 of the Tenth Schedule, *“where his original political party merges with another political party,”* indicates that the protection against disqualification is available to the elected members only when their original party has merged with another political party. However, in recent times, there has been a mass walkout of two-thirds elected members from their party to another political party across many states in India without any

¹⁶⁰Balchandra L. Jarkiholi v. B.S. Yeddyurappa (2011) 7 SCC 1

¹⁶¹Supra 134.

instances of a merger of political parties. This example in India demonstrates that the question is not about the inadequacy of laws preventing mass defections, but the problem lies in its implementation as the laws aren't lucidly worded, which enhances the chances of ambiguous and various legal interpretations of the same law. In conclusion, the authors suggest rewording the defection law, coherent amendments to Para 4 relating to mass defection and the Tenth Schedule enabling the Parliament and the State Legislatures to lay down procedures, including a time limit for the Speaker in the decision-making.

INTERDISCIPLINARY ANALYSIS OF CORRUPTION

Jorge Isaac Torres Manrique¹⁶²

Abstract

Corruption is one of the greatest evils that is rooted in the societies of the world. Its presence can be evidenced in all sectors and institutions of the State. But it also involves a diversity of interdisciplinary edges, which explain its non-eradication, contrary to its generalization and strengthening, since the very nature of the human being favours its incidence and promotion. The author develops this delivery in the light of what has been indicated, unravelling its quintessence, to culminate by analyzing, concluding and proposing alternative solutions.

Keywords: Values, corruption, public management, fundamental rights.

1. INTRODUCTION

We believe that corruption is the scourge of the century that threatens the world. It has been present since time immemorial, causing serious losses and setbacks in the economies and development of people.

However, very few countries seem to be interested in their very urgent fight and disappearance. For this reason, in the present work, we assume the challenge of revealing its nature, scope, analysis, and explanations and arriving at proposals for its urgent and effective fight.

2. DEFINITION, ELEMENTS, TYPE, CAUSES

We have to, in organizations, especially in public ones, establish a practice consisting of the use of functions and means of those for the economic benefit or otherwise of their managers.¹⁶³

The concept of corruption not only constitutes a cultural category that forms part of the legal, economic and social discourses but also of a common language. Therefore, it is not possible to have a single definition. While from the legal perspective, the determining factor is the use of power, from the economic perspective, it is money, although both approaches

¹⁶² President of the Interdisciplinary School of Fundamental Rights Praeeminentia Iustitia (PERU)

¹⁶³ Real Academia Española, *Corrupción*, available at <https://dle.rae.es/corrupti%C3%B3n>, last seen on 07/09/2021

agree that the purpose is to obtain a benefit by breaking a rule. From the broader perspective of the social sciences, although there is no unambiguous position, there is an agreement that the definition of corrupt conduct should not be limited to the concept of illegality since there are practices and activities that do not violate a legal provision but carry an ethical fault.¹⁶⁴

Inside of the characteristic elements of corrupt conduct, we can cite:¹⁶⁵

- The concept of corruption is linked to the normative system, understood as such, in a broad sense, the entire set of rules that regulate a social practice. That is to say, religious, legal, political, economic and normative systems, and so on.
- The actor or actors, in accordance with what has been said, are not limited to a specific field of activity and what characterizes it is its competence to make decisions by virtue of the position it occupies in the normative system or the social role it plays.
- Positional duties are those that are acquired when accepted to assume within the normative system and must be distinguished from the so-called natural duties, that is, those that apply to all individuals.
- Corruption is a crime or an offence that involves the violation of an obligation by a decision-maker. If it is accepted that the obligations are duties acquired by the express or tacit acceptance of a specific position, corruption always implies an act of disloyalty towards the normative system.
- The corrupt act or activity requires, in addition to the decision-maker, the intervention of one or more people. It is a participatory act in which one of the parties tries to influence the behaviour of the other through promises, threats or benefits prohibited by the regulatory system.

About the typology of corrupt practices, we can refer to:¹⁶⁶

- **Bribery-** Offering a reward to a public agent to influence his decisions in favour of the grantor.
- **Extortion-** Threat of a harmful measure by the public agent to the citizen if he/she does not make a consideration in favour of the agent.
- **Arrangements-** Reciprocal agreement between the public agent and the citizen so that an official decision favours the private one in exchange for a reward for the agent.

¹⁶⁴ Juan José Gilli, *La corrupción: Análisis de un concepto complejo*, 61, available at https://www.eseade.edu.ar/wp-content/uploads/2016/08/gilli_riim61.pdf, last seen 07/09/2021.

¹⁶⁵ Francisco Javier Laporta San Miguel & Silvina Álvarez Medina, *La corrupción política*, 7(1st ed., 1997).

¹⁶⁶ *Ibid.*

- **Fraudulent alterations of the market-** The public agent introduces externalities in the market of goods that affect their value with the purpose of a benefit for himself or a third party.
- **Embezzlement and fraud-** Use of public funds or official positions for purposes other than those provided for in the regulations.
- **Bias-** Deliberate discrimination in the formulation and application of laws (ad hoc norms) or in the provision of services, or in the provision of positions (favouritism and patronage).
- **Private collusion-** When certain economic agents agree with each other to set the amount of supply contract or public concession. Use of privileged information, when who, due to their function, has access to it and uses it to make private decisions for their own benefit or that of third parties.

Finally, about the abuses of corruption, in a preliminary way, we can consider:

- **Culture of secret-** First of all, it is stated in a generic way that the leading cause is the culture of secrecy, installed in large part of the state society since it is present in the very nature of the human being.
- **Cultural elements-** Although, in general, certain practices, such as bribery, extortion and fraud, are rejected, in some cultures, there is greater permissiveness regarding corrupt behaviour, or there may even be a higher degree of tolerance for corrupt behaviour and, in some cases, the proximity to the authorities or a certain degree of influence to obtain benefits is seen positively.¹⁶⁷
- **Egotry and messianism-** It is extremely worrying that the eventual well-known lightness with which the legislative modifications or proposals for the fight against corruption turn out to be assumed in the light of the corresponding reform commissions.

This occurs when, in principle, the true specialists are not necessarily summoned to do so. Then, the proposals and modifications end up being the product of a conjuncture and not of a real legislative need. The aforementioned lands on the fact that before the creation of a reform commission, it incredibly happened that the respective modifications and proposals simply did not exist.

Special mention should be made of what Mario Castillo Freyre points out as "Academic Temptations". That is, among a few members of the reform commissions, they observe the principle ("I do not oppose your proposals for articles for the law, and you do not oppose

¹⁶⁷ Supra 160, at 60.

mine"). Then, they agree that the complete package should go without further debate and analysis, in view of the fact that in the Congress of the Republic, the legislator will make the corresponding observations and amendments. Which certainly does not always happen.

As a consequence, it is that it can appreciate approved laws in which its articles do not present the obligatory internal and external systematization and where there are some in which the text presents repeated, incomplete, contradictory content.

In addition, one cannot fail to apostrophize that few givers of a legal norm are more concerned about the permanence of validity of a harmful or wrong law because it contains a proposal of their person, since they cannot conceive that their name leaves to be present in the proposal of the same.

Then, they end up opposing by all possible means the eventual modification of the supposed enlightened law that they were authors, managers or promoters. It is the typical case of those who consider themselves predestined to transcend without greater or no merit or sufficient foundation.

3. CRISIS OF THE ELECTORAL SYSTEM

In principle, it is necessary to record that the fundamental rights of vulnerable groups, such as: to choose and be elected and to intervene in opinion and debate on national politics, have been systematically and historically violated.

Proof of this, we have that recently the Court of Honor of the Electoral Ethical Pact (PEE) of the General Elections 2021 (EG-2021) urged the media to promote the intervention of groups in vulnerable situations to guarantee political participation on equal terms in the electoral process. Thus, it invokes them to encourage and ensure the visibility of the applicants who represent these minorities in the debates, interviews and other sections that they allocate to the coverage of the electoral process. Such pronouncement occurs after verifying the absence of applicants who are part of the aforementioned population (indigenous people, Afro-descendants, people with disabilities, women, people living with HIV and the LGBTI community) in public spaces, such as radio, television and written press. Given this, the collegiate highlights the need to have elections that reflect the diversity existing in the country. This is the tenth exhortation directed by the ethical

instance, which is in charge of ensuring compliance with the PEE's commitments in the current elections.¹⁶⁸

Undoubtedly, this leads us to a deep analysis, reflection and commitment in order to confront, without ambiguity, the aforementioned problem that is systematically and traditionally incurred against members of vulnerable groups.

However, in this instalment, we propose that faced with a situation not only typical of an electoral period, the well-known and worrying vulnerable groups do not end up being exclusively such, but rather the totality of voting citizens.

The objectives will be to determine the transcendence and constitutional recognition of the proposed fundamental right (to choose without fear, anxiety, or hopelessness).

Next, expose the edges of the problem raised due to its non-recognition in said headquarters in the legal system. The methodologies to be used will be qualitative and quantitative.

Finally, the justification is established in the urgent as the unavoidable need to have the constitutional recognition of a fundamental right, which we have called: to choose without fear, anxiety, or hopelessness.

The hypothesis that we handle for this work is based on the fact that as long as the aforementioned fundamental right is not constitutionally recognized and the crisis of the electoral system is not overcome, it will continue to have not only a large number of candidates but also, They will not meet the required profile expected to fulfil the important entrusted management. This is due to the fact that their motivations for presenting themselves as candidates become absolutely different since they turn out to be somewhat political, partisan and/or personal, which ultimately inevitably results in regrettable and corrupt management.

3.1. The Elector As A Vulnerable Group In The Broad Sense

As we pointed out at the beginning, vulnerable groups are understood to be indigenous people, Afro-descendants, people with disabilities, women, people living with HIV and the LGBTI community (lesbian, gay, bisexual, transsexual and intersex).

¹⁶⁸ Jurado Nacional De Elecciones, *Tribunal de honor exhorta a prensa a promover intervención de candidatos de grupos vulnerables*, available at https://portal.jne.gob.pe/portal_documentos/files/cdc25b56-89af-4cd0-b32f-25d4d773d826.pdf, lastseenon 11/08/2021

However, we consider that the group of voters who are not part of the vulnerable groups should be added to them.

The basis for the inclusion of non-vulnerable voters in a consolidated group of vulnerable groups is that, given the impossibility of finding both subgroups, options that are indeed the most suitable to choose in government elections: local, regional, congressional, become vulnerable after ending up being elected any of the candidates who would be ineligible, given the existence of suitable candidates, with democratic profiles, identified with fundamental rights, libertarian ideas, that represent progress, development and consolidation of the democracy of the peoples.

Once an election is completed in such circumstances, the voter ends up becoming vulnerable to the mistakes and atrocities of the public administration of those who end up being elected. Contrary to what would be expected of them, that is, the conduct of the synonymous public management with the quintessence and mystique turned in favour of the population and in no way against it.

4. PUBLIC MANAGEMENT AND CORRUPTION

It is known that the corruption that exists in public management is not from recent years and is far from extinct. But what do we do against it? Are public officials and servants prepared to face acts of corruption? Where is public ethics? Where are the values? One of the main deviations, in short, is in public ethics, the same that although it is found in the letter, that is, in the rules and regulations, it is not rooted in the officials of public institutions or in those in charge of directing State entities who, many times, are not clear about the national and institutional objectives of their work centres. Faced with this reality, how can one think of improving the public management of the country?¹⁶⁹

In the portal of the Association called "UTERO", and in the newspaper La República dated July 17 of this year, the following was published: "... 1,395 candidates for councillors, councillors, Mayors and Regional Presidents, had served criminal sentences and civilians of the most diverse: 871 for alimony and 113 for embezzlement. Also, 7 candidates sentenced for murder: 13 for drug trafficking, 5 for terrorism, etc. Similarly, 2,131 applicants are on the National Registry of Convictions. According to the JNE, it announced that 345 have valid sentences, 11 convicted of terrorism, 18 convicted of not paying a pension, and in

¹⁶⁹Juan Carlos Leonarte, *Corrupción en la gestión pública*, available at <https://www.esan.edu.pe/conexion/actualidad/2015/09/28/corrupcion-en-la-gestion-publica/>, lastseenon 11/08/2021

addition, there are 18 candidates who are swallows. " It remains, therefore, for the citizens to know what is the option that represents transparency and honesty; in order to be able to elect our council representatives within the framework of political cleanliness. Preventing corruption and people with antecedents from occupying the municipal seats, because otherwise, we will be governed by authorities that will make public institutions "their farm" or "their petty cash".¹⁷⁰

In this regard, it should be noted that it is extremely painful to have to apostrophize that corruption management seems to become the commonplace of the candidates, mainly focused on systematically withdrawing economic resources from the State coffers. A similar situation is configured in the scenario of general elections, which call for candidates for the Presidency and Congress of the Republic.

5. TOWARDS A SUCCESSFUL PUBLIC MANAGEMENT

Next, in order to achieve correct public management, below we propose a decalogue, a strategy. We suggest that the points to be developed be strictly observed, preferably at the beginning of assuming work in a public institution, in order to ensure a very orthodox, comfortable and safe entry.

In this sense, the referred strategy consists of:

5.1. Know Your Profession, Your Job And Administration.

This triad implies that first, you must have the knowledge that justifies the profession that we hold; that is, it is necessary to have assured professional solvency.

Second, it is necessary to have previous experience in the tasks to be carried out. Thus, it is not conceivable to present to the state entity and occupy a position with respect to which there is no knowledge or experience. You cannot go to it to learn. You have to go to work and apply from the beginning what you already know.

Third, management must be known, given that it is present in every act of our daily life. A fortiori in the present case. And it is to administer ("Governing, exercising authority or command over a territory and over the people who inhabit it"¹⁷¹); it is doing something through another. Ergo, we will need the administration to

¹⁷⁰Percy J Paredes Villarreal, *Candidatos corruptos y elecciones municipales*, available at <http://cpap.pe/articulos/candidatos-corruptos-y-elecciones-municipales>, lastseenon 11/08/2021.

¹⁷¹ Real Academia Española, *Administrar*, available at <http://dle.rae.es/?id=0mFIScm>, lastseenon 10/02/2018.

permanently deal with our superiors, inferiors at an institutional and inter-institutional level.

5.2. Get to Know Our Hierarchical Superiors And Inferiors

It is imperative to locate and identify them to be able to work in a duly organic way. This will facilitate those communications, not only in writing, that is correct, agile and fluent. Avoiding impasses, eventual sanctions, delays and functional administrative responsibility.

For the various communications, there is: i) If it is from lower to higher, the modality will be via report, ii) If it is between equal ranks, it will be through provided, iii) And from higher to lower, memorandum.

5.3. Know The Scope Of Our Attributions And Functions.

For this, we need to review and take into account what is contained in the Organization and Functions Regulations (ROF), Organization and Functions Manual (MOF), and Internal Regulations (IR), basically.

Taking due and timely knowledge will help to have adequate management of our assigned work. Also, avoiding eventual designations of work that we do not have to carry out and even sanctions.

In the event that the institution does not have said management instruments (or that they are not updated), it must be proposed in writing within the distance the attributions and functions in our charge and that the other areas, offices and management do the same in order to be sent as a proposal to the general management, so that it, in turn, elevates it to the presidency of the board of directors, for its subsequent approval.

As long as the aforementioned management instruments are not in force, work must be carried out taking as a basic premise that the functions of each body of the institution carry out what corresponds to their nature. Thus, for example, this does not imply in any way that because it is an order of the hierarchical superior, the legal manager has to do the work of the human resources manager.

5.4. Identify Autonomy And Support

It is essential to determine whether, in the exercise of our work, we have the two key elements to be able to work, without which it will be impossible to do so. We refer to autonomy and support, referred to by David Fishman in his work: "360 ° Motivation."

And it is that we need to have full autonomy to act and decide in the exercise of our powers and functions, without counting on pressure for us to take positions in the opposite or different sense.

In turn, we need the support of our superiors in order not to be a reason for sanctions or counter-orders regarding our adopted decisions.

It should be noted that when these budgets are not met, it happens that our attributions and functions are unduly monopolized by them. What does nothing more than demonstrate the profound ignorance and disregard of the requirements, meaning and effects of public management? Before which, after exhausting the claims for what happened, the logical and responsible thing is to immediately step aside, resigning from the position in order to avoid being prey to administrative responsibilities or even crimes.

5.5. Attention To Emblematic Cases And Workload

Special care must be taken with emblematic or difficult cases in order to avoid the presence of the press and their bosses.

On the other hand, we maintain that the joint handling of emblematic cases and workload should be assumed, giving priority and zeal to the former without affecting the normal and diligent attention to the latter.

This, although it is true that it involves an additional effort, is feasible and manageable, on the understanding that emblematic cases are usually very few.

5.6. Identify The Work Policy And Guidelines Of Said Institution

It is very important to know what the management or know-how of the institution is like, either intra- or inter-institutional—and also become aware of the approved institutional guidelines for action.

By the way, this will also avoid being eventually surprised when our work or work proposals are classified as not being in accordance with the supposed guidelines because it is possible that objectively, the so-called incredibly do not exist.

This is even aggravated when the boss of bosses acts by brandishing said cliché of the supposed guidelines (assuming them as valid without being so), but, nevertheless, in the face of a change in said personnel, it happens that they change suddenly and inexplicably. Thus, it is clear that these "guidelines" only existed in his imagination and what is worse, not only did they not exist, but they were not institutional but personal.

5.7. Identify The Goals That Are Set In The Exercise

The institution's annual, semi-annual or monthly goals must be known in order to carry out our management in function or direction of them.

This will avoid the eventual as an unnecessary investment of efforts that do not contribute to the fulfilment of the proposed goals.

5.8. Principle Of Objectivity

It should not be lost sight of the fact that just as in the law: "Everything that exists in the file exists in the world of law, and everything that does not exist in the file does not exist in the world of law. "; It also applies in administration.

Thus, we always have to communicate them in writing, with the party table reception charge. And in case it no longer attends because it is outside working hours, then it must be recorded via institutional email and/or other information technology means. This is in order to be demonstrable while avoiding possible management delays and penalties. It is understood that with a charge to regularize in writing in the first hour of the next business day.

5.9. Know the Code of Ethics of Public Management

Special care must be taken with the knowledge and meticulous handling of said legal body. Since, otherwise, functional administrative responsibility and crimes of public officials may be incurred.

5.10. Generate Public Value

Public management needs to embrace a public value generation approach. Public value¹⁷², in short, it assumes that: "(...) people have the ability and freedom to express their preferences regarding the activities and results of the Public Administration. It also assumes that Public Administrations have the will and the capacity to accommodate their objectives to the preferences of the citizens; and more than that, it assumes that by delivering the required public value, the people will be willing to pay for it with money, with the vote, or offering their time to collaborate with the government."

Thus, public value constitutes an obligation for those in charge of public management because they work with public funds, which belong to the population and therefore must be oriented towards it in general and specifically to the most depressed and social sectors, not for other purposes, even less so when the referred to "other purposes" postpone and distort the purpose that the public function embraces (whether it is derived through popular election or not).

6. THE FUNDAMENTAL RIGHT TO CHOOSE WITHOUT FEAR, ANXIETY, DESPERANCY

In this section, we go on to develop the present right that we have called; Fundamental right, to choose without fear, anxiety, or hopelessness. The same assists all vulnerable groups, which includes a broader group than those that, by definition, are considered vulnerable groups.

We argue that we must understand, as such, that the other vulnerable group is made up of those citizens who are not part of the conventional vulnerable groups.

The fundamental right to choose without fear, anxiety, hopelessness gains sustenance and validity from a situation that is generated silently, almost covertly, undeniable as worrying.

