



**IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION**

WRIT PETITION (C) NO. 1373 OF 2018

CENTRE FOR PUBLIC INTEREST
LITIGATION

...PETITIONER (S)

VERSUS

UNION OF INDIA

...RESPONDENT(S)

J U D G M E N T

K.V. Viswanathan, J.

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1. Independent India's first Home Minister Shri Sardar Vallabhbhai Patel referred to civil servants as the '*Steel Frame of India*'. In a similar vein, noted economist Joseph Schumpeter said – '*Bureaucracy is not an obstacle to democracy but an inevitable complement to it*'. This case brings into sharp focus the enduring profundity and the everlasting significance of these words of wisdom.

2. By this writ petition, the petitioner is challenging the constitutional validity of Section 17A of the Prevention of Corruption Act, 1988 [for short "the Act"]. The said section was introduced by virtue of Section 12 of the Prevention of Corruption (Amendment) Act, 2018 (for short 'the Amendment Act'). It should be recorded that yet another prayer challenging the validity of Section 7 of the Amendment Act on the assumed premise that the ingredients of the erstwhile Section 13(1)(d)(ii) of the Act were not engrafted, had been given up during the course of the arguments by Mr. Prashant Bhushan, learned counsel for the petitioner.

TEXT OF SECTION 17A:

3. Section 17A, as introduced w.e.f. 26.07.2018, reads as under:-

“17A. Enquiry or Inquiry or investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties.-

No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval—

(a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government;

(b) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed:

Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person:

Provided further that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month.”

4. It will be noticed that under the said section, no police officer shall conduct any enquiry or inquiry or investigation

into any offence alleged to have been committed by a public servant under the Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval of the authority prescribed therein. The proviso prescribes that no such approval is necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person. It is also prescribed that the concerned authority is to convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month.

CONTENTIONS OF THE PETITIONER:

5. Mr. Prashant Bhushan, learned counsel for the petitioner, ably assisted by Mr. Anurag Tiwary and Ms. Cheryl D'Souza, learned Counsels contends that Section 17A of the Act is violative of Articles 14 and 21 of the Constitution of India.

According to the learned counsel, this is an attempt to reintroduce a provision which had already been struck down twice by this Court in **Vineet Narain and Others** vs. **Union of India and Another**¹ and **Subramanian Swamy** vs. **Director, Central Bureau of Investigation and Another**². According to the learned counsel, in ***Subramanian Swamy (supra)***, this Court found that the provision prevented the investigating agency from collecting material evidence. He contends that all that Section 17A does is to extend the scope of protection to all levels of public servants and not just to a particular category. Pointing to the data filed by the Union of India pertaining to the Central Bureau of Investigation [CBI], it is contended by the learned counsel for the petitioner that out of 2395 cases, prior approval was refused in 41.3% of the cases, namely, in 989 cases. According to the learned counsel, there is no indication as to any transparent criteria for grant or refusal of sanction. It is contended that there is a reasonable

¹ (1998) 1 SCC 226

² (2014) 8 SCC 682

apprehension of arbitrariness on the part of the authority. According to the learned counsel, this will give room for selectively targeting officials and also result in protecting and shielding the politically connected officials. Learned counsel for the petitioner contends that Section 17A, by vesting the power in the government to grant approval, is repugnant to the provisions of the Lokpal Act and Lokayuktas Act, 2013 (for short 'the Lokpal Act') defeating the purpose of an independent mechanism. Learned counsel further contends that the impugned provision (Section 17A) runs contrary to the dictum of this Court in **Lalita Kumari vs. Government of Uttar Pradesh and Others**,³ which according to the learned counsel for the petitioner, mandated registration of FIR on the disclosure of a cognizable offence. Learned counsel also contends that the provision is contrary to the United Nations Convention against Corruption, particularly Articles 6(2), 19 and 36. Learned counsel submits that there is an obligation to

³ (2014) 2 SCC 1

interpret domestic law in the light of the obligation under the International Conventions. Alternatively, without prejudice to his arguments on the invalidity of Section 17A of the Act, Mr. Prashant Bhushan, learned counsel, in the rejoinder submissions, argued that if the regime of prior approval is to be preserved then screening by an independent agency, like for example the Lokpal, be engrafted.

CONTENTIONS OF THE RESPONDENT:

6. Mr. Tushar Mehta, learned Solicitor General, very ably assisted by Mr. Kanu Agrawal and Mr. Rajat Nair, learned counsels, vehemently opposed the submissions of the petitioner while defending the validity of Section 17A. It is contended that there is a presumption of constitutionality in favour of a statutory provision. It is further contended that a challenge to the validity can only be made in the background of an actual fact scenario. According to the learned Solicitor General, an extensive consultation, was undertaken before the enactment of the said provision. Apart from the

Parliamentary Standing Committee, the matter was also examined by the Law Commission of India and further by the Rajya Sabha Select Committee. The learned Solicitor General contended that Section 17A, as it stands, being a statutory provision, the principles laid down in ***Vineet Narain (supra)*** can have no application as the single directive in ***Vineet Narain (supra)*** was struck down on the ground that an executive instruction cannot be *ultra vires* the statute. Similarly, according to the learned Solicitor General, Section 6A of the Delhi Special Police Establishment Act, 1946 [for short “the DSPE Act”] which applied only to a class of individuals was found to be discriminatory and that vice is not attracted herein as Section 17A is applied across the board to all public servants. Learned Solicitor General also referred to the Standard Operating Procedure [SOP] for the grant or refusal of approval under Section 17A. The contents of the SOP have been dealt with in detail hereinbelow.

7. The learned Solicitor General contended that Section 17A was a salutary provision with substantial checks and balances enacted for a specific purpose, i.e. to protect honest public servants from harassment by way of enquiry or inquiry or investigation in respect of the recommendations made or decisions taken in bona fide performance of their official functions or duties. It was contended that the said provision was part of the larger parliamentary policy to protect genuine bona fide executive decisions taken by public servants while discharging their official functions or duties. The learned Solicitor General contends that the screening mechanism was introduced to prevent misuse of the legal process and to ensure that only genuine cases are proceeded with. The provision, according to the learned Solicitor General, was intended to maintain a balance between accountability and administrative efficiency. Learned Solicitor General, however, in para 5 of his written submissions expressly stated as under:-

“Before a public servant is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct and a FIR is lodged against him, there must be some suitable preliminary inquiry into the allegations by a responsible officer.”

8. Learned Solicitor General traced the legislative history leading to the enactment of Section 17A. The same has been discussed later in this judgment in detail. Learned Solicitor General brought out the qualitative distinction between Section 6A and Section 17A and the scope, sweep and ambit of the said two provisions. According to the learned Solicitor General, while ***Vineet Narain (supra)*** struck down the single directive on the ground of it being an executive instruction contrary to the statutory provision, in ***Subramanian Swamy (supra)***, Section 6A was struck down on the ground of classification only.

9. Learned Solicitor General submitted that pre-investigative sanctions are not an anathema to the rule of law and illustrated the point with reference to the judgment of this Court in ***K. Veeraswami vs. Union of India and Others***⁴ and

⁴ (1991) 3 SCC 655

contended that the protection is not confined to judges in constitutional courts but have been extended to all members of the judiciary. Learned Solicitor General emphasized on the use of the phrase “*discharge of official duties*” in Section 17A to bring home the point about narrow tailoring of Section 17A. Reliance was placed on **Matajog Dobey** vs. **H.C. Bhari**⁵ to contend that like in Section 197 of the Code of Criminal Procedure, 1973 (for short ‘the CrPC’), protection is extendable under Section 17A only when there is a reasonable connection between the act and the discharge of official duty. It was further emphasized that the Section is further confined to recommendation made and decision taken as is clear from the use of the phrase “*relatable to any recommendation made or decision taken*” which qualifies the phrase “*in discharge of official duties*”. This was argued to make good the point that all acts are not protected.

⁵ (1955) 2 SCR 925

10. It was argued that the prescription of time-limits for the decision to be taken itself is a guarantee against misuse. It was also argued that post the grant or refusal, remedies by way of judicial review are available. Learned Solicitor General laid emphasis on the proviso to Section 17A to contend that on the spot arrests are outside the purview of the screening mechanism. Learned Solicitor General contended that in view of Section 56 of the Lokpal Act, the Lokpal Act has an overriding effect and whenever there is an investigation ordered or FIR is ordered to be registered by the Lokpal, the provision of Section 17A has no application. A large number of judgments of the High Court interpreting Section 17A were placed for consideration.

11. It was argued by the learned Solicitor General that there was no breach of ***Lalita Kumari (supra)*** as even ***Lalita Kumari (supra)*** contemplated exceptions to the rule of mandatory registration of FIR and amongst the exceptions, corruption cases were covered. It was argued that where the

statute creates a new procedure and sets out a machinery dealing with it, the general provisions of the CrPC will not apply to those matters covered by the special statute.

12. Much emphasis was laid on the pre-investigative sanction prescribed for members of judiciary to contend that Section 17A which extends similar protection to the executive cannot be faulted with. Citing ***U.P. Judicial Officers' Association*** vs. ***Union of India and Others***⁶, it was argued that the protection has been extended to the higher judiciary which are not constitutional courts. It was submitted that ***Subramanian Swamy (supra)*** wrongly understood the protection given to the judicial officers as being confined to the judges of the constitutional courts. It was argued that mere possibility of abuse of provision cannot be the basis to judge its validity.

⁶ (1994) 4 SCC 687

QUESTION FOR CONSIDERATION:

13. In the above background, the question that arises for consideration is, whether Section 17A of the Act as introduced w.e.f. 26.07.2018 by Section 12 of the Amendment Act, is constitutionally valid?

PRECURSOR TO SECTION 17A:

14. Prior to the judgment dated 18.12.1997 in ***Vineet Narain (supra)***, a directive popularly known as the Single Directive was in vogue. It was in the form of an executive order which contained certain instructions to the CBI regarding modalities of initiating an inquiry or registering a case against certain categories of civil servants. Directive No. 4.7(3) read as under:-

“4.7(3)(i) In regard to any person who is or has been a decision-making level officer (Joint Secretary or equivalent or above in the Central Government or such officers as are or have been on deputation to a Public Sector Undertaking; officers of the Reserve Bank of India of the level equivalent to Joint Secretary or above in the Central Government, Executive Directors and above of the SEBI and Chairman & Managing Director and Executive Directors and such of the bank officers who are one level below the Board of Nationalised Banks), there

should be prior sanction of the Secretary of the Ministry/Department concerned before SPE takes up any enquiry (PE or RC), including ordering search in respect of them. Without such sanction, no enquiry shall be initiated by the SPE.

(ii) All cases referred to the Administrative Ministries/Departments by CBI for obtaining necessary prior sanction as aforesaid, except those pertaining to any officer of the rank of Secretary or Principal Secretary, should be disposed of by them preferably within a period of two months of the receipt of such a reference. In respect of the officers of the rank of Secretary or Principal Secretary to Government, such references should be made by the Director, CBI to the Cabinet Secretary for consideration of a Committee consisting of the Cabinet Secretary as its Chairman and the Law Secretary and the Secretary (Personnel) as its members. The Committee should dispose of all such references preferably within two months from the date of receipt of such a reference by the Cabinet Secretary.

(iii) When there is any difference of opinion between the Director, CBI and the Secretary of the Administrative Ministry/Department in respect of an officer up to the rank of Additional Secretary or equivalent, the matter shall be referred by CBI to Secretary (Personnel) for placement before the Committee referred to in clause (ii) above. Such a matter should be considered and disposed of by the Committee preferably within two months from the date of receipt of such a reference by Secretary (Personnel).

(iv) In regard to any person who is or has been Cabinet Secretary, before SPE takes any step of the kind mentioned in (i) above the case should be submitted to the Prime Minister for orders.”

Vineet Narain (supra) dealt with the validity of the said directive. Two questions arose in relation to the said Directive No. 4.7(3) of the Single Directive, namely, its propriety/legality and the extent of its coverage.

