Pre-Legislative Briefing Service (PLBS)

A BRIEFING DOCUMENT ON THE LOKPAL BILL, 2011: ISSUES OF CONSTITUTIONALITY & LEGALITY

Submitted to the Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice on 3rd September, 2011.

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EXECUTIVE SUMMARY

The primary aims and objectives of this briefing document are to analyse the legality and constitutionality of certain select clauses in the Lokpal Bill, 2011. A secondary focus of this briefing document is to analyse some of the broader issues that have been debated in context of the different versions of the Bill that have been drafted by various civil society groups.

The first chapter very briefly discusses the concept of an *ombudsman* and independent anti-corruption agencies as they exist in other foreign jurisdictions.

The second chapter deals with 'Clause 2(d)' of the Bill which defines the term 'complaint' and therefore by implication defines the jurisdiction of the proposed Lokpal. As of now this clause is limited to complaints under the Prevention of Corruption Act, 1988 (POCA). This chapter discusses how this maybe a restrictive definition since most acts of corruption will involve violation of other laws. The chapter also discusses how the functions of the proposed Lokpal may substantially overlap with existing agencies like the Central Vigilance Commission (CVC) and the Central Bureau of Investigation (CBI) and suggests how this may be avoided.

The third chapter deals with Clauses 3, 4 & 8 of the Bill which discuss the appointment and removal process of the Chairperson and members of the Lokpal. This chapter questions the constitutionality of appointing sitting or retired judges, from the Supreme Court and High Courts, as members of the proposed Lokpal. Also discussed is the skewed composition of the 'selection committee' in favour of the government especially when the Lokpal is expected to be investigating the government itself. The chapter also raises the larger issue of the requirement of 'judicial members' in a body which is primarily an investigative body. The last issue discussed in this chapter is the viability of the mechanism proposed by the Bill to remove the members of the Lokpal.

The fourth chapter deals with Clause 15 of the Bill, which vests in the Lokpal the power to control the Director of Public Prosecutions who is prosecuting cases filed by the Lokpal. The issues raised in this context are all based on several reports of the Law Commission of India which have continuously reiterated the requirement of keeping the prosecuting agency independent from the investigative agency.

The fifth chapter deals with Clause 17 of the Bill, which outlines the class of public servants against whom the Lokpal can initiate an investigation. The main areas of interest in this report is the inclusion of the Prime Minister within the ambit of the Bill and also the extent to which the different categories of the bureaucracy which may be investigated for corruption by the Lokpal.

The sixth chapter deals with Clause 31 of the Bill, which vests in the proposed Lokpal certain powers of a civil court. Although this Clause is largely borrowed from the 1968 version of the Bill, the present version fails to import the accompanying

safeguards despite the fact that the present Lokpal has been given more powers when compared to the Lokpal as proposed in the year 1968.

The seventh chapter deals with Clauses 49 & 50 of the Bill, which deal with persons filing false and vexatious complaints with the Lokpal. The Chapter discusses the issues arising from the imposition of harsh penalties as envisaged by the present Bill and recommends that some of the penalties be reduced in order not to dissuade genuine complainants.

The eighth chapter deals with the issues of Parliament legislating on Lokayuktas for all the States. The four provisions of the Constitutions discussed in this context are Articles 246, 249, 252 & 253.

A. Introduction

I. Institutional Structure

1. At the present moment, much has been said about the ideal institutional nature of the Lokpal and the powers that it should be accorded. According to the Lokpal Bill, the Lokpal is to be a quasi-judicial institution, whereas under the Jan Lokpal Bill, it is given a gamut of legislative, executive and judicial powers. Essentially, it is important to precisely delineate the nature of the institution, in order to enable the Parliament to create a strong Lokpal with the powers necessary to fulfill its institutional objectives as well as ensure its conformity with our constitutional set-up.

2. It is our submission that determining the nature of powers to be vested in the Lokpal should be guided by the principle of separation of powers. The principle of separation of powers, as stated aforesaid, expounded by Montesquieu under the belief that with consolidation of power emerges arbitrariness, inefficiency and the deprivation of liberty is both logical as well as time-tested across jurisdictions and institutions.[1] Besides, the separation of powers between the legislature, executive and judiciary is a cardinal principle embedded in India's constitutional scheme and part of the Basic Structure.[2]

II. International Experience

3. Globally, the principle of separation of powers has influenced the creation of institutions to check corruption. While many mechanisms are advocated for this cause, specific agencies/institutions are limited to a few. Most notably, such an institution is created either as an independent ombudsman or as an independent anti-corruption agency (ACA) with investigatory and prosecutorial powers.[3]

4. Under the former, the ombudsman primarily proceeds on the basis of complaints against the administration lodged by citizens on grounds of corruption as well as maladministration attributable to incompetence, bias, error or indifference.[4] The process is primarily informal and the decision of the ombudsman is mostly recommendatory.[5] Furthermore, an ombudsman also performs an advocacy role through the issuance of guidelines for the proper functioning of the

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[1] Montesquieu, *The Spirit of Laws* (Anne Cohler *et al* eds., Cambridge: Cambridge University Press, 1989); Alexander Hamilton, James Madison and John Jay, *The Federalist* (Cambridge MA, Belknap Press, 2009).
[2] *A. K. Roy v. Union of India,* AIR 1982 SC 710.
[3] See generally, The Global Programme Against Corruption: UN Anti-Corruption Toolkit, United Nations Office on Drugs and Crime, September 2004, available at http://www.unodc.org/documents/corruption/publications_toolkit_sep04.pdf
[4] The Global Programme Against Corruption: UN Anti-Corruption Toolkit, United Nations Office on Drugs and Crime, September 2004, at 50, available at http://www.unodc.org/documents/corruption/publications_toolkit_sep04.pdf
[5] S.P. Sathe, *Corruption and Administrative Discretion* in Corruption in India, eds. S. Guhan and Samuel Paul, Vision Books Private Limited, 1997, at 185-186.

administration.[6] Given the Scandinavian origins of the institution of ombudsman, successful programmes against corruption and maladministration under this institution can be found in Sweden, Finland and Denmark.[7]

5. On the other hand, as an executive body, ACAs seek to check corruption through investigations and ultimately seeking prosecution of corrupt officials in competent courts. For instance, Singapore has a Corrupt Practices Investigation Bureau whose mandate is to enforce and investigate all corruption offences.[8] In some jurisdictions, their role is amplified to include prevention and education programmes. Hong Kong's Independent Commission against Corruption (ICAC), globally renowned for its fight against corruption, not only investigates cases of corruption but also designs strategies to prevent corruption as well as engages in public education regarding corruption.[9]

III. A Strong Lokpal – An Imperative

6. Given the imperative of a strong Lokpal, it is important that this institution is not only functionally efficient but also foundationally sound. Therefore, we believe that adopting the model of an independent anti-corruption agency invested with powers of investigation, prevention and education is the ideal institutional structure for the Lokpal. Under this scheme, the Lokpal will be a functionary within the executive branch that exercises limited judicial powers in so far as its investigative powers are concerned.

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[6] The Global Programme Against Corruption: UN Anti-Corruption Toolkit, United Nations Office on Drugs and Crime, September 2004, at 93-99, available at http://www.unodc.org/documents/corruption/publications_toolkit_sep04.pdf

[7] The Global Programme Against Corruption: UN Anti-Corruption Toolkit, United Nations Office on Drugs and Crime, September 2004, at 93-99, available at http://www.unodc.org/documents/corruption/publications_toolkit_sep04.pdf

[8] Koh Teck Hin, Investigation and Prosecution of Corruption Offences, available at http://www.unafei.or.jp/english/pdf/RS_No83/No83_18VE_Koh2.pdf

[9] A Handbook on Fighting Corruption, Center for Democracy and Governance, February 1999, at 10.

B. Clause 2(d): Definition of 'Complaint' & Subject-matter jurisdiction of the Lokpal

I. Clause 2 (d): Definition of 'Complaint'

7. The subject-matter jurisdiction of the proposed Lokpal is determined by the definition of the term 'Complaint' in Clause 2(d) of the Bill. This provision is as follows: "*means a complaint, made in such form as may be prescribed, alleging that a public servant has committed an offence punishable under the Prevention of Corruption Act, 1988"*. Under Clause 3 of the Bill, the Lokpal can investigate only 'complaints' as defined by Clause 2(d).

8. The pertinent issue that requires discussion in this context is whether such a definition would adequately cover all acts of corruption or whether the ambit of Clause 2(d) should be widened to include offences under other relevant legislations. For instance the 'Jan Lokpal' Bill recommends that the definition be expanded to include offences committed under the Foreign Exchange Management Act (FEMA), 1999 and the Prevention of Money Laundering Act (PMLA), 2002. The force behind such a suggestion appears to be the concern that the Prevention of Corruption Act, 1988 (POCA) is possibly too narrow to cover all possible acts associated with corruption. However the mere addition of offences under FEMA and PMLA may not suffice, since certain acts of corruption may also be associated with crimes under other legislations such as the Indian Penal Code (IPC), 1860. For instance in the on-going trial pertaining to allegations of corruption in the sale of 2G spectrum, the main charges framed against the accused pertain to forgery, cheating and conspiracy under the IPC. It may therefore be required to expand the definition of 'corruption' under Clause 2(d) to include within its ambit all other offences committed under other laws provided that such offences are associated with the act of corruption being investigated under POCA.

9. If the definition of 'complaint' is amended on the above lines it will be required to change the organizational setup of existing investigative agencies and the associated adjudication mechanisms. For e.g. while offences under PMLA and FEMA are prosecuted by the Enforcement Directorate (ED), offences under POCA are prosecuted by the Delhi Special Police Establishment (DPSE), which is also known as the Central Bureau of Investigation (CBI). Apart from these other offences, there is also the issue of the jurisdiction exercised by the Central Vigilance Commission (CVC) over certain classes of Central Government employees. The overlaps that will result as an amendment to the definition of 'complaint' will be discussed in the next section.

II. Jurisdictional overlaps between the Lokpal, the CVC & the CBI

10. One of the implications of the proposed Lokpal is that it will substantially take over the functions of the CVC which was setup under a statute of Parliament in 1999. There is also a possibility that the proposed Lokpal will also take over several functions of the CBI. In order to understand the nature of the overlap between the Lokpal and the CBI and the CVC, there is a requirement to examine the history of these authorities:

A. Role of the CVC:

11. The CVC was initially setup in 1964 as a non-statutory body with the function of advising the Central Government on matters pertaining to corruption. In many ways the CVC was supposed to be an Ombudsman. Since the CVC was not a statutory body it did not have the powers to take action against civil servants found guilty of corruption. In 1999 the Supreme Court in the case of *Vineet Narain* v. *Union India*[10] for the first time ordered the Central Government to ensure that the CVC was given a statutory status by Parliament. The Supreme Court also laid down the specific criteria for the appointment of the 'Directors' of the CBI and the ED. In pertinent part the Supreme Court mandated that the CVC would head the Selection Committee appointing the directors of the ED and the CBI. Additionally the Supreme Court also held that the CVC would exercise powers of superintendence over the CBI, especially in cases of corruption.

