

Articles

LEGAL STRATEGIES TO COMBAT CORRUPTION: SOME DEVELOPMENTS IN THE SAARC REGION

Dr. Kamal Hossain*

While it is accepted that corruption is a systemic problem in the South Asian Association for Regional Cooperation (SAARC) region, questions remain about its underlying causes. This article identifies two developments that provide opportunities for corrupt practices to abound in the SAARC region – the transition from a pre-democratic to democratic polities and the transition from state-run to market-driven economies and the growing trend of political parties to look for illicit contributions to fund expensive election campaigns. In addition for the need to have greater transparency, the article argues that fostering respect for the Rule of Law and putting in place an enforceable Right to Information are key steps in combating growing corruption in South Asia, particularly in the context of distribution of state largesse. The article also discusses the role of new anti-corruption institutions and growing activism on the part of an independent judiciary as well as the possibilities that arise from adopting the formulations of the Inter-American Convention against Corruption and Transparency International.

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* D.Phil. (Oxon.); Senior Advocate, Supreme Court of Bangladesh; Chairman, Advisory Council, Transparency International.

I. CORRUPTION IN THE SAARC REGION

There are some striking similarities in the paradigms of corruption throughout the South Asian Association for Regional Cooperation (SAARC) region. Certain common causes of corruption can be readily identified. There are great disparities of power and resources in society that undermine the basic premises of the rule of law, namely, that no one is above the law and that all are equal before law. These premises are undermined as the powerful and the privileged can abuse power to extend patronage and grant undue favours to their protégés, all with impunity.

Further, opportunities are created for corruption in the context of two transitions that are taking place throughout the region: the first from a pre-democratic political order towards a democratic dispensation, and another from a bureaucratically-managed economy to a free market economy. Both of these transitions create opportunities for corruption. Many strategic decisions need to be taken by the state as it moves towards democracy and towards a market economy. The injection of 'black money' in the electoral process is seen to become critical in some cases to success of competing candidates. The transition towards a private market economy involves measures of reform such as privatization and de-regulation. This requires strategic decisions, which provide opportunities to grant undue advantages to those who are favoured.

Opportunities to grant favours abound. These involve grant of licences, grant of valuable public land, petroleum and mineral resources, and the award of mega-projects to private investors, domestic and foreign, in areas previously reserved to the public sector such as power, telecommunications, transportation and physical infrastructure. The increasing cost of elections and the ever-increasing funds sought to be mobilized by political parties has meant that the opportunities for abuse of power during the economic transition are used for fund raising.

II. PROBLEMS OF TRANSITION AND NEED FOR REFORM

Bureaucratic, centralized modes of governance which breed corruption and inefficiency call for reforms aimed at introducing transparency and accountability. The lack of transparency and accountability enables power to be abused. In the process it is not only the discipline of banks and financial institutions which is undermined, since business ventures and projects are dealt with not on the basis of economic feasibility or on market signals but on arbitrary and self-serving considerations of those who wield power. Neither entrepreneurship nor professional competence or productivity are encouraged and what is rewarded is clientelism.

A World Bank study notes, “many governments are wracked by corruption and are increasingly unable to command the confidence of the population at large.”² This study emphasized that investments and development could only be promoted if there was improvement in the accountability of leaders to their people, transparency of all transactions, proper administration of public funds and the overhauling of procurement procedures.³ It called for respect for due process, cautioned against the proliferation of administrative regulations, and emphasized the importance of reforming the bureaucracy. It underscored the need for a “simple and transparent legal framework properly enforced” as “indispensable for the long terms success of enterprises” and pointed out “the importance of establishing of rule of law, rehabilitating the judicial system” and ensuring “independence of the judiciary, scrupulous respect for the law and human rights at every level of Government, transparent accountability of public monies, and independent public auditors responsible to representative legislatures, not to the executive.”⁴