15. In defending the validity of the Single Directive, the then Attorney General had contended that the CBI being a special agency created by the Central Government, was required to function according to the mandate of the Central Government which had constituted the special agency. It was also contended that the Officers at the decision-making level needed protection against malicious or vexatious investigations in respect of honest decisions taken by them. While dealing with these contentions, this Court held that the general power to review the working of the agency would not extend to permitting the Minister to interfere with the course of investigation and prosecution in any individual case and in that respect the officers concerned are to be governed entirely by the mandate of law and the statutory duty cast upon them [para 28 of ***Vineet Narain (supra)***].

16. This Court quoted the judgment in **Union of India and Others** vs. **Sushil Kumar Modi and Others**⁷, which, in turn, relied on the observations of Lord Denning in **R** v. **Metropolitan Police Commr.**⁸ to the following effect:-

“I have no hesitation, however, in holding that, like every constable in the land, ***he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land.*** He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; ***but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.***”

[Emphasis supplied]

17. Thereafter, ***Vineet Narain (supra)*** distinguished the judgments in **State of Bihar and Another** vs. **J.A.C. Saldanha and Others**⁹ and ***K. Veeraswami (supra)*** and held that statutory powers cannot be fettered by single directives

⁷ (1997) 4 SCC 770

⁸ (1968) 1 All ER 763

⁹ (1980) 1 SCC 554

which are in the nature of executive instructions. This Court further held that unlike the power to sanction prosecution under the then Section 6 of the DSPE Act which was statutorily prescribed, the Single Directive was in the nature of an executive order. This Court held that in the absence of any statutory requirement of prior permission or sanction for investigation, the same cannot be imposed as a condition precedent for initiation of the investigation once jurisdiction is conferred on the CBI to investigate the offence statutorily.

18. Going further, this Court held that the law does not classify offenders differently for treatment thereunder, including investigation of offences and prosecution for offences, according to their status in life. This Court found that the Single Directive was applicable only to certain persons above the specified level who are described as “decision-making officers”. Further, this Court first excluded from the applicability of the Single Directive accusation of bribery which is supported by direct evidence including trap cases and offence of possession of assets disproportionate to known

sources of income. Thereafter, dealing with cases where accusation could not be supported by direct evidence and is a matter of inference of corrupt motive, this Court held as under:-

“46. There may be other cases where the accusation cannot be supported by direct evidence and is a matter of inference of corrupt motive for the decision, with nothing to prove directly any illegal gain to the decision-maker. Those are cases in which the inference drawn is that the decision must have been made for a corrupt motive because the decision could not have been reached otherwise by an officer at that level in the hierarchy. This is, therefore, an area where the opinion of persons with requisite expertise in decision-making of that kind is relevant and, may be even decisive in reaching the conclusion whether the allegation requires any investigation to be made. In view of the fact that the CBI or the police force does not have the expertise within its fold for the formation of the requisite opinion in such cases, the need for the inclusion of such a mechanism comprising of experts in the field as a part of the infrastructure of the CBI is obvious, to decide whether the accusation made discloses grounds for a reasonable suspicion of the commission of an offence and it requires investigation. In the absence of any such mechanism within the infrastructure of the CBI, comprising of experts in the field who can evaluate the material for the decision to be made, introduction therein of a body of experts having expertise of the kind of business which requires the decision to be made, can be appreciated. But then, the final opinion is to be of the CBI with the aid of that advice and not that of anyone else. It would be more appropriate to have such a body within the infrastructure of the CBI itself.”

19. What is important to note is, this Court held that the final opinion whether to investigate or not has to be made by the CBI and not by anybody else and exhorted the CBI to have within its midst body of experts to make the required decision. What was emphasized was that the final decision whether to investigate or not was to rest with the agency. Holding so, the Single Directive was held to be invalid.

20. A minute reading of *Vineet Narain (supra)* indicates that this Court first addressed the question of propriety/legality of the Single Directive. In answering the question, this Court held that the executive cannot dictate to the investigating machinery as to whom to prosecute or not to prosecute. This Court also reiterated that the formation of the opinion as to whether or not a case has to be placed for trial is that of a police officer and by no other authority. (See para 29)

RATIO, SPIRIT AND ESSENCE OF VINEET NARAIN
(SUPRA)

21. Though said in the context of examining the validity of the executive instruction, the ratio, true spirit and essence of the

judgment in ***Vineet Narain (supra)*** is that the executive on its own cannot foreclose enquiry into any allegation of corruption as that will be entering the domain of the investigative agency. This is the principle that permeates the warp and woof of the entire judgment in ***Vineet Narain (supra)***. The fact that what was struck down as an executive instruction and the observations on the aspect of classification have all to be read in the context of this one fundamental underpinning in the judgment, namely, that any decision to foreclose an enquiry against a public servant has to be taken by a body which is independent of the executive.

22. In ***Vineet Narain (supra)***, this Court proceeded to give certain directions to implement the rule of law, to reiterate as far as possible the recommendations of the Independent Review Committee popularly known as N.N. Vohra Committee. The following words of this Court from ***Vineet Narain (supra)*** repay study: -

“26. ... There can also be no doubt that the conclusions reached by the IRC and its recommendations are the minimum which require immediate acceptance and

implementation in a bid to arrest any further decay of the polity. It follows that the exercise to be performed now by this Court is really to consider whether any modifications/additions are required to be made to the recommendations of the IRC for achieving the object for which the Central Government itself constituted the IRC. We are informed by the learned Attorney General that further action on the report of the IRC could not be taken so far because of certain practical difficulties faced by the Central Government but there is no negative reaction to the report given by the Central Government.”

23. This Court reiterated some of the recommendations made by Lord Nolan of U.K. dealing with “Standards in Public Life” wherein one of the recommendations was as follows:-

“Independent scrutiny

7. Internal systems for maintaining standards should be supported by independent scrutiny.”

In conclusion, this Court in ***Vineet Narain (supra)*** held as under:-

“61. In the result, we strike down Directive No. 4.7(3) of the Single Directive quoted above and issue the above directions, which have to be construed in the light of the earlier discussion. The Report of the Independent Review Committee (IRC) and its recommendations which are similar to this extent can be read, if necessary, for a proper appreciation of these directions. To the extent we agree with the conclusions and recommendations of the IRC, and that is a large area, we have adopted the same in the formulation of the above directions. These directions

require the strict compliance/adherence of the Union of India and all concerned.”

INTRODUCTION OF SECTION 6A IN THE DELHI SPECIAL POLICE ESTABLISHMENT ACT, 1946

24. By the insertion of Section 26(c) to the Central Vigilance Commission Act, 2003 [CVC], Section 6A was introduced to the DSPE Act in 2003. Section 6A read as under:

“6-A. Approval of Central Government to conduct inquiry or investigation.—(1) The Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 (49 of 1988) except with the previous approval of the Central Government where such allegation relates to—

(a) the employees of the Central Government of the level of Joint Secretary and above; and

(b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government.

(2) Notwithstanding anything contained in sub-section (1), no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any gratification other than legal remuneration referred to in clause (c) of the Explanation to Section 7 of the Prevention of Corruption Act, 1988 (49 of 1988).”

25. A Constitution Bench of this Court in ***Subramanian Swamy (supra)*** examined the challenge to the validity of Section 6A of the DSPE Act. It is crucial to notice the argument of learned Amicus Curiae Shri Anil B. Divan, learned senior counsel, in supporting the challenge to the validity:-

- a) That the provision has to be struck down as it strikes at the core of rule of law as explained in ***Vineet Narain (supra)*** and the principle of independent, unhampered, unbiased and efficient investigation;
- b) That the provision was subversive of independent investigation;
- c) The very group of persons, namely, high-ranking bureaucrats whose misdeeds and illegalities may have to be inquired into, would decide whether the CBI should even start an inquiry or investigation;
- d) There will be no confidentiality and insulation of the investigating agency from political as well as bureaucratic control and influence because the approval

has to be taken from the Central Government which would involve leaks and disclosures at every stage.

- e) The very nexus of the criminal-bureaucrat-politician which is subverting the whole polity would be involved in granting or refusing prior approval before an inquiry or investigation can take place.
- f) The essence of a police investigation is skilful inquiry and collection of material and evidence in a manner by which the potential culpable individuals are not forewarned. The submission made being that the prior sanction of the same department would result in indirectly putting to notice the officers to be investigated before the commencement of investigation.
- g) Lastly, the classification contained in Section 6A created a privileged class of government officers of the level of Joint Secretary and above level and certain officials in Public Sector Undertakings, which is directly destructive and ran counter to the object of the Act and undermined

the object of detecting and punishing high-level corruption.

26. The validity of the statute was defended by contending that those in decision-making positions could become target of frivolous complaints and they need to be protected. Hence, a screening mechanism is legitimate as otherwise governance would be affected and decision makers instead of tendering honest advice would only give safe and non-committal advice. It was argued that the screening mechanism was to filter out frivolous or motivated investigation that could be initiated against senior officers to protect them from harassment to enable them to take decision without fear. The decision in ***Matajog (supra)*** was cited to contend that Section 197 of the CrPC was held to be valid and not violative of Article 14 and on similar logic Section 6A should also be upheld. It was argued that there was intelligible differentia since high-ranking public servants took policy decisions.

HOLDING IN SUBRAMANIAN SWAMY (SUPRA)

27. This Court, after analyzing the various arguments and after considering several precedents including the judgments in *Vineet Narain (supra)*, *JAC Saldanha (supra)* and *K. Veeraswami (supra)*, held as under:-

i) The classification made in Section 6A on the basis of status in government service is not permissible under Article 14 as it defeats the purpose of finding *prima facie* truth into the allegations of graft, which amount to an offence under the Act.
(para 59)

ii) Irrespective of their status or position, corrupt public servants are corrupters of public power and whether high or low, are birds of the same feather and must be confronted with the process of investigation and inquiry equally (para 59).

Section 6A neither eliminates public mischief nor achieves some positive public good. It advances public mischief and protects the crimedoer. The provision thwarts an independent, unhampered, unbiased, efficient and fearless

inquiry/investigation to track down the corrupt public servants. (para 60)

iii) The essence of police investigation is skillful inquiry and collection of material and evidence in a manner by which the potential culpable individuals are not forewarned. The previous approval from the Government necessarily required under Section 6A would result in indirectly putting to notice the officers to be investigated before the commencement of investigation, if CBI is not even allowed to enquire. (para 61)

iv) A preliminary enquiry is intended to ascertain whether a *prima facie* case for investigation is made out or not. If CBI is not even allowed to verify complaints by a preliminary enquiry, how can the case move forward? A fetter is put to enable the CBI to gather relevant material. (para 61)

v) As a matter of fact, CBI is not able to collect the material even to move the Government for the purpose of obtaining previous approval from the Central Government. (para 61)

vi) In the criminal justice system, the inquiry and investigation into an offence is the domain of the police. Even

this exercise of scrutiny of records and gathering relevant information to find out whether the case is worth pursuing further or not is not possible. (para 62)

vii) As per the CBI Manual, a preliminary enquiry relating to allegations of bribery and corruption should be limited to the scrutiny of records and interrogation of bare minimum persons which being necessary to judge whether there is any substance in the allegations which are being enquired into and whether the case is worth pursuing further or not. (para 62)

viii) The very power of CBI to enquire and investigate into the allegations of bribery and corruption against a certain class of public servants and officials in public undertakings is subverted and impinged by Section 6A. (para 62)

ix) Section 6A continues to suffer from the other two infirmities a) Where inference is to be drawn that the decision must have been for corrupt motive and direct evidence is not there, the expertise to take decision whether to proceed or not

in such cases should be with CBI itself and not with the Central Government, and;

b) In any event, the final decision to commence investigation into the offences must be of CBI with the internal aid and advice and not of anybody else. (para 65)

x) Section 6A also suffers from the vice of classifying offenders differently for treatment thereunder for inquiry and investigation of offences, according to their status in life. Every person accused of committing the same offence is to be dealt with in the same manner in accordance with law, which is equal in its application to everyone. (para 65)

xi) The impugned provision blocks inquiry and investigation by CBI by conferring the power of previous approval on the Central Government. (para 66)

xii) CBI is not able to proceed even to collect the material to unearth *prima facie* substance into the merits of allegations and thus the object of Section 6A itself is discriminatory. (para 68)

xiii) That being the position, the discrimination cannot be justified on the ground that there is a reasonable classification because it has a rational relation to the object sought to be achieved. (para 68)

xiv) The criminal justice system mandates that any investigation into the crime should be fair, in accordance with law and should not be tainted (Para 86).

xv) It is equally important that interested or influential persons are not able to misdirect or hijack the investigation so as to throttle a fair investigation resulting in the offenders escaping the punitive course of law. These are important facets of the rule of law. Breach of rule of law amounts to negation of equality under Article 14. Section 6A fails in the context of these facets of Article 14 (Para 86).

xvi) **Whether decision-maker or not, an independent investigation into such allegations is of utmost importance and unearthing the truth is the goal. The aim and object of investigation is ultimately to search for truth**

and any law that impedes that object may not stand the test of Article 14. (para 91)

28. The ratio, spirit and essence of the judgment in *Subramanian Swamy (supra)* indicates that the Constitution Bench was primarily concerned with the untenability of foreclosing any enquiry or inquiry by an independent agency before the grant or refusal of approval under Section 6A. It also emphasized on how vesting the power in the government would forewarn the officials who are subject matter of the inquiry. The Constitution Bench held that irrespective of the status of the public servants, they must be confronted with the same process of inquiry/investigation. It frowned upon the erstwhile Section 6A for subverting an inquiry by an independent agency and for that reason found the object of Section 6A to be discriminatory. Additionally, it found the classification of high-level public servants as illegal.