12. In the year 1999 the Central Government introduced a Central Vigilance Commission Bill to implement the recommendations of the Supreme Court in the *Vineet Narain* case. This Bill was finally debated and passed by Parliament only in 2003. Parliament had legislated on the recommendations of the Supreme Court to ensure that the CVC was chosen by a Committee consisting of the Prime Minister, the Home Minister and the Leader of Opposition. As per Section 8 of the Central Vigilance Commission Act, 2003 the CVC had the following functions:

    (i) Exercise superintendence over the CBI's investigation in corruption related cases without instructing the CBI to investigate or dispose any case in a particular manner;
    (ii) To inquire or investigate into a 'reference made by the Central Government wherein it is alleged that a public servant' has committed an offence under POCA;
    (iii) To *suo-moto* inquire or investigate into any complaint of corruption received against a Group A officer or any other such category of officers responsible for corporations or societies notified by the Central Government;

[10] (1998) 1 SCC 226

(iv) To review the progress of investigations by the CBI;
(v) To review the applications pending for 'sanction of prosecution' under S. 197 of the Cr.P.C;
(vi) To tender advice to the Central Govt;
(vii) To exercise superintendence over the vigilance administration of the various Ministries and Corporations of the Central Government.

Further, the CVC was also given the majority representation on the Selection Committee which would appoint the Directors of the CBI and the ED.

13. Overlap between the jurisdiction of the CVC & the Lokpal: Under Clause 17 of the Lokpal Bill, 2011 the proposed Lokpal will have the jurisdiction to investigate all allegations of corruptions against Ministers, Members of Parliament, 'Group A' officers and the equivalent officers employed at corporations controlled by the Central Government. As per Section 8 of the CVC Act, 2003 the CVC has *suo-moto* powers of investigation only with regards to 'Group A' officers and equivalent officers employed at corporations controlled by the Central Government. The jurisdictional overlap between the CVC and the Lokpal therefore pertains to 'Group A' officers & the equivalent officers employed at corporations controlled by the Central Government. It makes little administrative logic to have two different statutory authorities investigating the same class of public servants for the same offences. It is therefore necessary for the Committee to recommend an amendment to either Clause 17 of the Bill or Section 8 of the CVC Act, 2003.

B. Role of the CBI

14. The Central Bureau of Investigation (CBI) whose actual name is the Delhi Special Police Establishment (DPSE) was setup under the Delhi Special Police Establishment Act, 1946 to "investigate cases of bribery and corruption in transactions with the War & Supply Dept. Of India during World War II." The need for the CBI was felt even after independence and the bureau gradually evolved into the Central Government's premier investigating agency for all kinds of crimes. In 1988 when POCA was enacted by Parliament, the CBI was nominated as the agency authorized to investigate all offences of corruption under the Act. The CBI underwent its first major reform in the year 2008 when all investigations related to terrorism, were transferred to the National Investigation Agency (NIA) which was setup under the NIA Act, 2008. With the creation of the NIA the CBI's focus returned exclusively to corruption and other crimes as referred to it by Central or State Governments.

15. Clause 12 of the Lokpal Bill, 2011 states that "**Notwithstanding anything contained in any law for the time being in force, the Lokpal shall constitute an Investigation Wing for the purpose of conducting investigation of any offence alleged to have been committed by a public servant punishable under the Prevention of Corruption Act, 1988".**

16. However Section 17 of POCA states that "**17.Persons authorised to investigate Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no police officer below the rank,- (a) in the case of the Delhi Special Police Establishment, of an Inspector of Police; (b) in the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan area notified as such under sub-section (1) of section 8 of the Code of Criminal Procedure, 1973, of an Assistant Commissioner of Police; (c) elsewhere, of a Deputy Superintendent of Police or a police officer of equivalent rank**"

17. The overlap between the jurisdiction of the CBI & the Lokpal: This means that although Clause 12 of the Lokpal Bill, 2011 allows the Lokpal to investigate cases of corruption under POCA, the CBI also retains the power to investigate cases of corruption under POCA. The issue therefore is the overlapping jurisdiction between the proposed Lokpal and the CBI. It makes little administrative logic to give two different agencies the power to investigate the same offence. It is therefore necessary for the Committee to recommend an amendment to either Clause 12 of the Lokpal Bill or Section 17 of POCA.

C. Special Courts to hear offences investigated by the Lokpal

18. As per Clause 38 of the Bill the Central Government shall notify any number of Special Courts to hear and decide cases arising out of POCA or under the proposed Bill. This Clause is sufficient to deal with the ambit of cases investigated by the Lokpal under the current definition of 'complaint' under Clause 2(d). However if the Committee does accept the recommendation to amend Clause 2(d), to expand it to include within its ambit all other offences committed under other laws if such offences are associated with the act of corruption being prosecuted under POCA, then in that case even Clause 38 will have to be amended. The reason for this being that under the PMLA & FEMA legislations there are special tribunals, special courts and adjudicatory authorities to decide offences committed under those legislations. The Committee may therefore keep this point in mind while amending Clause 2(d) of the Bill.

19. **Recommendations with respect to Clause 2(d) of the Bill:-**

1. **Expand the definition of Clause 2(d) to bring into the ambit of the Lokpal all offences related to corruption;**

2. **The amended Clause 2(d) may read as follows -** ***"complaint" means a complaint, made in such form as may be prescribed, alleging that a public servant has committed either an offence punishable under the Prevention of***

***Corruption Act, 1988 or an offence, under any other law, which maybe in pursuance of an offence under the Prevention of Corruption Act, 1988*;**

3. **To amend either Section 17 of POCA or Clause 12 of the Lokpal Bill to ensure that there is no overlap between the functions and powers of the CVC, the CBI and the Lokpal;**

4. **In case the recommendation on Clause 2(d) is accepted, the Committee will also have to amend Clause 38 of the Bill in order to streamline the adjudication process as there would be an overlap of authorities.**

C. Clauses 3, 4 & 8: Appointment and Removal of the members of the Lokpal

I. Introduction – Function and Independence

20. In order to devise the most efficient and institutionally appropriate system for the selection and removal of the Chairperson and members of the Lokpal, it is necessary to focus on two crucial aspects involved in the design of an anti-corruption institution. Firstly, the selection process is primarily required to be appropriate for the function that the anti-corruption institution is meant to perform. Thus, the provisions of the Lokpal Bill (the "**Bill**") providing for the selection of the Chairperson and members of the Lokpal should ensure that best people, most capable of performing the functions of the Lokpal are selected. This, we will call the "*functional requirement*".

21. The second aspect, which becomes extremely important given that the Lokpal is meant to be a watch dog agency to keep an eye over the other organs and branches of Government, it is absolutely essential that it is independent from interference from any of the other branches of government that it is meant to monitor. Therefore the clauses in the Bill dealing with the appointment and removal of Lokpal members will have to reflect the requirement of utmost independence from the other branches of government. In this sense, any design of the provisions dealing with the selection and appointment of Lokpal members will have to reflect the provision in place for the judiciary which is required, under the constitutional scheme, to be entirely independent from the other branches of government. We will call this the "*independence requirement*".

22. There is another aspect of the "*independence requirement*" that is worth mentioning here. The framework and nature of organisation of the Lokpal may also have an impact on the way in which the judiciary functions. This is especially the case given that the appointment sections of the Bill explicitly provide that present and past judges of the Supreme Court and High Courts are eligible to be Chairperson and members of the Lokpal. Thus, indirectly, the institution of the Lokpal may, or most likely will, have an impact of one of the institutional features of the constitutional scheme, namely, the separation of powers and the independence of the judiciary. Apart from ensuring that the Lokpal is independent, care should be taken that creating the institution of the Lokpal will not end up compromising the independence of the judiciary. We will also highlight this aspect where relevant in our analysis of the clauses dealing with appointment and removal.

23. This section of this report will analyse the relevant clauses in the Bill that deal with the appointment and removal of the Lokpal Chairperson and members and test them against these twin requirements that we have outlined and see how

well they perform each of these functions. We will also, where appropriate, compare the provisions of the Bill against the versions of the Jan Lokpal Bill proposed by the civil society representatives (the "**Jan Lok Pal Bill**")and the NCPRI Basket of Reforms (the "**NCPRI Basket**") to try and identify the best solution that has been suggested.

24. Chapter II of the Bill contains the relevant provisions for establishment of the Lokpal, appointments of the Chairperson and the members, remuneration for the members of the Lokpal and removal of members of the Lokpal. Clause 3 deals with the establishment of the Lokpal, Clause 4 with the appointment of the Chairperson, members and the Selection Committee, Clause 5 with the filling up of vacancies in the Lokpal, Clause 6 with the terms of office of the Chairperson and the members, Clause 7 with the salary and remuneration of the Chairperson and members, Clause 8 contains the provisions dealing with removal and suspension of the Chairperson and members and Clause 9 contains certain restrictions on the employment of the Chairperson and members after they cease to be part of the Lokpal.

II. Establishment and Appointment – Clauses 3 and 4

A. Chairperson

25. Clause 3 of the Bill provides that the Lokpal shall consist of a Chairperson who is or has been a Chief Justice of India or a Judge of the Supreme Court. As noted elsewhere in this report, the Lokpal is presently designed to perform two functions, namely investigation and prosecution of offences of corruption alleged to have committed by public officials. It is not clear which of these functions the Chief Justice of India or a Judge of the Supreme Court (present or former) is an expert in. There are no explicitly judicial functions required to be performed by the Lokpal itself. Under the provisions of the Bill, in Chapter IX (Special Courts), the cases that arise under the Bill and are to be heard by special courts constituted for such purpose. Given this background it is unclear why the Chairperson of the Lokpal is required to be a Chief Justice of India or a Judge of the Supreme Court. Functionally, it appears that these individuals are not qualified to be the Chairperson.

26. Another functional issue that requires to be raised here is whether the Chairperson or indeed the “judicial members” of the Lokpal will be “deputed” from the judiciary to the Lokpal or if they are expected to perform both functions concurrently. While the former will interfere in the appointment/removal/transfer process of the judiciary and therefore be

violative of the independence of the judiciary,[11] the latter will be impractical for the sheer volume of work that the Lokpal can expect to face.

