Time to blow the whistle (prevention of corruption act)

As the nation engages in a doubtful “war on black money”, we run the risk of disengaging ourselves from any action on corruption, the fountainhead of black money. Indeed, we may be moving backwards in the battle against corruption. While everyone is busy debating demonetisation, Parliament is all set to change the Prevention of Corruption Act (PCA), 1988, into a law that can only be described as Protection of the Corrupt Act. Worse, this move enjoys cross-party support, as in most instances where the political establishment protects itself. All in the name of war against black money, of course.

On the face of it, the Prevention of Corruption (Amendment) Bill, 2013, which is pending before Parliament, merely proposes some amendments to the PCA. This Bill was first introduced in the Rajya Sabha in 2013, during the United Progressive Alliance regime following massive anti-corruption protests. The purpose, ostensibly, was to tighten existing anti-corruption legislation. But it had some worrisome provisions. The real death knell was sounded after the National Democratic Alliance government proposed additional and fatal amendments in 2014. A Select Committee of the Rajya Sabha, comprising members across the political establishment, has already approved these changes. So has the Cabinet. This regressive piece of legislation was to be taken up for passage in the current winter session, now nearly washed out.

Hydra-headed amendments

As it stands now in the version cleared by the Select Committee in August this year, the Bill serves to dilute and defeat the whole point of anti-corruption legislation in more ways than one. It narrows down the existing definition of corruption, increases the burden of proof necessary for punishing the corrupt, makes things more difficult for the whistle-blower, and strengthens the shield available to officials accused of corruption. And it slips in a diabolic clause that would protect the babu-neta nexus from ever facing any serious anti-corruption probe. If this Bill becomes law, our already weak anti-corruption mechanism would receive a fatal blow.

Let us examine how each of these key amendments serves to protect the corrupt rather than prevent corruption.

First, the proposed amendment narrows down the definition of corruption, as demanded by the powerful lobby of civil servants. Section 13(1) (d) of the existing PCA covers various indirect forms of corruption including the obtaining of “any valuable thing or pecuniary advantage” by illegal gratification or by “abusing his position as a public servant”. The present Bill removes this section and replaces it with a truncated definition of criminal misconduct by a public servant: fraudulent misappropriation of property under one’s control, and intentional, illicit enrichment and possession of disproportionate assets. Under this new definition, any benefit that is not economic, that is indirect or that cannot be proven to be intentional fraud will not be punished as corruption. The Law Commission studied this proposed amendment carefully and disagreed with the narrow definition. Instead it proposed an even wider definition. The Law Commission suggested that any “undue advantage” that results from “improper performance of public function or activity” of a public

servant should be punishable. Yet the government and the Parliamentary Committee disregarded this suggestion and have obliged the babu lobby.

This is critical, as the existing Section 13(1)(d) is the only provision in the PCA which deals with corruption in high places where, typically, no under-the-table transactions take place. The corrupt public servant usually receives illegal gratification in an extremely clandestine manner such as off-shore transactions or non-monetary considerations such as a better posting, post retirement benefits, etc. All major scams, right from Bofors to the 2G scam, the Commonwealth Games scam, the coal scam, etc. became criminal offences by virtue of this section. This is precisely why a section of bureaucrats has been demanding a deletion of this provision on the ground that it inhibits fearless decision-making that may involve exercise of discretion and bona fide errors. This argument is simply not true. T.S.R. Subramanian, a retired Cabinet Secretary known for his integrity, has repeatedly said that the existing law offers adequate protection to honest officers. It does not punish any bona fide difference or even mistake unless it is a clear abuse of power leading to financial or other gains.

Raising threshold of proof

Second, the Bill makes it more difficult to hold someone guilty of disproportionate assets as it raises the threshold of proof. Under the existing law, the possession of monetary resources or property disproportionate to the public servant's known sources of income is enough to prove corruption. Now the prosecutor will also have to prove that this disproportionate asset was acquired with the intention of the public servant to enrich himself illicitly. Although the Select Committee of the Rajya Sabha agrees that proving intention should not be made mandatory, we don't know the government's final position. Besides this, currently, "known sources of income" are limited only to those receipts which had been "intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant". This provision was made in 1988 in order to cover an earlier loophole, whereby many accused persons would cite fresh sources of income at the stage of trial, resulting in acquittal in a large number of disproportionate assets cases. Strangely, the government proposes to delete this requirement without any recommendation to this effect from any stakeholder. Thus the big offenders have secured a vital escape route for themselves.