And it is that fear, anxiety, hopelessness come to life and systematically stalks the voter of the vulnerable group in a broad, broad sense (we reiterate, not only of the usually vulnerable groups), mainly when deciding their vote. This inasmuch as a multiplicity of

¹⁷²Guido Bertucci, *Gobierno digital y valor público*, 12, available at http://www.politicadigital.com.mx/pics/edito/multimedia/418/filearton102_multimedia.pdf, last seen on 10/02/2018.

options or candidates is configured that does not guarantee or precisely grant the voter tranquillity, hope, peace

The aforementioned is configured in the identification or antidemocratic political line represented by the incredibly accepted candidates and options to achieve an electoral victory.

This new fundamental right governs permanently, not only in electoral periods, to the extent that the actions of political parties are not limited to electoral spaces and times. So, too, politicians do not stop acting politically in non-electoral settings.

6.1. Containing Law

The present fundamental right to choose without fear, anxiety, hopelessness embraces the nature of continent rights, thus we have to include the additional fundamental rights:

- To peace and quiet
- To the correct public management
- To transparency, access to public information and accountability.
- To the free development of the peoples
- To the best right of the voter
- To the legitimacy of the right to choose.

6.2. Interdisciplinary Explanation Of The Violation Of The Fundamental Right To Choose Without Fear, Anxiety, Hopelessness

6.2.1. Crisis Of Values

A wrong conception of success. The conception of the state coffers as a booty.

6.2.2. Legal Ignorance

In addition, the almost null identification with fundamental rights and constitutional law.

6.2.3. Ignorance of Public Management

As well as the principles that inspire it, in addition, to the administration. Thus, the public value is not observed, the same one that constitutes an obligation for those in charge of public management, because they work with public funds, which belong to the population and therefore must be oriented towards it in general and specifically. To the most depressed

sectors and not to other purposes, even less so when the referred to "other purposes" postpone and denature the purpose that the public function embraces (whether it is derived through popular election or not). Thus, the public value seeks, in a committed way, a system that promotes effective, efficient, equitable and sustainable development. From this perspective, the creation of public value is sought through state management, which has to contribute significantly to four fundamental purposes or principles: i) Reduction of inequality, ii) Reduction of poverty, iii) Strengthening of states. democratic, iv) Strengthening of citizenship.

Thus, the public value¹⁷³, in short, it assumes that: "(...) people have the ability and freedom to express their preferences regarding the activities and results of the Public Administration. It also assumes that Public Administrations have the will and the capacity to accommodate their objectives to the preferences of the citizens; and more than that, it assumes that by delivering the required public value, the people will be willing to pay for it with money, with the vote, or offering their time to collaborate with the government."

Likewise, it is necessary to record the indissoluble relationship between public management and fundamental rights.

In that order of ideas, the Fund should be seen. 9., of File No. 2939-2004-AA / TC, of the Peruvian Constitutional Court, which legalizes: "(...) the interpretative principle of the vertical effectiveness of fundamental rights, which requires that the public powers in the exercise of their competences give fundamental rights the character of true action mandates and special protection duties, also recognizing their ability to radiate in relationships between individuals, acting as true limits to private autonomy".

For its part, the Principle of Good Administration of public management must also be borne in mind.

Then, "It is about the principle of good administration, whose green shoots are beginning to be seen in the jurisprudence and will allow redefining the model of relationships between the use of discretion by the administration and the justice that controls it. Professor Julio Ponce Solé, who has already proven to be advanced in showing the way of negotiating the rules in previous works, now in his excellent work entitled "Discretion cannot be arbitrariness and must be good administration", postulates the advent of "a new paradigm of 21st century Law. The paradigm of good governance and good administration. " And it

¹⁷³ Ibid.

distinguishes the idea of "good governance" or the way in which the executive carries out its regulatory and political functions, from the idea of "good administration", which refers to the administrative management mode, which is breached by negligent management or corruption".¹⁷⁴

The curious thing is that with two beneficial principles, public management in sports law estates would be irreproachable. The principle of good administration, in the objective aspect of prudence, quality, objectivity and justification of the decisions. And the principle of good faith, on the subjective side of intentions.¹⁷⁵

6.2.4. Philosophy

This point turns out to be of particular importance and significance since, in principle, it has been possible to observe that State policies have been legislated or assumed, with a view or approach only from public or private entities; leaving the administered and defendants in oblivion, but above all the effective safeguarding of the fundamental right to choose without fear, anxiety, hopelessness and the fight against corruption mainly.

So, to begin with, we can reflect on the reason for the insufficient, partial, and incomplete decisions, which are manifested by not legislating correctly, for example, the subject matter of this work.

Next, we strike on purpose; we take care of answering the basic questions that deliberately fall when mature: i) Is it solely the responsibility of the legislator?; ζiii) Why so alien and erratic can the company in question be?) Why do the defendants and those administered have to suffer so much so that they can embrace a more equitable treatment in recognition of their fundamental rights? in Europe and here, yes, for example?

In that order of thought, we can try a resolution to them, attributing to nothing less than nature reasons as a kind of our Latin DNA.

Thus, the answer seems to point to profound reasons, to our construction, to something that we simply cannot avoid since it turns out to be part of our own nature.

¹⁷⁴ José Ramón Chaves, *Principio de buena administración: nuevo paradigma de control de la discrecionalidad*, available at <https://delajusticia.com/2016/06/07/principio-de-buena-administracion-nuevo-paradigma-de-control-de-la-discrecionalidad/>, lastseenon 11/08/2021.

¹⁷⁵ Ibid.

Thus, analyzing in-depth (or perhaps, really in-depth), we have to point out that this inability to reflect that characterizes us as Westerners are not the product of chance but of causality. Thus, we have to take into account that as Peruvians (for example), we present immense fractures since we did not have the ages of the "Renaissance" or "Enlightenment" (we jumped with a pole from the Ancient to the Modern Age). In this sense, we lack the ability to rethink, reflect, relearn to think about ourselves and their environment –or simply to be reborn-, as well as the loss of faith in all kinds of dogmas; that the Renaissance gave to Europe in the 11th and 15th centuries.

This is the explanation of our significant defect. To these fractures, we have to add (in the words of the outstanding jus philosophical and great teacher Juan Carlos Valdivia Cano, in his revealing and critical essay "the disease of love"), the fact that we are mestizos made or resulting from a kind of tutti frutti of an autochthonous culture (Inca), Christian morality, Roman power institutions (Parliament, Judiciary), and Greek mental structure; and Greek is or means (among other things) Platonic. What gives us the tendency to define things by their objective or ideal and not by what they effectively or in a total or complete integral way are (for example: when our western culture defines the word love, it makes it idealistically uniquely and unanimously as something, noble, sublime and wonderful - platonic love- and not because of what it really is in its totality, thus forgetting jealousy, betrayal, boredom, lies, power, disagreement, slap, scandal, hatred, death.

Our culture, Valdivia Cano continues, does not understand that love is ultimately a chronological problem; it is only a matter of time. Love is a chronic disease (it is not that the lovers are sick, but that Eros himself is), and thus, sooner or later (the ever-diligent jealousy will decipher the disappointing love signs), the lover will taste the vinegary taste of lucidity (such lucidity is paved with disappointments). Someone will say, is there not or is there not pure love (or only that of the beautiful part)? Fernando Savater responds in the affirmative, by the way, but refers to only the love of King Kong (the highest, greatest, who waits for everything and gives everything - in exchange for nothing - unique and "true" love that only appeared on the big screen), Thus, not to be Platonic is to go beyond Plato, then, it is to accept that the Danube is not blue, it is dirty, brown, water with mud and oil (to say the least). For this reason, Valdivia Cano also considers that in matters of love, better situated than Plato is Zarathustra ("love: in the media war, and deep-down eternal hatred between the sexes").

Then in light of the shortcomings.¹⁷⁶

Finally, we note that we only raised one term as an example, apparently simple (love), with which it was possible to see the disastrous "problem" that it unleashed (platonic love); Thus, let's imagine what happens when one investigates, discusses, analyzes and "reflects" —we reiterate that reflecting comes from being reborn/rethinking / learning from mistakes; that is to say, of the learning granted by the time of the European Renaissance, the same one that we did not have — about legal issues such as, for example, the present instalment in which we briefly address the stages of the evolution of Peruvian law.

7. CONCLUSIONS

Corruption is the traditional great scourge of humanity. It systematically and uncontrollably whips the administrations of the world. The worrying thing is that it is not just commonplace in most different societies. However, what is truly serious is its ability to penetrate all the structures of public management, reinvent itself, catch up with current affairs and new technologies, and even manage to enhance its harmful effect.

In this issue, we have analyzed and developed the various aspects of this problem, also pointing to an explanation beyond Law, that is, of an interdisciplinary nature.

8. SUGGESTIONS

The nature of corruption must be understood and assumed in all its extremes. Training and awareness of the scope and destructive capacity are essential. The implementation of public policies is urgently needed in order to combat corruption from an interdisciplinary perspective. It merits the urgent observance and safeguarding of fundamental rights (violated as a result of corruption), as well as the recognition of new fundamental rights.

¹⁷⁶ Carencias (de edades) y fracturas (culturales) que también pueden ser investigadas y analizadas por los ciudadanos de cada Estado o país occidental, respecto de su caso concreto; a efectos de poder realmente entender su propia naturaleza y acceder a al estado de lucidez que refiere Juan Carlos Valdivia Cano; para luego, realizar lo propio al respecto. (Deficiencias (of ages) and fractures (cultural) that can also be investigated and analyzed by the citizens of each Western State or country, with respect to their specific case; in order to be able to really understand their own nature and access the state of lucidity referred to by Juan Carlos Valdivia Cano; and then, do the same in this regard.)

ELECTORAL MALFEASANCE, CORRUPTION AND UNFAIR PRACTICES: A CONCERN FOR INDIA'S ELECTION INTEGRITY

Shivani Kapoor* & Shelly Mahajan**

Abstract

This research paper is a product of wide-ranging data studied by ADR over the last many years and the underlying observations recorded as a result of the data analysis and interpretation process. The paper examines some alarming trends in political funding, election expenditure, electoral playing field, financial disclosures of parties, wealth accumulation by re-elected legislators etc., while raising concerns around the implicit deterioration of the electoral system. Against this backdrop, it tries to explore the relationship between electoral politics and political corruption. The paper hypothesized that some of the existing electoral laws/guidelines and the recent reforms have been unsuccessful in safeguarding the purity and integrity of elections in the absence of guaranteed compliance, necessary course correction and political will. Based on the data, the authors concluded that there are growing instances of disregard for transparency guidelines/laws by political parties, opacity in political funding, election expenditure underreporting, electoral malfeasance and lack of accountability for unfair practices. In the end, the paper enumerates some limitations to ensuring election integrity in the absence of long-pending electoral reforms and offers remedies for the same.

Keywords: Corruption, Democracy, Election Integrity, Political Parties, Political Finance, Transparency

1. INTRODUCTION

The spread of democracy in the world has been one of the most momentous and dramatic events in political history. Historically, lives have been risked achieving democratic integrity in the form of free and fair elections, transparency and accountability, the rule of law and respect for an electoral mandate. The purity and integrity of the election process act as a powerful catalyst for better governance and credible institutions. While in the absence of democratic integrity and regard for electoral laws, the risk of corruption

*Program Officer (Legal), ADR

**Senior Program Associate, ADR

increases and malpractices go unchecked, gradually decaying the entire political system from within. The elections in India have always been huge fanfare events and have drawn attention for their festival-like feel. Given the size of India's voting population, elections are mostly seen as an arduous task, the conduct of which is celebrated, and their credibility is rarely questioned.

However, over the last many years, elections have become more and more about financial prowess, bitterly fought vicious campaigns, unfair practices, winnability and undue influence. The obsession with the outcome of the exercise has surpassed the sanctity of the process, given the intense competition and the pressure to win. The exorbitant costs of elections in India, coupled with unlimited access to political funding, have made money a significant determinant of the electoral outcome. Political Scientist Milan Vaishnav forecasted that close to \$10 billion could have been spent in the 2019 Lok Sabha polls.¹⁷⁷ While this is not hard to believe, none of the income and expenditure statements of political parties suggests that they have this kind of money in their coffers. The Law Commission observed in its 255th Report¹⁷⁸, "*Candidates and political parties have devised ingenious ways to disguise the illegitimate sources and expenditure of money...*" With the launch of electoral bonds, we now do not even know the nature of links major parties have with corporate houses and the exact source of this money. Bonds worth Rs 7380.638 Cr have been purchased between March 2018 and July 2021.¹⁷⁹ Kofi Annan, the former UN Secretary-General, argued how uncontrolled political finance threatens to hollow out democracy and rob it of its unique strengths¹⁸⁰.

In every election, the Election Commission seizes several crores worth of prohibited items that are distributed to voters as bribes. The total seized amount increased from Rs 299.943 Cr in 2014.¹⁸¹ Parliamentary elections to Rs 3475.76 Cr¹⁸² in 2019 – an upsurge of more

¹⁷⁷ S. Sanjiv, *India's huge Election Spending is a reason for political corruption*, Times of India (12/03/2019), available at <https://timesofindia.indiatimes.com/blogs/cash-flow/indias-huge-election-spending-is-a-reason-for-political-corruption/>, last seen on 11/07/2021.

¹⁷⁸ 255th Law Commission of India Report, *Electoral Reforms*, 9 (2015), available at <https://lawcommissionofindia.nic.in/reports/Report255.pdf>, last seen on 12/07/2021.

¹⁷⁹ *Electoral Bonds and Opacity in Political Funding*, ADR primer on Electoral Bonds, available at https://adrindia.org/sites/default/files/Note_Electoral%20Bonds_Mar-July%202021.pdf, last seen on 09/08/21.

¹⁸⁰ *Deepening Democracy: A Strategy for Improving Integrity of Elections Worldwide*, A Global Commission on Elections, Democracy & Security Report, 3 (2012), available at <https://www.idea.int/sites/default/files/publications/deepening-democracy.pdf>, last seen on 12/07/2021.

¹⁸¹ M. Rawat, *Seizure worth Rs 34,56,22,00,000 during 2019 LS polls: How drugs, cash, gold & booze kept netas busy*, India Today (22/05/2019), available at <https://www.indiatoday.in/elections/lok-sabha-2019/story/campaign-cash-drugs-alcohol-gold-seizures-election-commission-updates-1501954-2019-04-16>, last seen on 10/10/2019.

than 1000%. Professor at UC Berkeley and an expert on Indian elections and corruption, Dr Jennifer Bussell's survey point out that more than 90% of Indian federal-level officials feel compelled to pay bribes to voters, which include cash, drugs, liquor, freebies etc. because if they don't, their opponents will.¹⁸³

With the growing influence of digital technology and social media, parties have been spending several crores on digital advertising and campaigning through social media pages in the form of 'viralposts', 'Twitter trends', 'WhatsApp forwards' etc., which may or may not be easily traced back to the party or the candidates. Social media campaigning has managed to evade scrutiny for the purpose of the Model Code of Conduct (MCC) violations as well as for accounting of these expenses under the officially declared figures by party/candidate, as most of it is allegedly indirect campaigning or surrogate advertising.

Evidently, the electoral system in the world's largest democracy is marred with malpractices in more ways than one, which is often overlooked amidst the hype surrounding the elections and the personality politics that drive them. With the growing phenomena of opacity in campaign finance, vote-buying, election expenditure underreporting, disproportionate increase in assets of re-elected representatives, non-compliance with transparency guidelines/electoral rules, absence of deterrent action by authorities etc., the current electoral system will yield little tangible benefits for citizens. Institutions will be deprived of ethos and the spirit of democracy.

Against this backdrop, the authors have used the secondary data from the Election Commission of India (ECI) and the Association for Democratic Reforms (ADR) to study the various ways in which the electoral system is being undermined and the measures that could be adopted to reverse this trend. The data reveals a downward trend in political finance oversight, the growing influence of big money in elections and that the current rules governing asset declaration by Members of Parliament may not suffice. The inferences are drawn from the analysis point toward a sad state of affairs which requires urgent re-modelling of the current system.

¹⁸²*Seizure Report as on 24.05.2019*, Election Commission of India, 2 (2019), available at <https://eci.gov.in/files/file/10273-seizure-report-as-on-24052019/>, last seen on 25/12/2019.

¹⁸³N.Donovan, *India is holding one of the world's largest and most corrupt elections*, NewStatesman (10/05/2019), available at <https://www.newstatesman.com/world/asia/2019/05/india-holding-one-world-s-largest-and-most-corrupt-elections>, last seen on 14/07/2021.

2. EXPLORING THE RELATIONSHIP BETWEEN CORRUPTION & ELECTORAL POLITICS

Money has undoubtedly become a game-changer in Indian elections. Where money can only be one of the factors necessitated to contest elections, however, it certainly cannot be allowed to sabotage and ridicule the sanctity of elections completely. *Money power casts a sinister shadow on our elections, and the political payoff of undue expenditure in the various constituencies is too alluring for parties to resist temptation*¹⁸⁴. Corruption in the context of the Indian electoral and political system has attained a very complex and intricate form, such as deep-rooted nexus between muscle and money. In the outrageous quest for power, politicians and political parties have completely side-lined the other indispensable requirements expected from a public servant, such as public service, larger public interest, honesty, integrity, credibility and sincerity. In 2013¹⁸⁵, the Supreme Court was constrained to say,

“It can be stated without any fear of contradiction that corruption is not to be judged by degree, for corruption mothers’ disorder, destroys the societal will to progress, accelerates undeserved ambitions, kills the conscience, jettisons the glory of the institutions, paralyses the economic health of a country, corrodes the sense of civility and mars the marrows of governance. It is worth noting that immoral acquisition of wealth destroys the energy of the people believing in honesty, and history records with agony how they have suffered.”

Political establishments have pioneered themselves in furthering their goal of amassing money which, when combined with muscle, makes matters worse. While this rampant display of black money is seen during the election period, the remaining period is primarily focused on recompensing this money through various legitimately or illegitimately devised channels. The Supreme Court of India had in 1996¹⁸⁶ stated,

“When the elections are fought with unaccounted money, the persons elected in the process can think of nothing except getting rich by amassing black money. They retain power with the help of black money and while in office collect more and more to spend the same in the next election to retain the seat of power.”

¹⁸⁴Vatal Nagaraj v. R. Dayanand Sagar, Krishna Iyer J, MANU/SC/0280/1974.

¹⁸⁵Niranjan Hemchandra Sashittal v. State of Maharashtra, (2013) 4 SCC 642

¹⁸⁶Common Cause (A registered society) v. Union of India, AIR 1996 SC 3081.

Meanwhile, the ghost of corruption continues to haunt estranged Indian voters in almost every walk of life. The Santhanam Committee on Prevention of Corruption¹⁸⁷ has stated that,

“The public belief in the prevalence of corruption at high political levels has been strengthened by the manner in which funds are collected by political parties, especially at the time of elections. Such suspicions attach not only to the ruling party but to all parties, as often the opposition can also support private vested interests as well as members of the Government party.”