27. Given the provisions of Clause 3(4)(a) of the Bill which provides that a person, to be appointed as Chairperson or Member, shall have to resign any "office of profit or trust" before being so appointed; it appears that the sitting judge of the Supreme Court or High Court as applicable will have to resign prematurely to become part of the Lokpal. This provision is violative of Article 124 of the Constitution in case of the Supreme Court and Article 217 of the Constitution with respect to High Courts which provide the process for the removal of judges of the higher judiciary. Independence of the judiciary has been held to be a part of the Basic Structure of the Constitution by the Supreme Court,[12] and any measure to impinge upon such independence will be struck down. This provision essentially provides that the senior most judicial officer of the country shall also undertake a serious, burdensome obligation under the executive branch of the government, thereby greatly interfering with his or her capacity to continue performing the judicial function effectively. The same argument applies for sitting judges of the High Courts.

28. Even if the provisions relating to appointment were amended to refer to only retired judges of the Supreme Court and High Court, it would still constitute a grave interference with the independence of the judiciary. The same rationale that motivates Clause 9 of the Bill should apply with equal force in the case of judges.

9. (1) On ceasing to hold office, the Chairperson and every Member shall be ineligible for—
(i) reappointment as the Chairperson or a Member of the Lokpal;
(ii) any diplomatic assignment, appointment as administrator of a Union territory and such other assignment or appointment which is required by law to be made by the President by warrant under his hand and seal;
(iii) further employment to any other office of profit under the Government of India or the Government of a State;
(iv) contesting any election of President or Vice President or Member of either House of Parliament or Member of either House of a State Legislature or Municipality or Panchayat within a period of five years from the date of cessation of holding the office of the Chairperson or Member.

[11] In one of the most authoritative understandings of judicial independence to have emanated from the Supreme Court, Justice Bhagwati in *S. P. Gupta v. Union of India,* MANU/SC/0080/1981 held judicial independence to include independence not only freedom from executive pressures but also "fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong." (Paragraph 26).
[12] *S P Gupta v. Union of India,* AIR 1982 SC149; *Kumar Padma Prasad v. Union of India* AIR 1992 SC 1213.

(2) Notwithstanding anything contained in sub-section (1), a Member shall be eligible to be appointed as a Chairperson, if his total tenure as Member and Chairperson does not exceed five years.

29. The rationale for the above provision is that the government may use post-retirement employment opportunities as a carrot to induce an individual to be pro-government in the performance of his or her role as Chairperson or member of Lokpal. The same concern applies, if only more acutely, to the judiciary. Given the prominent role that the Lokpal is set to play in the coming years in the executive operation of the country, judges could easily be swayed into toeing the government's line on the promise of a post in the Lokpal. This will not only compromise the independence of the judiciary but also ,the effectiveness of the Lokpal that is being created. This has also been borne out in experience when retired judges of the Supreme Court and High Courts have been appointed to head various commissions that have been set up on an ad hoc basis. A number of allegations against such commissions headed by former judges have come to the fore.[13] This is part of the reason why, in many jurisdictions such as the United States, the Supreme Court justices are in office for life.

B. Members

30. Section 3 goes on to prescribe that there shall be eight members of the Lokpal with half of them being "judicial" members and the other half being non-judicial members. It prescribes that judicial members shall be sitting or former justices of the Supreme Court or Chief Justices of the High Courts. Once again, it is unclear why the Lokpal should have such a high concentration of judicial members given that none of the functions it will perform are judicial functions. Further, the independence requirements outlined with respect to the Chairperson in paragraph A above apply equally with respect to the members and any move to add burdens on the workload of the higher judiciary should not be welcomed.

31. The provisions relating to appointment of the Chairperson and the members appear to be the same in the Bill, the Jan Lokpal Bill and the NCPRI Basket, with only minor variations. In all the versions of the proposals put forth with respect to the Lokpal, the above issues appear and will require resolution. Moreover, it does not seem to have been appreciated in any of the debates that these provisions are clearly contrary to the doctrine of separation of powers and independence of the judiciary and are very likely to be struck down by the Supreme Court.

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[13] See for an illustrative example: http://www.indianexpress.com/news/nhrc-chairman-balakrishnan-should-resign-imm/734230/. Generally, the proposition of post-retirement employment of judges affecting the independence of the judiciary was recognized in Parliament by Shri Arun Jaitley in a speech on the Motion re. presenting an Address under Article 217 read with clause (4) of Article 124 of the Constitution to the President for removal from office of Justice Soumitra Sen of the Calcutta High Court dated 18.08.11. Available at http://164.100.47.5/newdebate/223/18082011/14.00pmTo15.00pm.pdf

Recommendations:

1. **Have a non-judicial expert Lokpal who can perform the twin functions of investigation and prosecution effectively.**

2. **Remove provisions appointing sitting members of the judiciary to the Lokpal.**

3. **Remove provisions that prescribe that sitting judges of the Supreme Court or the High Courts shall resign before they take office as the Chairperson or member of the Lokpal.**

4. **Remove provisions that state retired judges of the Supreme Court or the High Courts shall become Chairperson or members of the Lokpal.**

5. **All these provisions are liable to being struck down by the Supreme Court for being violative of the principle of the independence of judiciary.**

Recommended Clause:

3. (1) As from the commencement of this Act, there shall be established, for the purpose of making inquiries in respect of complaints made under this Act, an institution to be called the "Lokpal".
(2) The Lokpal shall consist of a Chairperson and such number of Members, not exceeding eight.
(3) A person shall be eligible to be appointed as a Chairperson or as a Member if he is a person of impeccable integrity, outstanding ability and standing having special knowledge and expertise of not less than twenty-five years in the matters relating to anti-corruption policy, public administration, vigilance, finance including insurance and banking, law, and management.

Provided that no sitting or former judge of the Supreme Court or any of the High Courts shall be eligible to be appointed under this Clause 3 as a Chairperson or as a Member.

II. Selection Committee: Clause 4

32. Clause 4 of the Bill provides for the establishment of the Selection Committee empowered to select the Chairperson and the members of the Lokpal. The overriding objective of a provision determining the Selection Committee is to ensure the independence and impartiality of the Chairperson and members to be selected. Towards this end, a Selection Committee which has representation from across the spectrum of governmental agencies and party lines is required to be designed. The Bill provides that the Selection Committee shall consist of the following individuals:(a) the Prime Minister (b) the Speaker of the House of the

People (c) the Leader of Opposition in the House of the People (d) the Leader of Opposition in the Council of States (e) a Union Cabinet Minister to be nominated by the Prime Minister (f) one sitting Judge of the Supreme Court to be nominated by the Chief Justice of India (g) one sitting Chief Justice of a High Court to be nominated by the Chief Justice of India (h) one eminent Jurist to be nominated by the Central Government (i) one person of eminence in public life with wide knowledge of and experience in anti-corruption policy, public administration, vigilance, policy making, finance including insurance and banking, law, or management to be nominated by the Central Government.

33. In the above list of individuals comprising the Selection Committee, the Prime Minister, the Speaker and the Union Cabinet Minister are all likely to be from the ruling party. The jurist to be appointed by the Central Government and the "eminent person in public life" to be appointed by the Central Government will also be expected to toe the line of the Central Government. Therefore, effectively, out of nine members, five members are likely to be pro-government and not independent.

34. Further, Clause 4(2) of the Bill which provides as follows: "*No appointment of a Chairperson or a Member shall be invalid merely by reason of any vacancy in the Selection Committee"*, is problematic because there is a real risk that the government may choose to keep independent positions in the Selection Committee vacant during the appointment of the Chairperson and members of the Lokpal. This will vitiate the entire appearance of an independent appointment process. Moreover, there is no provision that determines how the Selection Committee is expected to decide upon the Chairperson and the members of the Lokpal. Is this to be done by unanimous resolution or by majority? It is highly recommended that the Chairperson and the members of the Lokpal be appointed in a unanimous fashion by the Selection Committee in order to remove doubts regarding the independence of the Lokpal.

35. The Selection Committee proposed under the Jan Lok Pal Bill appears to be more balanced given that the whole purpose of setting up the Lokpal is that the anti-corruption agencies already in place in India do not perform effectively due to governmental interference. The Jan Lok Pal Bill provides that the Selection Committee shall consist of the following individuals:

(i)the Prime Minister of India, who will be the Chairperson of the Selection Com mittee.
(ii) The Leader of the Opposition in the Lok Sabha
(iii) Two judges of Supreme Court of India and two permanent Chief Justices of t he High Courts selected by collegium of all Supreme Court judges
(iv) The Chief Election Commissioner of India
(v) The Comptroller & Auditor General of India; and
(vi) Three previous Chairpersons of the Lokpal.

36. In the above list, only the Prime Minister will be a government nominee with all other members being independent of the government. We recommend that the above list be incorporated with respect to the members of the Selection Committee.

37. Clause 4(3) of the Lokpal Bill provides that the Selection Committee, may, if it considers necessary for the purposes of selecting the Chairperson and members of the Lokpal and for preparing a panel of persons to be considered for appointment as such, constitute a Search Committee consisting of such persons of standing and having special knowledge and expertise in the matters relating to anti-corruption policy, public administration, vigilance, policy making, finance including insurance and banking, law, and management, or in any other matter which, in the opinion of the Selection Committee, may be useful in making the selection of the Chairperson and members of the Lokpal.

38. Provided that the recommendations with respect to the constituent members of the Selection Committee we have made in this report above are taken, this provision, which provides that the opinion of the Search Committee is merely binding is acceptable.

39. This report explicitly rejects the proposal made by both the Jan Lokpal Bill and the NCPRI Basket. Both these models propose that the recommendations of the Search Committee shall be binding. They further go on to provide that the members of the Search Committee shall all be unelected individuals.

40. The Jan Lokpal Bill provides that the Search Committee shall comprise 10 members. 5 of its members shall be selected by the Selection Committee from amongst the retired Chief Justices of India, the retired Chief Election Commissioners and the retired Comptroller and Auditor Generals with impeccable reputation of integrity, who have not joined any political party after retirement and who are not holding any office under any government. The 5 members so selected shall, through consensus, co-opt another 5 members from the Civil Society in the search committee.