29. It is in this background that the validity of Section 17A, as introduced in 2018, needs to be tested.

METAMORPHOSIS OF SECTION 17A:

RECOMMENDATIONS OF THE LAW COMMISSION

30. The Law Commission of India in its 254th report considered the Prevention of Corruption (Amendment) Bill, 2013. The proposed Section 17A, after certain minor amendments suggested by the Law Commission, read as follows: -

“17A. Investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties.

(2) No police officer shall conduct any investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by a public servant in the discharge of his official functions or duties, without the previous approval-

(c) of the Lokpal, in the case of a public servant who is employed, or as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of the Union, and is a person referred to in clauses (a) to (h) of sub-section (1) of section 14 of the Lokpal and Lokayuktas Act, 2013;

(d) of the Lokayukta of the State or such authority established by law in that State under whose jurisdiction the public servant falls, in the case of a person who is employed, as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of a State,

conveyed by an order issued by the Lokpal in accordance with the provisions contained in Chapter VII of the Lokpal and Lokayuktas Act, 2013 or Lokayukta of the State or such authority referred to in clause (b) for processing of investigation against the public servant

Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person.”

31. It will be noticed that the section, as recommended by the Law Commission, provided for previous approval of the Lokpal in case of a public servant employed with the affairs of the Union and Lokayukta of the State or such authority established by law in that State under whose jurisdiction the public servant fell, in case of a person who is employed with the affairs of the State. This draft Bill is significant.

32. A close and minute reading of the judgments in ***Vineet Narain (supra)*** and ***Subramanian Swamy (supra)*** clearly brings to the fore the aspect that the Constitution Bench had found fault with foreclosing any independent investigation before the papers are put for approval to the Government. Moreover, the Court had expressly observed that under the impugned provisions therein, the very group of persons,

namely, high-ranking bureaucrats whose misdeeds and illegalities may have to be inquired into were to decide whether CBI should even start an inquiry or investigation against them or not. The finding on discrimination was only an additional finding as is clear from the use of the word “also” employed in the judgment in ***Subramanian Swamy (supra)*** in para 65 set out hereinabove.

33. The draft, as proposed by the Law Commission, addressed this issue squarely and vested the power in the Lokpal in accordance with Chapter VII of the Lokpal Act. The draft Bill carrying amendments to the Prevention of Corruption Act was thereafter placed before the Rajya Sabha Select Committee in August 2016.

RECOMMENDATIONS OF THE RAJYA SABHA SELECT COMMITTEE:

34. The Select Committee, in its Report, observed that several stakeholders stated that the grant of sanction of prosecution by Lokpal/Lokayukta for prosecuting public

servants under Section 23 of the Lokpal Act would be *ultra vires* Article 311 of the Constitution. It was felt that disciplinary/appointing authority should retain the power to grant sanction of prosecution of government servant as that authority is well placed with the functioning and conduct of his/her employee. (See para 15.2 of the Report). The Select Committee further observed that almost all State Governments/UT Administration were of the view that the power of granting sanction for prosecution should remain with the competent/appointing authority of appropriate government for practical reasons and administrative convenience.

35. What is significant is that there was no discussion on the serious concerns pointed out by the Constitution Bench in ***Subramanian Swamy (supra)*** about the unconstitutionality in vesting the power of grant of approval in the Government without any independent screening mechanism.

36. The ultimate Section 17A which emerged has been set out in para 3 hereinabove.

**QUALITATIVE DIFFERENCE BETWEEN THE ERSTWHILE
SECTION 6A AND THE PRESENT SECTION 17A:**

37. It will be seen that unlike Section 6A which was applicable to “*any offence alleged to have been committed under the Act*” [except those mentioned in sub-section (2)], Section 17A applies only to “*any offence alleged to have been committed by a public servant under this Act (the PC Act) where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties.*” Section 17A also excepted cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person. Section 6A applied only to employees of the Central Government of the Level of Joint Secretary and above and to such officers as are appointed by the Central Government in corporations established by or

under any Central Act, Government companies, societies and local authorities owned or controlled by that Government. The Section, as such, did not mention about its applicability to State employees. Section 17A applies to all public servants and in that sense does not make any classification and also applies to employees at the State Government level.

MANNER OF FUNCTIONING OF GOVERNMENT MACHINERY:

38. The phrase “*is relatable to any recommendation made or decision taken*” is crucial because it considerably limits the applicability of the filter mechanism to offences relatable to recommendations made or decisions taken in discharge of official duties or functions of the public servant.

39. In **A. Sanjeevi Naidu, Etc.** vs. **State of Madras and Another**,¹⁰ K.S. Hegde, J. felicitously speaking for the Constitution Bench of six Judges of this Court, while explaining the method of administration under the Council of

¹⁰ (1970) 1 SCC 443

Ministers with civil servants manning each department
observed as under: -

“9. We think that the above submissions advanced on behalf of the appellants are without force and are based on a misconception of the principles underlying our Constitution. Under our Constitution, the Governor is essentially a constitutional head, the administration of State is run by the Council of Ministers. But in the very nature of things, it is impossible for the Council of Ministers to deal with each and every matter that comes before the Government. **In order to obviate that difficulty the Constitution has authorised the Governor under sub-article (3) of Article 166 to make rules for the more convenient transation of business of the Government of the State and for the allocation amongst its Ministers, the business of the Government. All matters excepting those in which Governor is required to act in his discretion have to be allocated to one or the other of the Ministers on the advice of the Chief Minister.** Apart from allocating business among the Ministers, the Governor can also make rules on the advice of his Council of Ministers for more convenient transaction of business. He cannot only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function. But this again he can do only on the advice of the Council of Ministers.

10. The cabinet is responsible to the Legislature for every action taken in any of the Ministries. That is the essence of joint responsibility. That does not mean that each and every decision must be taken by the cabinet. The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Council of Ministers to discharge all or any of the Governmental functions. Similarly an individual Minister is responsible to the Legislature for every action taken or omitted to be taken in his ministry. This again is a political responsibility and not personal responsibility. **Even the**

most hard working Minister cannot attend to every business in his department. If he attempts to do it, he is bound to make a mess of his department. In every well planned administration, most of the decisions are taken by the civil servants who are likely to be experts and not subject to political pressure. The Minister is not expected to burden himself with the day-to-day administration. His primary function is to lay down the policies and programmes of his ministry while the Council of Ministers settle the major policies and programmes of the Government. When a civil servant takes a decision, he does not do it as a delegate of his Minister. He does it on behalf of the Government. It is always open to a Minister to call for any file in his ministry and pass orders. He may also issue directions to the officers in his ministry regarding the disposal of Government business either generally or as regards any specific case. Subject to that over all power, the officers designated by the "Rules" or the standing orders, can take decisions on behalf of the Government. These officers are the limbs of the Government and not its delegates."

40. Further, explaining how when civil servants discharge the functions allotted to them, they do so as limbs of the government and not as persons to whom the power of the government has been delegated, this Court observed as under:-

12. In *Ishwarlal Girdharlal Joshi, etc. v. State of Gujarat and Another*, [(1968) 2 SCR p. 266], this Court rejected the contention that the opinion formed by the Deputy Secretary under Section 17(1) of the Land Acquisition Act cannot be considered as the opinion of the State Government. After referring to the rules of business

regulating the Government business, this Court observed at p. 282:

“In our case the Secretaries concerned were given the jurisdiction to take action on behalf of Government and satisfy themselves about the need for acquisition under Section 6, the urgency of the matter and the existence of waste and arable lands for the application of sub-sections (1) and (4) of Section 17. In view of the Rules of business and the instructions their determination became the determination of Government and no exception could be taken.”

13. In *Capital Multi-purpose Cooperative Society v. State of M.P. and others*, [Civil Appeal No. 2201 of 1966, decided on 30-3-1957] this Court dealing with the scope of Section 68 (d) of the Act observed that the State Government obviously is not a natural person and therefore some natural person has to give hearing on behalf of the State Government and hence the hearing given by the special secretary pursuant to the power conferred on him by the business rules framed under Article 166 (3) is a valid hearing.

14. As mentioned earlier in the very nature of things, neither the Council of Ministers nor an individual Minister can attend to the numerous matters that come up before the Government. Those matters have to be attended to and decisions taken by various officials at various levels. When those officials discharge the functions allotted to them, they are doing so as limbs of the Government and not as persons to whom the power of the Government had been delegated. In *Halsbury Laws of England*, Vol. I, 3rd Edn. at p. 170, it is observed:

“Where functions entrusted to a Minister are performed by an official employed in the Minister's department there is in law no delegation because constitutionally the act or decision of the official is that of the Minister.”

This crucial aspect of transacting business in government has to be borne-in-mind while considering the validity of Section

17A. If as laid down in *Sanjeevi Naidu (supra)*, the law is that the officers take decisions on behalf of the government and that they are limbs of the government and not its delegates, one question that arises is should there not be an independent agency which will screen the information before grant or refusal of approval under Section 17A and ought that decision not bind the government?

IMPORTANCE OF HONEST AND FEARLESS ADVICE BY PUBLIC SERVANTS:

41. Civil servants should have the necessary freedom to take administrative decisions and express their views fearlessly without any threat of frivolous or vexatious complaints, for if they were to be exposed to such complaints in future, there will be a chilling effect on them and their hands will be shackled. The net result will be a “policy paralysis”. It will be the tendency of every civil servant then to play it safe by taking no decision at all. Though said in the context of a

debate on the erstwhile Section 6A, the observations of Shri Shivraj V. Patil in the Lok Sabha merits mention herein: -

“I have seen files which have been moving not, only from one table to the other, but they have been moving from one Ministry to the other. If the Ministry of Defence has to take a decision, the matter is referred to the Finance Ministry. The Finance Ministry's opinion is obtained and then the Finance Ministry also does not give the final opinion. It says that it could go to the Industries Ministry and let the Industries Ministry decide whether a particular thing is to be imported or whether it can be manufactured in the country. If the Industries Ministry says that can be manufactured in the country or it can be imported from outside also, then they would say that they should examine the legal position. So, the matter goes to the Law Ministry and it opines something and then it comes back to the Ministry of Defence. Then, the Ministry of Defence again says that they have taken decisions separately sitting in their own offices, but they should take the decision jointly sitting in a meeting. Again, the file goes back and then the officers have to come together and take a decision.