One of the core reasons behind burgeoning corruption is the complete lack of political will to introduce any form of transparency and accountability within their work. This has given a clean chit to corruption to percolate further in the electoral and political process. Because of the lack of penal consequences for political parties and inadequate reporting and disclosure laws, corruption has taken many shapes in the form of heightened election expenditure, unknown sources of income within parties and candidates, unaccountable political party funding, foreign funding, disproportionate increase in assets of the lawmakers, unaccounted accumulated wealth, doling out freebies, bribery and corrupt practices. It is not only shocking but rather sad that reforms suggested by many committees/commissions over the past twenty years and more have been purposely ignored by governments over the years. In addition, the present government has not hesitated from devising and legitimizing illegal ways of hoarding wealth. This has led to the creation of corrupt and conniving political establishments, complacent institutions, absent laws and regulations, unfair and arbitrary practices. Against this backdrop, it becomes significant to understand various means devised to gather illegitimate wealth by our main stakeholders and recognize the limitations of our current laws that have considerably failed in curbing the threats imposed by these evil practices. According to the National Commission to Review the Working of the Constitution Report¹⁸⁸

“The paradox of India is that in spite of a vigilant press and public opinion, the level of corruption is exceptionally high. This may be attributed to the utter insensitivity, lack of shame and the absence of any sense of public morality among the bribe-

¹⁸⁷Ministry Of Home Affairs , Government Of India , *Report Of The Committee on Prevention of Corruption 1962*, available at https://cvc.gov.in/sites/default/files/scr_rpt_cvc.pdf, last seen on 03/08/2021.

¹⁸⁸Ministry of Law, Justice and Company Affairs, Department of Legal Affairs, Government of India, *The National Commission To Review The Working Of The Constitution Report 2002*, available at <https://legalaffairs.gov.in/nrwc-report>, last seen on 03/08/2021.

takers. Indeed, they wear their badge of corruption and shamelessness with equal élan and brazenness.”

3. LEGAL LACUNAE

The existing law does not measure up to the existing realities¹⁸⁹. The current legal provisions do not hold the political parties accountable for the money collected from various sources and the expenditure made on and during the election. Good governance also banks on good stringent laws that act as a deterrent. So far, the election laws in place do not make the accounting and auditing method of political parties' funds transparent as well as there are hardly any stringent rules or a system of checks and balances with respect to the dubious sources of income of politicians. Part IV of the Representation of People Act, 1951, along with specific provisions of the Income Tax Act, 1961, seeks to ensure accountability in the party funds only to a certain extent.

In addition, in the event of contravention of any law, rules, or guidelines, political parties and their office bearers are hardly held accountable. Even specific laws that command culpability like Section 13A of the Income Tax Act, 1961 and Section 29 (C) of the Representation of People Act, 1951 which lay down a proviso stating cancellation of tax exemption to political parties if they fail to submit their financial statements has not been stringently enforced by the Election Commission. These provisos were added with a specific purpose significant to the fact that political party finances have a propensity of getting murkier, especially in view of now law directly dealing with political parties' culpability. The Central Information Commission (CIC) stated in 2008¹⁹⁰,

“It is difficult to be persuaded by the argument that though political parties control the political executive — who are their appointees — these parties should be allowed to be insulated from the demands of transparency.”

Where the present laws have failed to cure problems of money within parties and during elections, on the other hand, recent amendments brought by the government through the passage of the Money Bill are the final nail in the coffin. Many disclosures and reporting laws before the Finance Act, 2017 and Finance Act, 2018 already required serious and urgent deliberation in view of stricter regulations and penalties, action and implementation.

¹⁸⁹170th Law Commission of India Report, *Reform of the Electoral Laws*, (1999), available at <https://lawcommissionofindia.nic.in/lc170.html> , last seen on 03/08/2021.

¹⁹⁰*Ms. Anumeha v. Chief Commissioner of Income Tax-XI, New Delhi & Ors*, CIC/AT/A/2007/01029 & 01263-01270, (Central Information Commission, 29/04/2008).

However, with these arbitrary and unlawful amendments, the confidence of millions who aspired for a clean, transparent, credible democracy has been shattered. Electoral bonds have patently endorsed and encouraged black money by permitting political parties to become a breeding ground for illegitimate money. As of 30th September 2020¹⁹¹, the total number of political parties in India has increased to 2,628. Most of these parties will never contest elections and are rather involved in money laundering activities or may simply be using their status to turn black money into white. Finance Act 2017 and 2018 have resulted in the most objectionable, unethical, illicit and debauched form of funding any democracy could possibly witness.

Between FY 2012-13 and 2018-19, donations from corporates to National parties increased by 974%.¹⁹² Corporate funding in India was prohibited entirely till 1985. Section 293A¹⁹³ of the Companies Act, 1965, as inserted in 1969, imposed a ban on companies making contributions to any political party. Unfortunately, this ban was lifted in 1985 by amending the Act. Till 2013 there existed a cap on the donations permitted up to 5.5% of net profits of the last 3 years for the companies. The Company Act 2013 brought this limit to 7.5%, which was ultimately given a free hand through the Finance Act 2017. Under the present provision, a company is permitted to contribute any amount to a political party for a political purpose without any accountability. On 17.09.2015¹⁹⁴, the Supreme Court of Brazil ruled that all corporate donations were unconstitutional because *“it is for citizens to elect their government, not the companies.”* It was held:

“The influence of economic power has ended up transforming the electoral process into a rigged political game, a despicable pantomime which makes the voter a puppet, simultaneously undermining citizenship, democracy and popular sovereignty.”

Expenses incurred by political parties and candidates are another matter of concern. Chapter VIII of the Representation of People Act 1951 only, to a certain extent, seeks to ensure the accountability of the candidates; unfortunately, the proviso of the said provision excludes accountability of any expense incurred by the political parties during the period of

¹⁹¹ See Election Commission's Notification No. 56/2019 (IV)/PPS-III, dated 30-11-2020.

¹⁹² *Analysis of donations from Corporates & Business Houses to National Political Parties for FY 2018-19*, ADR Report on Donation Analysis, available at <https://adrindia.org/content/analysis-donations-corporates-business-houses-national-political-parties-fy-2018-19-known>, last seen on 09/07/2021.

¹⁹³ S. 321, Code of Criminal Procedure, 1973.

¹⁹⁴ Anthony Boodle, *Brazil's top court bans corporate money in election campaigns*, Reuters (18/09/2015), available at <https://www.reuters.com/article/us-brazil-politics-financing-idUSKCN0RH33A20150917>, last seen on 03/08/2021.

election. The ceiling on election expenditure is only fixed with respect to the expenditure incurred by a candidate, whereas the political parties have been given a free hand to spend any amount of money. In 1999, the 170th Law Commission report had termed this form of escape route by keeping the political parties outside the purview of any legal sanction as a ‘mere eye-wash’. The Law Commission, in its 170th report¹⁹⁵ in 1999 had observed,

“The spirit of the provision suffers violation through the escape route. The prescription of a ceiling on expenditure by a candidate is a mere eye-wash and no practical check on election expenses for which it was enacted to attain a meaningful democracy. This provision has ceased to be even a fig leaf to hide the reality.”

Indian elections have also witnessed an overt misuse of money in the form of election manifestos, where it has become difficult to distinguish between genuine promises made in the manifestos and freebies. In 2013¹⁹⁶ the Supreme Court held,

“Although the law is obvious that the promises in the election manifesto cannot be construed as ‘corrupt practice’ under section 123 of The Representation of the People Act, the reality cannot be ruled out that distribution of freebies of any kind, undoubtedly, influences all people. It shakes the root of free and fair elections to a large degree.”

The ECI had issued guidelines¹⁹⁷ in connection with the release of election manifestos for any election to the Parliament or State Legislatures for compliance by all the political parties. These guidelines were implemented as part of the Model Code of Conduct (MCC) in 2014 for all future elections that prohibited parties from making promises in their manifestos that would exert an undue influence on voters. However, the very fact that the powers of the Election Commission are not binding in nature and the MCC is not enforceable by law has led to such guidelines being followed only in abeyance. The MCC issued by the Election Commission is observed to be more in breach than in compliance. Due to its non-binding nature, it depends on the whims and fancies of the political parties to follow it or not. Vagueness in provisions relating to freebies and search and seizure during the election period has also disarrayed Indian elections. Bribery in India is still not a ground for disqualification. The non-binding nature of powers and functions of ECI has also not

¹⁹⁵Supra 185

¹⁹⁶Subramaniam Balaji v. State of Tamil Nadu and Ors. (2013) 9 SCC 659.

¹⁹⁷ See Election Commission’s Letter No. 436/6/manifesto/2013, dated 19th February 2014.

acted as deterrence. The time-to-time guidelines issued by the Commission are ineffective until and unless some strict penalties are imposed. Mere formal reprimands leave rather more scope for parties and candidates to adapt to the corrupt ways to collect, accumulate and distribute more money.

The *National Commission to Review the Working of the Constitution*¹⁹⁸, in its report *submitted in March 2002*, had also recommended that

“Political Parties as well as individual candidates be made subject to a proper statutory audit of the amounts they spend. Both the candidates and political parties have devised ingenious ways to disguise their illegitimate sources of money. The present system also seems to tolerate, or at least does not prevent, this multiplication of unregulated or under-regulated money and lobbying where a sort of quid pro quo transpires between political parties and candidates.”

In 1922, Mr. C. Rajagopalachari had anticipated the present state of affairs twenty-five years before independence when he wrote in his prison diary: *“Elections and their corruption, injustice and tyranny of wealth, and inefficiency of administration, will make a hell of life as soon as freedom is given to us...”*¹⁹⁹

Candidates, on various occasions, violate the sanctity of Form 26 by filing wrong or suppressing material information about their financial background. There have been instances where the sources of income of the candidate do not match their profession. What is noteworthy is the comparison between an increase in assets with the profession mentioned by lawmakers in Form 26 prescribed under Rule 4A of the Conduct of Election Rules, 1961. Most of the MPs/MLAs declare social service and politics as their main profession, which certainly cannot be their main source of income given the gigantic amount increase in their assets with each election. There is a serious lacuna in Section 125A²⁰⁰ of the Representation of People Act 1951, as the provision doesn't lead to termination of membership in the event of incomplete or wrong information about assets. The *20th Law Commission of India, in its 244th Report on Electoral Disqualification*,²⁰¹ had recommended inserting disqualification in Section 125A along with the need for the

¹⁹⁸Supra 184, at 6.

¹⁹⁹ Per C Rajagopalachari in Kishor Gandhi, *India's Date with Destiny: Ranbir Singh Chowdhary Felicitation Volume*, 133 (1st ed., 2006).

²⁰⁰S. 125A, The Representation of People Act, 1951.

²⁰¹244th Law Commission of India Report, *Electoral Disqualifications*, (2014), available at <https://lawcommissionofindia.nic.in/reports/Report244.pdf>, last seen on 03/08/2021

scrutiny of the affidavits filed by the candidates during elections in order to make our electoral system more representative, fair, accountable and transparent. The J.S. Verma Committee on Amendments to Criminal Law had also stated in its report dated 23rd January 2013

“a free and fair election does not commence only with the filing of nomination papers and declaration of the list of candidates for each constituency. Rather, it also requires intermediate scrutiny by the Election Commission of statements which have been made by candidates on oath.”

Another easy access for politicians resorting to corruption is because of the fragility of our judicial system in terms of pendency of cases, power play and quid pro quo at times; the Supreme Court’s orders dated 10th March 2014 and 1st November 2017, which had mandated the trial against MPs and MLAs be fast-tracked and brought to a conclusion has hardly seen the light of the day. It is also the blatant misuse of unbridled and arbitrary power given under Section 321²⁰² of the Code of Criminal Procedure, 1973, i.e., *withdrawal from prosecution by ‘party in power*, which has led to a state where the governments of the day have brazenly ordered the withdrawal of cases pending against powerful politicians, ministers and other rich and powerful people²⁰³. This Politician-Mafia-Police-Bureaucrat nexus, as highlighted in the Vohra Committee Report,²⁰⁴ is deeply ingrained in our society, and it is appalling that our laws have not really succeeded in breaking this complicated nexus.

4. METHODOLOGY

This study is a mixed-method – a combination of both qualitative and quantitative research. The rationale behind this paper is to examine in detail through official figures the instances of misappropriation, non-compliance and lack of course correction in electoral politics that have an impact on the integrity of Indian democracy.

Firstly, the authors identified the wide range of malpractices that plague the electoral processes and democratic politics in India and shortlisted some critical issues from these, for

²⁰² Supra 189.

²⁰³Aditya Ranjan, *Politics in prosecution: Withdrawing of cases for votes undermines the criminal justice system*, Firstpost (19/03/2021), available at <https://www.firstpost.com/india/politics-in-prosecution-withdrawing-of-cases-for-votes-undermines-the-criminal-justice-system-9438241.html>, last seen on 03/08/2021.

²⁰⁴ Ministry Of Home Affairs, *Vohra Committee Report 1993*, available at https://adrindia.org/sites/default/files/VOHRA%20COMMITTEE%20REPORT_0.pdf, last seen on 03/08/2021.

which the data was available to be collated and subsequently analysed. Six different datasets were created and studied to arrive at findings that form part of this study. These datasets include (1) Income declared by the recognised political parties between FY 2015-16 and FY 2019-20 from 'unknown' sources, including electoral bonds (2) The incomplete disclosure of information (undeclared, incomplete & incorrect PAN) by the recognised political parties in their contribution statements to the Election Commission of India (ECI) (3) Disproportionate increase in the assets of the re-elected representatives (Members of Parliament) covering 15th to 17th Lok Sabha (4) Total seizures of prohibited items conducted by the ECI during the Parliamentary elections 2019 campaign trails in comparison with the official election expenditure statements of the parties and candidates (5) Encashment of electoral bonds by ineligible registered unrecognised political parties and (6) Contributions made to electoral trusts and their disbursement to political parties between FY 2013-14 and 2019-20.

Secondly, the authors selected five indicators of electoral malfeasance, corruption and unfair practices based on the analysis of the aforesaid data:

- a) Opacity in political funding
- b) Disproportionate wealth accumulation
- c) Vote-buying and voter manipulation
- d) Under-reporting of election expenditure
- e) Non-compliance with rules/laws/guidelines

Lastly, the authors scrutinized the inferences drawn from data interpretation against the prevailing literature as well as the established legal framework to identify areas of concern and arrive at appropriate remedial measures.

The data sources include the reports of political parties, candidates and electoral trusts available on the websites of ECI and state Chief Electoral Officers (CEOs). Political parties are regularly required to file audited statements of their income and expenditure as well as contribution reports, including details of donations (above Rs 20,000) received in a given financial year. Both candidates and parties are mandated to submit their election expenditure reports for Parliamentary and State Assembly elections to ECI/state CEOs in a stipulated time period. The statistical reports on search and seizure during the 2019 general elections have been available in the public domain through ECI's website.

The 2003 landmark judgment of the Supreme Court of India made disclosure of criminal, financial and educational background mandatory for all contesting candidates through self-

declared affidavits filed prior to every election with the ECI. Since then, ADR and the National Election Watch (NEW) have been collecting and collating the data of contesting candidates and subsequently analysing it for the winners, ministers etc., which has been made available for public access through the myneta.info website and on the form of detailed reports on ADR website.

The data on electoral bonds has been accessed through the regular filing of Right to Information (RTI) applications with the State Bank of India (SBI) as well as through declarations made by political parties in their audit reports.

5. ANALYSIS

The Election Commission of India issued transparency guidelines for the political parties using its powers under Article 324 of the Constitution on August 29, 2014. The rationale given by the Commission behind these guidelines was the growing use of black money in election campaigns which disturbs the level-playing field and vitiates the purity of the election process. The Commission stated that to protect the purity of the election process and for the conduct of free and fair elections, the need was felt to issue transparency guidelines.²⁰⁵

The question that arises is whether these lawful instructions issued by the Commission and the other existing legal framework as outlined in this paper above have managed to achieve what they had set out to, i.e., transparency and accountability in the electoral process? The authors have attempted to answer this question using the following findings arrived at after analysing the aforesaid datasets.

5.1. The Downward Trend in Transparency in Political Funding

5.1.1. Political Finance

If money is what money does, then there should be no scepticism about drawing a conjecture that the money circulating within political parties has throttled participatory democracy in every possible sense. This is evident from the figures seen in donations and election expenditure statements of political parties and the disproportionate asset increase of elected representatives with every election. The term “fair” denotes ‘equal opportunity to all people’

²⁰⁵Clarification of Transparency guidelines for the political parties issued by Election Commission of India on 19.11.2014, Election Commission of India, available at <https://eci.gov.in/files/file/5038-clarification-of-transparency-guidelines-for-the-political-parties-issued-by-election-commission-of-india-on-19112014-%E2%80%93matter-reg/>, last seen on 10/07/2021.

and money has corroded the concept of 'equality of treatment and opportunity. In a participatory democracy, a true and informed choice can only be reflected if there is a level-playing field among parties and candidates, there are no unfair and corrupt practices, no vote for cash and the Rule of Law is preserved and protected in its letter and spirit. The Supreme Court of India had termed this practice of using and making money as "tyranny over mind" by stating. "*What does, however, attempt to interfere with the exercise of an electoral right is "tyranny over the mind"*²⁰⁶". The finances of political parties at present have brazenly resulted in complete lawlessness where vast amounts of tainted money are circulating quite conveniently within the political establishments. Current circumstances have compelled us to foresee what lies ahead of us if such trends are not reined in. The National Commission to Review of the Working of the Constitution²⁰⁷ had also stated,

"Corruption, because it erodes performance, becomes one of the leading reasons for non-performance and compromised governance in the country. The sources of some of the election funds are believed to be unaccounted criminal money in return for protection, unaccounted funds from business groups who expect a high return on this investment, kickbacks or commissions on contracts etc. No matter how we look at it, citizens are directly affected because, apart from compromised governance, the huge money spent on elections pushes up the cost of everything in the country. It also leads to unbridled corruption, and the consequences of widespread corruption are even more serious than many imagine. Electoral compulsions for funds become the foundation of the whole superstructure of corruption."

5.1.2. Amendments to FCRA, 1976 and 2010

The government, with an affirmative nod from the opposition this time, had amended the definition of 'foreign source' in 2018 with an express intent of letting itself off the hook from the 2014 Delhi High Court judgment that held both INC and BJP guilty of taking foreign funding from Vedanta and its subsidiaries, i.e., M/s Sterlite Industries Ltd. And M/s Sesa Goa Ltd. in violation of Foreign Contribution Regulation Act (FCRA), 1976. These amendments were also brought through the channel of the Money Bill. The changes made in the FCRA, 2010 and repealed Act of 1976 were not just incidental but it was, in fact, a carefully deliberated, calculated move on the part of the government after the aforesaid parties had exhausted all other deceitful and repugnant ways – right from challenging the

²⁰⁶Shiv Kirpal Singh v. Shri V. V. Giri, 1971 SCR (2) 197

²⁰⁷Supra 184, at 6.

High Court order by filing an SLP in the Supreme Court to eventually deciding to amend a repealed law. The appeals filed by BJP and INC were ultimately “dismissed as withdrawn by the Supreme Court in the year 2014. In order to change the definition of what constitutes a ‘foreign company’, the Finance Bill, 2016 was brought to amend the FCRA, 2010 in such a way to keep the key beneficiaries of the UK-based Vedanta group, the BJP and Congress, outside the scope of any legal scrutiny for donations they received from these companies. However, the donations in question given to the political parties were issued in 2009, and therefore, these amendments could not cover the years prior to 2010. Thus, the 2016 amendment didn’t have any effect on the guilt already recognized on the part of BJP and INC decided in the Delhi High Court’s order. Once the government realized this technicality and in order to tide itself over this problem, the Finance Act, 2018 was brought into the picture to retrospectively amend a repealed piece of legislation with the sole objective of condoning the illegalities committed by these two political parties with effect from 26.09.2010.