41. The NCPRI Basket also contains a similar provision designed to ensure that no elected representatives are included in the Search Committee for the Lokpal. This is a dangerous proposal for many reasons. Primarily for the fact that by designing an appointment institution that does not include any elected representatives, no democratic oversight is possible over the Search Committee. Since the members of the Search Committee do not come up for re-election every five years, it will not be possible to vote them out of power. Secondly, there are no guidelines provided as to what constitutes the "Civil Society" from which the 5 other members of the Search Committee are to be recruited. Further, given this system of selection it is unclear why a Selection Committee is required in the

first place, since the recommendations of the Search Committtee are binding. It could well have been designed in such manner that the Search Committee directly provides its recommendations to the President.

42. We feel that the above proposals by the NCPRI Basket and the Jan Lokpal Bill go too far in their goal of ensuring independence of the Lokpal thereby risking the entire structure of democratic accountability in India. We feel that, provided our recommendations in relation to the constituent members of the Selection Committee, are accepted, the goal of independence will be attained.

Recommendations:

1. **Change the constitution of the Selection Committee to make it more independent;**

2. **Delete Clause 4(2),**

3. **Insert a clause requiring unanimous decision making by the Selection Committee.**

Recommended Clause:

4. (1) The Chairperson and Members shall be appointed by the President after obtaining the recommendations of a Selection Committee consisting of—
(i)the Prime Minister of India, who will be the Chairperson of the Selection Committ ee.
(ii) The Leader of the Opposition in the Lok Sabha
(iii) Two judges of Supreme Court of India and two permanent Chief Justices of the High Courts selected by collegium of all Supreme Court judges
(iv) The Chief Election Commissioner of India
(v) The Comptroller & Auditor General of India; and
(vi) Three previous Chairpersons of the Lokpal.

(2) All actions taken by the Selection Committee shall only be valid if be taken by a unanimous resolution of all the members of the Selection Committee.

(3) The Selection Committee may, if it considers necessary for the purposes of selecting the Chairperson and Members of the Lokpal and for preparing a panel of persons to be considered for appointment as such, constitute a Search Committee consisting of such persons of standing and having special knowledge and expertise in the matters relating to anti-corruption policy, public administration, vigilance, policy making, finance including insurance and banking, law, and management, or in any other matter which, in the opinion of the Selection Committee, may be useful in making selection of the Chairperson and Members of the Lokpal.

III. Clause 8 – Removal of the Chairperson and members of the Lokpal

Clause 8 provides as follows:

> *8. (1) Subject to the provisions of sub-section (3), the Chairperson or any Member shall be removed from his office by order of the President on the grounds of misbehaviour after the Supreme Court, on a reference being made to it —*
> *(i) by the President, or*
> *(ii) by the President on a petition being signed by at least one hundred Members of Parliament, or*
> *(iii) by the President on receipt of a petition made by a citizen of India and where the President is satisfied that the petition should be referred,*
>
> *has, on an inquiry held in accordance with the procedure prescribed in that behalf, reported that the Chairperson or such Member, as the case may be, ought to be removed on such ground.*

43. Firstly, it must be pointed out here that both sub-clause (i) and (iii) of Clause 8 have the same effect of the President having to make a reference to the Supreme Court. It is not clear what the additional requirement of a petition by a citizen of India adds to the process given that such petition is not binding on the President in any manner whatsoever.

44. While the objectives of Clause 8 are laudable, it is not clear under what provisions of the constitution or any law or rule of practice, the Supreme Court is able to conduct such an enquiry as specified under Clause 8. The Supreme Court is essentially an appellate court of record. The enquiry mentioned in Clause 8 is likely to be a trial of fact which will necessitate going into issues of evidence and cross examination which the Supreme Court is not equipped to do. It would be better to amend this provision to refer to a special court, presided, if required, by a sitting Supreme Court judge, to be conducted in accordance with the procedure prescribed in that behalf. The order of such special court will under the normal operation of Indian constitutional law, be appealable to the Supreme Court.

45. Moreover, Clause 8 will have to be reconciled with the provisions of Clause 40 which provides as follows:

> *40. (1) The Lokpal shall not inquire into any complaint made against the Chairperson or any Member.*
> *(2) Any complaint against the Chairperson or Member shall be made by an application by the party aggrieved, to the President.*
> *(3) The President shall, in case there exists a prima facie case for bias or corruption, make a reference to the Chief Justice of India in such manner as may be prescribed for inquiring into the complaint against the Chairperson or Member.*
> *(4) The President shall decide the action against the Chairperson or Member on the basis of the opinion of the Chief Justice of India and in case the President is satisfied, on the basis of the said opinion that the Chairperson or the Member is biased or has*

indulged in corruption, the President shall, notwithstanding anything contained in sub-section (1) of section 8, remove such Chairperson or Member and also order for initiation of prosecution in case of allegation of corruption.

46. It is not entirely clear why there has been a distinction made between "misbehavior" as used in Clause 8 and "corruption" as used in Clause 40 with a different procedure prescribed in each case. It would be better to have one provision dealing with the removal of the members and Chairperson of Lokpal with a uniform procedure. Therefore, we would recommend the deletion of Clause 40.

Recommendations:

1. **Delete references to complaint made to President in Clause 8(i).**

2. **Delete the reference to an enquiry to be conducted by Supreme Court and instead provide for a special court, presided by a Supreme Court judge to hear the complaint.**

3. **Delete Clause 40 in its entirety and include "corruption" under Clause 8.**

Recommended Clause:

8. (1) Subject to the provisions of sub-section (3), the Chairperson or any Member shall be removed from his office by order of the President on the grounds of misbehaviour , such term to include corruption within its meaning, after a special court presided by a Supreme Court judge constituted for such purpose, on a reference being made to it —

(i) by the President on receipt of a petition made by a citizen of India and where the President is satisfied that the petition should be referred, or

(ii) by the President on a petition being signed by at least one hundred Members of Parliament,

has, on an inquiry, held in accordance with the procedure prescribed in that behalf, reported that the Chairperson or such Member, as the case may be, ought to be removed on such ground.

D. Clause 15 – The Lokpal's control over the Prosecutor & Prosecution

I. Introduction

47. One of the critical differences between the Lokpal Bill, 2011 and the earlier versions of the Bill is that the latter never allowed the Lokpal to initiate prosecutions against persons found guilty of violating the law. For instance, the first version of the Bill introduced in Parliament in the year 1968 allowed the Lokpal to only investigate complaints and forward its reports to the competent authorities. The decision to launch prosecutions therefore depended on the political executive and not the Lokpal. Even the penultimate version, which was tabled in 2001, did not provide the Lokpal with prosecutorial powers. The current version of the Bill however provides for the establishment of both an 'investigation' wing and a 'prosecution' wing under Chapter III and Chapter IV respectively. The inspiration behind this move appears to be Clause 6(l) of the Jan Lokpal Bill.

48. The issue that is required to be discussed in this context is whether it is legally permissible for Parliament to require the investigative and the prosecutorial wings to remain under the control of the same institution. The Law Commission of India has debated this issue extensively in at least three of its reports and has always come to the conclusion that the Office of the Public Prosecutor is required to remain independent from the influence of the investigating agency. The reason for this being the different, sometimes opposing roles of both agencies i.e. the investigating agency is always trying for a conviction but the prosecutor is an officer of the court whose job is to assist the court in ensuring justice and not ensuring a conviction. The relevant reports of the Law Commission and the Supreme Court precedents on the topic are discussed below.

II. The Reports of the Law Commission of India

(a) The 14th Report of the Law Commission of India on 'Reforms of the Judicial Administration':

49. This report of the Law Commission which was submitted to the Government of India on September 26th, 1958 was the first ever study of the Office of the Public Prosecutor in independent India.

50. In this report the Law Commission frowned on the practice of having prosecutors from the police department leading prosecutions in criminal courts. The Law Commission instead recommended the separation of the investigative and prosecutorial agencies of the State. The concern being that there would be a

conflict of interest if both these wings are fused or under the control of one agency. The conflict of interest, according to the Law Commission, lies in the fact that the investigative agency and the prosecutorial agency have completely different objectives i.e. while the investigative agency is required to ensure a conviction, the prosecutor is required by law to act as a judicial officer and assist the Court in ensuring justice and not necessarily a conviction. A divorce between the investigative and prosecutorial agencies was expected to ensure improved impartiality in the criminal justice system. To this end, the Law Commission recommended the creation of an independent public prosecutor cadre in each state.

51. The Law Commission's recommendations were incorporated into Sections 24 and 25 of the Code of Criminal Procedure by Parliament. Both these provisions reflected the spirit of the Law Commission's recommendations by ensuring a separation between the prosecutor and the investigating agency. In a further step Parliament also ensured that prosecutors were appointed only in consultation with the judges of the High Court of Sessions Court. It must be noted that 'judicial consultation' in the appointments process is usually considered a prerequisite only during the appointments of judges. By adopting the same process for the appointment of public prosecutors, Parliament has expressed its intention that prosecutors are required to be as independent as the judiciary.

(b) The 154th Report of the Law Commission of India on the 'Code of Criminal Procedure, 1973':

52. This report of the Law Commission which was submitted to the Government of India on August 22nd, 1996 extensively examined the Code of Criminal Procedure, 1973 and submitted its recommendations on possible revisions to the Code.

53. In this report the Law Commission reiterated the basic principles of its 14th Report, which recommended, the separation of the prosecutor's office from the investigative agency. Reference was also made to the decision of the Supreme Court of India in the case of *S.B.Shahane* v. *State of Maharashtra*[14] where the Court had reiterated the principles of the 14th Report of the Law Commission and also ordered the State of Maharashtra to create an independent cade of public prosecutors. The 154th Report went a step further and borrowed the recommendations of the National Police Commission and recommended the creation of a statutory office of the 'Director of Public Prosecution' who would now be responsible for all prosecutions in a State.

(c) The 197th Report of the Law Commission of India on 'the Appointment of Public Prosecutors':

[14] 1995 Suppl. (3) SCC 37.

54. This report of the Law Commission which was submitted to the Government of India on the July 31st, 2006 was the first report which was dedicated entirely to reforming the Office of the Public Prosecutor in India. The report was prepared in response to a request from the Prime Minister's Office. The PMO was concerned with the excessive politicization of the public prosecutor's office and had requested the Law Commission to consider certain remedial measures suggested by the PMO.

55. The Law Commission replied with the following recommendations which were broadly, but not completely, in consonance with the suggestions of the PMO:

    (i) Public Prosecutors must be independent of the investigating agencies.

    (ii) States should be asked to constitute an independent cadre of Asst. Public Prosecutors selected through a competitive purpose.

    (iii) That 50% of the Public Prosecutors should be drawn from the cadre of Asst. Public Prosecutors on the advice of a Selection Committee, while the remaining 50% should be selected from senior members of the Bar in consultation with the Sessions Court.