Third, the proposed amendment makes it more risky for a bribe-giver to give evidence against a bribe-taker. Under the existing law, if a person makes a statement during a corruption trial that he gave a bribe, it would not be used to prosecute him for the offence of abetment of corruption. The current Bill omits this provision and proposes that bribe taking and bribe-giving will be equally punishable. This would obviously deter bribe-givers from appearing as witnesses in cases against public officials.

Admittedly, there is some merit in not granting complete exemption to bribe-givers, but there was no need to do away with it altogether. The government had better options. The report of the Second Administrative Reforms Commission has recommended a distinction between "coercive" and "collusive" bribing. Those who are coerced into bribing but report it thereafter should be given some protection. At one stage there was a proposal to give a seven-day window for declaration by the bribe-giver in order to qualify for exemption. But all such ideas were rejected. The final proposal now seeks to punish everyone and thereby reduces the chances of evidence against the bribe-taker.

The fourth change reduces the chances of prosecution of the corrupt. The existing PCA requires the government's or higher officials' sanction before any serving public servants can be prosecuted under the Act. The basic idea is to protect honest public officials from harassment, persecution and frivolous litigation. The proposed amendment extends this protection to retired public servants, if the case pertains to the period when they were in office. This seems a reasonable and necessary corollary of the original provision. But it also adds another unnecessary and pointless condition. If a private person approaches the government for sanction to prosecute a public servant for corruption, he would now need a court order to this effect. This additional layer of protection for the accused would discourage victims of corruption and anti-corruption activists from prosecuting corrupt public servants. Clearly, the government is concerned more about shielding government officials than prosecuting the corrupt.

Getting the nod first

And, finally, the most deadly and diabolic provision that the government has quietly slipped in without much public scrutiny. It proposes to insert a new Section 17A that would bar investigating agencies from even beginning an inquiry or investigating the offences under this Act without prior approval. The amendment proposed by the government said this sanction was to be obtained from a Lokayukta or Lokpal. The Select Committee of the Rajya Sabha makes it worse: it shifts the power to give this sanction to an "authority competent to remove" the person from office. Effectively, it means that now, the political masters will decide whether they wish to allow a corruption inquiry against any government employee or not.

This defies logic. As noted earlier, Section 19 of the Act already protects officials from mala fide litigation. If someone wishes to harass an innocent officer without any credible evidence of corruption, the government can refuse to give sanction for prosecution. But why insist on sanction even before an inquiry? Surely, if there is no inquiry, there is no credible evidence. On what basis then would the government (or the Lokpal, if we go by the previous proposal) give or refuse to give the sanction? Or, how would anyone produce evidence to secure this sanction without an inquiry in the first place? Even if the sanction is granted, would it not alert the corrupt official about the impending inquiry and give him time to hide evidence? This diabolic provision can only serve one purpose: make the higher bureaucracy and political bosses the ultimate arbiters in cases of corruption. If a politician wants to protect a corrupt officer, he can not only save him from prosecution (which can be challenged in a court) but also prevent any evidence gathering from taking place.

Reactivating the 'Single Directive'

The babudom has thus managed to bring back the infamous "Single Directive". This refers to an older governmental order that no senior officer (of the rank of Joint Secretary or above) could be investigated without permission from the government. In the famous Vineet Narain judgment, the Supreme Court had held this order as illegal, in 1997. The government brought it back, this time as provision of law, in 2003. Finally, as recently as 2014, a Constitutional bench of the Supreme Court held that this provision was unconstitutional, as it violated the right to equality. Such is the power of babudom and its hold over netas that it has managed to bring this immunity clause back for the third time.

As the winter session of Parliament draws to a close, it seems that this Bill may now be postponed to the Budget session. This gives concerned citizens another couple of months to build public opinion against this attempt to protect the corrupt. It is time to revive the anti-corruption movement.