The result of this kind of procedure adopted is that not only months, but years pass before the final decision is taken. When years pass, the cost of acquiring the equipments or the cost of implementing a project goes up by 25 per cent or 30 per cent or even 50 per cent. The delays are there; time has its own cost. If you do not respect time now, it will certainly increase the cost. This aspect has to be considered. So, while governing and administering, a balanced attitude is required; and that balanced attitude is that there should not be corruption and at the same time, there

should not be undue delays which can increase the cost of doing things.

So, it is easy to allege anything against anybody but it is very difficult to substantiate an allegation. As a Government it has a responsibility to see that there is no corruption and everything that is necessary for this purpose should be done. At the same time it has a responsibility to see that delays are avoided. That is a very important thing. **That is why we shall have to be careful in seeing that corruption is not there, delay is not there and the innocent people are not put to any inconvenience.**”

[Emphasis supplied]

42. This Court in *State of Bihar and Others* vs. *Kripalu Shankar and Others*¹¹, while holding how file notings cannot be the basis for an action for contempt made the following telling observations. Speaking through V. Khalid, J., this Court observed thus: -

“13. In our considered view the internal notes file of the Government, maintained according to the rules of business, is a privileged document. If the government claims privilege or quasi-privilege regarding the notes file we will not be justified in rejecting the claim outright. In this case, the notes file was brought to the court not voluntarily by the Government. It was summoned by the court. The court can always look into it. The right of the court to look into any file can never be denied. The contents of the notes file brought to court got communicated to the court because the court looks into it. **It would be dangerous to found an action for contempt,**

¹¹ (1987) 3 SCC 34

for the views expressed in the notes file, on the discovery of unpleasant or unsavoury notes, on a perusal of the notes file by the court after getting them summoned. This would impair the independent functioning of the civil service essential to democracy. This would cause impediments in the fearless expression of opinion by the officers of the Government. The notings on files differ from officer to officer. It may well be that the notes made by a particular officer, in some cases, technically speaking is in disobedience of an order of the court or may be in violation of such order but a more experienced officer sitting above him can always correct him. To rely upon the notings in a file for the purpose of initiating contempt, in our view, therefore, would be to put the functioning of the Government out of gear. We must guard against being over-sensitive, when we come across objectionable notings made by officers, sometimes out of inexperience, sometimes out of over-zealousness and sometimes out of ignorance of the nuances of the question of law involved.

30. Before parting with this case we would like to observe the need for restraint and care in dealing with the internal files of the Government. We have already indicated its privileged position and limited areas where exposure is permissible of the notings in the file. This is not to say that absolute privilege can be claimed of its exposure and protection from the view of the courts. **But what is to be borne in mind is that the notings in the departmental files by the hierarchy of officials are meant for the independent discharge of official duties and not for exposure outside. In a democracy, it is absolutely necessary that its steel frame in the form of civil service is permitted to express itself freely uninfluenced by extraneous considerations.** It might well be that even orders of court come in for adverse remarks by officers dealing with them, confronted with difficult situations to straightway obey such orders. Notings made on such occasions are only for the benefit of the officers concerned. When a subordinate official

commits a mistake higher official will always correct it. It is necessary for courts also to view such notings in the proper perspective. In this case, the court, after looking into the notes file could have passed appropriate orders giving relief to the affected party and expressing its displeasure at the manner in which its order was implemented instead of initiating action on the notings made in the file. That way the court would have enhanced its prestige.”

43. In *P. Sirajuddin, Etc vs. State of Madras, Etc*¹², speaking about the incalculable harm the lodging of FIR can do to an honest public servant, this Court observed as under:-

“17. ... Before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. **The lodging of such a report against a person, specially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general. If the Government had set up a Vigilance and Anti-Corruption Department as was done in the State of Madras and the said department was entrusted with enquiries of this kind, no exception can be taken to an enquiry by officers of this department but any such enquiry must proceed in a fair and reasonable manner.....”**

[Emphasis supplied]

¹² (1970) 1 SCC 595

44. Very recently, I had occasion to make the following observations in **MMTC Limited** vs. **Anglo American Metallurgical Coal Pvt. Limited**¹³ about the need to protect the honest public servants who are faced with the duty to take decisions during the day-to-day administration: -

“99. Before we part, a small postscript. Whether in Government, Public Sector Corporations or even in the private sector, the driving force of the entity are the persons who administer them. A certain play in the joints is inevitable for their day-to-day functioning. If they are shackled with the fear that, their decisions taken for the day-to-day administration, could years later with the benefit of hindsight, be viewed with a jaundiced eye, it will create a chilling effect on them. A tendency to play it safe will set in. Decision making will be avoided. Policy paralysis will descend. All this will in the long run prove detrimental not just to that entity but to the nation itself. We are not to be understood to be condoning decisions taken for improper purposes or extraneous considerations. All that we are at pains to drive home is that great caution and circumspection have to be exercised before such allegations are brought forward and adequate proof must exist to back them. Otherwise for fear that carefully built reputations could be casually tarnished, best of talent will not be forthcoming, especially for government and public sector corporations.”

¹³ 2025 INSC 1279

CONSTITUTIONAL VALIDITY OF SECTION 17A:

45. Viewed in this background, the object behind Section 17A to provide that without the previous approval, no police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, cannot be found fault with. However, the question that arises is, whether Section 17A addresses the issue of an independent agency being involved in the filtering mechanism before the decision is taken by the Government.

46. As adverted to earlier, a minute reading of the judgment in ***Subramanian Swamy (supra)*** would clearly indicate that the reasoning was not only on the ground of untenable classification contrary to Article 14 but on larger grounds of upholding the majesty of the rule of law because Section 6A was perceived as foreclosing any enquiry before grant or

rejection of approval. If the ingredients of Section 6A were to be reincarnated and made applicable to all public servants irrespective of the level at which they are working, the said section would still be unconstitutional, applying the ratio, spirit and essence of *Subramanian Swamy (supra)*. As noticed earlier, there is a qualitative difference between Section 6A and the present Section 17A.

EXISTING STANDARD OPERATING PROCEDURE (SOP)

GOVERNING THE GRANT/REJECTION OF APPROVAL:

47. When a query was put to the learned Solicitor General as to whether there was any Standard Operating Procedure [SOP] for processing of cases under Section 17A of the Act, the learned Solicitor General produced before the Court a Standard Operating Procedure circulated with the letter of 03.09.2021 of the Additional Secretary, Government of India, Ministry of Personnel, Public Grievances and Pensions to all the Chief Secretaries of all State Governments/Union Territory administrations. The SOP provides for –

“a) Stage-wise processing of information received by a Police Officer;

b) Specifying the rank of the police officer entitled to seek prior approval under Section 17A in respect of different categories of public servants;

c) Consideration of the proposals under Section 17A of the Act by the Appropriate Government or Authority;

d) Laying down of single window procedure to specify receipt stage of the proposal; and

e) Check List for submitting proposals under Section 17A.”

48. The SOP provides that on receipt of an information, the police officer shall place the matter before the police officer of the appropriate rank for seeking prior approval under Section 17A of the Act, by such police officer of appropriate rank. Thereafter, it states that the police officer of the appropriate rank shall make a proposal to the appropriate government/authority under Section 17A of the Act, in respect of a person who is or has been a public servant in accordance with the prescription in Annexure-I thereon. Thereafter, it states that the police officer of the appropriate rank shall decide whether the information received, merits to be a) enquired; or b) inquired into; or c) investigated. The police

officer of the appropriate rank shall thereafter make a proposal containing the following information:

- “i. the office held by the public servant(s) when the offence was alleged to have been committed;
- ii. the present rank and status of the public servant; or
- iii. the post/office last held by the person who ceases to be a public servant; and
- iv. the appropriate Government or Authority, before whom the proposal of previous approval is to be made in accordance with the provisions of clauses (a) to (c) of section 17A of the Act.

Thereafter, it states that the said proposal shall be made to the appropriate government or authority through the single window procedure as laid down by the SOPs and shall ensure that the proposal is in accordance with the requirements laid down in the Check List and shall enclose legible and authenticated documents as may be required. Separate proposals were to be submitted for enquiry/inquiry or investigation, as the case may be. Separate proposals were to be made in respect of each public servant, where a composite offence is alleged against more than one public servant and the proposal shall be submitted in a sealed cover in

accordance with the Check List as prescribed in Annexure-2 thereon. The Check List is as follows: -

Annexure-II

CHECK LIST OF ITEMS FOR MATTERS RELATING TO SECTION 17A OF THE PREVENTION OF CORRUPTION ACT, 1988

S. No.	Head	Yes/No	Folder No./ Page No.
1.	Name, designation or office held by the public servant against whom the allegation of an offence under the Prevention of Corruption Act, 1988 has been made. If the person has ceased to be a public servant, the post or office last held by such person may also be indicated.		
2.	The post or office held by such public servant at the time of alleged commission of offence under the Prevention of Corruption Act. Please furnish the details of the Appropriate Government or Authority the public servant was serving at the relevant point of time.		
3.	(i) Whether the request is based on a complaint received? Please enclose a copy thereof. (ii) If yes, please enclose an authenticated translation thereof where the original complaint has been made in a vernacular language.		
4.	Whether the complaint prima facie reveals deriving of an undue advantage		

	by a public servant for self or any other person? Please furnish details.		
5.	Whether any information is available in respect of the bribe giver? If so, please furnish details.		
6.	Mention clearly, the offences under specific provisions of the Prevention of Corruption Act, 1988 as alleged against the person who is or has been a public servant.		
7.	Please provide specific details of the recommendation made or decision taken by a public servant, which is relatable to the offence alleged against the public servant.		
8.	In case any preliminary enquiry/ inquiry was undertaken at any earlier stage, please enclose the findings thereof and it may also be confirmed as to whether prior approval was sought for such PE/ inquiry?		
9.	Whether any criminal offences under the Indian Penal Code or offences under any other law have also been alleged against the public servant? If so, please furnish details thereof.		
10.	Any other information which is considered to be relevant for consideration of the proposal.		

11.	Name, designation and contact details of person authorized by the Police Officer of Appropriate Rank to rectify inadequacies and deficiencies in the proposal seeking Previous Approval, as pointed out by the Officer designated to receive the proposal by Appropriate Government or Authority.		
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Signature_____

Date:_____

Name of Police officer authorised
to seek prior approval
(in Block letters)_____

Designation_____

Telephone No._____

email ID_____

49. The Check List makes for an interesting reading. Apart from some biographical particulars, Serial No.4 prescribes the following: “Whether the complaint prima facie reveals deriving of an undue advantage by a public servant for self or any other person? [please furnish details]

7.	Please provide specific details of the recommendation made or decision taken by a public servant, which is relatable to the offence alleged against the public servant.
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8.	In case any preliminary enquiry/ inquiry was undertaken at any earlier stage, please enclose the findings thereof and it may also be confirmed as to whether prior approval was sought for such PE/ inquiry?
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SOP – DOES NOT CONTEMPLATE SCREENING BY AN INDEPENDENT AGENCY:

50. To say the least, the SOP is only a compilation of documents and does not indicate any independent examination being carried out by any independent agency. The crucial holding in ***Subramanian Swamy (supra)*** that the investigating agencies are not able to proceed even to collect the material to unearth prima facie substance into the merits of the allegations has not been addressed at all in the SOP. The further finding in ***Subramanian Swamy (supra)*** that the criminal justice system mandates that any investigation into the crime should be fair, in accordance with law and should not be tainted and it is important to ensure that interested or influential persons are not able to misdirect, hijack and

throttle a fair investigation has not been recognized at all in the SOP.

51. There cannot be two opinions on the fact that honest and independent public servants have to be protected from frivolous prosecutions. In fact, that is the reason why when the validity of Section 197 CrPC was questioned, this Court in ***Matajog Dobey (supra)*** held as follows:-

“13 ... Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard. ...”

52. The only distinction is that Section 197 CrPC like Section 19 of the Act would operate at the stage of cognizance. By then the material is collected by the investigating agency and that the sanctioning authority does is to weigh the material and grant or refuse sanction. The sanctioning authority is not groping in the dark unlike in a scenario that is prescribed in the SOP of the government, as set out earlier.