    (iv) Public Prosecutors for the High Court must be appointed in consultation with the relevant High Court.

    The Law Commission drafted an amendment to the Code of Criminal Procedure on the above lines.

III. <u>Conclusions on the issue of separation of public prosecutors & investigative agencies</u>:

56. Clause 15(1) of the Lok Pal Bill, 2011 requires the Lokpal to constitute a prosecution wing by notification. Clause 15(2) states that "*The Director of prosecution shall, after having been so directed by the Lokpal, file a complaint before the Special Court, and take all necessary steps in respect of the prosecution of public servants*". It is obvious that this Clause requires the prosecution agency to be under complete control of the Lokpal which also controls the investigative agency. Although the investigative and prosecuting agencies are separate entities in the Bill, with the Lokpal acting as the over-arching authority, the fact of the matter remains that the Prosecutor does not have the independence that is required of his office because he is under the control of the Lokpal. Since the objective of the Lokpal is to ensure a conviction, its role is in direct conflict with the role of the Prosecutor, who as an officer of the Court is required to ensure justice and not necessarily guarantee a conviction. In a sense Clause 15 of the Lok Pal Bill, 2011 goes back to the scenario that the 14th Report of the Law Commission tried to solve.

57. It is therefore recommended that the Lokpal not be given powers over the Prosecutor as such a move would be extremely regressive in light of the 3 reports of the Law Commission that have been discussed above. It would thus be more prudent to amend the Code of Criminal Procedure, 1973 to incorporate the recommendations of the 197th Report of the Law Commission in order to ensure that the Prosecutor is appointed in consultation with the judiciary. Further amendments should be made to ensure that the Director of Public Prosecution is provided with a fixed tenure under the statute.

The following are the recommendations with respect to Clause 15 of the Bill:-

1. **Delete Clause 15 from the Bill since both the Law Commission and the Supreme Court have constantly reiterated that the prosecuting agency has to be independent of the investigating agency;**

2. **Enforce the recommendations of the 154th Report of the Law Commission of India to amend the Code of Criminal Procedure, 1973 to make the Director of Public Prosecutor a statutory body in charge of all public prosecutions;**

3. **Enforce the recommendations of the 197th Report of the Law Commission of India to amend the Code of Criminal Procedure, 1973 to ensure that public prosecutors are appointed only in consultation with the judiciary;**

4. **Amend the Code of Criminal Procedure, 1973 to ensure that Public Prosecutors have a fixed statutory tenure.**

E. Clause 17 (2) – Whether the conduct of MPs in Parliament should be within the ambit of the Lokpal's jurisdiction

I. Introduction

58. A significant legal controversy concerning the jurisdiction of the Lokpal relates to whether the Lokpal will have the power to investigate and prosecute Members of Parliament for corruption pursuant to or in connection with their exercise of their right to vote and speak in Parliament. In the recent past, with several instances of high-profile corruption centrally concerning the behaviour of MPs in Parliament, such as the JMM Bribery case and the cash-for-query scandal having surfaced, the Jan Lokpal Bill has sought to include such cases of corruption within the ambit of the Lokpal's jurisdiction by way of Clause 2(e) which specifically includes such acts within the definition of "act of corruption".[15] On the contrary, the Lokpal Bill, excludes such instances of corruption by way of the proviso to Clause 17(1).[16]

59. The key legal issue that arises is whether the inclusion of such acts of corruption in respect of anything said or voted on in Parliament within the Lokpal's jurisdiction is a violation of Art. 105(2) of the Constitution of India, which gives members of Parliament immunity from any court proceeding in this regard. This, in turn, revolves around the question of the extent to which such immunity exists, as has been decided by the Supreme Court, as well as whether proceedings before the Lokpal would qualify as court proceedings, which an MP is immune from owing to the existence of parliamentary privilege.

II. Interpretation of Art. 105(2)

60. Regarding the extent of immunity available to MPs under Art. 105(2), the position of law is fairly well-settled. In *Tej Kiran Jain v. Neelam Sanjiva Reddy*[17] the Supreme Court held that the extent of privilege under Art. 105(2) is of wide import and includes anything said in Parliament. All that has to be shown is that Parliament was in session and what was said was in the course of business conducted by Parliament. The contention that what was said would have to be relevant to the discussion was irrelevant for determining the extent of privilege.

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[15] Clause 2(e) reads:
"Act of corruption" includes:
(i) Anything made punishable under Chapter IX of the Indian Penal Code or under the Prevention of Corruption Act, 1988; which would also include any offence committed by an elected member of a house of legislature even in respect of his speech or vote inside the House.

[16] The proviso to Clause 17(1) reads:
"Provided that the Lokpal shall not inquire into any matter involved in, or arising from, or connected with, any such allegation of corruption against any Member of either House of Parliament in respect of anything said or a vote given by him in Parliament or any committee thereof covered under the provisions contained in clause (2) of article 105 of the Constitution.

[17] AIR 1970 SC 1573.

Amplifying this, in *P.V. Narasimha Rao v. State (CBI/ SPE)*[18] (JMM Bribery Case) it was held by the majority that a Member of Parliament is a public servant to whom the Prevention of Corruption Act applies. However, a member has immunity in respect of anything said or any vote cast in Parliament in order to protect his independence as a legislator. The phrase 'in respect of' was held to be of the widest import in order to serve this purpose. Thus Art. 105(2) immunises Members of Parliament from any court proceedings that 'relate to, or concerns, or have a connection or nexus with, anything said or vote given, by him in Parliament.' On this reading, those members who had allegedly taken bribes and had voted in Parliament as a consequence of the same were immune from prosecution (Shibu Soren, Simon Marandi and seven others) whereas those who had taken a bribe but not voted (Ajit Singh) were not. The said understanding was also approved by the Supreme Court by *dicta,* in *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha* (Cash-for-Query case).[19]

III. The Lokpal's Jurisdiction

61. On the basis of the case law it is clear that the ambit of Art. 105(2) is wide and a member is not liable to be proceeded against in Court in respect of anything said or any vote given by him in Parliament. The task of the Lokpal according to the Lokpal Bill is to act as an investigative and prosecutorial body which will exercise its powers quasi-judicially at appropriate stages. If merit is found in the case, it can file a case in the Special Court and send a copy of its report together with its findings to the Presiding Officer of the relevant house.[20] The Jan Lokpal Bill provides a special safeguard which requires permission from a special 7-member Bench of the Lokpal before a MP can be proceeded against.[21] However with regard to consequences of such a proceeding, no special procedure or punishments are laid out. This would mean, by default, that the Lokpal would be able to impose punishment for corruption by MPs conducted within the house as well as initiate and oversee prosecution in the Special Court.

62. *In limine,* it can be said that the power vested in the Lokpal to impose punishment for dismissal of MPs, irrespective of whether the alleged act of corruption is in the House or not would be a breach of parliamentary privilege, and unconstitutional, given the procedure for removal of members laid down in the Constitution (Art. 102, 103 of the Constitution r/w 10th Schedule). *Pro tanto,* the provisions in the Jan Lokpal Bill will be liable to be struck down.

63. With regard to the power to investigate and prosecute, it is clear that if a literal interpretation is taken, the bar in Art. 105(2) is on MPs being subject to proceedings in any court. Prosecution is clearly a court proceeding and hence it

[18] Appeal (crl.) 1207 of 1997 available at http://www.indiankanoon.org/doc/1708249/.
[19] (2007) 3 SCC 184.
[20] Clause 28(1), Lokpal Bill.
[21] Clause 17(1)(ii), Jan Lokpal Bill.

would be unconstitutional, in light of Art. 105(2) for any prosecution by a Lokpal regarding anything said or vote cast by an MP in Parliament. Investigation, on the other hand, is strictly not a proceeding in court.[22] At the same time, the term 'proceeding in any Court' is not a term of art. The closest analogous term is 'judicial proceeding' according to S. 2(i) of the CrPC "includes any proceeding in the course of which evidence is or may be legally taken on oath." Since the Lokpal has the power of a Civil Court while conducting investigations,[23] it can be argued on this basis that even an investigation is part of a judicial proceeding. Again, Clause 30(2) of the Lokpal Bill deems any proceeding before a Lokpal to be a judicial proceeding under S. 193 of the IPC. Explanation 2 to S. 193 reads:

"An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice."

64. Thus it is clear that investigation by a Lokpal would be considered a judicial proceeding, which may, in material part, be seen as similar to a proceeding in Court. At the same time, if a purposive interpretation of Art. 105(2) is adopted, as the Supreme Court has done, it is clear that the purpose of the privilege is to ensure the independence of the legislator, to allow him/ her to speak his/ her mind in Parliament without fear of being questioned. If this objective is kept in mind, then even allowing investigations into such speeches made or votes cast, may hinder the freedom of the legislator and will thus be a breach of Art. 105(2).

On the basis of the aforesaid analysis, we make the following recommendations:

1. **The formulation in the proviso to Clause 17(1) of the Lokpal Bill is salutary and requires no modification**

2. **Nothing in the said provision must affect the privilege that Parliament itself possesses to expel members, as was upheld by the Supreme Court in *Raja Ram Pal v. Union of India*[24]**

3. **The formulation in Clause 2(e) of the Jan Lokpal Bill to include the conduct of MPs in respect of anything said or any vote given in Parliament within the jurisdiction of the Lokpal is clearly unconstitutional.**

[22] *Sheo Raj v. State of Uttar Pradesh,* AIR 1964 All 290.
[23] Clause 30(1), Lokpal Bill.
[24] (2007) 3 SCC 184.

F. Clause 17: Whether the ambit of the Lokpal's jurisdiction should extend to the higher judiciary

I. Introduction

65. An equally significant legal controversy pertaining to the jurisdiction of the Lokpal is whether it extends to the judges of the higher judiciary, i.e. the Supreme Court and the High Courts. The Lokpal Bill does not expressly exclude such jurisdiction but instead excludes it by implication since the scope of the Lokpal's jurisdiction does not specifically include the higher judiciary.[25] On the other hand, the Jan Lokpal Bill, makes it evident, albeit obtusely, in Clause 17(1)(ii) that it is intended that judges of the higher judiciary be within the ambit of the Lokpal's jurisdiction, though with a specialized procedure for investigation.[26] On grounds of both constitutional theory as well as constitutional law, we believe that inclusion of the higher judiciary within the jurisdiction of the Lokpal is unsound.