5.1.3. Unknown & Anonymous sources of donations

A key marker of transparency and accountability in political funding is the presence of full disclosure of sources of party funds and also the manner in which those funds are received and expended by political parties. The money received by parties has direct implications for the electoral outcome; money facilitates political participation, reflects/shapes political competition and influences politics at large. Consequently, a political finance system which is transparent and accountable levels the electoral playing field prevents undue influence and reduces the risk of corruption.

The analysis of income of recognized political parties for a five-year period between FY 2015-16 and FY 2019-20 shows a sharp upward trajectory in the proportion of income received by parties from ‘unknown’ sources. Alarming, a huge proportion of this income has gone to one party, whose total share of this income is more than twice that of the remaining National parties and at least five times more than the total income of state parties from ‘unknown sources.’²⁰⁸ The ‘unknown’ sources are defined by ADR as income declared by parties in their IT returns but without giving their source. This income includes

²⁰⁸ Data compiled by *Association for Democratic Reforms (ADR)*

‘donations below Rs 20,000’, ‘donations via Electoral Bonds’, ‘voluntary contributions’, ‘contributions from meetings/morchas’, ‘sale of coupons’, ‘miscellaneous income’ etc.²⁰⁹

Between FY 2015-16 and FY 2019-20, National political parties accumulated Rs 7999.75 crores from ‘unknown sources. There was more than a 376% increase in the National parties’ income from such sources between FY 2015-16 and 2019-20. 71.674% of the total share of unknown income was collected by *Bharatiya Janta Party (BJP)*, the party in power, followed by 21.088% share of the *Indian National Congress (INC)* in the period between FY 2015-16 & 2019-20.²¹⁰

Figure I: Year-wise unknown sources of income of National Parties, FY 2015-16 to 2019-20

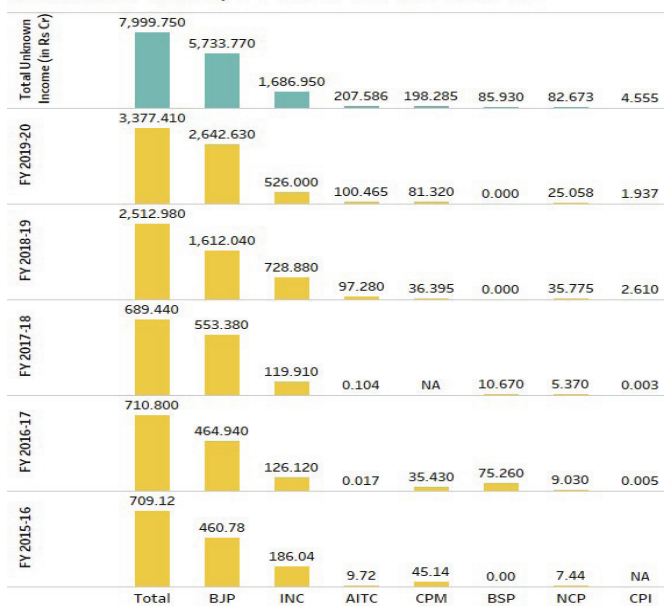


Table I: National Parties' Income from Unknown Sources, FY 2015-16 to FY 2019-20

Financial Year	FY 2019-20	FY 2018-19	FY 2017-18	FY 2016-17	FY 2015-16	Total Unknown Income
Total Amount (in Rs Cr)	3377.41	2512.98	689.44	710.80	709.12	7999.75

²⁰⁹ Analysis of Sources of Funding of National Parties FY 2018-19, ADR Report on Income & Expenditure of National Parties, available at <https://adrindia.org/content/analysis-sources-funding-national-parties-fy-2018-19>, last seen on 06/07/2021.

²¹⁰ Supra 204.

Figure II: Year-wise 'unknown' sources of income of top 10 Regional Parties, FY 2015-16 to 2019-20



Source: ADR reports on Sources of Funding and ECI's website

Among state parties, between FY 2015-16 and 2019-20, these parties amassed a total of Rs 1080.428 crores from 'unknown' sources. The year-wise trend in total income from 'unknown' sources among them is no different from that observed in the case of National parties. From FY 2015-16 to 2019-20, there was a whopping 955% jump in the Regional parties' income from 'unknown' sources. The top five parties that received the highest revenue from 'unknown' sources during this period are *Biju Janata Dal (BJD)*, *YSR-Congress Party*, *Telugu Desam Party (TDP)*, *Shiv Sena* and *Telangana Rashtra Samithi (TRS)*.²¹¹ It is also important to note that BSP has been declaring that it did not receive any donations above Rs 20,000 for the past 14 years, which means it does not have to declare any details of its donations since it claims that all its donations are below the threshold amount for reporting. The figures for the top ten state parties that received the highest income from 'unknown' sources are given below.

Table II: Regional Parties' Income from Unknown Sources, FY 2015-16 to FY 2019-20						
Financial Year	FY 2019-20	FY 2018-19	FY 2017-18	FY 2016-17	FY 2015-16	Total Unknown Income
Total Amount (in Rs Cr)	446.722	481.276	31.94	78.15	42.34	1080.428

Source: ADR reports on Sources of Funding and ECI's website

²¹¹ Supra 204, at 15.

Among the income from ‘unknown’ sources, the largest share constitutes the contributions from electoral bonds to political parties. Since the first sale and purchase of these bonds in March 2018, recognised political parties have declared donations worth Rs 6201.53 crores from electoral bonds.²¹² These bonds are anonymous, and parties are not required to display the details of their donors. Consequently, they have emerged as the most popular mode of donations to political parties. More than 52% of the total income of National parties and 53.83% of that of Regional parties in FY 2018-19 came from donations via electoral bonds. 61.52% of the total value of electoral bonds were redeemed by parties in three months alone – March 2019 (phase VIII), April 2019 (phase IX) & May 2019 (phase X) – the period of Lok Sabha elections. Political parties witnessed the highest ever anonymous funding through Electoral Bonds during the Lok Sabha 2019 elections. Between FY 2017-18 and 2019-20, the lion’s share of the donations via electoral bonds went to the BJP, i.e., Rs 4215.89 cr or 67.98%.²¹³

Table III: Donations declared through Electoral Bonds by Recognised Parties since 2018 (Amount in Cr)				Total (in Rs Cr)
Political Party	FY 2019-20	FY 2018-19	FY 2017-18	
BJP	2555	1450.89	210	4215.89
INC	317.861	383.26	5	706.121
AITC	100.4646	97.28	-	197.7446
NCP	20.5	29.25	-	49.75
BJD	50.5	213.5	-	264
TRS	89.1529	141.5	-	230.6529
YSR-C	74.35	99.84	-	174.19
TDP	81.6	27.5	-	109.1
SHS	40.98	60.4	-	101.38
JDS	7.5	35.25	6.0336	48.7836
DMK	45.5	-	-	45.5
AAP	17.7651	-	-	17.7651
JDU	13	-	-	13
SP	10.84	-	-	10.84
SAD	6.76	-	-	6.76
AIADMK	6.05	-	-	6.05
RJD	2.5	0	-	2.5
JMM	1	-	-	1
SDF	0	0.5	-	0.5
Total	Rs 3441.32 Cr	Rs 2539.17 Cr	Rs 221.0336 Cr	Rs 6201.53 Cr

²¹² Supra 175, at 2.

²¹³ Ibid.

Source: ADR reports on Analysis of Income/Expenditure of parties and ECI's website

As these bonds have emerged as a vital instrument for donations to political parties prior to polls and a single party is able to collect a disproportionate amount of money from them, the impact on the electoral playing field is unimaginable. Furthermore, 92.30% of the bonds purchased to date are in the denomination of Rs 1 crore, hinting that companies, not individuals are the biggest purchasers of these bonds.²¹⁴ These bonds can potentially act as a channel for corporate bribes paid to political parties as a quid pro quo and an untraceable funnel for illicit money payments in the electoral and political system. This kind of drift in political funding also implies that even loss-making companies now qualify to make donations of any amount to political parties out of their capital or reserves. Further, there is a grave possibility of companies being brought into existence by crooked elements primarily for routing funds to political parties through anonymous and opaque instruments like electoral bonds. This has further increased the opacity of funding of political parties and the danger of quid pro quo and if any benefits are passed on to such companies or their group companies by the elected government. In the FY 2018-19, the opening year of sale and purchase of electoral bonds, the share of direct corporate donations to National political parties was 23%, while the share of donations from anonymous electoral bonds rose to 52%.²¹⁵

Party Name	Table IV: Sources of Income of National Parties: FY 2018-19						
	Total Income (A)	Income from Electoral Bonds (B)	Share of Electoral Bonds (B/A*100)	Income from corporate (C)	Share of corporate Income (C/A*100)	Other Income (D)	Share of other income (D/A*100)
BJP	2410.08	1450.89	60.20%	698.14	28.97%	261.05	10.83%
INC	918.03	383.26	41.75%	127.602	13.90%	407.168	44.35%
AITC	192.65	97.28	50.50%	42.986	22.31%	52.384	27.19%
NCP	50.71	29.25	57.68%	11.345	22.37%	10.115	19.95%
CPM	100.96	0	0%	1.187	1.18%	99.773	98.82%
BSP	69.79	0	0%	0	0%	69.79	100%
CPI	7.15	0	0%	0	0%	7.15	100%
Total	Rs 3749.37 cr	Rs 1960.68 cr	52.294%	Rs 881.26 cr	23.504%	Rs 907.43 cr	24.202%

Source: ADR analysis of Contribution reports of parties & ECI website

In 2017, ADR and Common Cause challenged the Finance Act, 2017, enacted as a Money Bill, which introduced the Electoral Bond Scheme, 2018, for the purpose of electoral

²¹⁴ Ibid at 18.

²¹⁵ Supra 188, at 7.

funding. The petitioners have also challenged the removal of 7.5% of the company's average three-year net profit for political funding, including the removal of the company's liability to name the political parties to which such contributions were made. The petition argues that by allowing electoral bonds on the donor's side and removing the name of the recipient brings in complete opacity to political funding. Such a system of complete opacity will not only amplify the odds of conflict of interest, but it will also severely increase black money and corruption.

Another grave apprehension is the possibility of shell companies and the uncontrolled rise of *Benami* transactions to maneuver the undocumented cash into the Indian Political System. Big corporates voluntarily fund political parties, especially the government in power, to essentially use their clout for money-spinning by meandering laws, policies, regulations and contracts made in their favour. This exchange between corporates and political parties comes at the cost of public interest. This quid pro quo kind of arrangement between parties and corporate houses has been reproached in judgments given by various courts of Law in India. In 1957 Chief Justice M.C. Chagla²¹⁶ of the Bombay High Court warned about the plausible dangers of permitting companies to fund political parties,

“It is necessary that democracy should be looked after, tended and nurtured so that it should rise to its full and proper stature” and any “proposal or suggestion which is likely to strangle that democracy almost in its cradle must be looked at not only with considerable hesitation but with a great deal of suspicion.”

Chief Justice Chagla, in its judgment, had also noted that,

“Any attempt on the part of anyone to finance a political party is likely to contaminate the very springs of democracy. Democracy would be vitiated if results were to be arrived at not on their merits but because money played a part in the bringing about of those decisions. The form and trappings of democracy may continue, but the spirit underlying democratic institutions will disappear. History of democracy has proved that in other countries democracy has been smothered by big business and money bags playing an important part in the working of democratic institutions...”

On different occasions, i.e. 5th March 2019, 29th November 2019, 26th October 2020 and 9th March 2021, the petitioners had in totality filed four applications before the Supreme Court

²¹⁶JayantilalRanchhoddasKoticha v. Tata Iron & Steel Co. Ltd., (1957) 27 Comp Cas 604.

to bring on record many serious issues grappling around political party finances; however, the Hon'ble Court had not only disappointed the electorate with its complete lack of far-sightedness, but the court had also entirely overlooked the unabashed misuse and power play of money since the inception of electoral bonds and unlimited anonymous corporate donations. To make matters worse, the apex court failed to take up this matter for an urgent hearing and thorough adjudication despite the significant questions concerning India's democratic integrity raised by the petitioner.

5.1.4. Incomplete, Incorrect & Undeclared information in parties' reports

The opacity in political finance not only comes from sources that are untraceable but also as a result of incomplete, incorrect or undeclared reporting of details of funds received by political parties in their annual reports. Time and again, many parties fail to conform to the standardized format prescribed by the ECI for disclosure. It is also not clear whether any action has been taken against these parties. In several cases, the donor's name, address, PAN, mode of payment details etc., are missing or incomplete.

ADR analysed the PAN information of donations declared by National and Regional parties in their contribution reports. The period of study for National parties was FY 2012-13 to 2017-18, while that for Regional parties was FY 2014-15 to 2018-19. National parties reported total donations with undeclared, incomplete or incorrect PAN information of donors worth Rs 453.61 cr (5569 donations), which constituted 21.19% of their total income during the said period. In the six-year period, the highest number of such contributions (Rs 282.647 cr) were reported during the FY 2014-15, the year Parliamentary elections were held. Donations having incomplete/incorrect PAN, as well as incomplete/undeclared mode of payment, were worth Rs 58.30 lakhs.²¹⁷ In the case of Regional parties, the percentage of such donations of the total income was relatively higher. Between FY 2014-15 and 2018-19, these parties reported contributions of Rs 185.596 cr (16,628 donations) with undeclared, incomplete, or incorrect PAN details, constituting 26.55% of their total income. Rs 57.03 cr of this was reported in the year of the 2014 general elections. Donations with

²¹⁷*Analysis of Discrepancies in PAN details in Contribution Reports of National Parties FY 2012-13 to 2017-18*, ADR Report on Donation Analysis, available at <https://adrindia.org/content/analysis-discrepancies-pan-details-contributions-reports-national-parties-fy-2012-13-2017-18>, last seen on 05/07/2021.

incomplete/incorrect PAN and incomplete mode of payments amounted to Rs 50.96 lakhs.²¹⁸

5.1.5. Electoral Trusts

These trusts are not-for-profits that were introduced to allow corporate entities to make donations to political parties in a more transparent manner and act as a buffer between the company and the political party. The registration of trust is approved by the Central Board of Direct Taxes (CBDT), and its functioning is governed under the Electoral Trusts Scheme, 2013. Some of the country's largest and leading corporate conglomerates contribute to these trusts. While the objective behind these trusts is to make political funding more transparent, ADR analysis of the annual reports of these trusts shows otherwise. In the period from FY 2013-14 to 2019-20, ten out of the 21 registered electoral trusts either declared receiving nil contributions or their contribution reports have not been available on the ECI website even once since their registration. Six trusts declared that they received contributions only once since registration.²¹⁹ This does not augur well for the objective with which the electoral trusts were set up – to receive voluntary contributions and distribute the same to political parties.

Most recently, 50% of the electoral trusts that submitted their annual reports for FY 2019-20 declared that they received nil contributions that year. The reports of one-third of the total registered trusts are not available on the ECI website more than nine months after the deadline. One electoral trust did not disburse the donations to any political party despite receiving contributions worth Rs 1 lakh in FY 2019-20. It is also worth noting that for the first time in FY 2019-20, an electoral trust disbursed contributions to a political party/parties using electoral bonds and did not disclose its name(s).²²⁰ This is setting a bad precedent and also goes against the rationale behind the Electoral Trusts Scheme and Rule 17CA of the Income Tax Rules, 1962, which mandate trusts to furnish every detail in their annual reports. If electoral trusts start donating to parties through electoral bonds, which do not permit disclosure and discourage transparency in political finance, then anonymous, unchecked, unlimited funds will become the norm. Black money payments, foreign funding and corrupt practices will become rampant.

²¹⁸ *Analysis of Discrepancies in PAN details in Contribution Reports of Regional Parties FY 2014-15 to FY 2018-19*, ADR Report on Donation Analysis, available at <https://adrindia.org/content/analysis-discrepancies-pan-details-contribution-reports-regional-parties-fy-2014-15-fy-2018>, last seen on 05/07/2021.

²¹⁹ *Analysis of Contribution Reports of Electoral Trusts FY 2019-20*, ADR Report on Electoral Trusts, available at <https://adrindia.org/content/analysis-contribution-reports-electoral-trusts-%E2%80%93-fy-2019-20>, last seen on 23/06/2021.

²²⁰ *Ibid* at 22.

5.1.6. Unrecognized Parties

Political parties that are newly registered or have never contested elections or have failed to secure a certain minimum percentage of polled valid votes/a certain number of seats in the state legislative assembly or Lok Sabha during the last election are referred to as unrecognized parties. As of March 2019, 97.50% (2,301) of the total 2,360 registered parties in India are unrecognized political parties.²²¹ While recognized parties such as National and Regional parties face the same scrutiny from time to time, enough evidence is not available to suggest whether unrecognized parties are being monitored or held accountable for non-compliance with ECI's transparency guidelines.

We analyzed the status of submission of contribution and audit reports of the unrecognized parties for a two-year period – FY 2017-18 and 2018-19. The findings confirmed our hypothesis about the absence of scrutiny and revealed that donation statements of only 22 parties²²² and audit reports of only 52 parties²²³ out of 2301 registered unrecognized parties were available on the state CEOs' websites. Given that political parties in India enjoy tax exemption, it is worrying to see that IT returns and donations statements of more than 90% of unrecognized parties are not available for public scrutiny²²⁴, submission of which is also a prerequisite to enjoy the aforesaid tax exemption.

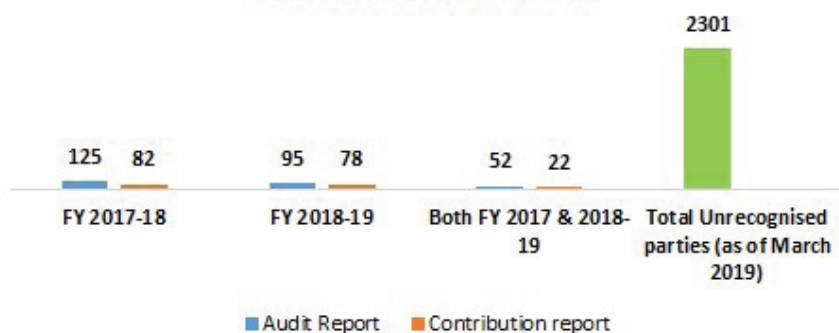
²²¹ *Analysis of status of submission of annual audit reports of Registered Unrecognised Political Parties during FY 2017-18 & 2018-19*, ADR Report on Unrecognised Parties, available at <https://adrindia.org/content/analysis-status-submission-annual-audit-reports-registered-unrecognised-political-parties>, last seen on 05/02/2021.

²²² *Analysis of Donations received by Registered Unrecognised Political Parties during FY 2017-18 & FY 2018-19*, ADR Report on Unrecognised Parties, available at <https://adrindia.org/content/analysis-donations-received-registered-unrecognised-political-parties-during-fy-2017-18-fy>, last seen on 08/07/2021.

²²³ Supra 217.

²²⁴ Data compiled by ADR.

Figure III: No. of Unrecog. parties whose audit & contribution reports are available for FY 2017-18 & 2018-19



42 out of 69 unrecognized parties that submitted details of donations via electoral bonds to ECI in compliance with the Supreme Court order dated 12th April 2019 were found ineligible to receive donations via bonds as per the Electoral Bonds Scheme, 2018. The vote share details of only 43 out of 69 parties were available for examination, of which only one was found eligible to receive electoral bonds. In the last decade, unrecognized parties have grown two-fold, and a 9.8% increase was witnessed in their numbers between 2018 and 2019.²²⁵ There is a fair probability that a large number of these parties are registered to receive tax benefits, black money payments, unlimited/anonymous donations etc., they may never contest elections and continue to engage in unfair electoral practices without ample scrutiny.