**THROWING BABY OUT WITH THE BATHWATER – NOT
AN OPTION:**

53. What is the solution then? Is the option then to strike down Section 17A and throw the baby out with the bathwater? Certainly not. If honest public servants are not given a basic assurance that decisions taken by them will not be subjected to frivolous complaints, it is the nation that will suffer. Public servants will resort to a play it safe syndrome and that will result in policy paralysis. The panacea of striking down will turn out to be worse than the disease. Instead, the correct course is to find whether within the framework of law the mischief pointed out in **Subramanian Swamy (supra)** and **Vineet Narain (supra)** could be addressed in the process of grant or refusal of approval under Section 17A.

54. **Vineet Narain (supra)** found the executive instructions to be ultra vires the statutory provisions and held the foreclosing of enquiry, to be a serious threat to the rule of law. **Subramanian Swamy (supra)** echoed the same sentiments

and additionally found classification to be invalid. There can be no manner of doubt that if an independent inquiry was to precede a grant of approval no fault can be found. Section 17A has no vice of invalid classification.

POSSIBILITY OF ABUSE – NO GROUND TO HOLD PROVISION UNCONSTITUTIONAL:

55. There is no merit in the submission of Mr. Prashant Bhushan that Section 17A could be struck down because there is a possibility of the power being abused. It is well settled that mere possibility of an abuse of an otherwise valid provision cannot be a ground for declaring a provision unconstitutional. The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as

reasonably construed. [See **The Collector of Customs, Madras vs. Nathella Sampathu Chetty and Another**¹⁴].

56. This case cannot be viewed only in a binary manner, that is either to accept the SOP of the government and uphold the provision under the rubric of protecting honest public servants or to strike down the law on the ground that the SOP does not contemplate an independent inquiry.

57. The SOP is only an executive instruction. Section 17A has to be construed with the interpretative tools at our command. A constitutional court in this scenario cannot throw up its hands in despair and say that it is caught between Scylla and Charybdis – between a rock and a hard place. This Court in **Manzoor Ali Khan vs. Union of India and Others**¹⁵, while upholding a validity of Section 19 of the Act made the following observations:-

“13. Thus, while it is not possible to hold that the requirement of sanction is unconstitutional, the competent authority has to take a decision on the issue of sanction expeditiously as already observed. **A fine balance has to**

¹⁴ (1962) 3 SCR 786

¹⁵ (2015) 2 SCC 33

be maintained between need to protect a public servant against mala fide prosecution on the one hand and the object of upholding the probity in public life in prosecuting the public servant against whom prima facie material in support of allegation of corruption exists, on the other hand.”

(Emphasis supplied)

58. As was rightly observed, a fine balance has to be maintained between the need to protect a public servant against mala fide prosecution on the one hand and the object of upholding the probity in public life in prosecuting the public servant against whom prima facie material in support of allegation of corruption exists, on the other. It is necessary to notice that Article 30(2) of the United Nations Convention Against Corruption also advocates the striking of adequate balance by providing as follows:-

“Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.”

59. Echoing the need for an independent screening mechanism by an impartial agency before prior approval is granted, the Fourth Report (January 2007), of the Second Administrative Reforms Commission had the following emphatic observations to make: -

7.1 The *raison d'être* of vigilance activity is not to reduce but to enhance the level of managerial efficiency and effectiveness in the organization. Risk-taking should form part of government functioning. Every loss caused to the organization, either in pecuniary or non pecuniary terms, need not necessarily become the subject matter of a vigilance inquiry. One possible test for determining the bona-fides could be whether a person of common prudence working within the ambit of the prescribed rules, regulations and instructions, would have taken the decision in the prevailing circumstances in the commercial/operational interests of the organization.

7.5 There is a general perception among officers and managers that anti-corruption agencies do not fully appreciate administrative and business risks and that they tend to misinterpret the motives where the decision has gone awry or where a loss is caused in a commercial transaction. Such a perception is not without foundation. It is essential therefore for the investigating agencies to establish that their actions are designed in such a way as to protect honest officers. This depends on the ethical standards and professional competence of the personnel manning anti-corruption agencies. Allegations can be made by dishonest subordinates against whom the officer has initiated disciplinary proceedings or he may have stood in the way of dishonest intentions of the corrupt subordinate. More sinister could be the role of "aggrieved" outsiders who failed to have their wrongful way.

7.6 It is generally assumed by the investigating agencies that (1) a decision should be wrong for there to be corruption, and (2) it is easier to involve everyone in the chain of decision making and allege 'conspiracy' than to take pains to find out the individuals who are actually involved. It is often overlooked that a corruption can take place even when the decisions are correct and that it also takes place at specific points inside and outside the system. This entrenched approach to investigation has led to conviction rates being dismally low, honest functionaries getting demoralized and dishonest ones often going scot free.

7.7 The crucial question is one of ensuring a balance between equality before law and protection of an honest civil servant who has his reputation to safeguard, unlike a corrupt one. Such a balance could be achieved by an impartial agency which would screen cases of prior permission for investigation and sanction prosecution of public servants involved in corruption. The Commission has already recommended that the Central Vigilance Commission should be empowered to give such permission.

[Emphasis supplied]

60. Here is where the need for an independent agency to consider the matter before the grant or refusal of the approval under Section 17A becomes primordial. The stage is set now to have a closer look at the provisions of the Lokpal Act.

THE LOKPAL AND THE LOKAYUKTAS ACT, 2013:

61. The Lokpal Act was enacted to provide for the establishment of a body of Lokpal for the Union and Lokayukta for States to inquire into the allegations of corruption against certain public functionaries and for matters connected therewith or incidental thereto. The Act was enacted to give effect to the United Nations Convention Against Corruption. It was enacted to give effect to the Government's commitment to clean and responsive governance and to punish acts of corruption. It was enacted for providing prompt and fair investigation and prosecution in cases of corruption.

62. Section 3 provides for establishment of Lokpal and reads as follows: -

“3. Establishment of Lokpal.- (1) On and from the commencement of this Act, there shall be established, for the purpose of this Act, a body to be called the "Lokpal".

(2) The Lokpal shall consist of-

(a) a Chairperson, who is or has been a Chief Justice of India or is or has been a Judge of the Supreme Court or an eminent person who fulfils the eligibility specified in clause (b) of sub-section (3); and

(b) such number of Members, not exceeding eight out of whom fifty per cent shall be Judicial Members:

Provided that not less than fifty per cent of the Members of the Lokpal shall be from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes. Other Backward Classes, Minorities and women.

(3) A person shall be eligible to be appointed,-

(a) as a Judicial Member if he is or has been a Judge of the Supreme Court or is or has been a Chief Justice of a High Court;

(b) as a Member other than a Judicial Member, if he is a person of impeccable integrity and outstanding ability 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.

(4) The Chairperson or a Member shall not be-

(i) a member of Parliament or a member of the Legislature of any State or Union territory;

(ii) a person convicted of any offence involving moral turpitude;

(iii) a person of less than forty-five years of age, on the date of assuming office as the Chairperson or Member, as the case may be;

(iv) a member of any Panchayat or Municipality;

(v) a person who has been removed or dismissed from the service of the Union or a State,

and shall not hold any office of trust or profit (other than his office as the Chairperson or a Member) or be affiliated with any political party or carry on any business or practise any profession and, accordingly, before he

enters upon his office, a person appointed as the Chairperson or a Member, as the case may be, shall, if-

(a) he holds any office of trust or profit, resign from such office; or

(b) he is carrying on any business, sever his connection with the conduct and management of such business; or

(c) he is practising any profession, cease to practise such profession.”

63. Section 4 prescribes that the Chairperson and Members of the Lokpal shall be appointed by the President after obtaining the recommendations of a Selection Committee consisting of a) the Prime Minister as the Chairperson; b) the Speaker of the House of the People as Member; c) the Leader of Opposition in the House of the People as Member; d) the Chief Justice of India or a Judge of the Supreme Court nominated by the Chief Justice as Member and e) one eminent jurist, as recommended by the Chairperson and Members referred to in Clauses (a) to (d) to be nominated by the President as Member.

64. Section 11 provides for the establishment of an Inquiry Wing of the Lokpal. It prescribes that the Lokpal shall

constitute an Inquiry Wing headed by the Director of Inquiry for the purpose of conducting preliminary inquiry into any offence alleged to have been committed by a public servant punishable under the Act.

65. Section 11, which occurs in Chapter III, reads as under: -

“11. Inquiry Wing.- (1) Notwithstanding anything contained in any law for the time being in force, the Lokpal shall constitute an Inquiry Wing headed by the Director of Inquiry for the purpose of conducting preliminary inquiry into any offence alleged to have been committed by a public servant punishable under the Prevention of Corruption Act, 1988 (49 of 1988):

Provided that till such time the Inquiry Wing is constituted by the Lokpal, the Central Government shall make available such number of officers and other staff from its Ministries or Departments, as may be required by the Lokpal, for conducting preliminary inquiries under this Act.

(2) For the purposes of assisting the Lokpal in conducting a preliminary inquiry under this Act, the officers of the Inquiry Wing not below the rank of the Under Secretary to the Government of India, shall have the same powers as are conferred upon the Inquiry Wing of the Lokpal under section 27.”

66. Chapter IV speaks of the Prosecution Wing. Section 12, which occurs in Chapter XII, reads as under: -

“12. Prosecution Wing.- (1) The Lokpal shall, by notification, constitute a Prosecution Wing headed by the Director of Prosecution for the purpose of prosecution of public servants in relation to any complaint by the Lokpal under this Act:

Provided that till such time the Prosecution Wing is constituted by the Lokpal, the Central Government shall make available such number of officers and other staff from its Ministries or Departments, as may be required by the Lokpal, for conducting prosecution under this Act:

(2) The Director of Prosecution shall, after having been so directed by the Lokpal, file a case in accordance with the findings of investigation report, before the Special Court, and take all necessary steps in respect of the prosecution of public servants in relation to any offence punishable under the Prevention of Corruption Act, 1988 (49 of 1988).

(3) The case under sub-section (2), shall be deemed to be a report, filed on completion of investigation, referred to in section 173 of the Code of Criminal Procedure, 1973 (2 of 1974).”

67. Chapter VI deals with jurisdiction in respect of inquiry by the Lokpal. Section 14, which occurs in Chapter VI, reads as under: -

“14. Jurisdiction of Lokpal to include Prime Minister, Ministers, Members of Parliament, Groups A, B, C and D officers and Officials of Central Government.-

(1) Subject to the other provisions of this Act, the Lokpal shall inquire or cause an inquiry to be conducted into any matter involved in, or arising from, or connected with, any

allegation of corruption made in a complaint in respect of the following, namely:-

(a) any person who is or has been a Prime Minister:

Provided that the Lokpal shall not inquire into any matter involved in, or arising from, or connected with, any such allegation of corruption against the Prime Minister,-

(i) insofar as it relates to international relations, external and internal security, public order, atomic energy and space;

(ii) unless a full bench of the Lokpal consisting of its Chairperson and all Members considers the initiation of inquiry and at least two-thirds of its Members approves of such inquiry:

Provided further that any such inquiry shall be held in camera and if the Lokpal comes to the conclusion that the complaint deserves to be dismissed, the records of the inquiry shall not be published or made available to anyone;

(b) any person who is or has been a Minister of the Union;

(c) any person who is or has been a member of either House of Parliament;

(d) any Group 'A' or Group 'B' officer or equivalent or above, from amongst the public servants defined in sub-clauses (i) and (ii) of clause (c) of section 2 of the Prevention of Corruption Act, 1988 (49 of 1988) when serving or who has served, in connection with the affairs of the Union;

(e) any Group 'C' or Group 'D' official or equivalent, from amongst the public servants defined in sub-clauses (i) and (ii) of clause (c) of section 2 of the Prevention of Corruption Act, 1988 (49 of 1988) when serving or who has

served in connection with the affairs of the Union subject to the provision of sub-section (1) of section 20;

(f) any person who is or has been a chairperson or member or officer or employee in any body or Board or corporation or authority or company or society or trust or autonomous body (by whatever name called) established by an Act of Parliament or wholly or partly financed by the Central Government or controlled by it:

Provided that in respect of such officers referred to in clause (d) who have served in connection with the affairs of the Union or in any body or Board or corporation or authority or company or society or trust or autonomous body referred to in clause (e) but are working in connection with the affairs of the State or in any body or Board or corporation or authority or company or society or trust or autonomous body (by whatever name called) established by an Act of the State Legislature or wholly or partly financed by the State Government or controlled by it, the Lokpal and the officers of its Inquiry Wing or Prosecution Wing shall have jurisdiction under this Act in respect of such officers only after obtaining the consent of the concerned State Government;

(g) any person who is or has been a director, manager, secretary or other officer of every other society or association of persons or trust (whether registered under any law for the time being in force or not), by whatever name called, wholly or partly financed by the Government and the annual income of which exceeds such amount as the Central Government may, by notification, specify:

(h) any person who is or has been a director, manager, secretary or other officer of every other society or association of persons or trust (whether registered under any law for the time being in force or not) in receipt of any

donation from any foreign source under the Foreign Contribution (Regulation) Act, 2010 (42 of 2010) in excess of ten lakh rupees in a year or such higher amount as the Central Government may, by notification, specify.