II. Separation of Powers: An Argument against inclusion from constitutional theory

66. The principle of separation of powers has been held to be part of the basic structure of the Constitution.[27] The underlying rationale for this principle is the need to prevent concentrations of political power, a rationale accepted by the drafters of the Constitution.[28] When the principle originated in medieval England, it was seen as a device to prevent the King from exercising legislative, executive as well as judicial powers, and creating a 'balanced constitution'.[29] Montesquieu, chiefly responsible for giving the doctrine a defining role in contemporary constitutional theory understood it as a measure which would allow governmental organs to check and balance each other and thereby preserve liberty in the process and lead to optimally efficient functioning.[30] The Federalist Papers, key preparatory documents for the Constitution of the United States, saw separation of powers in a written Constitution as a doctrine that posited an entwined web of immunities and inter-dependencies between governmental organs that would ensure that while each organ had a sphere of supremacy, they

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[25] Clause 17 of the Lokpal Bill does not include judges of the higher judiciary within the ambit of the Lokpal's jurisdiction.

[26] Clause 17(1)(ii) of the Jan Lokpal reads:
"No investigation or prosecution shall be initiated without obtaining permission from a 7-member Bench of the Lokpal against any of the following persons:
(ii) Any judge of the Supreme Court or any High Court."

[27] *A. K. Roy v. Union of India,* AIR 1982 SC 710.

[28] Constituent Assembly Proceedings on 10.12.48 available at: http://parliamentofindia.nic.in/ls/debates/vol7p24.htm.

[29] For a clear and concise historical account of separation of powers theory before Montesquieu, see W. B. Gwyn, *The Meaning of the Separation of Powers* (New Orleans: Tulane University, 1965) 3-81.

[30] Montesquieu, *The Spirit of Laws* (Anne Cohler, Basia Miller and Harold Stone eds., Cambridge: Cambridge University Press, 1989).

were welded together in the common aims of upholding the Constitution.[31] Thus theoretically, over time, and in different jurisdictions, including India, separation of powers has been understood as necessary to prevent concentrations of political power in any single entity.

67. If the Lokpal is given power to investigate and prosecute cases of corruption in the higher judiciary as well, in addition to its analogous powers relating to the MPs as well as the executive government, there is a distinct possibility that this principle will be violated. This is primarily because, although the nature of the power in all these cases may be executive (or quasi-judicial, if necessary), its widened scope, covering all three political organs will itself ensure that there will be a concentration of political power in the Lokpal. Thus the underlying principled rationale behind the separation of powers warns us of the perils of vesting any institution with such wide powers over such a wide canvas of governmental organs. Since such an institution is necessary in relation to the legislature and the executive, as existing institutions such as the CVC and the CBI are mired in controversy, whereas its necessity in relation to the judiciary is questionable and an alternative in the form of a strengthened Judicial Standards and Accountability Bill, 2011 has been proposed, we believe that it would be imperative that the higher judiciary is kept outside the Lokpal's jurisdiction.

III. Analysing arguments against inclusion from constitutional law

68. Two arguments have been advanced arguing against the inclusion of the higher judiciary within the ambit of the Lokpal's jurisdiction on the basis of constitutional law. The first is that it violates judicial independence; the second that it is contrary to the decision of the Supreme Court in *K. Veeraswami v. Union of India* (Veeraswami).[32] While we disagree with the first argument, the second contains merit and provides sufficient reason for not including the judiciary within the Lokpal's jurisdiction.

69. Judicial independence has been held to be part of the basic structure of the Constitution.[33] It is a cardinal principle that posits that both judges as well as the institution of the judiciary must be sufficient independent, especially from executive government, so that it can make its decisions impartially. It has thus been argued, that having another institution such as the Lokpal perform the task of overseeing the judiciary and prosecuting corrupt judges, could be a violation of judicial independence.[34] However we believe that merely having an external institution overseeing investigation and prosecution of allegedly corrupt judges

[31] James Madison, "Federalist No. 47" in Alexander Hamilton, James Madison and John Jay, *The Federalist* (Cambridge: Belknap Press 2009) 318.
[32] *K. Veeraswami v. Union of India,* 1991 SCC (3) 655.
[33] *Indira Gandhi* v. *Raj Narain,* 1975 (2) SCC 159.
[34] For illustrative examples see, Anuradha Raman 'Weighing the Scales: A caveat: Is the Lokpal the right authority to investigate judges? Legal luminaries think otherwise.' Available at http://www.outlookindia.com/article.aspx?272113

cannot be seen as a violation of judicial independence, but a necessary attribute of judicial accountability. Even the Judicial Standards and Accountability Bill proposes a National Judicial Oversight Committee that comprises persons from outside the judiciary.[35] Further, this Honourable Committee in its report further suggested that a nominee each of the Speaker and the Chairman of the Rajya Sabha having legal expertise be made part of the Oversight Committee.[36] Thus it is clear that the proposition of having an institution external to the judiciary supervising investigation and prosecution (in several respects analogous to the Oversight Committee which will hear complaints against sitting judges) violating judicial independence *per se* is a simplistic notion and ought to be rejected. In fact, it may be seen instead as a measure designed to promote judicial accountability, and as this Committee itself has noted, a balance between judicial independence and accountability in the functioning of the higher judiciary must be sought.[37]

70. However including the higher judiciary within the jurisdiction of the Lokpal will be superfluous in light of the judgment of the Court in *Veeraswami.* In this case, in order to protect the independence of the judiciary, the Court, by majority held that sanction for prosecuting a judge under the Prevention of Corruption Act, would have to be taken from the President (deemed the 'authority competent to remove him' under S. 19 of the Act) in consultation with the Chief Justice of India, whose opinion, the President must ordinarily agree with. Thus all cases of prosecution of a judge of the higher judiciary under the Prevention of Corruption Act (which is the substantive law underpinning the Lokpal's jurisdiction) by the Lokpal can only proceed after sanction is given by the President after consultation with the Chief Justice of India. Such consultation was deemed necessary to prevent vexatious prosecutions and ensure judicial independence. This reading is further fortified by Clause 27(3) of the Lokpal Bill which specifically excludes Clauses 27(1) and (2) (exemption to the grant of sanction) with regard to those who hold constitutional offices with established procedures for removal, a category which clearly includes judges of the higher judiciary. Thus vesting the jurisdiction for investigating corruption cases with the Lokpal is *per se* contrary to the precedent of the Supreme Court. Even if it is argued that a new legislation overturning Supreme Court precedent based on an older legislation is not illegal, it is still superfluous, since no investigation by the Lokpal can proceed without sanction being granted by the Chief Justice of India, bypassing which was a key intention in bringing the higher judiciary within the ambit of the Lokpal in the first place.

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[35] Clause 18, Judicial Standards and Accountability Bill, 2010.

[36] Department-related Parliamentary Standing Committee on Personnel, Public grievances, Law and Justice, 47th Report on the Judicial Standards and Accountability Bill, 2010 (August 2011) available at http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Personnel,%20PublicGrievances,%20Law%20and%20Justice/47.pdf.

[37] *Id.*

Recommendation:

On the basis of the aforesaid analysis, we believe:

1. **Inclusion of the judiciary within the ambit of the Lokpal's jurisdiction as Clause 17 of the Jan Lokpal Bill does by implication is misguided**

2. **In furtherance of the 47th Report of this Hon'ble Standing Committee on the Judicial Standards and Accountability Bill, the accountability provisions of the proposed Judicial Standards and Accountability Bill may be strengthened. Arguments in this regard may be found in our earlier report.[38]**

[38] Pre-Legislative Briefing Service, 'The Judicial Standards and Accountability Bill, 2010: A Briefing Document' Submitted to the Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice (January 2011).

G. Clause 31: Lokpal to have powers of civil courts in certain cases

71. Clause 31 of the Lokpal Bill, 2011 bestows on the Lokpal, certain powers of a civil court. These powers are as follows:

(i) summoning and enforcing the attendance of persons and examining him on oath,
(ii) requiring the discovery and production of any document;
(iii) receiving evidence on affidavits;
(iv) requisitioning any public record or copy thereof from any court or office;
(v) issuing commissions for the examination of witnesses or documents;
(vi) such other matters as may be prescribed.

There are three issues pertaining to the inclusion of such a provision in the Lok Pal Bill, 2011. The same are discussed below:

(a) The lack of safeguards to protect the rights of the accused:

72. Clause 31 of the present Bill is borrowed from Clause 11 of the Lok Pal Bill introduced in Parliament 1968. The troubling issue however is that the present version only borrows the powers without borrowing the accompanying safeguards which were laid down in Clause 11 of the 1968 version. For instance Clause 11(6) of the 1968 version states "*that no person shall be compelled for the purposes of investigation under this Act to give an evidence or produce any document which he could not be compelled to give or produce in proceedings before a Court*". Such a clause is required to protect the fundamental rights of the accused especially the fundamental right against self- incrimination under Article 20(3) of the Constitution.

(b) The lack of safeguards to protect confidential information of the State:

73. Another safeguard in the 1968 version of the Lok Pal Bill is Clause 11(5). This Clause forbids any person from sharing with the Lok Pal any information which may "*prejudice the security or defence or international relations of India or the investigation or detection of any crime*". While Clause 11(5) of the 1968 version may be too wide, it may be necessary to have some version of this Clause be included in the present Lok Pal Bill, 2011 since even the Right to Information Act, 2005 excludes certain sensitive information from the purview of the Act. However another way of approaching this issue is by studying the history of the Comptroller Auditor General (CAG). The CAG regularly audits defence purchases and although the Armed Forces have regularly complained that the CAG is jeopardizing national security by making such reports public, there has been no move to muzzle the CAG. Given the fact that the Lokpal is expected to investigate corruption even in defence contracts it may be necessary to put in place a mechanism to either allow 'in-camera' proceedings or alternatively a mechanism

to de-classify confidential documents by redacting the said confidential documents. The Committee may consider either of the two options explained above.

(c) The power to allow for cross-examination:

74. Although Clause 31 allows for the Lokpal to summon and examine persons on oath, it is silent on whether or not the Lokpal has the power to allow for cross-examination. Normally other authorities with the powers of a civil court are given the power to conduct cross-examination. For example 'Commissions' issued under 'The Commissions of Inquiry Act, 1952' have the power to allow for cross-examination under Section 8C of that legislation. Given the task at hand before the Lokpal it may be prudent for the Committee to provide the Lokpal with the power to allow cross-examination.

The following are the recommendations with respect to Clause 31 of the Bill:-

(a) To import certain safeguards from Clause 11(6) of the 1968 version of the Lokpal Bill;
(b) To protect the confidentiality of certain sensitive information pertaining to national security & foreign relations;
(c) To allow the Lokpal to conduct cross-examinations.