The above findings imply that a huge proportion of recognized and unrecognized political parties' income is from sources that are unknown, anonymous, and untraceable due to the sheer nature of reporting by political parties. Schemes such as the one governing electoral trust have not managed to achieve their desired objective and continue to function without sufficient accountability or course correction. The increase in the share of unknown/anonymous income with every passing year reaffirms the assertion that transparency and disclosure in political funding are witnessing a downward trend.

While income from untraceable sources and incomplete/incorrect disclosure is on the rise, the non-availability of audit and contribution reports of political parties every year as per the due date is also a matter of concern. The untimely submission by parties or delay in uploading of their reports on the ECI website goes against the spirit of Section 29C (3) of the Representation of People's Act, 1951, as well as ECI's own transparency guidelines. As

²²⁵ *Analysis of Eligibility of Registered Unrecognised Political Parties to receive funding through Electoral Bonds*, ADR Report on Electoral Bonds, available at <https://adrindia.org/content/analysis-eligibility-registered-unrecognised-political-parties-receive-funding-through>, last seen on 15/06/2021.

per ADR analysis, in the last 16 years, several recognized parties have defaulted at least once on the submission of their audit and contribution reports. Contribution reports of eleven recognized political parties are not available even once on the ECI website since their registration between FY 2003-04 and 2018-19.²²⁶

5.2. Money Power Trumps Election Integrity

Christophe Jaffrelot argued that the voter in India is subject to the law of two 'Ms', money and muscle. In this section, we take a look at the role of money power during the election period in perpetuating corrupt practices and undermining the integrity of the election process.

General elections in 2019 have been estimated to be the costliest elections in the history of democratic politics. The Centre for Media Studies (CMS) reported a figure of Rs 55,000-60,000 crore, 40% of which was estimated to be spent by candidates and 35% by political parties.²²⁷ Political parties and candidates spent several crores on the distribution of freebies and cash for buying votes. Rs 3475.76 crore worth of prohibited items were seized by the Election Commission.²²⁸ Drugs/narcotics topped the list at Rs 1279.90 crore, followed by precious metals (gold etc.) at Rs 987.11 crore, Rs 844 crore worth of cash, Rs 304 crore worth of liquor and other items or freebies worth Rs 60 crore. During Lok Sabha 2014 elections, unaccounted cash worth Rs 300 cr and more than 17,000 kg of drugs and huge amounts of liquor and arms were seized.²²⁹ The same is also true for the state assembly elections such as Delhi 2020 (Rs 57 cr) and Bihar 2020 (Rs 35.26 cr). The recent assembly elections held in West Bengal, Tamil Nadu, Kerala, Puducherry and Assam also witnessed the unethical flow of cash, liquor, drugs and other precious metals and freebies amounting to Rs 1001.43 cr. While it was gold and cash for the states of Tamil Nadu, Kerala and Puducherry, drugs were the most sought of counter bands for West Bengal, followed by liquor in Assam. It is crucial to note here that the RTI applications filed by ADR in this matter did not find any information on the status of cases of seizure during Lok Sabha polls 2019, whether the accused were found guilty, or the prohibited items were released to its owner. Once the polls are over, it is seen that none of the authorities, including the ECI,

²²⁶ Data compiled by ADR.

²²⁷ *A CMS Report Poll Expenditure, The 2019 Elections*, Centre for Media Studies, 7 (2019), available at <https://cmsindia.org/sites/default/files/2019-05/Poll-Expenditure-the-2019-elections-cms-report.pdf>, last seen on 29/10/2019.

²²⁸ *Seizure Report as on 24.05.2019*, Election Commission of India, 2 (2019), available at <https://eci.gov.in/files/file/10273-seizure-report-as-on-24052019/>, last seen on 25/12/2019.

²²⁹ *Supra* 177 at 3.

state Chief Electoral Officers, and CBDT, maintains any centralized database to track the cases of items seized during elections.

The distribution of freebies at the time of elections or immediately preceding the elections is a hard reality deeply ingrained in the current scenario. There is an upsurge trend of doling out freebies to voters in cash or kind during pre and post-election periods. The rival contestants are outspending in a bid to win and create a vote bank, thereby muddying up the purity necessitated as a public servant. Corrupt politicians are not only getting repeatedly elected by doling out freebies, but they also happen to occupy decision-making positions in the governance of the country. Meanwhile, the spectre of corruption and hoodwinking of the innocent, gullible voters hang over our electoral processes.

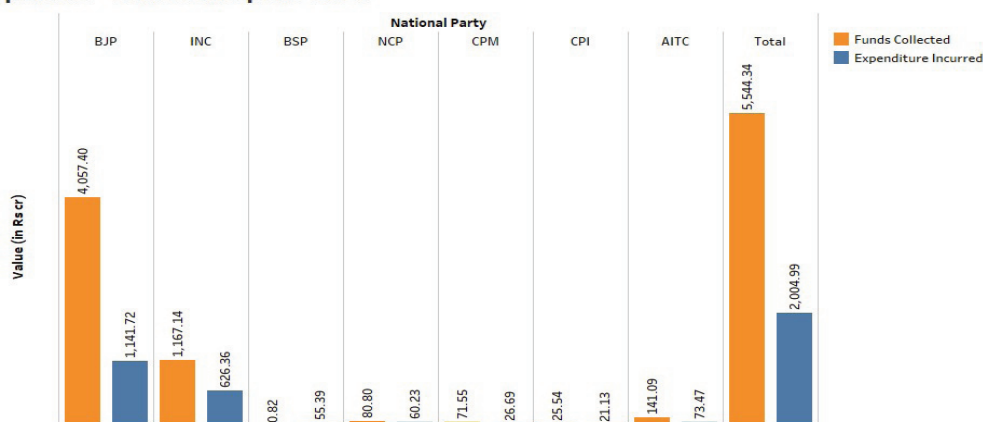
This trend certainly proves that the sole objective of our political establishment is to get re-elected, often by changing the nature and packaging of these freebies as the situation demands. Distributing freebies has become such an accepted electoral tradition in India that parties that are not offering freebies now risk losing votes. From a bottle of country liquor and little money meant to herd simpletons, the incentives have been upgraded over the years. Political parties have not shied from targeting the womenfolk with clothes, gas cylinders, stoves, juicer-mixer-grinders and colour television sets. The farmers are lured with motors to pump water. The youth demanded more than customary bicycles and got laptops. The religious were already enjoying free supplies of festive goodies, whereas some political parties took it to another level by offering 4-gram gold *mangalsutra* to every bride²³⁰.

The distribution of freebies is from the state exchequer, which tends to deplete the exchequer and leaves limited resources for the balanced development of the states/country at large, and completely distorts developmental and sectoral priorities. Needless to say, the malady of freebies stunts economic growth, distorts developmental priorities, corrupts the voters and adversely affects their voting choices which are deleterious not only to the growth process but also injurious to the purity of electoral processes.

²³⁰ *Why Supreme Court is right to question election freebies*, Firstpost (07/07/2013), available at <https://www.firstpost.com/business/economy/why-supreme-court-is-right-to-question-election-freebies-935275.html>, last seen on 03/08/2021.

While the instances of seizure, projected expenditure figures, and those reported in the media run into several thousand crores, the official statistics declared by parties in their expenditure statements tell a different story. During the 2019 polls, seven National parties, including BJP, INC, BSP, NCP, CPM, CPI and AITC, declared a total expenditure of Rs 2004.99 cr, more than 56% of which was spent by a single party, BJP. On the funding side, 73.18% of the total funds collected by National parties during the election period went to

Figure IV: Funds collected and Expenditure Incurred by National parties - Lok Sabha polls 2019



BJP.²³¹ A single party having disproportionate access to campaign money subverts the idea of free and fair elections and results in skewed political competition.

Furthermore, 25 Regional parties analysed by ADR managed to collect funds worth Rs 861.25 cr while they spent a total of Rs 586.40 cr, much less in comparison to National parties.²³² If we were to extrapolate the expenses of Regional parties whose statements are not yet available, even then, the declared figures are nowhere close to those widely reported or boasted about by political leaders in their rallies.

Does that mean that parties under-report their expenditure figures to ECI? Supreme Court of India in *Common Cause vs Union of India*²³³ held that,

“The political parties in their quest for power spend more than one thousand crores of rupees on the General Election (Parliament alone), yet nobody accounts for the bulk of the money so spent, and there is no accountability anywhere.”

²³¹ Association for Democratic Reforms, *Lok Sabha Election Watch 2019* (4th ed., 2020).

²³² *Analysis of Funds Collected and Expenditure Incurred by Political Parties during Lok Sabha elections, 2019*, ADR Report on Election Expenditure, available at <https://adrindia.org/content/analysis-funds-collected-and-expenditure-incurred-political-parties-during-lok-sabha>, last seen on 07/07/2021.

²³³ *Supra* 182, at 5.

The Law Commission, in its 255th report, said that *“There is clearly under-reporting of election expenditure and opacity in political contribution. Part of the explanation lies in the lacunae in the law, and part in black money and poor enforcement”*. Former Chief Election Commissioner, Dr Nasim Zaidi, said that winners only report 40%-80% of their expenses to the Commission.²³⁴ Election expenditure cannot exceed Rs 77 lakhs (Rs 70 lakhs earlier) for the Lok Sabha poll and Rs 30.8 lakhs (Rs 28 lakhs) for assembly elections, as per the new limit set post-Covid-19, in case of candidates. The ADR analysis of expenditure statements of 538 MPs for the 17th Lok Sabha shows that only two MPs exceeded the expense limit by Rs 9.27 lakhs and Rs 7.95 lakhs, respectively. The average amount of money spent by 538 MPs was Rs 50.84 lakhs, 73% of the total limit.²³⁵

There is a perceived mismatch between the visible lavish spending by major parties/candidates during election campaigns, and the figures declared to ECI several months after the deadline. In addition, the electoral playing field is deeply tilted in favour of a few parties that have access to a huge share of campaign finance. The law requires parties to submit their statement of expenditure 90 days after the parliamentary elections and 75 days after the state polls. ADR analysis shows that the expenditure statement of Janata Dal (Secular) was not available for a single election that it contested in the five-year period between 2016 and 2020. Political parties such as SHS, JDU, AAP, RJD, JMM, RSP and NPEP defaulted on the submission of their election expenditure statements more than five times during this period.²³⁶

The aforesaid are some explicit ways in which money power has been used to subvert electoral democracy traditionally. However, in the last few years, digital technology has permitted a more precarious display of financial superiority by parties with majority access to campaign resources in the form of voter suppression/manipulation, misinformation, paid news, surrogate advertising, digital micro-targeting, deep fakes etc. On July 8, 2021, the Supreme Court, in *Facebook vs. Delhi Assembly* case, observed that the election and voting process stood threatened by social media manipulation. It further stated that,

“Facebook has played a crucial role in enabling free speech...it has simultaneously become a platform for disruptive messages, voices and ideologies. The successful

²³⁴Majority of Candidates ‘Under-Reporting’ Poll Expenses: Chief Election Commissioner, NDTV (15/12/2015), available at <https://www.ndtv.com/india-news/majority-of-candidates-under-reporting-poll-expenses-chief-election-commissioner-1255174>, last seen on 26/09/2020.

²³⁵Lok Sabha 2019: Analysis of Election Expenditure statements of MPs, ADR Report on Lok Sabha elections 2019, available at <https://adrindia.org/content/lok-sabha-elections-2019-analysis-election-expenditure-statements-mps>, last seen on 02/07/2021.

²³⁶ Data compiled by ADR.

functioning of a liberal democracy can only be ensured when citizens are able to make informed decisions."²³⁷

The expenses incurred by wealthier political parties/candidates in employing third-party political consultancies to run their election campaigns using sophisticated technologies, which are difficult to track/monitor by ECI's own admission, are not coherently cited in their expenditure statements. If candidates are to be subject to the limitation of the ceiling, but the political parties sponsoring them or their allies, agents and supporters are free to spend as much as they like in connection with elections, the object of imposing the ceiling would be meaningless, and the enacted laws in the interest of purity and genuineness of the democratic process would be wholly emasculated. Much of the actual spending is not captured in the prescribed limits and also does not include party and independent supporter spending. A candidate has an incentive to doctor his accounts and report expenses below the official ceiling because expenditures in excess of the limit can result in the candidate's disqualification and the loss of his seat. It is known that more than thousands of crores of rupees are involved in both Assembly and General elections. Unless a cap is introduced, a level playing field is not available for the contesting parties. If the expenditure statement is submitted frequently by the party, discrepancies will automatically get highlighted. It would be easier to keep track of whether or not the statements are factual, including the benefit of cross-checking the disclosure made with the consolidated report.

Despite Election Commission's instructions, issued in February 2019, to include all campaign expenses on social media advertising, the analysis of expenditure statements of National parties for social media spending during Lok Sabha polls 2019 shows that parties fail to provide a separate account or detailed break-up of these expenses, and often combine them with other expenses under electronic media. As a result, there's a lack of transparency in the transactions or scrutiny of the relationship between political parties and agencies that handle campaigns on their behalf.

The pernicious influence of big money inevitably results in the worst form of political corruption, and that in its wake is bound to produce other vices at all levels. This danger has been pointed out in saying words from the notes in

Harvard Law Review, Vol. 66, p. 1260: "A less debatable objective of regulating campaign funds is the elimination of dangerous financial pressures on elected

²³⁷*Election & Voting Processes stand threatened by Social Media manipulation, says Supreme Court*, Live Law (09/07/2021), available at <https://www.livelaw.in/top-stories/election-voting-processes-threatened-social-media-manipulation-supreme-court-177139>, last seen on 09/07/2021.

officials. Even if contributions are not motivated by an expected return in political favours, the legislator cannot overlook the effects of his decisions on the sources of campaign funds.”

It is, therefore, necessary to understand the impact of money power, which has eliminated many contestants of undoubted ability and credibility from the electoral contest. ‘Rule of Law’ reasonably commands comparison between the merits and abilities of the contestants without the influence of power and pelf.

“The small man's chance is the essence of Indian democracy, and that would be stultified if large contributions from rich and affluent individuals or groups are not divorced from the electoral process. The democratic process can function efficiently and effectively for the benefit of the common good and reach out the benefits of self-government to the common man only if it brings about a participatory democracy in which every man, howsoever lowly or humble he may be, should be able to participate on a footing of equality with others²³⁸.”

The objective behind the limitation on election expenditure of political parties is two-fold²³⁹; a) to bring about participatory democracy and b) to eliminate, as far as possible, the influence of big money in the electoral process.

ADR filed a petition in Delhi HC in 2014 to regulate and monitor the election expenditure of political parties, including the direction to impose a limit on the election expenditure of political parties. Though the Election Commission has issued guidelines dated 29th August 2014, which are captioned “Transparency and accountability in party funds and election expenditure”, which were followed by a clarification dated 19th November 2014, no information is forthcoming with regard to the compliance thereof. The court agreed to examine this aspect. ECI, however, has yet to file a status report on action taken against the political parties which have not filed their annual audited reports and contribution reports.

It is clear that money power has dominated the election process in myriad ways that hamper the fairness of the election process and make political participation favourable for the rich. It also concerns that electoral malpractices driven by abuse of money power may or may not be easily checked and held accountable by authorities given the complexities of digital technology and the manner in which the party-political consultancy nexus operates. This

²³⁸ Kanwar Lal Gupta v. Amar Nath Chawla & Ors, 1975 AIR 308, 1975 SCR (2) 269

²³⁹ Supra 185, at 6.

reaffirms what an article in The Economist said, “Everyone knows the elections are costly. The shame is that no one knows the price nor who is paying.”²⁴⁰

5.3. Wealth Accumulation by MPs while in Office

A clean and fair electoral process is a *sine qua non* for any democracy²⁴¹. The unjustified accretion of assets of lawmakers and their allies certainly gives a grim narrative of Indian democracy. Such a practice indicates a monopoly of money and mafia over the Indian political system. A legislator whose primary focus is to accumulate wealth can never be expected to empathize with people and their plight and instead becomes a burden and nuisance for society at large. The Supreme Court, in 2018,²⁴² while adding the column on ‘Sources of income of spouse and dependents’ and ‘Information regarding the contracts with the appropriate government either by the candidate or his/her spouse and dependents’ in Form 26 had held, “They are deputed by the people to get grievances redressed. But they become the grievance”. In addition, the court had directed the government, “to set up a permanent mechanism to monitor the accrual of the wealth of sitting Members of Parliament and Members of Legislative Assemblies, their spouses and associates.”

As part of the self-declared affidavits filed with the ECI prior to polling, all contesting candidates are required to declare their assets and liabilities. After getting elected, MPs file a declaration of assets and liabilities with the Lok Sabha Speaker and Chairman of Rajya Sabha.²⁴³ In November 2018, senior officials of both Houses of Parliament, the Law Ministry, the EC, and around 20 state legislatures participated in a meeting to discuss the implementation of the Supreme Court’s February 2018 order on setting up a permanent mechanism to monitor the source of income of elected representatives and to make disproportionate assets a new ground for disqualification. The officials expressed that there is no provision – to ensure compliance once the MPs have filed their declarations, requiring periodic disclosure of this information and disqualifying MPs on account of the acquisition of disproportionate assets.²⁴⁴ On 12 March 2019²⁴⁵, the apex court had asked the Centre to

²⁴⁰ *Black Money Power*, The Economist (04/05/2014), available at <https://www.economist.com/banyan/2014/05/04/black-money-power>, last seen on 09/07/2021.

²⁴¹ Lok Prahari v. Union of India and others, W.P (C) No. 784/2012015

²⁴² Ibid.

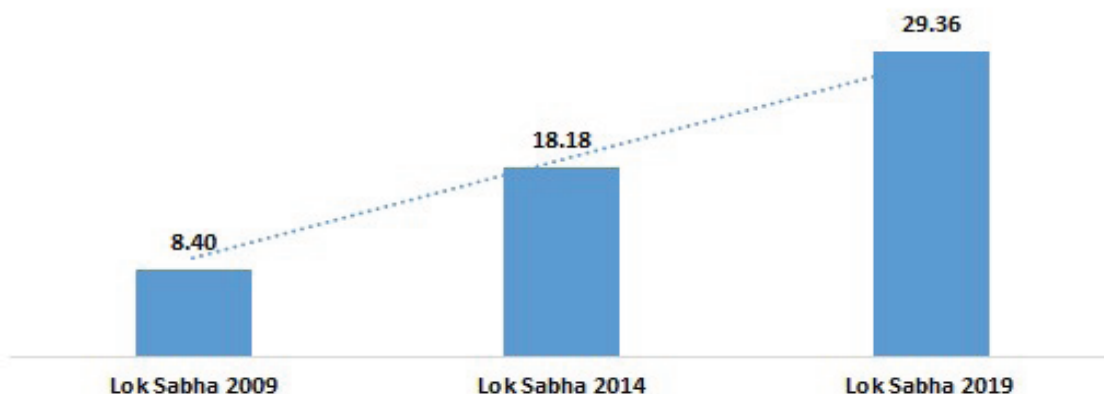
²⁴³ C. Roy, *Assets and Liabilities of MPs after election*, PRS Legislative Research, available at <https://prsindia.org/theprsblog/assets-and-liabilities-of-mps-after-election>, last seen on 10/07/2021.

²⁴⁴ *Parliament, EC officials discuss making disproportionate assets ground for lawmakers’ disqualification*, Times of India (26/11/2018), available at <https://timesofindia.indiatimes.com/india/parliament-ec-officials-discuss-making-disproportionate-assets-ground-for-lawmakers-disqualification/articleshow/66815490.cms?frmapp=yes&from=mdr>, last seen on 10/07/2021.

explain in two weeks why it has not set up a permanent mechanism to monitor the undue accretion of assets. But till now, no such mechanism has been setup by the government.