Explanation. For the purpose of clauses (f) and (g), it is hereby clarified that any entity or institution, by whatever name called, corporate, society, trust, association of persons, partnership, sole proprietorship, limited liability partnership (whether registered under any law for the time being in force or not), shall be the entities covered in those clauses:

Provided that any person referred to in this clause shall be deemed to be a public servant under clause (c) of section 2 of the Prevention of Corruption Act, 1988 (49 of 1988) and the provisions of that Act shall apply accordingly.

(2) Notwithstanding anything contained in sub-section (1), 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.

(3) The Lokpal may inquire into any act or conduct of any person other than those referred to in sub-section (1), if such person is involved in the act of abetting, bribe giving or bribe taking or conspiracy relating to any allegation of corruption under the Prevention of Corruption Act, 1988 (49 of 1988) against a person referred to in sub-section (1):

Provided that no action under this section shall be taken in case of a person serving in connection with the affairs of a State, without the consent of the State Government.

(4) No matter in respect of which a complaint has been made to the Lokpal under this Act, shall be referred for inquiry under the Commissions of Inquiry Act, 1952 (60 of 1952).

Explanation.- For the removal of doubts, it is hereby declared that a complaint under this Act shall only relate to a period during which the public servant was holding or serving in that capacity.”

68. It will be noticed that Lokpal has jurisdiction to inquire or cause an inquiry to be conducted into any matter involved in, or arising from, or connected with, any allegation of corruption made in a complaint even in respect of the Prime Minister of the country. Apart from the Prime Minister, the Lokpal has jurisdiction over the Ministers of the Union and other civil servants mentioned therein.

69. Chapter VII prescribes the procedure in respect of preliminary inquiry and investigation. Section 20, which occurs in Chapter VII, reads as under:-

“20. Provisions relating to complaints and preliminary inquiry and investigation.- (1) The Lokpal on receipt of a complaint, if it decides to proceed further, may order-

(a) preliminary inquiry against any public servant by its Inquiry Wing or any agency (including the Delhi Special Police Establishment) to ascertain whether there exists a prima facie case for proceeding in the matter; or

(b) investigation by any agency (including the Delhi Special Police Establishment) when there exists a prima facie case:

Provided that the Lokpal shall if it has decided to proceed with the preliminary inquiry, by a general or special order, refer the complaints or a category of complaints or a complaint received by it in respect of public servants belonging to Group A or Group B or Group C or Group D to the Central Vigilance Commission constituted under sub-section (1) of section 3 of the Central Vigilance Commission Act, 2003 (45 of 2003) :

Provided further that the Central Vigilance Commission in respect of complaints referred to it under the first proviso, after making preliminary inquiry in respect of public servants belonging to Group A and Group B, shall submit its report to the Lokpal in accordance with the provisions contained in sub-sections (2) and (4) and in case of public servants belonging to Group C and Group D, the Commission shall proceed in accordance with the provisions of the Central Vigilance Commission Act, 2003:

Provided also that before ordering an investigation under clause (b), the Lokpal shall call for the explanation of the public servant so as to determine whether there exists a prima facie case for investigation:

Provided also that the seeking of explanation from the public servant before an investigation shall not interfere with the search and seizure, if any, required to be undertaken by any agency (including the Delhi Special Police Establishment) under this Act.

(2) During the preliminary inquiry referred to in sub-section (1), the Inquiry Wing or any agency (including the Delhi Special Police Establishment) shall conduct a preliminary inquiry and on the basis of material, information and documents collected seek the comments on the allegations made in the complaint from the public servant and the competent authority and after obtaining the comments of the concerned public servant and the competent authority, submit, within sixty days from the date of receipt of the reference, a report to the Lokpal.

(3) A Bench consisting of not less than three Members of the Lokpal shall consider every report received under sub-section (2) from the Inquiry Wing or any agency (including the Delhi Special Police Establishment), and after giving an opportunity of being heard to the public servant, decide whether there exists a prima facie case, and proceed with one or more of the following actions, namely:-

(a) investigation by any agency or the Delhi Special Police Establishment, as the case may be;

(b) initiation of the departmental proceedings or any other appropriate action against the concerned public servants by the competent authority;

(c) closure of the proceedings against the public servant and to proceed against the complainant under section 46.

(4) Every preliminary inquiry referred to in sub-section (1) shall ordinarily be completed within a period of ninety days and for reasons to be recorded in writing, within a further period of ninety days from the date of receipt of the complaint.

(5) In case the Lokpal decides to proceed to investigate into the complaint, it shall direct any agency (including the Delhi Special Police Establishment) to carry out the

investigation as expeditiously as possible and complete the investigation within a period of six months from the date of its order:

Provided that the Lokpal may extend the said period by a further period not exceeding of six months at a time for the reasons to be recorded in writing.

(6) Notwithstanding anything contained in section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), any agency (including the Delhi Special Police Establishment) shall, in respect of cases referred to it by the Lokpal, submit the investigation report under that section to the court having jurisdiction and forward a copy thereof to the Lokpal.

(7) A bench consisting of not less than three Members of the Lokpal shall consider every report received by it under sub-section (6) from any agency (including the Delhi Special Police Establishment) and after obtaining the comments of the competent authority and the public servant may-

(a) grant sanction to its Prosecution Wing or investigating agency to file charge-sheet or direct the closure of report before the Special Court against the public servant;

(b) direct the competent authority to initiate the departmental proceedings or any other appropriate action against the concerned public servant.

(8) The Lokpal may, after taking a decision under sub-section (7) on the filing of the charge-sheet, direct its Prosecution Wing or any investigating agency (including the Delhi Special Police Establishment) to initiate prosecution in the Special Court in respect of the cases investigated by the agency.

(9) The Lokpal may, during the preliminary inquiry or the investigation, as the case may be. pass appropriate

orders for the safe custody of the documents relevant to the preliminary inquiry or, as the case may be, investigation as it deems fit.

(10) The website of the Lokpal shall, from time to time and in such manner as may be specified by regulations, display to the public, the status of number of complaints pending before it or disposed of by it.

(11) The Lokpal may retain the original records and evidences which are likely to be required in the process of preliminary inquiry or investigation or conduct of a case by it or by the Special Court.

(12) Save as otherwise provided, the manner and procedure of conducting a preliminary inquiry or investigation (including such material and documents to be made available to the public servant) under this Act, shall be such as may be specified by regulations.”

70. It will be noticed that, under Section 20, on receipt of a complaint, the Lokpal may decide to proceed further or may decide otherwise. If it decides to proceed further, the Lokpal may order

a) the preliminary inquiry against any public servant by its Inquiry Wing or any agency (including the DSPE) to ascertain whether there exists a prima face case for proceeding in the matter; or

b) investigation by any agency (including the DSPE) when there exists a prima facie case ordinarily.

71. In case of utterly frivolous complaints, the Lokpal may decide not to proceed further in its discretion for reasons to be recorded. If it decides to proceed further, it may order a preliminary inquiry to ascertain whether there exists a prima facie case and investigation by any agency where prima facie case exists. The proviso prescribes that the Lokpal shall if it has decided to proceed with the preliminary inquiry, by a general or special order, refer the complaints or a category of complaints or a complaint received by it in respect of public servants belonging to Group A or Group B or Group C or Group D to the Central Vigilance Commission [CVC] constituted under sub-section (1) of Section 3 of the Central Vigilance Act, 2003. The proviso further provides that the CVC in respect of complaints referred to it under the first proviso, after making preliminary inquiry in respect of public servants belonging to Group A and Group B, shall submit its

report to the Lokpal in accordance with the provisions contained in sub-Sections (2) and (4) and in case of public servants belonging to Group C and Group D, the Commission shall proceed in accordance with the provisions of the CVC Act, 2003.

72. In case the Lokpal decides to order an investigation, before ordering the investigation, the Lokpal shall call for the explanation of the public servant so as to determine whether there exists a prima facie case for investigation. Sub-section (2) of Section 20 prescribes that during the preliminary enquiry referred to in sub-section (1), the Inquiry Wing or any agency (including the DSPE) shall conduct a preliminary inquiry and on the basis of material, information and documents collected, seek the comments on the allegations made in the complaint from the public servant and the competent authority and after obtaining the comments of the concerned public servant and the competent authority,

submit, within 60 days from the date of receipt of the reference, a report to the Lokpal.

73. What is crucial to notice is that in proceedings under the Lokpal Act when a preliminary inquiry is conducted an opportunity is given not only to the public servant to explain but also opportunity is given to the competent authority before furnishing a report to the Lokpal.

74. Competent authority has been defined in Section 2(c) of the Act as under:-

“(c) "competent authority", in relation to-

- (1) the Prime Minister, means the House of the People;
- (ii) a member of the Council of Ministers, means the Prime Minister;
- (iii) a member of Parliament other than a Minister, means-
 - (A) in the case of a member of the Council of States, the Chairman of the Council; and
 - (B) in the case of a member of the House of the People, the Speaker of the House;
- (iv) an officer in the Ministry or Department of the Central Government, means the Minister in charge of the Ministry or Department under which the officer is serving;

- (v) a chairperson or members of any body or Board or corporation or authority or company or society or autonomous body (by whatever name called) established or constituted under any Act of Parliament or wholly or partly financed by the Central Government or controlled by it, means the Minister in charge of the administrative Ministry of such body or Board or corporation or authority or company or society or autonomous body;
- (vi) an officer of any body or Board or corporation or authority or company or society or autonomous body (by whatever name called) established or constituted under any Act of Parliament or wholly or partly financed by the Central Government or controlled by it, means the head of such body or Board or corporation or authority or company or society or autonomous body;
- (vii) in any other case not falling under sub-clauses (i) to (vi) above, means such Department or authority as the Central Government may, by notification, specify:

Provided that if any person referred to in sub-clause (v) or sub-clause (vi) is also a Member of Parliament, then, the competent authority shall be-

- (A) in case such member is a member of the Council of States, the Chairman of the Council; and
- (B) in case such member is a member of the House of the People, the Speaker of the House;"

75. Reverting back to Section 20 of the Lokpal Act, sub-section (7) of Section 20 prescribes that not less than three Members of the Lokpal shall consider every report received by it under sub-section (6) from any agency (including the

DSPE) and after obtaining the comments of the competent authority and the public servant may - grant sanction to its Prosecution Wing or investigation agency to file charge-sheet or direct the closure of report before the Special Court against the public servant. Sub-clause (b) of Section 20(7) provides not less than three members of the Lokpal may direct the competent authority to initiate the disciplinary proceedings or any other appropriate action against the concerned public servant. Under sub-section (8) of Section 20, the Lokpal may, on the filing of the chargesheet, direct its Prosecution Wing or any investigating agency (including the DSPE) to initiate prosecution in the Special Court in respect of the cases investigated by the agency. Under Section 23, the Lokpal has the power, notwithstanding anything contained in Section 197 of the CrPC or the erstwhile Section 6A of the DSPE Act or Section 19 of the Act, to grant sanction for prosecution under clause (a) of sub-section (7) of Section 20.