H. Clauses 49 & 50: Offences and Penalties

75. Clauses 49 and 50 of the Bill make it an offence to institute "any false and frivolous or vexatious complaint under this Act" and make this offence punishable by imprisonment which "shall not be less than two years but which may extend to five years" and "with fine which shall not be less than twenty-five thousand rupees but which may extend to two lakh rupees". These clauses raise three potential issues: (1) the nature of the offence; (2) the quantum of punishment; and (3) the need for procedural safeguards for any person accused under this provision.

(a) The Nature of the Offence

76. In its current form, clauses 49 and 50 of the Bill punish an individual who made a complaint that was thought by the special court to be "false and frivolous or vexatious". The exact scope of this offence is unclear. In many instances, complaints may be found to be false, even though the complainant did not file the same knowing it to be false, or maliciously, or with any *mala fides*. Under the current Bill, such complainants may also be penalized under clauses 49 and 50. In penalizing such complainants, it is possible that the government would deter citizens from reporting instances of corruption.

77. Other government initiatives seeking to combat corruption have faced similar problems and have sought to strike a balance between ensuring the integrity of the complaint-process and deterring potential complainants. The Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010, for example, only penalizes disclosure that was "malafidely and knowingly" incorrect or false or misleading.[39]

78. It is suggested, therefore, that the scope of the offence under clauses 49 and 50 be clarified and re-phrased to only penalize false or vexatious complaints that are made maliciously or where the complainant knew that the complaint was false at the time at which it was filed.

(b) Quantum of Punishment

79. Clauses 49 and 50 of the Bill prescribe a minimum imprisonment of two years and a maximum imprisonment of five years for filing a false complaint. A survey of previous Lokpal Bills and equivalent legislation currently in force suggests that this penalty is disproportionately high.

[39] Clause 16, Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010.

80. Clause 30 (1) of the Jan Lokpal Bill does not provide for any imprisonment for a false complaint, and only allows for the imposition of a fine. The Lokpal Bill, 2001 did not have an equivalent provision; false complaints were presumably supposed to be penalized under Clause 19 - titled "Intentional insult or interruption to Lokpal" – where the maximum sentence was six years in prison. Even prior government sanctioned Lokpal Bills that have prescribed imprisonment as penalty for a false complaint to the Lokpal have not mandated such high sentences. For example, the Lokpal Bill, 1989 provides for a maximum ceiling of one year for the punishment of false complaints.[40] The Lokpal Bill, 1998 provides for a minimum punishment of one year and a maximum punishment of 3 years for a false complaint to the Lokpal.[41] The same provision is contained in the Lokpal Bill, 1996 and the Lokpal Bill, 1985.[42] Standing committees in the past have approved these provisions as well. Hence, a minimum sentence of two years imprisonment for false complaints is the highest that has been suggested thus far in the development of the Lokpal in India.

81. A brief survey of other Indian laws suggests that a two-year minimum imprisonment for a false complaint is only prescribed for graver offences. Under the Indian Penal Code, the penalty for furnishing false information is a maximum of six months imprisonment;[43] the penalty for a false statement under oath is a maximum of three years of imprisonment with no minimum prescribed sentence;[44] and the penalty for knowingly furnishing false evidence also has no minimum sentence with a maximum of seven years imprisonment.[45]

82. Situations where a false complaint or false information leads to a minimum sentence of two years imprisonment usually require harm that has occurred due to the false complaint and are applicable in far graver situations. For example, a minimum sentence of two years imprisonment is mandated for furnishing false information that leads to arrest or search under the Narcotic Drugs and Psychotropic Substances Act, 1985;[46] the Foreign Exchange Regulation Act, 1973,[47] and the Prevention of Money Laundering Act, 2002.[48] And in all of these cases, there is a requirement of willfulness and malice - on part of the individual furnishing the information - to constitute an offence.

[40] Clause 22, the Lokpal Bill 1989.
[41] Clause 22 (2) , Lokpal Bill, 1998.
[42] *See* Clause 24, Lokpal Bill, 1996 & Clause 22, Lokpal Bill 1989.
[43] Section 177, Indian Penal Code, 1860.
[44] Section 181, Indian Penal Code, 1860.
[45] Section 173, Indian Penal Code, 1860.
[46] Section 58 (2), Narcotic Drugs and Psychotropic Substances Act, 1985.
[47] Section 58 (2), Foreign Exchange Regulation Act, 1973.
[48] Section 63, Prevention of Money Laundering Act, 2002.

83. Therefore, it is suggested that clauses 49 and 50 be amended to mandate a lower sentence.

(c) Procedural Safeguards for the Accused

84. Clauses 49 and 50 do not grant a person accused of making a false complaint with any explicit procedural safeguards. Prior versions of the Lokpal Bill, the Draft Jan Lokpal Bill and equivalent provisions in other enactments, however, do so and it is suggested that the same be incorporated into the current version of the Lokpal Bill as well. These safeguards include granting the complainant the opportunity to be heard prior to conviction and sentencing; and stipulating that any such proceeding shall follow the requirements of the Cr.P.C.

Recommendations: In light of this discussion, it is suggested that clause 49 (1), 49 (3) and 49 (4) be drafted as follows:

49 (1) Notwithstanding anything contained in this Act, whoever, knowingly or maliciously, makes a false or vexatious complaint under this Act, may on conviction be sentenced to imprisonment for a term that shall not exceed three years, and may also be liable to pay a fine of such amount as the Lokpal sees fit, but which shall not exceed two lakh rupees."

…

49 (3) No Special Court shall take cognizance of an offence under sub-section (1) except on a complaint made by a person against whom the false, frivolous or vexatious complaint was made. To the extent possible, the accused shall be tried summarily, in accordance with the procedure for a summary trial contained in the Code of Criminal Procedure, 1973.

49 (4) The prosecution in relation to an offence under sub-section (1) shall be conducted by the public prosecutor and all expenses connected with such prosecution shall be borne by the Central Government. The accused shall be given reasonable opportunity to show cause for why s/he should not be convicted and punished.

I. Issues of federalism – can Parliament create Lokayuktas for all the States?

Introduction

85. As of now the government's version of the Lokpal Bill covers only a certain class of Central Government employees and does not extend to the employees of the different states within the Indian Union. A section of civil society has been demanding that the Lokpal either be extended to the State Governments or alternatively that Parliament should create Lokayuktas for each State within the Indian Union. There has been considerable divergence of opinion on whether the federal structure of the Indian Constitution allows for Parliament to create Lokayuktas for the states. This section of the report, therefore aims to examine whether Parliament has the legislative competence under the Constitution to enact an overarching Lokpal Act that brings officials of state governments within its purview. Would the enactment of such a law be antithetical to the federal distribution of powers under the Indian constitutional framework? We consider, in particular, Articles 249, 252 and 253 of the Constitution and analyse whether any of these provisions could form a basis for the enactment of a central Lokpal Act that is applicable to officials of both the central and state governments.

Article 246

86. Article 246 of the Constitution sets out the limits of the subject matter on which Parliament and state legislatures may enact laws. While Parliament has the exclusive power to legislate on matters in List 1 of Schedule VII of the Constitution (the "**Union List**"), state legislatures have the exclusive power to legislate on matters in List II of Schedule VII (the "**State List**"). Both Parliament and state legislatures have the power to make laws on any of the matters enumerated in List III of Schedule VII (the "**Concurrent List**"). As per Article 254, if there is a conflict between a law enacted by Parliament on a matter under the Concurrent List and a state law pertaining to the same matter, the law enacted by Parliament shall prevail.

87. In order to determine Parliament's legislative competence to enact an overarching Lokpal Act, it is crucial to assess whether the subject matter of such a statute would fall within the State List (and therefore, within the exclusive domain of the state legislatures) or within the Union or Concurrent Lists. As per the doctrine of pith and substance, the *substance* of a statute must be assessed in determining whether it falls under an entry in one or other of the lists in Schedule VII. The Supreme Court elaborated on the doctrine of pith and substance in *Kartar Singh* v. *State of Punjab*[49]:

[49] (1994) 3 SCC 569.

"This doctrine of 'pith and substance' is applied when the legislative competence of a legislature with regard to a particular enactment is challenged with reference to the entries in the various lists i.e. a law dealing with the subject in one list is also touching on a subject in another list. In such a case, what has to be ascertained is the pith and substance of the enactment. On a scrutiny of the Act in question, if found, that the legislation is in substance one on a matter assigned to the legislature enacting that statute, then that Act as a whole must be held to be valid notwithstanding any incidental trenching upon matters beyond its competence i.e. on a matter included in the list belonging to the other legislature. To say differently, incidental encroachment is not altogether forbidden."

88. If state officials are brought within the purview of the Lokpal Act, it may be argued that the subject matter of the statute falls within Entry 41 of the State List ("state public services; state public service commissions").

89. Alternatively, because the Bill deals with the creation of the Lokpal, an institution for the investigation and prosecution of acts of corruption, its subject matter may also be located within Entry 1 of the Concurrent List ("criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power").

90. In our view, regardless of whether state officials are brought within its ambit, the central focus of the Bill is not "state public services", but, as stated in the preamble to the Bill, the establishment of "a strong and effective institution to contain corruption". Applying the doctrine of pith and substance, there is then, a strong basis for the argument that the Bill falls under Entry 1 of the Concurrent List, bringing it squarely within the legislative domain of Parliament.

91. Does the limiting language in Entry 1 of the Concurrent List,[50] read with Entry 41 of the State List defeat this argument? On a combined reading of these two entries, it may be argued that any legislation dealing with corruption within the state public services would fall within the exclusive legislative domain of the state legislatures. However, to arrive at such a conclusion would be to misconstrue the crux of the Bill. Even if the scope of the Bill were expanded to include officials at the state and central levels, its focal point would be the creation of an effective Lokpal to combat corruption within the executive, not the offence of corruption within the state bureaucracy, which is simply incidental to the substance of the Bill. Whilst Entry 1 does exclude offences against laws

[50] Please see text underlined above.

dealing with matters in the State List, it does not, of course, exclude the creation of an institution to tackle an offence.

92. Even if, contrary to the conclusion that we have reached, the substance of an overarching Lokpal Act is located within Entry 41 of the State List, the Constitution contains provisions that override the federal distribution of powers between the Union and the States, and may therefore, constitute alternate bases for Parliament to enact an overarching Lokpal Act applicable to state officials. We consider each of these in the following part of this section.