ADR compared the assets of 70 re-elected MPs over three Lok Sabha periods from 2009 to 2019. We found that between 2009 and 2014, the average increase in the assets of these MPs was Rs 9.78 cr, whereas, between the 2014 and 2019 Lok Sabha elections, it was Rs 11.17 cr. Between 2009 and 2019, there was an increase in the declared assets of all the re-elected legislators, and the average increase was Rs 20.95 cr. There was an overall increase of almost 250% in the average assets of re-elected MPs between 2009 and 2019, as shown in

Figure V: Average Assets of Re-elected MPs (in Rs cr)



the chart below.²⁴⁶

As per a *Business Standard* analysis based on ADR data in 2019, it was seen how the gap between the MP's wealth and its constituents is widening with every election. It argued how it would take 346 years for a voter to match an elected representative's assets, given that an MP's assets may be growing faster than the average salary of the income tax-paying person.²⁴⁷ The data from financial disclosures reveal that our elected representatives enjoy substantial wealth accumulation in office. Whether this wealth accumulation has to do with corruption and other fraudulent practices is difficult to answer and requires more profound study. Does wealth accumulation in office alarm voters or affect their electoral behaviour?

²⁴⁵Lok Prahari, Through Its Secretary S. N Shukla v. G.N. Raju, Secretary, Legislative Department, MANU/SCOR/08904/2019.

²⁴⁶ Data compiled by ADR.

²⁴⁷ S.P. Mampatta, *It will take 346 years for you to match your MP's assets*, Business Standard (05/06/2019), available at <https://www.rediff.com/news/special/it-will-take-346-yrs-for-you-to-match-your-mps-assets/20190605.htm>, last seen on 09/07/2021.

Do wealthy politicians make for good public policy-makers? These are some other questions that researchers must concern themselves with.

6. CONCLUSION AND RECOMMENDATIONS

A state loses its objectivity and purpose when it sanctions anarchy by adopting deceitful tactics and willfully withholding crucial publication information from its key stakeholders, i.e., citizens or voters or civil society groups and journalists. At present, the government of the day has not hesitated from defying the existing laws or legislating new laws with the sole intent of profiting from its own affiliates. The corruption by means of unaccounted, illegal sources of money from unknown sources seriously affects the voters' statutory rights as well as the freedom of speech and expression as guaranteed by Article 19(1)(a), as for the purpose of securing such illegal money, the political parties are going to any extent, and in such a process, the deserving and capable candidates, who can provide a better representation to the people of this country do not get level playing field.

For a nation to thrive, the well-being of its people should be of paramount importance. At present, corruption in the Indian political and electoral system has corroded this very essence. The Supreme Court of India noted in 1996²⁴⁸;

“The corruption in quest of political office and the corruption in the mechanics of survival in power has thoroughly vitiated our lives and our times. It has sullied our institutions. The corrupt politician groomed to become the corrupt minister, and, in turns, the corrupt minister set about seducing the bureaucrat. THINK OF ANY problem our society or the country is facing today, analyse it, and you will inevitably conclude, and rightly, that corruption is at the root of the problem.”

In a participatory democracy, anonymity cannot be an answer to transparency. Good governance necessitates honesty, accountability and courage to answer. Arbitrariness cannot take over ethical and moral propriety and fairness. The implementation of the recommendations made by the 15th Law Commission in its 170th Report and the 20th Law Commission's 255th Report is still waiting to see the light of the day. The Supreme Court of India, in various judgments,²⁴⁹ has already stated that in recent times the elections are fought on the might of the monies received from multiple illegal sources, including from the unaccounted funds for the people and the corporate having vested interest, which seriously

²⁴⁸Supra 182, at 5.

²⁴⁹Ashok Shankarrao Chavan v. Dr. MadhavraoKinhalkar&Ors., Civil Appeal No. 5044 of 2014.

affects the fairness of the electoral process. The following recommendations need to be adopted for a clean, credible and participatory democracy.

In order to attain full public confidence and support, political establishments should make sure that every public act done in a public way for the public should be open to public scrutiny, and every penny collected and spent should be accounted for.

- a. All national and regional political parties should be mandatorily subjected to disclose for public scrutiny complete details about their income as well as expenditure, complete details of donations and funding received by them, irrespective of the amount donated and full details of donors making donations to them.
- b. The recommendations made by the 170th and 255th reports of the Law Commission of India with regard to the financial accountability of the political parties should be implemented by introducing a ceiling on the election expenditure of political parties on and during the elections. Political parties in India should also be directed to submit expenditure statements beginning one year prior to the polls. In addition, political parties should submit the Account Statements of Income and Expenditure periodically, i.e., once a month before the declaration of the election and at least once a week during the elections.
- c. There should be a complete ban on the distribution of freebies by governments of states/at the Centre and by political parties and candidates to woo the voters. Freebies should be defined preceding the elections and during the period of election and should also be declared as corrupt practice in terms of Section 123 of the Representation of the People Act (RPA), 1951. Directions should be issued to the party-in-power at the Centre and states to compensate the complete cost if such party is found guilty of the practice of distributing freebies.
- d. Electoral bonds should be wholly scrapped in their entirety. Finance Act, 2017 and 2016 should be held unconstitutional, void and illegal.
- e. There should be a complete ban on any form of direct or indirect foreign funding and corporate funding to political parties and candidates.
- f. No party should be allowed to accept any donation in cash. The current threshold limit of reporting of donations of Rs 20,000 and above should be removed, and every penny collected, accumulated and should be reported.

- g. The 255th Law Commission report recommended amendments to Section 29C of the RPA in order to maintain and submit annual accounts duly audited by a qualified and practising chartered accountant from a panel of such accountants retained for the purpose by the Comptroller and Auditor General (CAG), to the ECI every financial year should be implemented. In addition, such reports should be made available to the public. Necessary changes should be made in Form ITR7 prescribed under Rule 12 of the Income Tax Rules, 1962, to include sources of income in the prescribed form.
- h. Section 13A of the Income Tax Act, 1961, read with Section 28B of the RP Act, 1956, should be applied for its purpose. There should be a cancellation of income tax exemption given to those registered political parties which default in the submission of their annual accounts.
- i. As per the recommendations of the 255th Law Commission report,
“Express penalties, apart from losing tax benefits, should be imposed on political parties for non-compliance with the disclosure provisions. This should include a daily fine of Rs. 25,000 for each day of non-compliance, with the possibility of de-registration if the default continues beyond 90 days. Further, ECI may levy a fine of up to Rs. 50 lakhs if it finds any particulars in the party’s statements as having been falsified.”
- j. Scrutiny and verification of the disclosures made by elected lawmakers in respect of their assets and sources of income should be made by the CAG with necessarily follow-up action by ECI and CBDT. In cases of such disclosures being found to be incorrect or false, such discrepancies should be a ground for subsequent disqualification under the RPA, 1951.
- k. The recommendations of the 244th Law Commission Report on Electoral Disqualification should be implemented by prescribing punishment for filing false affidavits under Section 125A should be increased to a minimum of two years, and the alternate clause for fine be removed. Second, conviction under Section 125A should be made a ground for disqualification under Section 8(1) of the RPA and be also made a corrupt practice under Section 123 of the RPA.

- l. Civil and criminal action should be initiated against office bearers of the registered political parties in case they fail to follow due process of law or deliberately neglect time-to-time guidelines of the Election Commission.
- m. Election Commission of India should exercise its broad powers under Article 324 of the Constitution and de-register and de-recognise any political party if it persistently defaults in their annual audited accounts, neglects repeated reminders given by the Commission or in case of any contempt of the court orders delivered in the light of free and fair elections.
- n. The 3rd of June 2013 order of the CIC that had held Political parties as public authorities by bringing them under the ambit of the Right to Information Act should be upheld and brought into force. In addition, there should be comprehensive law regarding the functioning of the political parties in India.

Annexure I

S. No.	Political Party	Party Code
1	Bharatiya Janata Party	BJP
2	Indian National Congress	INC
4	All India Trinamool Congress	AITC
3	Communist Party of India (Marxist)	CPM
5	Bahujan Samaj Party	BSP
6	Nationalist Congress Party	NCP
7	Communist Party of India	CPI
8	Biju Janata Dal	BJD
9	YuvajanaSramikaRythu Congress Party	YSR-Congress
10	Telugu Desam Party	TDP
11	Shiv Sena	SHS
12	Telangana Rashtra Samithi	TRS
13	Janata Dal Secular	JDS
14	DravidaMunnetraKazhagam	DMK
15	Samajwadi Party	SP
16	Aam Aadmi Party	AAP
17	Janata Dal (United)	JDU
18	Shiromani Akali Dal	SAD
19	Maharashtra Navnirman Sena	MNS
20	PattaliMakkalKatchi	PMK
21	Jharkhand Vikas Morcha (Prajantrik)	JVM-P
22	Nationalist Democratic Progressive Party	NDPP
23	All India Anna DravidaMunnetraKazhagam	AIADMK
24	Rashtriya Janata Dal	RJD
25	Lok Jan Shakti Party	LJP
26	Sikkim Democratic Front	SDF
27	Jammu & Kashmir National Conference	JKNC
28	Jharkhand Mukti Morcha	JMM
29	All India Majlis-e-Ittehadul Muslimeen	AIMIM
30	Naga People Front	NPF
31	All India United Democratic Front	AIUDF
32	Rashtriya Lok Dal	RLD
33	DesiyaMurpokkuDravidaKazhagam	DMDK

34	All India N.R. Congress	AINRC
35	Sikkim Krantikari Morcha	SKM
36	Mizoram People's Conference	MPC
37	All India Forward Bloc	AIFB
38	Zoram Nationalist Party	ZNP
39	People's Party of Arunachal	PPA
40	Indian National Lok Dal	INLD
41	Jammu and Kashmir Peoples Democratic Party	JKPDP
42	Bodoland Peoples Front	BPF
43	MaharashtrawadiGomantak Party	MGP
44	Asom Gana Parishad	AGP
45	Kerala Congress (M)	KC-M
46	Revolutionary Socialist Party	RSP
47	Mizo National Front	MNF
48	Indian Union Muslim League	IUML
49	People's Democratic Alliance	PDA
50	Hill State People's Democratic Party	HSPDP
51	AJSU Party	AJSU
52	Indigenous People's Front of Tripura	IPFT
53	Jammu & Kashmir National Panthers Party	JKNPP
54	Rashtriya Lok Samta Party	RLSP
55	United Democratic Party	UDP
56	National People's Party	NPEP
57	Goa Forward Party	GFP
58	Janta Congress Chhattisgarh (J)	JCC (J)
59	People's Democratic Front	PDF
60	RashtriyaLoktantrik Party	RLP
61	Jannayak Janta Party	JJP

GOVERNMENT CONTRACTS; LOOT OF LARGESSE: INDIAN PANORAMA

Dr. Ashish Kumar Srivastava²⁵⁰

Abstract

“India is a plural democracy with a mandate of securing justice: social, economic and political to ‘we the people of India’. A contract is a wonderful tool for providing economic justice and securing social justice as well. A contract is a wonderful instrument of mobilization of resources. Resources are the means and end to justice. When these resources are public, and mobilization of these resources is attached with the realization of its worth to the coffers of Government, then a judicious and impeccable state governed by the rule of law becomes sine qua non to execute ‘distributive justice’. Sovereign India is also under the obligation of securing even distribution of resources to execute Benthamite Utilitarianism. The journey of India from a closed to a mixed and then to an open economy has obviously changed the policies and legal framework of the Government. India has its own unique problems like population, corruption, nepotism, red-tapism etc. Indian policies and legal frameworks, though often have attempted to tighten the loose nuts and bolts of the system, but the results have not been very encouraging. This paper tries to analyze and investigate a fundamental question that whether the legal framework of India pertaining to government contracts has always helped the corrupt to divert all ‘revenue’ and ‘proceeds’ to personal pockets which were meant to go into the coffers of the Government?”

1. CONSTITUTIONAL FRAMEWORK

India is a federal State²⁵¹. Contracts by and against the government were an important subject, so it was given a place in the constitution under Article 299. Article 299 says that all contracts in the exercise of executive power shall be made by President or Governor. All contracts shall be executed by them or persons authorized by them. President and Governor will not have any personal liability²⁵². This simply means that a government contract shall be written and executed by the authority of executive power. Schedule VII provides for

²⁵⁰Assistant Professor Faculty of Law, University of Lucknow

²⁵¹ Article 1, the Constitution of India.

²⁵² Article 299(2), the Constitution of India.

Union, State, and Concurrent lists, and Union can execute contracts pertaining to union and concurrent lists and state for state and concurrent lists.

The requirement of a written agreement or contract saves the government and the public both as it avoids unnecessary obligations of the Government, as government can avoid executing contracts which are unauthorized and lack the executive force, and it brings authenticity as it saves the public from fraud and corrupt officials of Government²⁵³. 'In India, the contractual liability of the State, modified by prescribed formalities and statutory conditions or limits, is the same as that of an individual under the ordinary law of contract. No special exemption in favour of the State has been made in Article 299 of the Constitution.'²⁵⁴ Chris says that cases on contractual liability say that to enforce the contractual liability of a state, many factors are responsible, and theories and principles are not consistent in this sphere.²⁵⁵

We need to understand that Article 299 provides for contractual liability of the state. In a contract, parties are put or exonerated from liabilities by the other party. In a government contract, one of the parties is the government or its department or any public sector undertaking. The government as a party in the formation of the contract exercises the executive power either of union or state, and Article 299 explicitly says that the President and Governor will have no personal liability, so the liability is either of State or Union Government ultimately, which is good and bad both. As the Government officials are not personally liable and the 'State' is vicariously liable, transparency and accountability are often compromised.

Initially, the Indian economy was a closed economy, so the sectors were not much opened to foreign and national players. Most of the commercial activity was being done by the Indian Government. The government didn't have much scope for commercial activity, and India was struggling to settle the dust caused by partition, communal violence, and the war of 1947. Subsequently, the legal framework recognized that a government contract is not different except that Government is a party to it, so Government has absolute power in picking and choosing the parties whom it considers competent and reliable. The only requirement the State and judiciary maintained is that the provisions of Article 299 must be

²⁵³M.P. Jain, *Indian Constitutional Law*, 1671(Lexis Nexis, Sixth Edition).

²⁵⁴BangenduGanguly, *Liability of The State in Modern India*,29 (4) The Indian Journal of Political Science 392, 393 (1968).

²⁵⁵Chris-James Pretorius, *The Basis of Contractual Liability in English Law and Its Influence on The South African Law of Contract*, 37(1) The Comparative and International Law Journal of Southern Africa96, 97(2004).

duly complied with. In *K.P. Chaudhury v. State of M. P.*,²⁵⁶ the court held that “if the contract between the Government and another person is not in full compliance with Article 299(1), it would be no contract at all and could not be enforced either by the Government or other person as a contract.” This kind of rigid interpretation by the Apex Court created a furore amongst the public. However, the apex court realized and said that if the basics of a contract are complete, then a contract may spring from correspondence also. In *Union of India v. Rallia Ram*,²⁵⁷ the court held that

“Constitutional provision did not in terms stipulate that only a formal document executed on behalf of Government of India with other contracting party was effective. In the absence of any direction by the President prescribing the manner in which a contract is to be executed, a valid contract may result from the correspondence between the parties.”

However, one must be cautious that State is *Parens patriae* and a watchdog of resources and government coffers, so it has an equally onerous duty to avoid illegal contracts as well; so in *BhikrajJaipuria v. Union of India*²⁵⁸ Supreme Court held that “no binding or concluded contract came in to effect because the only person authorized to enter in to contract for the sale of rails was director of stores and the secretary was not authorized to enter in to contract on behalf of President of India.” In *Mulaam Chand v. State of M.P.*²⁵⁹ Supreme Court adopted a rigid view of Article 299(1) and held that, “there was no question of ratification or estoppel by or against the government in case of a contract not confining to Article 299(1). No estoppel can apply against the Government if it seeks to nullify a contract which is not in form as prescribed by Article 299.” In *M. Mohammad v. Union of India*,²⁶⁰ the court held that a “contract not complying the requirements of Article 299 is only relatively void but not void for all purposes. It means while the contract is not enforceable by the parties thereto, it can still subsist for some collateral purpose.” Again, in *Mary v. the State of Kerala*²⁶¹ in the case of award of the license of liquor shops, Apex court held that “statutory contract cannot be viewed under Article 299 and Kerala Abkari Shops

²⁵⁶*K. P. Chaudhury v. State of M.P.*, AIR 1967 SC 203 See *Lubi Industries LLP v. State of Assam*, 2018 SCC OnLine Gau640.

²⁵⁷*Union of India v. Rallia Ram* AIR 1963 SC 1685.

²⁵⁸*BhikrajJaipuria v. Union of India* AIR 1962 SC 113; See *Orissa Industrial Infrastructure Development Corporation v. MESCO Kalinga Steel Ltd. & Others*, (2017) 5 SCC 86.

²⁵⁹*Mulaam Chand v. State of M.P.* AIR 1968 SC 1218 See *Orissa Industrial Infrastructure Development Corporation v. MESCO Kalinga Steel Ltd. & Others*, (2017) 5 SCC 86.

²⁶⁰*M. Mohammad v. Union of India* AIR 1982 Bom 443.

²⁶¹*Mary v. State of Kerala* (2014) 14 SCC 272.

(Disposal in Auction) Rules, 1974 cannot be struck down on the ground that it does not meet the requirement of the doctrine of reasonableness or fairness.”

1.1. Scope Of Article 299

The legal framework of India in its first two decades maintained that Article 299 requirements, i.e., written and executive force prescribed in the constitution, area must. However, it narrowed the scope of Article 299 by excluding service and statutory contracts from its purview. In *Purushottam Lal Dhingra v. Union of India*²⁶² Supreme Court stated that “as a service contract with the Government is subject to pleasure under Article 310(1) and can be terminated at will despite an express condition to the contrary, it can’t be regarded as a contract in the usual sense of the term and as such, it would not be brought within the purview of Article 299(1).” In *State of Haryana v. Lal Chand*²⁶³ Supreme Court held that, “grant of exclusive privilege of licensing of liquor under Punjab Excise Act gave rise to a contract of statutory nature distinguished from one executed under Article 299(1) and therefore compliance of Article 299(1) was not required in such a case.”

1.2. Quasi-Contractual Liability Of State

The rigidity of Article 299 and its strict compliance by the Apex Court of the country resulted in injustice to ‘we the people of India’. Government officials who are mostly holding transferable posts commenced the process of inking the contract and enjoyed the fruits of the contract but avoided the contract when the other party invoked the execution in the name of want of requirements of Article 299.

To dilute the effect of rigidity of compliance with Article 299, Apex Court has held that Government is liable under section 70 of the Indian Contract Act. In *State of West Bengal v. B.K. Mondal*²⁶⁴, a contractor, constructed the building, which was accepted by Government; the contractor was not paid, and the contract was denied for non-compliance with Article 299. Supreme Court held that “though the contract was unenforceable as it did not fulfil the requisite of Article 299, yet the State was still liable to pay under section 70 of the Contract Act on the quasi-contract for the work done by the contractor and accepted by the Government. Section 70 lays down three conditions, namely: (i) a person should lawfully

²⁶²*Purushottam Lal Dhingra v. Union of India*, AIR 1958 SC 36.

²⁶³*State of Haryana v. Lal Chand*, AIR 1984 SC 1326.

