

## EDITORIAL NOTE

### ***Public Participation and Accountability: Signs of a Maturing Democracy***

Over the last few years, the four pillars of our democracy- the legislature, the executive, the judiciary and the media have been tainted by frequent allegations of corruption and their credibility called into serious question. The cash-for-votes scam, the continuing controversy over 2-G spectrum, Commonwealth Games fiasco, corruption within the rungs of higher judiciary and the *Radia tapes* episode, collectively mark not just a shameful ebb in Indian politics but also hide a deep crisis of constitutional values and public ethics. Together they present an authoritative challenge to the success of Indian democracy, symbolising the significant challenges of accountability and legitimacy that need to be met. Corruption has truly enveloped the horizons of our public institutions, embedding itself in every office, revealing itself at every file. The vast expanse which corruption commands now must compel us consider these moments seriously as they mask a significant threat to the institution of Indian democracy and the constitutional values that have shaped its unique trajectory.

The constitutional values, as envisaged by our founding fathers, of secularism, equality, justice, liberty and human dignity amongst others have endured the first sixty-two years of the Indian Republic. These values have until now remained intact for the most part due to the delicate balance of powers and arrangements of accountability struck in the constitutional design, the commitment of the Indian populace and the contribution of a free and fair Indian press. This balance bears testimony to the ideal of accountability that is critically instrumental in sustaining the spirit of our democracy. Accountability is not an external principle and is embodied in our constitutional scheme of separation of powers. Thus, the demands for the creation of an institution of Lokpal must not be understood as demands for supplanting the existing structure. Any movement that seeks to safeguard accountability must be consistent with constitutional principles else it runs the risk of undermining the same values it seeks to affirm.

With corruption in India reaching monumental proportions, the faith of its people appears dwindling in the democratic ideal. The scale of corruption in recent times has fueled public ire and resulted in strengthening the demands for creation of a Lokpal. Public opinion has been mobilised through mass protests to ensure the establishment of a strong anti-corruption institution. All previous efforts towards this over the last 43 years have been unsuccessful due to lack of political will. Over four decades of inaction has precipitated into widespread *dharnas* and protests led by iconic figures like Anna Hazare and Baba Ramdev, who have resorted to coercive measures such as fasting unto death to pressurise the government. The protests have gained a wide currency in an atmosphere marked by cynicism and perverse levels of corruption. Our protests evoke images of an unresponsive and tyrannical regime being opposed by *Gandhian* means. However, there are dangers of over-simplification and populism associated with the use of such measures. It is worth reminding each one of us that corruption may not end too fast or too soon, and our use of protests or any such measure should not foreclose the possibility of other means, be it of dialogue or deliberation. Corruption is a deeply embedded feature of the manner in which the State devolves itself and it will require much more than a legislation to meaningfully arrest the decline of our public institutions. It may require an understanding of the structures and processes that facilitate corruption, it may require us to close the gaps in our pre-legislative deliberative processes and it will certainly require our co-operation and patience with these tasks.

The perceived sense of non-participation in our own affairs is not a mere illusion. There is a clear deficit of accessible modes which facilitate dialogue between the governing and the governed and the need for a more deliberative form of democracy has been increasingly felt. For instance, in recent times the Prevention of Torture Bill and the Communal Violence Bill were not opened for public feedback before they were introduced in the Parliament. The roots of deliberative democracy can be found in the *polis* of ancient Greece, and more recently, it has featured as a key idea in the works of eminent philosophers like John Rawls, Amartya Sen, John Elster and Joshua Cohen amongst many others. Deliberative democracy is the availability of the opportunity to effectively participate in the collective decision-making process. The idea of deliberation between different

stakeholders lends legitimacy to any law or policy that emerges out of such engagement. 'Deliberation' is a step beyond mere consultation and is characterised by the willingness of the participants to amend their views during negotiations. Participation and deliberation lead to better decisions and more effective laws and policies; they also ensure greater accountability. Self-governance, adult franchise and constitutional guarantees need to be augmented by a deliberative process to deepen legitimacy and make politics accountable.