76. Sub-section (2) of Section 23 prescribes that no prosecution under sub-section (1) shall be initiated against any public servant accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, and no court shall take cognizance of such offence except with the previous sanction of the Lokpal.

77. The reason why the above provisions are set out is to demonstrate that while drafting the amendments to the provisions of the Act which ultimately culminated in the Amendments of 2018, the Lokpal Act was also being drafted and brought into force w.e.f 16.01.2014. Even the Prime Minister is subject to a certain procedure under the Lokpal Act. Any complaint could be made to the Lokpal and for the rigors of Section 14 to kick in, the Lokpal may apply the procedure under Section 20, on the same, subject to the restrictions prescribed therein. The provision is so couched that the Lokpal can decide not to proceed in absolutely

frivolous complaints and if it decides to proceed, it is vested with an Inquiry Wing to conduct a preliminary Inquiry where an opportunity is given to the public servant and the competent authority.

78. The statement of object and reasons which led to the enactment of the Lokpal Act provide as under:-

“STATEMENT OF OBJECTS AND REASONS

The need to have a legislation for Lokpal has been felt for the quite sometime. In its interim report on the "Problems of Redressal of Citizens' Grievances" submitted in 1966, the Administrative Reforms Commission, inter alia, recommended the setting up of an institution of Lokpal at the Centre. To give effect to this recommendation of the Administrative Reforms Commission, eight Bills on Lokpal were introduced in the Lok Sabha in the past. However, these Bills had lapsed consequent upon the dissolution of the respective Lok Sabha except in the case of 1985 bill which was subsequently withdrawn after its introduction.

2. In pursuance of the efforts to constitute a mechanism for dealing with complaints on corruption against public functionaries including in high places, the Government constituted a Joint Drafting Committee on 8th April, 2011 to draft a Lokpal Bill. Divergent views emerged during deliberations in the JDC. Government introduced a revised Bill namely 'Lokpal Bill, 2011' in the Lok Sabha on 4th August, 2011. This Bill was referred to the Department-related

Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice on the 8th August, 2011 for examination and report and this was followed by discussions in both the Houses of Parliament on 27th August, 2011. A sense of the House was communicated to the Standing Committee on the basis of discussions in the Houses. The Department-related Parliamentary Standing Committee after extensive discussion with all the concerned Stakeholders suggested major amendments as regards the scope and content of the Bill introduced in August 2011. It also recommended that Lokpal at the Centre and Lokayukta at the States be conferred constitutional status in its report of 9th December, 2011. Upon consideration of the recommendations of the Standing Committee it was decided to withdraw the Lokpal Bill, 2011 pending in Lok Sabha and to introduce a thoroughly revised bill for carrying out the necessary amendments to the Constitution for the setting up of Lokpal and Lokayuktas as constitutional bodies.

3. India is committed to pursue the policy of 'Zero Tolerance against Corruption'. India ratified the United Nations Convention Against Corruption by deposit of Instrument of Ratification on 9th May, 2011. This Convention imposes a number of obligations, some mandatory, some recommendatory and some optional on the member States. The Convention, inter alia, envisages that State Parties ensure measures in the domestic law for criminalization of offences relating to bribery and put in place an effective mechanism for its enforcement. The obligations of the Convention, with reference to India, have come into force with effect from 8th June, 2011. As a policy of Zero Tolerance against Corruption the Bill seeks to establish in the country, a more effective mechanism to receive complaints relating to allegations of corruption against public servants including

Ministers, MPs, Chief Ministers, Members of Legislative Assemblies and public servants and to inquire into them and take follow up actions. The bodies, namely, Lokpal and Lokayuktas which are being set up for the purpose will be constitutional bodies. This setting up of these bodies will further strengthen the existing legal and institutional mechanism thereby facilitating a more effective implementation of some of the obligations under the aforesaid Convention.”

79. As the statement of objects and reasons indicates, it was enacted to give effect to the recommendations of the Administrative Reforms Commission to provide a mechanism for dealing with complaints of corruption against public functionaries including in high places. The statement of objects and reasons makes it clear that India as a nation has committed to pursue the policy of “Zero Tolerance against Corruption.” The Lokpal and Lokayuktas have been set up to further strengthen the existing legal and institutional mechanism for effective implementation of the United Conventions against Corruption.

80. It will be useful to recall that even the Law Commission in its 254th Report wanted to vest the power of prior approval in

the Lokpal. This aspect has been discussed hereinabove. However, when the matter went to the Select Committee in order to give effect to the wishes of the State Government and on some assumed notion that it will be contrary to Article 311 the said clause was given up and Section 17A was enacted in the present form. The Rajya Sabha Select Committee had recorded that several stakeholders had opined that Article 311 of the Constitution would be violated if the Lokpal or Lokayukta is mandated with the task of screening the information prior to the grant of approval under Section 17A. One is at a loss to understand how Article 311 would be violated. The Lokpal Act as well as the State Acts permit the authorities concerned in those statutes to inquire into the conduct of public servant. Further, the interpretation that is placed in this judgment is only to vest the screening mechanism with the Lokpal/Lokayukta to bring the provision in line with the holding of the decision of the Constitution Bench in ***Subramanian Swamy (supra)***. Article 311 deals with

dismissal/removal or reduction in rank. Hence the reference to Article 311 in this scenario is totally incorrect.

81. The only way the validity of the provision can be sustained from a challenge under Article 14 and the consequent negation of rule of law, is to have the examination of the information which the appropriate government receives under Section 17A to be forwarded to the Lokpal. The Lokpal/Lokayukta may if it finds the information frivolous, recommend for reasons to be recorded in writing that the government reject the approval. If the Lokpal finds that the complaint calls for an inquiry it may order an inquiry by the Inquiry Wing. It may have the inquiry conducted under Chapter III and where it finds that there is no prima facie case, it can make the appropriate recommendations. On the contrary, if it finds a prima facie case it may forward the same to the Government which Government will be obliged to follow the recommendation and proceed to grant the approval. Thereafter, the investigating agency may follow the appropriate procedure laid down in the appropriate manual and regulate their investigation. This mechanism will

also take care of the serious concern to the threat to rule of law envisaged in ***Vineet Narain (supra)*** and ***Subramanian Swamy (supra)***, by vesting the decision to grant approval or not in the government without any inquiry by an independent agency.

82. Similar mechanism is available in the different Lokayukta Acts of the States and with regard to approval sought in the case of persons employed in connection with the affairs of the State. Reference will be made by the authority to whom approval is sought to the State Lokpal.

83. A question may arise as to how in this mechanism the officials covered by Section 17A(c) would be governed.

Section 17A(c) reads as under: -

“In the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed.”

84. The jurisdiction of Lokpal under the Central Act as prescribed under Section 14 applies also to:-

a) Group ‘A’ or Group ‘B’ officer or equivalent or above, who has served or is serving, in connection with the affairs of the Union.

- b) Group 'C' or Group 'D' official or equivalent, from amongst the public servants who have served or have been serving in connection with the affairs of the Union.
- c) Any person who is or has been a chairperson or member or officer or employee in any body or Board or corporation or authority or company or society or trust or autonomous body (by whatever name called) established by an Act of Parliament or wholly or partly financed by the Central Government or controlled by it.
- d) Any person who is or has been a director, manager, secretary or other officer of every other society or association of persons or trust, by whatever name called, wholly or partly financed by the Government and the annual income of which exceeds such amount as the Central Government may, by notification, specify;
- e) Any person who is or has been a director, manager, secretary or other officer or every other society or association of persons or trust in receipt of any donation from any foreign source under the Foreign Contribution (Regulation) Act, 2010

in excess of ten lakh rupees in a year or such higher amount as the Central Government may, by notification, specify.

85. These officials will be subject to the jurisdiction of Lokpal and any Section 17A information can easily be referred to the Lokpal and the grant or refusal of approval under Section 17A would depend on the recommendation of the Lokpal.

86. It is reiterated that, as prescribed in Section 20, the Lokpal may in case where it decides to proceed further, may order a) preliminary inquiry by its Inquiry Wing or any agency (including the DSPE) to ascertain whether exists a *prima facie* case for proceeding in the matter; or b) investigation by any agency (including the DSPE) when there exists a *prima facie* case.

87. The proviso empowers the Lokpal by a general or special order, refer the complaints or a category of complaints or a complaint received by it in respect of a public servants belonging to Group A or Group B or Group C or Group D to the Central Vigilance Commission constituted under sub-

Section (1) of Section 3 of the Central Vigilance Act, 2003. The second proviso further provides that the Central Vigilance Commission in respect of complaints referred to it under the first proviso, after making preliminary inquiry in respect of public servants belonging to Group A and Group B, shall submit its report to the Lokpal and in case of public servants belonging to Group C and Group D, the Commission shall proceed in accordance with the provisions of the Central Vigilance Act, 2003.

88. Section 8A of the CVC Act, 2003 deals with action on preliminary inquiry in relation to public servants insofar as Group C and Group D officials are concerned. Section 8A is set out hereinbelow:-

“8A. Action on preliminary inquiry in relation to public servants.-(1) Where, after the conclusion of the preliminary inquiry relating to corruption of public servants belonging to Group C and Group D officials of the Central Government, the findings of the Commission disclose, after giving an opportunity of being heard to the public servant, a prima facie violation of conduct rules relating to corruption under the Prevention of Corruption Act, 1988 (49 of 1988) by such public servant, the Commission shall proceed with one or more of the following actions, namely:-

(a) cause an investigation by any agency or the Delhi Special Police Establishment, as the case may be;

(b) initiation of the disciplinary proceedings or any other appropriate action against the concerned public servant by the competent authority;

(c) closure of the proceedings against the public servant and to proceed against the complainant under section 46 of the Lokpal and Lokayuktas Act, 2013 (1 of 2014).

(2) Every preliminary inquiry referred to in sub-section (1) shall ordinarily be completed within a period of ninety days and for reasons to be recorded in writing, within a further period of ninety days from the date of receipt of the complaint.”

Both the provisos in Section 20 apply only when there exists general or special order under the said Section of the Lokpal Act. This will not be relevant when information is forwarded by the Government to the Lokpal in the scenario that is being contemplated here.

89. For the purpose of Section 17A all that ***Vineet Narain (supra)*** and the Constitution Bench in ***Subramanian Swamy (supra)*** have mandated is the need for an independent examination to uphold the rule of law. Information under Section 17A when being forwarded to the Lokpal may be inquired into by the Inquiry Wing or any agency as the Lokpal

may deem appropriate. Based on the report submitted to the Lokpal, the Lokpal may make a recommendation to the government which recommendation will be binding on the government for the grant or refusal of approval under Section 17A for all public servants. Question of involvement of CVC does not arise here.