²⁶⁴*State of West Bengal v. B.K. Mondal*, AIR 1962 SC 779 See *New Marine Coal Co. v. Union of India*, AIR 1964 SC 152; *Orissa Industrial Infrastructure Development Corporation v. MESCO Kalinga Steel Ltd. & Others*, (2017) 5 SCC 86

do something for another person or deliver something to him; (ii) in doing so, he must not act gratuitously; (iii) the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. In this case, all the elements are satisfied, and so the Government is liable.” The illustration of quasi-contractual liability of the state is also found in the USA, UK and France.²⁶⁵

2. MIXED ECONOMY AND GOVERNMENT CONTRACT

Democratic socialism and the Nehruvian socialist formula impacted the Indian economy, and GDP from 1950 to 1980 remained at 3.5%. Two wars with Pakistan, One war with China, Death of Nehru and Shastri impacted Smt. Indira Gandhi and she opened the economy, and Aryabhata and Pokhran I happened because of that. However, Smt. Gandhi introduced the socialist philosophy into the constitutional framework and started the process of ‘nationalization’. In this era, India was struggling to offload its stereotype of a ‘closed’ economy and open specific sectors for investment, and at the same time, it was nationalizing private enterprises to execute socialism. She proclaimed an emergency also, which is still seen as a blot on the face of vibrant Indian democracy. This phase also found an amusing ‘babudom’ who, with a briefcase and safari suit, was out to award a government contract. Red-tapism and corruption took the central stage. In this phase, significant scams like the Maruti scam, the Kalinga tube scam, and the Kuo Oil scam started.

In this topsy-turvy and turbulent period, guidance was needed, which came in the landmark judgment of *Ramana Dayaram Shetty v. International Airport Authority*²⁶⁶ Supreme Court settled cardinal principles with regard to the award of contract. It held that “It must therefore follow as a necessary corollary from the principle of equality enshrined in Article 14 that though the state is entitled to refuse to enter into a relationship with anyone yet if it does so it cannot arbitrarily choose any person it likes for entering into a relationship and discriminate between persons similarly circumstanced, it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground.” *R. D. Shetty* is a watershed judgment which laydown bedrock foundation that resources and distributive justice must be followed on the basis of equality and *Wednesbury* principles.

²⁶⁵Alan W. Mewett, *The Quasi-Contractual Liability of Governments*,13(1), The University of Toronto Law Journal56(1959).

²⁶⁶*Ramana Dayaram Shetty v. International Airport Authority*, AIR 1979 SC 1628See *Municipal Corporation v. BVG Indian Ltd.*, 2018 SCC OnLine SC 278.

In *F.C.I. v. Kamdhenu Cattle Feed Industries*²⁶⁷ Apex Court observed that “In Contractual sphere as in all other state actions the state and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for the public good. This imposes the duty to act fairly and to adopt a procedure which is fair play in action.” In *LIC of India v. Consumer Education and Research Centre*²⁶⁸ Supreme Court observed, “The actions of the state and its instrumentality any public authority or person whose actions bear insignia of public law element or public character are amenable to judicial review and validity of such an action would be tested on the anvil of Article 14.” Supreme Court upheld the cancellation of a Government Mining Contract on account of illegality and favouritism²⁶⁹.

2.1. Open-Economy & Government Contracts

The decades of the Nineties are known for a free and open economy known as the era of liberalization, privatization and globalization. India, owing to its economic compulsions, became an open and unrestricted market due to being party to World Trade Organisation. The regulatory regime of India moved from control of resources to regulation and management of resources. Many pragmatic legislation was passed as Foreign Exchange Management Act, Foreign Trade Development and Regulation Act, Depositories Act, SEBI Act etc. Due to FDI and FII, many foreign players and joint ventures started making investments, and new resources like mobile spectrum, cellular technology, internet, space programme, missile, defence equipment, space activities and many other resources were available for sale. At the same time, non-productive white elephants (Government PSUs) started being divested, and the contract became a handy instrument for both. Again, the apex court, in the changed scenario in *Tata Cellular v. Union of India*²⁷⁰, the Supreme Court, held that, the “Court could review administrative discretion in awarding a contract on following grounds (i) illegality; (ii) irrationality and (iii) procedural impropriety. This judgment started the era of technical evaluation and price evaluation separately in government tendering process to bring more transparency and accountability in award of contract.”

²⁶⁷*F.C.I. v. Kamdhenu Cattle Feed Industries*, AIR 1993 SC 1601 See *MadhoorBuildwellPvt. Ltd. v. Yeola Municipal Council. & Others* (2019) 9 SCC 350.

²⁶⁸*LIC of India v. Consumer Education and Research Centre*, AIR 1995 SC 1811.

²⁶⁹*Sunder Marketing Associates v. State of Haryana & Others*, (2017) 14 SCC 763.

²⁷⁰*Tata Cellular v. Union of India* AIR 1996 SC 11.

At the same time, in *Balco Employees Union (Regd.) v. Union of India*²⁷¹ Supreme Court held that “(1) Disinvestment by the Government in a public enterprise is a matter of economic policy which is for the Government to decide. The Court does not interfere with economic policies unless there is a breach of law. (2) Sale of an undertaking to the highest bidder after a global advertisement inviting tenders at a price which was way above the reserve price fixed by the government could not be said to be vitiated in any way. The procedure followed was proper. (3) The matter of fixation of the reserve price being a question of fact, the court does not interfere unless the methodology adopted is arbitrary.”

Judicial restraint and judicial overreach played an important role, and from 2000 to 2005 Judiciary was not actively engaged in human affairs. In *Directorate of Education v. EducompDatamatics Ltd.*²⁷² Supreme Court observed that “The terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. The government must have a free hand in setting the terms of the tender. The court can scrutinize the award of contracts. The courts cannot strike down the terms of tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical.” Supreme Court in *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.*²⁷³ held that “public sector undertakings must accept beneficial tenders as huge public stakes are involved, but it held that Government cannot be rigid and apply a hard and fast rule for awarding tenders.”

In *Reliance Energy Ltd. v. Maharashtra State Road Development Corporation Ltd.*²⁷⁴ Supreme Court, relying on the *Tata Cellular* case, held that “right under Article 14 correlates with Article 21. The norms laid down by the administration must be clearly and adequately understood by the administration as well as those interacting with the administration. If such standards are uncertain, then the rule of law could be breached. Legal certainty is a critical aspect of the rule of law, and any vagueness or subjectivity in such norms could result in unequal and discriminatory treatment and thereby violate the doctrine of a level playing field. “

²⁷¹*Balco Employees Union (Regd.) v. Union of India*, AIR 2002 SC 350.

²⁷²*Directorate of Education v. EducompDatamatics Ltd.*, (2004) 4 SCC 19.

²⁷³*B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.*, (2006) 11 SCC 568.

²⁷⁴*Reliance Energy Ltd. v. Maharashtra State Road Development Corporation Ltd.*, (2007) 8 SCC 1.

2.2. E-contract and Government Contract

The advent of the computer and the internet brought a paradigm shift in business. E-commerce and e-contract became the order of the day. B2B, G2B, G2G, C2C, and B2C models of e-commerce came as a revolutionary model to market. UNCITRAL mandated its member to enact laws to give validity and authenticity to electronic transactions, and India passed Information Technology Act, 2000 and at the same time amended Indian Evidence Act to make electronic evidence admissible. This change necessitated the guidelines of Apex Court on e-contracts and in *Ashoka Smokeless Coal India (P.) Ltd. v. Union of India*²⁷⁵ Supreme Court on e-auction held that “(i) The concept of price fixation is that all persons who are in requirement of the commodity should know the basis or criterion thereof. (ii) While adopting a policy decision as regards the mode of determining the price of coal, either fixed or variable, the coal companies were bound to keep in mind the social and economic aspects of the matter. They could not take any step which would defeat the constitutional goal. (iii) Arbitrary fixation of price and arbitrary mode of fixation would be violative of Article 14 of the Constitution. (iv) A monopoly concern is meant to cater to the needs of all sections of people. (v) E-auction is not a policy decision of the Central Government but a policy decision on the part of the executive of the Central Government and must be strictly construed in terms of Article 77 of the Constitution. (vi) Since the price fixation of an essential commodity is to be determined on the touchstone of public interest, the state must follow a reasonable and fair procedure and, for that purpose, may collect data, obtain the public opinion and may appoint an expert committee. (vii) In the fact that coal companies proceeded only to safeguard their own interests as a dealer and not as a state and primarily for a profit motive. (viii) It was no defence for the coal companies to say that they were acting at the instance of the Central Government when there was no control over the price and had no say in the matter of fixation of price under the Colliery Control Order, 2000. (ix) The Government or the coal company could change an existing policy subject to the satisfaction of the Constitutional requirement and adopt e-advertisement or e-tender if due and proper transparency is maintained.”

3. LOOT OF LARGESSE

In spite of a vigilant Apex Court and a plethora of guidelines for the award of the contract, we find a pile of scams in which a staggering amount of money was diverted for private means and ends. In the list 2G scam in 2008, Rs. 1,76,000 crores, UPNHRM Scam in 2010

²⁷⁵*Ashoka Smokeless Coal India (P.) Ltd. v. Union of India*, (2007)2 SCC 640.

Rs. 10,000 Crores, Coalgate Scam in 2012 Rs. 1,85,591 crores, CWG Scam in 2010 Rs. 70,000 Crores, Abhishek Verma Arms Deal Scam in 2012 Rs. 80,000, Saradha Scam in 2013 Rs. 2, 500 Crores, and recently in 2018 PNB Scam Rs. 13, 600 Crores were looted from public exchequer. It looks like lack of policy, increased and institutionalized corruption, abuse of discretionary power, degrading morality, and lack of patriotism and nationalism led to such big corruption. It looks as if one wants to outnumber others in terms of the amount of loot. In such a situation, the conflicting opinion of the Supreme Court is a matter of concern. In Centre for Public Interest Litigation v. Union of India²⁷⁶ Supreme Court held that,

“This Court has repeatedly held that wherever a contract is to be awarded, or a license is to be given, the public authority must adopt a transparent and fair method for making the selection so that all eligible persons get a fair opportunity of competition. To put it differently, the state and its agencies/instrumentalities must always adopt a rational method for the disposal of public property, and no attempt should be made to settle the claim of worthy applicants. When it comes to the alienation of scarce natural resources like spectrum etc., it is the burden of the state to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest. In our view, a duly publicized auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like ‘First Come First Serve’ when used for alienation of natural resources/ public property, are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for constitutional ethos and values. In other words, while transferring or alienating the natural resources, the state is duty-bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process.”

To review the judgment President of India, under constitutional provisions, referred the matter to Indian Supreme Court for review of the policy of awarding a government contract. On this reference in Re Natural Allocation²⁷⁷ Supreme Court held that,

“From a scrutiny of the trend of decisions, it is clearly perceivable the action of state whether it relates to distribution of largesse, grant of contracts or allotment of land

²⁷⁶Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1.

²⁷⁷Re Natural Allocation (2012), 10 SCC 119.

is to be tested on the touchstone of Article 14 of the constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity qua Article 14 of the Constitution.”

The action must be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased without favouritism or nepotism, in pursuit of the promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed by reasons and guided by public interests. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14 of the Constitution of India. Supreme Court²⁷⁸ further observed that,

“Therefore, in conclusion, the submission that the mandate of Article 14 is that any disposal of a natural resources for commercial use must be for revenue maximization and thus by auction is based neither on law nor on logic. There is no constitutional imperative in the matter of economic policies. Article 14 does not pre-define any economic policy as a constitutional mandate. Even the mandate of Article 39(b) imposes no restrictions on the means adopted to sub-serve the public good and uses the broad term distribution suggesting that the methodology of distribution is not fixed. Economic logic establishes that alienation/allocation of natural resources to the highest bidder may not necessarily be the only way to sub-serve the common good and, at times, may run counter to the public good. Hence it needs little emphasis that disposal of all-natural resources through auctions is clearly not a constitutional mandate.”

Supreme Court citing the Tata Cellular case, held that,

“It is indeed unthinkable that in a democracy governed by the rule of law, the executive Government or any of its officers should possess arbitrary power over the interests of individual. Every action of the executive government must be informed with reason and should be free from arbitrariness.”²⁷⁹

Apex Court also held that *“Judicial review of the decision-making process is permissible if it suffers from arbitrariness or mala fide or procedure adopted is to favour one.”²⁸⁰*In awarding a

²⁷⁸Ibid

²⁷⁹ Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016)8 SCC 622.

²⁸⁰ Monte Carlo Ltd. v. NTPC Ltd., (2016)15 SCC 272.

contract, commercial consideration, along with the mandate of social justice, affordability of goods and services, price and supply, are to be kept in mind; however, the court can review whether the process has been fair or not.²⁸¹ Supreme Court held that financial arrangements between two state Governments do not require an instrument under Article 299²⁸².

The public trust doctrine has been introduced and endorsed by our Supreme Court on environmental issues²⁸³. The Gandhian idea of trusteeship also has been a celebrated idea in India. Now a question arises about whether the public trust doctrine can be applied in a government contract? The author firmly believes that this public trust doctrine which has been limited to environmental issues, may also be extended to cases of public corruption. Government must act as a managing trustee in distributing resources via government contracts in the best interests of beneficiaries (We the people). If any dereliction of duty in breach of a fiduciary relationship is found, the government officials must be held accountable. Recovery of money and resources in line with UNCAC is the only possible action to mitigate corruption. However, liberating the public trust doctrine to general cases of corruption may invite excessive judicial intervention and affect the economic prosperity of the country²⁸⁴.

4. CONCLUSION

Since its independence Indian legal system has been striving very hard to build a nation on socialist values by distributive justice, Indian journey in awarding contracts has been influenced by its changing philosophies, e.g., welfare State, laissez-faire state, socialism, capitalism, close, mixed and open economy. Corruption and abuse of discretion have played a very vital role in India for abuse of contractual capacity of the state. Mobilization of resources by contract is not a child's play. A closed to open economy will obviously have its implications on the legal system; however, the factors of abuse of discretion and institutionalized corruption also have affected the policies and their execution. Apex Court, by watershed judgments like R.D. Shetty and Tata Cellular, has been a flag runner of corruption-free India. The new kind of technological resources is creating a challenge for proper and impeccable disbursement in the line of socialism and Benthamite philosophy.

²⁸¹Municipal Corporation v. B.V.G. Indian Ltd., (2018) 5 SCC 462.

²⁸²Ramesh Parsram Malani & Others v. State of Telangana, (2020) 11 SCC 653.

²⁸³M.C. Mehta v. Kamal Nath (1997) 1 SCC 388.

²⁸⁴James L. Huffman, *Why Liberating The Public Trust Doctrine Is Bad For The Public Environmental Law* Vol. 45, No. 2, Symposium: Public Trust Doctrine, pp. 337-377 (Spring 2015)

One needs to guard the public exchequer and follow egalitarian justice based on propriety, rationality and equality.

The Government, while awarding contracts under article 299, must be more compliant with the Wednesbury principle of fairness, procedural propriety, non-discrimination, equality etc. The tone and tune of the tendering process have already been set in the Tata Cellular case, which has to have strictly adhered to. The Government must train Government officials, departments and PSUs about the legal framework and seek compliance at the optimum level. Central Vigilance Commission has to play an active and supportive role in the creation of a corruption-free ecosystem where transparency and accountability are practised as the highest ideals. Apart from issuing guidelines for government contracts, CVC must create an ecosystem wherein an audit, like a social audit of government contracts, has a threshold limit of Rs. 100 Cr. Shall be done in the financial year of award of contract. Guidelines issued by Supreme Court in the Ashoka Smokeless case relating to e-contracts must be clearly adhered to. A FAQ and primer on these guidelines must be circulated in all Government offices and uploaded on the website of CVC. The proceeds of corruption gained in government contracts must be recovered under the relevant anti-corruption law. All the parties which are blacklisted must not ever be given an opportunity to work in a vicarious capacity again, especially in cases where natural or manmade resources like spectrum etc., are to be disbursed in Government contracts. CVC must create a special division to monitor government contracts. Further, the use of AI, ML, Blockchain will also fish out anomalies in government contracts, so the use of smart contracts must not be ruled out to bring transparency and accountability to Government contracts.

A CRITICAL STUDY OF OPERATIONS OF THE STATE INFORMATION COMMISSION HARYANA

Poonam Dahia, and Prof RajkumarSiwach²⁸⁵

Abstract

The Right to Information Act, 2005, came into operation on June 15, 2005, to foster open governance and vibrant democracy by promoting transparency, accountability, and integrity in the working of public authorities. For superintendence, direction, and control over the affairs of openness of information, the Central and State Information Commissions have been set up as practical regimes of right to information enabling citizens to access records, documents, reports, papers, and samples held by the public authorities. Yet their functioning and performance have been criticized on many grounds. To address the performance of the State Information Commission, Haryana, this article endeavours to explain the efficiency in terms of time taken and expenditure incurred from the state exchequer on the complaints, appeals and compensation heard by the selected information watchdog.

Keywords: Accountability, Transparency, State Information Commission Haryana, Disposal rate, Cost of decisions, Information watchdog, Pendency of complaints and Appeals.

1. INTRODUCTION

The Right to Information Act, 2005 envisages an information regime mandating informed citizenry, transparent information, contained corruption and public authorities accountable to the governed. For this, the State Information Commission Haryana, vide clause 15, is set up to exercise superintendence, direction and management of the affairs under the Act, but its performance, more often than not, has been questioned on various grounds. For example, Siwach (2018) finds weaknesses in the Commission's working on the basis of enquiries, complaints and appeals decided from 2005 to 2018.²⁸⁶ The Commissions have delivered contradictory decisions in view of judicial verdicts.²⁸⁷ Second Administrative Reforms

²⁸⁵Research Scholar, department of Public Administration, Ch. Devi Lal University, Sirsa (Haryana) and Department of Public Administration, Ch. Devi Lal University, Sirsa (Haryana)

²⁸⁶Siwach & Rajkumar, *Adjudicators of the RTI Regime: A Critical Analysis of the Performance of State Information Commission, Haryana*, 64(4) *The Indian Journal of Public Administration* 717 (2018).

²⁸⁷Dhaka & Rajvir, Singh, *The Information Commissions in India: A Jurisprudential Explication of their powers and functions*, 64(4) *The Indian Journal of Public Administration* 703 (2018), available at <https://journals.sagepub.com/doi/abs/10.1177/0019556118788481>.

Commission enumerates implementation problems and removal of difficulties in the context of the RTI Act, 2005.²⁸⁸ An article which appeared in *The Hindu*²⁸⁹ analyzed the shortcomings in the functional performance of the Commissions with regard to laxity in imposing a penalty, delay, pending appeals and complaints. Satyaprakash²⁹⁰ (2020) noted that more than 50% of vacant posts of the Commissions led to a backlog of 36,000 cases. The performance of the Commissions was hindered due to excessive delay, inability to recover the arrears, dominance of the bureaucracy and clash of interests between the Commissioners and the Public Information Officers (*The Hindu*²⁹¹, Siwach²⁹² (2020) and Indira Jaisingh²⁹³ (2021)).

The brief review of literature, thus, reveals a hiatus between the roles of the Commissions under the legislation and their actual performance. Resultantly, transparency of the information is suffocated. Therefore, this article seeks to measure the performance of the Haryana State Information Commission on the basis of the criteria of efficiency (Henry, 2012:178). To ascertain the Commission's performance from 2019-20 to 2021-22, efficiency parameters are used. These are the time taken and pendency to dispose of complaints and appeals, Commission-wise monthly disposal rate, total cases decided by the Commission, public money incurred to decide cases, and incumbency of the Chief Commissioners. Before evaluating its performance, it becomes appropriate to briefly review the composition, powers, and process of the Commission to entertain complaints and appeals.