Institutionalised forms of deliberative democracy exist in the United States, United Kingdom and Switzerland among other countries. At the very least, the model of deliberative democracy envisages that the draft versions of legislations and policies at all stages be published and be easily accessible to the public so as to foster meaningful public debate and that comments be invited. In the event of non-acceptance of the comments and feedback of the public, the government should be under an obligation to offer reasons for the same. Needless to say, a corresponding responsibility lies on the members of the civil society to act reasonably and not inordinately hinder the legislative process.

Elements of deliberative democracy exist in India too. For example, the Right to Information Act, 2005 makes information readily available which is an essential precondition for deliberation. Furthermore, Parliamentary Standing Committees at times consult with prominent experts and invite public feedback. However, most draft legislations are kept secret and are not available for public scrutiny, until tabled in the Parliament (at which stage fundamental changes are seldom entertained). This denies members of the Opposition, academia, stakeholders and the society at large, a reasonable opportunity to review, object and make recommendations to enhance the proposed law. Further, a large percentage of bills placed before the Standing Committees are never referred to independent experts for their opinion.

The Lokpal Bill 2011 is another step towards strengthening citizen participation in our democracy. However, there are apprehensions that remain about the effectiveness of the institution of the Lokpal as envisaged in the Bill tabled before Parliament. We highlight some of these below.

*Limited Coverage:* The Preamble of preliminary drafts of the Bill referred to the recent ratification of the United Nations Convention against Corruption (UNCAC), 2005 by India. However, this allusion has been removed in order to restrain the courts from interpreting the scope of the Bill broadly. The UNCAC has a universal coverage of ministers, bureaucrats, judiciary and legislators. In comparison, the tabled Bill exempts, judges, members of Parliament to the extent of their conduct in Parliament and non- Group-A Central Government employees from the ambit of the Lokpal.

*'Safeguards' for the accused:* While the Lokpal does not have to obtain a sanction before instituting an investigation against a public servant, as required under the Indian Penal Code, there is an evident bias in favour of the accused in the Bill. For instance, in direct contradiction with general criminal law, the Bill mandates that the accused be given an opportunity to be heard before the determination of a *prima facie* case is made against him. Further, according to clause 23(12) of the Bill if the Lokpal decides to inquire into a complaint it can at *any* stage forward the relevant material to the accused and provide him with an opportunity to be heard.

*Disincentives for the complainants:* The Bill discourages citizens from coming forward and making complaints to the Lokpal by providing disproportionately heavy penalties for false and frivolous or vexatious complaints. This penalty of imprisonment for between two to five years when weighed against the punishment for a public servant convicted of corruption i.e. imprisonment for between six months to five years, seems unjustifiably harsh. This coupled with an existing imbalance of power and influence between the complainant and the accused would operate as a disincentive for the complainants, which threatens the relevance of the office of the Lokpal.

Given these gaps, amongst others, serious reservations about the credibility of the office of Lokpal and its effectiveness as a tool of accountability have been raised. The modes of accountability assume great significance as we seek to institute greater opportunities for deliberation and discussion in our democracy. The debate about Lokpal is at various levels also a debate about our democracy – a discovery of present challenges and future directions. The Lokpal debate has helped in some measure by

bringing us together to confront these challenges, even if in an uneven manner. It is to our advantage if we use this opportunity to critically reflect upon ideas to institutionalise deeper deliberation in the law-making process.

Today, we have a vibrant intelligentsia and civil society both willing and well equipped to participate in informed public discourse. This is evident from their response to issues such as BT Brinjal, TRIPS access to medicine and the Nuclear Liability Bill. It is only through a deliberative model that this citizen potential can be directly and effectively tapped. Moving towards a deliberative model would afford this opportunity to the citizenry. It would further help create a stronger national identity by involving the youth in the governance of the nation and moving them away from their disenchantment with the democratic process. However, generating participation would remain impossible or at best futile if the channels of governance remain marred with corruption. Participation demands and ensures a greater degree of accountability. This underlines the pressing need for a strong anti-corruption institution, like the Lokpal. Adherence to the twin towers of public accountability and public participation will form the foundation for a more evolved form of Indian democracy.

*Board of Editors*