Reform policies cannot be effective in the absence of a system that translates them into workable rules and makes sure that they are complied with. Such a system assumes that: a) there is a set of rules which are known in advance, b) such rules are actually in force, c) mechanisms exist to ensure the proper application of the rules and to allow for departure from them as needed according to established procedures, d) conflicts in the application of the rules can be resolved through binding decisions of an independent judicial or arbitral body and, e) there are known procedures for amending the rules when they no longer serve their purpose... The emphasis placed on rules and institutions should not be seen as a call for excessive regulation or for rigid procedures. On the contrary, experience shows that such excesses lead to abuses of power and invite corruption and evasion, with negative effects on the development process. Rather, an appropriate system of a rule of law only ensures that both the application of and departure from existing rules should follow processes that are not only known in advance but also provide safeguards against arbitrariness and subjectivity.

In this context, it is important for the right to information to be secured to require disclosure of material information on which policies or important decisions are made. This is particularly important, where governments exercise powers that involve grant

² WORLD BANK, SUB-SAHARAN AFRICA--FROM CRISIS TO SUSTAINABLE GROWTH: A LONG TERM PERSPECTIVE STUDY (1989), as cited in Ibrahim Shihata, *Issues of “Governance” in Borrowing Members, the Extent of their Relevance under the Bank’s Articles of Agreement: Memorandum of the Vice-President and General Counsel*, in 1 IBRAHIM SHIHATA, THE WORLD BANK IN A CHANGING WORLD 85 (1991) at 1-4.

³ See Kamal Hossain, *Ethics, Accountability and Good Governance: Some Reflections*, Paper presented at the Ninth International Anti-Corruption Conference (Oct. 9-15, 1999), available at http://www.transparency.org/iacc/9th_iacc/papers/day3/plenary/d3pl_khosain.html (last visited June, 4 2005).

⁴ 1 IBRAHIM SHIHATA, THE WORLD BANK IN A CHANGING WORLD 53 (1991).

of substantial economic or financial benefits, such as through the award of oil or gas or mineral concessions/contracts, contracts for major projects such as construction of power plants, or highways, or pipelines, or dams, or public procurement involving large purchases. This is necessary to avoid the conferring of favours upon cronies and is the best safeguard against corruption. As Justice Louis Brandeis of the U.S. Supreme Court once said: “sunlight... is the best disinfectant.”⁵ If the award of such contracts or other economic benefits is done on the basis of an open and transparent process, through competitive bidding, this could significantly reduce arbitrariness and the possibility of public power being abused for private profit.

III. SOME INITIATIVES AND JUDICIAL DECISIONS

In recent years innovative initiatives to combat corruption have been taken in the SAARC region. These have involved establishment of new institutions such as the Abuse of Authority Investigation Commission in Nepal, the establishment of an Independent Anti-corruption Commission in Bangladesh, and the National Accountability Bureau in Pakistan. Judicial activism of the Indian Supreme Court and resort to public interest litigation are significant developments in India that are also being emulated in neighbouring countries.

In a number of judgments the Supreme Court of India has exercised its powers so as to provide guidance for grant of licences and allotment of dealerships so as to ensure proper exercise of discretion.⁶ Allotments made in breach of these guidelines have been cancelled.⁷

Two recent cases of Bangladesh have demonstrated the Bangladesh Supreme Court’s pro-active role in nullifying “improper” grant of licenses and approvals of projects. The first concerned the award of contract in 1998 for the establishment of two Private Container Port Terminals. The award was made on the basis of an unsolicited bid disregarding recommendations to adopt competitive bidding. The second case related to the grant of a license in 1999 to install and operate a television channel under private ownership, where awarding the licence was alleged to be “flawed” due to unfairness.

The approval for setting up of container terminals given by the Government in favour of a joint-venture entity was challenged in a public interest petition⁸ by a citizens’ group. They contended that the approval was given arbitrarily, without application of

⁵ See LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1913).

⁶ *Centre for Public Interest Litigation v. Union of India*, (1995) Supp. (3) S.C.C. 382.

⁷ *Common Case v. Union of India*, (1996) 6 S.C.C. 530, 552 (per Kuldip Singh & Faizan Uddin, JJ.). See also *Shiv Sagar Tiwari v. Union of India*, (1996) 6 S.C.C. 558.