2. STATE INFORMATION COMMISSION, HARYANA: COMPOSITION AND POWERS

The State Information Commission Haryana comprises one Chief Information Commissioner and other Commissioners but not exceeding ten. All the Commissioners are appointed by the Governor on the recommendations of a committee consisting of the Chief Minister as its chairperson, the leader of the opposition in the Legislative Assembly, and a cabinet Minister to be nominated by the Chief Minister. The RTI Act provides that if a person, who acquired eminence in public life with broad knowledge and experience in the

²⁸⁸Second Administrative Reforms Commission, Government of India, *First Report on the Right to Information: Master key to Good Governance*, 2006.

²⁸⁹*The Hindu* (New Delhi, 12/10/2019).

²⁹⁰Sataya Prakash, *The Tribune* (Chandigarh, 19/10/2020).

²⁹¹*The Hindu* (New Delhi, 17/11/2020).

²⁹²Siwach & Sukhbir, *The Indian Express* (Chandigarh, 13/09/2020)

²⁹³Vinita Deshmukh, *Dominance of Babus in the Information Commission Can Lead to Conflict of Interest: Indira Jaising*, Money Life, available at <https://www.moneylife.in/article/dominance-of-babus-in-the-information-commission-can-lead-to-conflict-of-interest-indira-jaising/62587.html>, last seen on 24/09/2021.

specified fields, can be considered eligible for the appointment to the positions of Chief Information Commissioner or the Commissioners. These specific fields of eminence in public life are Law, Science and Technology, Social service, Management, Journalism, Mass media, Administration and Governance. It should be noted that nowhere it has been specifically prescribed what constitutes eminence in public life, connoting wide knowledge and experience. Thus, it leaves the scope for discretion and patronage. For this reason, the persons of political affiliation or liking to get a chance to be appointed to these positions.

Under the original Act, the Commissioners were entitled to hold office for up to five years, but this provision was amended by the Right to Information (Term of Office, Salaries, Allowances and Other Terms and Conditions of Service of Chief Information Commissioner, Information Commissioners in CIC State Chief Information Commissioner and State Information Commissioners in the State Information Commission) Rules, 2019. Now, the tenure of the incumbent is for a period of three years from the date on which she/he enters his office or attaining the age of 65 years, whichever earlier.

The Commission is fully empowered to adjudicate appeals and complaints. The complaints can be lodged directly to the Commission, whereas the second appeals are entertained only after the failure or dissatisfaction of the information seeker with the decision of the SPIO and the First Appellate Authority. The complaints are lodged under section 18. The office of the Commission registers the second appeal. There is no provision for submitting the appeals by email. However, the complaints can be lodged by email. The appeal or complaint, as the case may be, is sent to the Reader of the respective Commissioner, who scrutinizes the appeal/complaint. If it is complete in all respects, then it is placed before the Commission for deciding the date of hearing. If there are discrepancies in the appeal, then it is forwarded to the Registrar for compliance by the appellant. After compliance, a case number is allotted to the complaint, and the notice is served to all parties with time-bound comments of the SPIO and the First Appellate Authority. This process takes a minimum of 15 days. The Commission has the same powers as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908.

“The appellant lodges a second appeal as per the rules framed under the RTI Act. It should be noted that the First Party, the applicant and the third party have the right to file a second appeal. If aggrieved by the decision of the SPIO or the FAA, the appeal can be lodged. The appeal can be made within 90 days from the actual receipt of the decision of the FAA. However, the Commission can entertain the appeal beyond this

period also. There is no time limit to entertain an appeal and to decide the appeal. The commission gives the opportunity of hearing to all parties. The Commission has the power to take any step to ensure compliance with the RTI Act. If the allegations levelled by the applicant are proven, then the Commission can impose a penalty of two hundred and fifty rupees each day till the application is received or information is furnished. But the total amount of such penalty shall not exceed twenty-five thousand rupees. Besides, the Commission is also empowered to recommend compensation causing the harm to the applicant and disciplinary action against the SPIO.”

3. PERFORMANCE APPRAISAL

The Commission has vast powers to ensure compliance. Its decisions are binding. But the operational performance of this information adjudicator suffers from various weaknesses. To substantiate this statement, we have collected the data from the office of the Commission and also held in-depth discussions with the officers. After analysing the data²⁹⁴, it was found that the Chief Information Commissioners did not remain in the office for the complete tenure. So far, six Chief Information Commissioners have occupied this prestigious position, out of which only two Commissioners, G. Madhwan and Naresh Gulati, barring the present incumbent, worked for more than five years. The tenure of Sh. Madhwan, the first Chief Information Commissioner, was the longest one, whereas the term of Maj. General Jagbir Singh Kundu was the shortest, i.e., only for 26 days. The tenure of the rest of the incumbents lasted for varying periods. Meenaxi Anand Chaudhary retained office for six months, and Urvashi Gulati acted as the CIC for one year and one month.

There is a direct correlation between the performance of the Commission and the number of cases adjudicated by it. So, the following tables address this criterion.

Table 1: Number of cases decided under sections 18(2), 19(3) and 20(1) in calendar years 2019, 2020 and 2021

Sr. No	Year	Section 18(2)	Section 19(3)	Section 20(1)
1	2019	608	8424	1895
2	2020	770	7259	2243
3	2021	965	7886	2739

Source: SICH Office

²⁹⁴ State Information Commission, Haryana, available at <https://cicharyana.gov.in/scic>

The State Information Commission, under section 18(2), is empowered to enquire into any matter, hear appeals against decisions of the FAA and the SPIOs, under section 19(3) and to award the penalties for denying information vide section 20(1). The information pertaining to these cases is described in the above table. For all three years under the reference, the Commission decided 20,569-second appeals, followed by 6,877 cases of compensation and 2,343 complaints. It is pertinent to mention that only those cases of the second appeal are listed with fresh numbers under section 20(1), in which the Commission finds that information has not been furnished without any reasonable cause.

Table 2: Pendency of cases and cases decided under sections 18(2), 19(3), 20(1) during the calendar years 2019, 2020 and 2021

Month	Pendency of cases			Cases decided		
	2019	2020	2021	2019	2020	2021
January	3731	6394	6798	1149	925	1109
February	3561	6218	7033	955	1132	1202
March	3946	6330	6910	858	513	1247
April	4077	Lockdown	6881	844	Lockdown	762
May	4337	6515	6555	964	424	789
June	4321	6930	6900	896	884	780
July	4536	6796	6782	929	1056	1049
August	4720	6748	6687	803	984	1039
September	5120	6339	6518	961	1137	1074
October	5559	6820	6297	755	1149	890
November	5815	7032	6208	863	823	767
December	6080	6795	6227	942	1245	882

Source: SICH Office

A significant trend that emerged from this table reveals that the amount of pendency of complaints, appeals, and compensation is in increasing order during these years. The maximum number of pendency, barring a slight variation in the month of June 2012, is reported during the calendar year 2021. Similarly, the trend for decided cases varies, but the

average higher disposal rate is calculated during the years 2019 and 2021. The impact of the COVID-19 pandemic on performance delivery is vividly seen. There is also a month-wise upward trend in the pendency of cases registered in the office of the SICH.

Table 3: Per case expenditure incurred during the financial year 2019-2020, 2020-2021 and 2021-2022

Sr. No	Year	Nature of cases	Total cases	Expenditure (In lac)	The average cost of a case
1	2019-2020	u/sec 18(2)	629	810.17	1,28,802
2		u/sec 19(3)	8011		10,113
3		u/sec 20(1)	1887		42,934
4		Total	10,527		7,696
5	2020-2021	u/sec 18(2)	904	736.67	81,490
6		u/sec 19(3)	7708		9,557
7		u/sec 20(1)	2648		27,819
8		Total	11,260		6,542
9	2021-2022	u/sec 18(2)	670	544.85	81,320
10		u/sec 19(3)	5619		9,656
11		u/sec 20(1)	1743		31,259
12		Total	8032		6,783

Source: Adapted from the office of the State Information Commission, Haryana

Note: The calculated expenditure is incurred on the salary and allowances of the Commissioners, regular supporting staff, equipment, office expenses, wages to the professional and outsourced staff and miscellaneous expenses etc. The figures for the financial year 2021-22 are calculated up to December 2021 as no information on the number of cases was accessed beyond the month of December 2021.

The motive behind the setting up of the Information Commission was to deliver justice to ordinary citizens economically and efficiently. Thus, to keep this in mind, the instant study evaluated the cost per case. The data in this regard is presented in the above table. Its analysis reveals that the cost of a decision on a complaint filed by the complainant amounted to rupees 1 28,802/- to the state exchequer for the year 2019-20. An appeal has a financial liability of rupees 10,113, and the compensation for the year amounted to 42,934 rupees. Total amount incurred on the complaints, appeals and compensation cases (10,527) during the year 2019-20 is priced at rupees 7,696. However, these financial figures come down slowly in the next year, 2020-21. An amount of 81,490 rupees were paid from the state exchequer to deliver one complaint. An appeal's delivery cost was calculated as 9,557 rupees. Similarly, the cases were also listed for awarding the compensation and per cost of this type of case was 27,819 rupees. An average cost per the complaint, per appeal and per compensation was found to be 6,542 rupees. During the current financial year but only up to December 2021 due to non-availability of the number of listed complaints, appeals and compensation. An amount of rupees 81,320 was incurred per complaint, rupees 9,656 per appeal and rupees 31,259 on the compensation-related cases. The average cost of all three types of cases was calculated to be rupees 6,783. The net conclusion of this table is that complaints and compensation under sections 18(2) and 20(1), respectively, are costlier than appeals. The variable of the cost of a decision is directly linked to the disposal rate of the Commissioners. This aspect is explained in the following tables.

Table 4: Commissioner-wise disposal rate during the calendar year 2019 under sections 18(2), 19(3) and 20(1)

Sr. No	Months	CI C, Y.P . Sin gal	Shiv Ram an Gau r	Re kha	Bhu pend er K. Dhar mani	Suk hbir S. Guli a	Nari nder S Yada v	Cha nder Prak ash	Aru n Sang wan	K.J. Sing h	Kama ldeep Bhan dari	Jai Sin gh Bis hno i	Total
1	January	218	83	123	101	191	117	130	186	-	-	-	1149
2	February	182	77	141	34	177	126	111	107	-	-	-	955
3	March	113	93	120	61	176	129	106	60	00	00	00	858
4	April	163	6	69	40	138	108	119	113	34	16	38	844
5	May	159	-	62	89	177	93	114	100	57	37	76	964
6	June	110	-	48	68	204	108	113	112	42	3	88	896
7	July	166	-	58	118	18	108	121	136	57	55	92	929
8	August	88	-	00	109	00	106	134	108	67	48	143	803
9	September	218	-	-	71	-	122	133	107	82	96	132	961
10	October	140	-	-	110	-	100	121	54	69	76	85	755
11	November	134	-	-	135	-	104	173	132	79	29	77	863
12	December	156	-	-	128	-	115	125	126	96	88	108	942
13	Total decided	1847	259	621	1064	1081	1336	1500	1341	583	448	839	

The report card of the CIC is satisfactory; during the calendar year 2019 decided, 1,784 cases, followed by a close contest between Chander Parkash and Arun Sangwan. It was found that Shiv Raman Gaur disposed of a minimum number of cases, followed by Kamaldeep Bhandari. Month-wise progress reveals that CIC again decided on maximum cases, whereas Mrs. Bhandari decided on only three cases in the month of June. The Commission as a whole decided on 10,919 cases during the year 2019, and the annual disposal rate thus becomes 909.

Table 5: Commissioner-wise disposal rate during the calendar year 2020 under sections 18(2), 19(3) and 20(1).

Sr. No	Months	CIC, Y.P. Singhal	Bhupender K. Dharmani	Narinder S Yadav	Chander Prakash	Arun Sangwan	K.J. Singh	Kamaldeep Bhandari	Jai Singh Bishnoi	Total
1	January	147	108	113	134	121	155	109	38	925
2	February	161	112	130	166	123	157	130	153	1132
3	March	95	20	36	107	11	103	3	138	513
4	April	Nil during lockdown								
5	May	80	74	60	24	58	58	7	63	424
6	June	160	76	124	105	50	177	41	151	884
7	July	191	156	105	129	83	160	70	162	1056
8	August	160	132	102	134	113	132	92	119	984
9	September	161	160	103	126	100	192	167	128	1137
10	October	106	175	109	130	180	136	146	167	1149
11	November	175	151	126	110	55	0	96	110	823
12	December	197	153	111	141	144	244	65	190	1245
13	Total decided	1633	1317	1119	1306	1038	1514	926	1419	

The above data reveals that the CIC while keeping his performance intact, disposed of a maximum number of cases, followed by KJ Singh, whose performance improved by three times as compared to the previous year. The performance of Kamaldeep Bhandari, in comparison to the year 2019, declined as she stood at the bottom in view of performance delivery. She decided on only three cases during the month of March. The CIC, again, placed at the top of the performers, who decided 197 cases on monthly basis progress during the year. He was followed by Jai Singh Bishnoi by disposing of 190 cases. In total, the Commission decided on 10272 cases which on an average basis become 856.

Table 6: Commissioner-wise disposal rate during the calendar year 2021 under sections 18(2), 19(3) and 20(1).

Sr. No	Months	CIC, Y.P. Singhal	Bhupender K. Dharmani	Narinder S Yadav	Chander Prakash	Arun Sangwan	K.J. Singh	Kamaldeep Bhandari	Jai Singh Bishnoi	Total
1	January	134	244	104	107	143	188	49	140	1109
2	February	194	222	113	110	130	170	142	121	1202
3	March	201	246	102	121	151	48	101	277	1247
4	April	132	00	100	152	95	100	33	150	762
5	May	139	-	47	106	40	34	42	381	789
6	June	176	-	105	143	112	93	35	116	780
7	July	244	-	102	125	174	2	100	302	1049
8	August	177	-	137	166	227	-	122	210	1039
9	September	243	-	120	177	206	-	56	272	1074
10	October	124	-	127	169	171	-	122	177	890
11	November	196	-	143	169	128	-	30	101	767
12	December	201		132	195	133		74	147	882
13	Total decided	2161	712	1332	1740	1710	635	906	2394	

On the lines of analysis of the previous two years, we found that Jai Singh Bishnoi, followed by the CIC, Yash Pal Singal, again earned the name of the better performer. Surprisingly, K.J. Singh, who was the commended performer last year, could not maintain his record. He was followed by Kamaldeep Bhandari, whose monthly disposal touched the lowest figure of 30 against the best monthly score of 381 achieved by Jai Singh Bishnoi. The performance of BhupenderDharmani was not taken into account, who retired on March 31, 2021. The annual disposal rate of the Commission was 965, calculated on the basis of the total yearly disposal of 11590 cases.

The best performers during the studied three-year period are the CIC, Y.P. Singal, Jai Singh Bishnoi and Chander Parkash. K.J. Singh's position is found shuffled because, in the year 2019, he figured in the list of least performers, followed by Shiv Raman Gaur and Kamaldeep Bhandari and strangely, she scored the second position in delivering maximum

cases in the year 2020. The data reveals that Mrs. Kamal Deep Bhandari is the least performer.

Table 7: Time taken to Award Compensation to the Appellants under Section 19 (8) (B) during Calendar Year 2019, 2020 and 2021

Sr. No	Time	No. of Cases (2019)	No. of Cases (2020)	No. of Cases (2021)
1	0-6months	73 (31.87%)	43 (30.71%)	37 (26.42%)
2	6 mths- one year	79 (34.49%)	42 (30.00%)	25 (17.85%)
3	One year-One year & 6 months	53 (23.14%)	22 (15.71%)	10 (7.24%)
4	One year & 6 months - 2year	17 (7.42%)	24(17.14%)	14 (10.00%)
5	2year-2 year & 6 months	5 (2.18%)	2 (1.42%)	6 (4.28%)
6	2 year & 6 months-3year	-	7 (5.00%)	7 (5.00%)
7	3year-3 year & 6 months	1(.43%)	-	1(0.71%)
8	3 year & 6 months-4year	1 (.43%)	-	2 (1.42%)
9	4year-4 year & 6 months	-	-	1(0.71%)
10	4 year & 6 months-5year	-	-	1(0.71%)

It may be noted that only those cases are listed for the compensation on which the commissioner deemed fit for the penalties on sufficient and reasonable grounds. Thus, out of all listed and decided complaints and appeals, this table presents data for those appeals in which the penalties were awarded by the Commission. The data are analysed to explore the estimated time, divided into the six-months interval, taken to adjudicate the compensation to the appellants. A broad conclusion drawn from this table is that majority of cases were disposed of before one year during the years 2019 and 2020, but this situation declined in the year 2021, during which only 44.27 % of cases could be resolved before the lapse of one year. As many as around 31% of cases were decided between one to two years time period and the number of cases during this period comes down to 17.24% in the year 2021. The number of cases which took more than two years and less than four years is 7 in 2019, 9 in 2020 and 10 in 2021. There are two cases reported during the year 2021 for which the Commission took five years to decide.

4. CONCLUSION

The Commission was established to promote Citizen-centric Governance, but its working is plagued by delay, lacklustre disposal rate, and expensive delivery. The Commission decides 7000-8000 appeals annually, and there have been annual pendency of more than 6000 cases. The decision in a complaint costs more than one lakh rupees, whereas the cost of an appeal is estimated at rupees 9,500. Thus, for the taxpayers, the delivery is costly. The monthly performance of the Commissioners is also a cause of worrisome. There are Commissioners who did not decide a single case in a month or, sometimes, decided only 3 of 4 cases in a month. No standard yardstick on the lines of the Central Information Commission is followed by the state Commission to decide the minimum number of cases annually. No initiative in this regard is taken by the Commission to bring efficiency to its delivery system. Surprisingly, at the instance of a few activists, a case to fix the minimum disposal rate of the appeals and complaints is pending for adjudication by the Hon'ble Punjab and Haryana High Court at Chandigarh. It is a matter of grave concern. The lackadaisical attitude of the Commissioners to adjudicate cases led to an inordinate delay and pendency. During our analysis, we found that more than one year is taken to decide an appeal in the majority of the cases. Hence, the 'delayed justice is denied justice' becomes a reality, and for this reason, the faith of common citizens in the transparency of the information regime is declining steadily. To improve its functional performance, the Commission has not yet fully adopted the digitized way to speed up justice. The state government does not seem serious as it took an inordinate delay to fill up the vacant positions of the Information Commissioners. The hearing process per se is cumbersome, bureaucratic, and dilatory. It was also observed that no review of the pattern of the Supreme Court is being followed by the Commission. The lenient attitude to punish the guilty and the absence of an effective mechanism to recover the arrears give leeway to the guilty to deliberately deny the information. As per the information that appeared in a newspaper, the Dainik Bhaskar, Panipat, September 3, 2021, as many as 28 departments' SPIOs did not disclose information. They also did not deposit penalties amounting to rupees 2.76 crores.

These working shortcomings of the Commission do not only contribute to the trust deficit of the people in the information watchdog but also escalate the expenditure of the public exchequer. The Commissioners are appointed to deliver justice economically and efficiently, not to enjoy the perks and privileges in the forms of salaries, allowances, remuneration, pension, accommodation and other facilities. They, thus, should deliver expeditiously and

economically. The Commission, therefore, should reengineer and reinvent its modus operandi by adopting digitized innovations, procedural changes and a workaholic outlook to improve its performance. We, only then, are pretty sanguine that the foundations of an edifice of information regime can be reinforced to promote and sustain transparency, accountability, and a corruption-free environment as per the aims and objectives of the RTI Act, 2005.