Alternate Bases for the enactment of an overarching Lokpal Act

Article 253

93. Article 253 reads as follows:

> "Legislation for giving effect to international agreements
>
> Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

94. Article 253 opens with the non-obstante wording "notwithstanding anything in the foregoing provisions of this Chapter". Therefore, Parliament's power to legislate for the entire country under Article 253 overrides the federal distribution of legislative powers between the Union and the States under the other provisions of Chapter 1 of Part XI of the Constitution ("Relations between the Union and the States"). Entry 13 of the Union List is: "Participation in international conferences and associations and other bodies and implementing decisions made thereat." On a combined reading of Article 253 and Entry 13 of the Union List, Parliament has the power to enact legislation for the purpose of implementing decisions made at international fora, even if the subject matter of such legislation falls within the exclusive domain of state legislatures.[51] This interpretation is supported by the report of the 186th Law Commission of India ("**186th Law Commission Report**"):

> "Art. 253 (entering into treaties and agreements and conventions) by the use of the words "notwithstanding the foregoing provisions", empowers the Union Parliament to make laws with regard to entries in List II, insofar as that may be necessary for the purpose of implementing the treaty obligations of India. Thus, an enactment made under Entry 13, List I, Schedule VII (participation in international conferences etc.) read with Art. 253 to implement an international agreement would override and prevail over any inconsistent State enactment."[52]

[51] 186th Law Commission Report, page 106.
[52] 186th Law Commission Report, page 107.

95. In May 2011, India ratified the United Nations Convention against Corruption, 2003 (the "**Convention**"). Although the Convention and the Bill both deal with the issue of corruption, the Convention goes well beyond the scope of the Bill. For instance, the Convention deals with corruption in the private sector[53]. Nevertheless, the provisions of the Bill do address some of the obligations that India has taken on under the Convention. Article 36 of the Convention, for instance, requires signatory states to "ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement". This is precisely what the Bill seeks to do.

96. For Parliament to invoke its power under Article 253, it must be clarified in the preamble of the proposed legislation that it is being enacted in order to give effect to a decision taken at an international forum. The 186th Law Commission Report mentions this requirement in the context of discussing the enactment of a statute under Article 253, which amends or repeals an existing statute:

"All that is necessary is that while passing such amending or repealing Act, amending the Water (P&CP) Act, 1974, Parliament must state in the preamble that Parliament is passing the amending law for giving effect to international agreements, treaties or decisions taken at international conferences."

Article 249

97. Under Article 249, the Rajya Sabha may by a resolution passed by not less than two-thirds majority, resolve that it is "necessary or expedient in national interest" for Parliament to enact a legislation with respect to a matter in the State List for the whole or any part of India with respect to such matter. Such a resolution would remain in force for the period specified in the resolution (which may extend to a maximum of one year) and Parliament would be competent to enact such a law during the life of the resolution.

98. The Supreme Court explained the scope of Article 249 in *Kuldip Nayar* v. *Union of India*[54]*:*

"In effect this provision permits the Rajya Sabha to encroach upon the specified legislative competence of a state legislature by declaring a matter to be of national importance. Though it may have been incorporated as a safeguard in the original constitutional scheme, this power allows the Union government to interfere with the functioning of a State government, which is most often prompted by the existence of opposing party-affiliations at the Central and state level. This bias towards 'Unitary power' under normal circumstances is not seen either in U.S.A. or Canada."

[53] See Article 12 of the Convention.
[54] (2006) 7 SCC 1.

Article 252

99. Under Article 252, two or more state legislatures may pass a resolution consenting to the enactment of a law by Parliament that it is not otherwise authorised to enact, except as provided under Articles 249 and 250.[55]

100. Article 252 does not, in our view, provide a sound basis for the enactment of an overarching Lokpal Act applicable to officers of state public services across the country for two primary reasons.

101. *Firstly*, on a literal reading of the provision, Article 252 only applies to matters with respect to which Parliament has no power to make laws for states except as provided in Articles 249 and 250. As discussed earlier in this section, arguably, Parliament has the power to enact an overarching Lokpal Act applicable across states in India not only under Articles 249 and 250, but also under Article 253 (provided of course, that the necessary clarifications are made in the preamble to the Act), given India's recent ratification of the Convention.

102. *Secondly*, Article 252 grants individual states the *choice* to determine whether they would like Parliament to legislate on any given matter for them. State legislatures may choose not to pass such a resolution, rendering it impossible for Parliament to enact a statute that is uniformly applicable to state officials across the country.

Conclusion

103. In conclusion, there are a number of alternate bases in the Constitution on which Parliament may rely, in order to enact an overarching Lokpal Act that brings officials of state governments within its purview: Articles 246, 249 and 253.

104. The Constitution and the jurisprudence on Centre-State relations developed by the Supreme Court have a distinct centrist tilt, because of which the Indian constitutional framework has been characterised as "quasi-federal". Articles 246, 249 and 253, which allow Parliament to override the federal distribution of legislative power, reflect this tilt. Therefore, the enactment of an overarching Lokpal Act applicable to officials of both the central and state governments is not inconsistent with the vision of a federal state enshrined in the Constitution.[56]

[55] The text of Article 250 is reproduced below:
"Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation
(1) Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have, power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.
(2) A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period."
[56] The authors however reserve their comments on the viability of such a system.

J. Summary of recommendations

<u>Recommendations with respect to Clause 2(d) of the Bill:-</u> The definition of 'Complaint'

1. Expand the definition of Clause 2(d) to bring into the ambit of the Lokpal all offences related to corruption;

2. The amended Clause 2(d) may read as follows - *"complaint" means a complaint, made in such form as may be prescribed, alleging that a public servant has committed either an offence punishable under the Prevention of Corruption Act, 1988 or an offence, under any other law, which maybe in pursuance of an offence under the Prevention of Corruption Act, 1988*;

3. To amend either Section 17 of POCA or Clause 12 of the Lokpal Bill to ensure that there is no overlap between the functions and powers of the CVC, the CBI and the Lokpal;

4. In case the recommendation on Clause 2(d) is accepted, the Committee will also have to amend Clause 38 of the Bill in order to streamline the adjudication process as there would be an overlap of authorities.

<u>Recommendations with respect to Clause 3:</u> Qualification criteria to be appointed as a member or Chairperson of Lokpal

5. Have a non-judicial expert Lokpal who can perform the twin functions of investigation and prosecution effectively;

6. Remove provisions appointing sitting members of the judiciary to the Lokpal;

7. Remove provisions that prescribe that sitting judges of the Supreme Court or the High Courts shall resign before they take office as the Chairperson or member of the Lokpal;

8. Remove provisions that state retired judges of the Supreme Court or the High Courts shall become Chairperson or members of the Lokpal;

9. All these provisions are liable to being struck down by the Supreme Court for being violative of the principle of the independence of judiciary.

<u>Recommendations with respect to Clause 4:</u> Selection Committee

10. Change the constitution of the Selection Committee to make it more independent;

11. Delete Clause 4(2);

12. Insert a clause requiring unanimous decision making by the Selection Committee.

Recommendations with respect to Clause 8: Procedure for removal

13. Delete references to complaint made to President in Clause 8(i);

14. Delete the reference to an enquiry to be conducted by Supreme Court and instead provide for a special court, presided by a Supreme Court judge to hear the complaint;

15. Delete Clause 40 in its entirety and include "corruption" under Clause 8.

Recommendations with respect to Clause 15: The Lokpal's control over the Prosecutor & the Prosecution

16. Delete Clause 15 from the Bill since both the Law Commission and the Supreme Court have constantly reiterated that the prosecuting agency has to be independent of the investigating agency;

17. Enforce the recommendations of the 154th Report of the Law Commission of India to amend the Code of Criminal Procedure, 1973 to make the Director of Public Prosecutor a statutory body in charge of all public prosecutions;

18. Enforce the recommendations of the 197th Report of the Law Commission of India to amend the Code of Criminal Procedure, 1973 to ensure that public prosecutors are appointed only in consultation with the judiciary;

19. Amend the Code of Criminal Procedure, 1973 to ensure that Public Prosecutors have a fixed statutory tenure.

Recommendations with respect to Clause 17: Whether the conduct of MPs in Parliament should be within the ambit of the Lokpal's jurisdiction?

20. The formulation in the proviso to Clause 17(1) of the Lokpal Bill is salutary and requires no modification;

21. Nothing in the said provision must affect the privilege that Parliament itself possesses to expel members, as was upheld by the Supreme Court in *Raja Ram Pal v. Union of India*[57]*;*

[57] (2007) 3 SCC 184.

22. The formulation in Clause 2(e) of the Jan Lokpal Bill to include the conduct of MPs in respect of anything said or any vote given in Parliament within the jurisdiction of the Lokpal is clearly unconstitutional.

<u>Recommendations with respect to Clause 17:</u> Whether the ambit of the Lokpal's jurisdiction should extend to the higher judiciary?

23. Inclusion of the judiciary within the ambit of the Lokpal's jurisdiction as Clause 17 of the Jan Lokpal Bill does by implication is misguided;

24. In furtherance of the 47th Report of this Hon'ble Standing Committee on the Judicial Standards and Accountability Bill, the accountability provisions of the proposed Judicial Standards and Accountability Bill may be strengthened. Arguments in this regard may be found in our earlier report.

<u>Recommendations with respect to Clause 31:</u> Lokpal to have powers of civil courts in certain cases

25. To import certain safeguards from Clause 11(6) of the 1968 version of the Lokpal Bill;

26. To protect the confidentiality of certain sensitive information pertaining to national security & foreign relations;

27. To allow the Lokpal to conduct cross-examinations.

<u>Recommendations with respect to Clauses 49 & 50:</u> Offences and Penalties

28. It is suggested that clause 49 (1), 49 (3) and 49 (4) be drafted as follows:

49 (1) Notwithstanding anything contained in this Act, whoever, knowingly or maliciously, makes a false or vexatious complaint under this Act, may on conviction be sentenced to imprisonment for a term that shall not exceed three years, and may also be liable to pay a fine of such amount as the Lokpal sees fit, but which shall not exceed two lakh rupees."

…

49 (3) No Special Court shall take cognizance of an offence under sub-section (1) except on a complaint made by a person against whom the false, frivolous or vexatious complaint was made. To the extent possible, the accused shall be tried summarily, in accordance with the procedure for a summary trial contained in the Code of Criminal Procedure, 1973.

49 (4) The prosecution in relation to an offence under sub-section (1) shall be conducted by the public prosecutor and all expenses connected with such prosecution shall be borne by the Central Government. The accused shall be given reasonable opportunity to show cause for why s/he should not be convicted and punished.

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- To provide rigorous, independent and non-partisan legal and policy analysis of Bills introduced in Parliament
- To suggest appropriate legal reform to enable bills to pass tests of constitutionality if challenged
- To suggest appropriate policy reform if the legislative policy is to be sound in principle and efficacious in practice

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