⁸ *Engineer Mahmudul-ul Islam v. Government of Bangladesh*, W.P.No. 4692 of 2000.

mind, unreasonably and against public interest and without evaluating the past record of the company as to its capability, performance, and financial soundness and in the absence of a project feasibility report. In May 2003,⁹ Bangladesh's Supreme Court declared that the Government's approval for the project in 1998 was granted illegally, affirming the judgment of the High Court.¹⁰ That judgment had held the company had been awarded the project without competitive bidding and the government officials involved in the process of the impugned approval had acted negligently and arbitrarily for the benefit of a private party and against the public interest. It further held that the approval process had lacked transparency.

The second case involved grant of a licence to establish a private television station. The Government had invited applications to install and operate a television channel under private ownership for which advertisements were published in the national dailies. Seventeen parties participated in the tender process. The proposals of the participants in the tender were evaluated by a technical committee. The successful company was placed at serial number five. However, after submission of the evaluation report the technical committee had changed the evaluation report and the successful company, which was in the rejected list, in the earlier evaluation report, was placed in the list of the participants found satisfactory. The successful company was then awarded the license for operating the country's first private television station, with the right to broadcast its programmes through a terrestrial channel under a licensing agreement signed by the Ministry of Information.

A year and a half after the private television station had started operations, a writ petition was moved alleging that there was irregularity in the grant of the license, on the ground that there had been two evaluation reports and the second had allegedly been manipulated in favour of the successful company. The High Court Division declared that the process through which the original license was granted was flawed and, therefore, the licence was invalid. Leave against the High Court judgment was refused by the Appellate Division. The Appellate Division also rejected the related review petition but observed that the judgment would have no bearing in considering the application by the company for a license from the newly-established regulatory commission, which would be free to decide in accordance with law.

⁹ SSA Bangladesh Ltd. v. Engineer Mahmudul-ul Islam, 9 M.L.R. (A.D.) 8 (2004) (App. Div.).

¹⁰ Engineer Mahmudul-ul Islam v. Government of Bangladesh, 55 D.L.R. 171 (2003) (High Ct.).

IV. MEASURES WHICH MAY CONTRIBUTE TOWARDS STRENGTHENING THE CAPACITY TO COMBAT CORRUPTION: AGENDA FOR REFORM

Measures of reform, which can contribute significantly towards combating corruption include the following:

(i) Restoring the rule of law and ending impunity for corruption. This would involve a range of measures including separation of the judiciary from the executive, effective law enforcement through establishment of an independent anti-corruption commission and the office of ombudsman.

(ii) A legally binding Electoral Code of Conduct could expressly regulate and provide for transparency in relation to party financing and funding of elections. A provision could be made in the electoral law, which would require disclosure of sources of contributions including contributions by a candidate to a party or party functionary, and the candidate should be required to file a sworn declaration with his/her nomination paper disclosing this information. If the statement is proved to be false, s/he would incur both a penalty and disqualification and the party or party functionary would also be criminally liable. Active campaigns among citizens to exercise vigilance in this regard and to create opinion against those who indulge in these practices could also make a useful contribution.

(iii) All persons holding elected public office and their family members should be required periodically to file a declaration of their assets. Such declarations should be available for inspection to the members of the public. Most of the political parties in Bangladesh had made public commitments to this effect before the last election and should be pressed to comply with this requirement. In the U.K. among measures adopted to monitor and provide checks on activities of members of parliament, a register, which is open for inspection by the public, is maintained in which members have to declare and record nine categories of "business interests" from which they may derive financial benefits. These include directorships in companies, professional engagements, gifts, and share-holding in public or private companies above a certain nominal value.

(iv) Given the liberalisation of the economy and large investments in sectors such as power generation, telecommunications, and oil and gas which will involve multi-million dollar investments as well as large construction contracts and privatisation of publicly-owned enterprises, there is strong temptation for bidders to secure awards in their favour by undue influence through unscrupulous local agents and lobbyists. The institutional checks that have been developed in other democracies include either totally disqualifying local agents or lobbyists "with access" from playing any role in procuring and securing such contracts, or, at a minimum, to require that local agents and lobbyists be formally registered and that they disclose any relationship with elected representatives or public officials and undertake that such relationship will not be used for procuring any undue benefits for those whom they represent.

(v) Innovative strategies are needed to neutralize the injection of black money in the electoral process. In addition to requiring the declaration of assets by candidates and their family members, there could be a request for audited financial statements to be filed by political parties, and rigorous monitoring of election expenses. Measures could also be taken to ensure reduction of extravagant expenditures in individual campaigns by having publicity materials and common projection meetings, provided by the Election Commission.

(vi) Effective investigative journalism by a free press, and a conscious citizenry and pro-active citizens groups, which exercise vigilance, can play an important role in preventing corruption.

Other preventive measures (recommended by the Inter-American Convention for their region) which merit adoption in the SAARC region, include the following:¹¹

Standards of conduct for the correct, honourable, and proper fulfillment of public functions. These standards shall be intended to prevent conflicts of interest and mandate the proper conservation and use of resources entrusted to government officials in the performance of their functions. The standards shall also establish measures and systems requiring government officials to report to appropriate authorities acts of corruption in the performance of public functions. Such measures should help preserve the public's confidence in the integrity of public servants and government processes.

Mechanisms to enforce these standards of conduct.

Instruction to government personnel to ensure proper understanding of their responsibilities and the ethical rules governing their activities.

Systems for registering the income, assets and liabilities of persons who perform public functions in certain posts as specified by law and, where appropriate, for making such registrations public.

Systems of government hiring and procurement of goods and services that assure the openness, equity and efficiency of such systems.

Government revenue collection and control systems that deter corruption.

¹¹ Inter-American Convention against Corruption, Mar. 29, 1996, art.3, *available at* <http://www.oas.org/juridico/english/Treaties/b-58.html> (last visited July 2, 2005).

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Laws that deny favourable tax treatment for any individual or corporation for expenditures made in violation of the anti-corruption laws of the States Parties.

Systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems.

Oversight bodies with a view to implementing modern mechanisms for preventing, detecting, punishing and eradicating corrupt acts.

Deterrents to the bribery of domestic and foreign government officials, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable detail, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable their officers to detect corrupt acts.

Transparency International's *Global Corruption Report (2004)* with its special focus on political corruption states the following key recommendations:¹²

Governments must enhance legislation on political funding and disclosure. Public oversight bodies and independent courts must be endowed with adequate resources and skills and the power to review, investigate and hold offenders accountable.

Governments must implement adequate conflict of interest legislation, including laws that regulate the circumstances under which an elected official may hold a position in the private sector or a state-owned company.

Candidates and parties should have fair access to the media. Standards for achieving balanced media coverage of elections must be established, applied and maintained.

Political parties, candidates and politicians should disclose assets, income and expenditure to an independent agency. Such information should be presented in a timely fashion, on an annual basis, as well as before and after elections.

² *Executive Summary*, in TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT (2004), available at http://www.globalcorruptionreport.org/download/gcr2004/02_executive_summary.pdf (last visited June 4, 2005).

International financial institutions and bilateral donors should take political corruption into account when deciding to lend or grant money to governments. They should establish sensitive criteria to evaluate corruption levels.

The U.N. Convention against Corruption must be swiftly ratified and enforced.

The OECD Anti-Bribery Convention must be strengthened and properly monitored and enforced. Signatory governments should launch an education campaign to ensure that businesses know the law and the penalties for breaching it.

Developing legal strategies to combat corruption presents a challenge to the creativity of lawyers. Those who engage in "grand corruption" resort to elaborate legal devices involving transactions through intermediaries and off-shore entities and adopt devious modes of money-laundering. A high degree of specialized legal expertise and international and regional co-operation will increasingly be needed in order to effectively combat new and sophisticated forms of corruption that are emerging in a globalized world.