90. Similarly, the State Lokpal Acts are designed broadly on the same pattern as the Central Lokpal and Lokayuktas Act, 2013. To illustrate, under the Maharashtra Lokayukta and Upa-Lokayuktas Act, 1971, which is currently in force, the “public servant” is defined as under:-

“(k) “public servant” denotes a person falling under any of the descriptions hereinafter following, namely:

(i) every Minister referred to in Clause (h);

(ii) every officer referred to in Clause (i);

(iii) (a) every President, Vice-President and Councillor of a Zilla Parishad, Chairman, Deputy Chairman and Member of a Panchyat Samiti, and Chairman of the Standing or any Subjects Committee, constituted under the Maharashtra Zilla Parishads and Panchyat Samitis Act, 1961 (Mah. V of 1962);

(b) every President, Vice-President and Councillor of a Municipal Council, and Chairman of the Standing or any Subjects Committee, constituted or deemed to be

constituted under the "Maharashtra Municipal Councils, Nagar Panchyats and Industrial Townships Act, 1965 (Mah. XL of 1965);

(c) every Mayor, Deputy Mayor and Councillor of all Municipal Corporations and Chairman of Standing or any Subject Committee, constituted under the Mumbai Municipal Corporation Act (Bom. III of 1888), the City of Nagpur Corporation Act, 1948 (C. P. and Berar II of 1950) and the Bombay Provincial Municipal Corporations Act, 1949 (Bom. LIX of 1949);

(iv) every person in the service or pay of,-

(a) any local authority in the State of Maharashtra, which is notified by the State Government in this behalf in the Official Gazette,

(b) any corporation (not being local authority) established by or under a State of Provincial Act and owned or controlled by the State Government,

(c) any Government company within the meaning of section 617 of the Companies Act, 1956 (1 of 1956), in which not less than fifty-one per cent. of the paid up share capital is held by the State Government, or any company which is a subsidiary of a company in which not less than fifty-one per cent. of the paid up share capital is held by the State Government,

(d) any society registered under the Societies Registration Act, 1860 (21 of 1860), which is subject to the control of the State Government and which is notified by that Government in this behalf in the Official Gazette,"

91. Section 7 deals with matters which may be investigated

by the Lokayukta or Upa-Lokayuta, which reads as under:-

"7. Matters which may be investigated by Lokayukta or Upa-Lokayukta. (1) Subject to the provisions of this

Act, the Lokayukta may investigate any action which is taken by, or with the general or specific approval of,

(i) a Minister or a Secretary, or

(ii) any public servant referred to in sub-clause (iii) of clause (k) of section 2; or

(iii) any other public servant being a public servant of a class or sub-class of public servants notified by the State Government in consultation with the Lokayukta in this behalf,

in any case where a complaint involving a grievance or an allegation is made in respect of such action or such action can be or could have been, in the opinion of the Lokayukta, the subject of a grievance or an allegation.

(2) Subject to the provisions of this Act, an Upa-Lokayukta may investigate any action which is taken by, or with the general or specific approval of, any public servant not being a Minister, Secretary or other public servant referred to in sub-section (1) in any case where a complaint involving a grievance or an allegation is made in respect of such action or such action can be or could have been, in the opinion of the Upa-Lokayukta, the subject of a grievance or an allegation.

(3) Notwithstanding anything contained in sub-section (2), the Lokayukta may, for reasons to be recorded in writing, investigate any action which may be investigated by an Upa-Lokayukta under that sub-section whether or not a complaint has been made to the Lokayukta in respect of such action.

(4) Where two or more Upa-Lokayuktas are appointed under this Act, the Lokayukta may, by general or special order, assign to each of them matters which may be investigated by them under this Act:

Provided that, no investigation made by an Upa-Lokayukta under this Act and no action taken or thing

done by him in respect of such investigation shall be open to question on the ground only that such investigation relates to a matter which is not assigned to him by such order.”

Apart from a Minister or a Secretary, any action which is taken by or with the general or specific approval of, a public servant referred to in Section 2(k)(iii), as extracted above, and any other public servant being a public servant of a class or subclass of public servants notified by the State Government in consultation with the Lokayukta in his behalf, are all within the ken of the Lokayukta.

92. Section 10 deals with procedure for investigation and authorizes the Lokayukta or Upa-Lokayukta to carry a preliminary enquiry.

Section 10 reads as under:-

“10. Procedure in respect of investigations. (i) Where the Lokayukta or an Upa-Lokayukta proposes (after making such preliminary inquiry, as he deems fit) to conduct any investigation under this Act, he-

(a) shall forward a copy of the complaint or, the case of any investigation which he proposes to conduct on his own motion, a statement setting out the grounds therefore, to the public servant concerned and the competent authority concerned;

(b) shall afford to the public servant concerned an opportunity to offer his comments on such complaint or statement; and

(c) may make such orders as to the safe custody of documents relevant to the investigation, as he deems fit.

(2) Every such investigation shall be conducted in private and in particular, the identity of the complainant and of the public servant affected by the investigation shall not be disclosed to the public or the press whether before, during or after the investigation:

Provided that, the Lokayukta or an Upa-Lokayukta may conduct any investigation relating to a matter of definite public importance in public, if he, for reasons to be recorded in writing, thinks fit to do so.

(3) Save as aforesaid the procedure for conducting any such investigation shall be such as the Lokayukta or, as the case may be, the Upa-Lokayukta considers appropriate in the circumstances of the case.

(4) The Lokayukta or an Upa-Lokayukta may, in his discretion, refuse to investigate or ceases to investigate any complaint involving a grievance or an allegation if in his opinion,-

(a) the complaint is frivolous or vexatious, or is not made in good faith;

(b) there are no sufficient grounds for investigating or, as the case may be, for continuing the investigation; or

(c) other remedies are available to the complainant and in the circumstances of the case it would be more proper for the complainant to avail of such remedies.

(5) In any case where the Lokayukta or Upa-Lokayukta decides not to entertain a complaint or to discontinue any investigation in respect of a complaint, he shall record his

reasons therefore and communicate the same to the complainant and the public servant concerned.

(6) The conduct of an investigation under this Act in respect of any action shall not affect such action, or any power or duty of any public servant to take further action with respect to any matter subject to the investigation.”

Similar provisions exist in other States.

93. In view of these provisions, insofar as public servants employed with the affairs of the Central Government and those public servants who are employed in bodies controlled by the Central Government, the Lokpal will conduct the inquiry. With regard to employees with the affairs of the State Government and with the agencies controlled by the State Government, the State Lokayukta will make an inquiry and forward the recommendation to the appropriate government/authority competent to remove.

94. If while forwarding the information received under Section 17A for screening and obtaining of recommendation any issue arises as to whether the concerned Lokpal will be Central Lokpal or the State Lokpal the issue will be resolved by applying the following test:-

With regard to the concerned public servant covered under Section 17, whether the Central Lokpal or the State Lokayukta would be the jurisdictional Lokpal/Lokayukta for receiving a complaint directly in case a complaint were to be made to the Lokpal directly?

Applying this test, the issue would be resolved and the information for approval received under Section 17A would be forwarded by the authorities concerned in Section 17A to the concerned Lokpal. For example, in the case of a public servant covered under Section 17A(c) if the authority competent to remove receives an information with a request for grant of approval, the authority competent to remove would apply the test set out hereinabove and forward the information to the concerned Lokpal/Lokayukta accordingly.

BODIES NOT COVERED UNDER THE JURISDICTION OF LOKPAL: -

95. Insofar as the judiciary is concerned, already *Veeraswami (supra)* and *U.P. Judicial Officers' Association (supra)* have provided a mechanism. Section 17A(c) could

also be attracted in cases where the body/organization/public servant is not covered within the jurisdiction of Lokpal. For such associations/bodies/public servants, when a scenario presents itself the authority competent to remove the public servant in question, would before grant or refusal of approval, commission any appropriate independent investigative agency to screen the information received and act in accordance with the recommendation of the said independent investigative agency.

96. This is the appropriate course to adopt for the reason that if the complainants were to proceed with the complaint to the Lokpal directly, there will be no choice but to follow the procedure under the Lokpal Act. That is the procedure the highest executives of the government at the Centre and of the States are being subjected to. Why cannot the public servants engaged in the affairs of the Union or the State or those covered under Section 17A be subjected to the same rigour? Merely for the reason that the information is not

lodged as a complaint in the Lokpal should a different procedure be adopted. There is no good reason to hold so. By this mechanism, what is being followed is the procedure laid down by Parliament and the State Legislature by setting up of an independent machinery. No prejudice will be caused to honest public servants also. Section 17A can be retained in its same form except that the procedure, as set out hereinabove, will have to be followed. A constitutional court faced with a challenge to the validity of the statute can always interpret a provision in the manner so as to save its validity and to harmonize it in such a manner that the provision does not fall foul of the provisions of the constitution or of any earlier binding judgments of the court.

TEST OF READING DOWN

97. In considering the validity of a statute, to save a statute from being rendered unconstitutional, the Court can apply the

test of reading down. In **B.R. Enterprises vs. State of U.P. and Others**¹⁶, this Court held as under:-

“81.... Thus, where there are two possible interpretations, one invalidating the law and the other upholding, the latter should be adopted. For this, the courts have been endeavouring, sometimes to give restrictive or expansive meaning keeping in view the nature of legislation, maybe beneficial, penal or fiscal etc. Cumulatively it is to subserve the object of the legislation. Old golden rule is of respecting the wisdom of legislature that they are aware of the law and would never have intended for an invalid legislation. This also keeps courts within their track and checks individual zeal of going wayward. Yet in spite of this, if the impugned legislation cannot be saved the courts shall not hesitate to strike it down. Similarly, for upholding any provision, if it could be saved by reading it down, it should be done, unless plain words are so clear to be in defiance of the Constitution. **These interpretations spring out because of concern of the courts to salvage a legislation to achieve its objective and not to let it fall merely because of a possible ingenious interpretation. The words are not static but dynamic. This infuses fertility in the field of interpretation. This equally helps to save an Act but also the cause of attack on the Act. Here the courts have to play a cautious role of weeding out the wild from the crop, of course, without infringing the Constitution. For doing this, the courts have taken help from the Preamble, Objects, the scheme of the Act, its historical background, the purpose for enacting such a provision, the mischief, if any which existed, which is sought to be eliminated...**”

98. Further, in ***Subramanian Swamy (supra)***, dealing with the concept of reading down, this Court mentioned as under:-

¹⁶ (1999) 9 SCC 700

“61. Reading down the provisions of a statute cannot be resorted to when the meaning thereof is plain and unambiguous and the legislative intent is clear. The fundamental principle of the “reading down” doctrine can be summarised as follows. Courts must read the legislation literally in the first instance. If on such reading and understanding the vice of unconstitutionality is attracted, the courts must explore whether there has been an unintended legislative omission. If such an intendment can be reasonably implied without undertaking what, unmistakably, would be a legislative exercise, the Act may be read down to save it from unconstitutionality. The above is a fairly well-established and well-accepted principle of interpretation which having been reiterated by this Court time and again would obviate the necessity of any recall of the huge number of precedents...”

99. In the present case, the object of preventing frivolous and vexatious complaints against honest public servants is sub-served by Section 17A. The only aspect missing expressly from the statute is the provision for an independent screening mechanism. Section 17A has been enacted after the judgments of this Court in *Vineet Narain (supra)* and *Subramanian Swamy (Supra)*. Two of the infirmities pointed out in those judgments, namely, that an executive instruction cannot go ultra vires to a statutory provision and that there has to be a valid classification among public servants have been

taken care of in the enactment of Section 17A. ***Vineet Narain (supra)*** and ***Subramanian Swamy (Supra)*** both emphasize the need for an independent screening mechanism before the grant or refusal of an approval to prosecute.

100. When Parliament enacts a law it is deemed to be conscious of the judicial pronouncements having a bearing on the subject-matter. Viewed in that light, one has to presume that Section 17A does contemplate in the grant or refusal of the previous approval of exercise of a screening by an independent mechanism. No doubt, it has not been expressly set out. However, the simultaneous enactment of the Lokpal and Lokayuktas Act in the Centre and the States and the Law Commission's recommendation that the approval itself under Section 17A has to vest with the Lokpal/Lokayukta do have a bearing on the interpretation of the provision. The Lokpal Act contemplates an Inquiry Wing, Investigation Wing and a Prosecution Wing. In this judgment, all that has been done is to avail the advantage of the independent Inquiry Wing for screening the information received under Section 17A for the

purpose of grant or refusal of approval. If direct complaints could be entertained by the Lokpal and those complaints could be subjected to the procedure under the Act, there is no reason why Section 17A information received by the Government cannot be screened by the Inquiry Wing of the Lokpal and why that recommendation of the Lokpal after the screening was done ought not to be binding on the Government. This interpretation will take care of the mischief pointed out in **Vineet Narain (supra)** and **Subramanian Swamy (Supra)**. The SOP prevalent now is wholly unsatisfactory and does not address the serious infirmity pointed in **Vineet Narain (supra)** and **Subramanian Swamy (Supra)**.

101. We are a country governed by the rule of law and not by rule of men. Executives at the highest level, including the Prime Minister and Ministers have subjected themselves to the jurisdiction of the Lokpal. There is no reason why, as set out earlier, public servants against whom information is placed for previous approval with the concerned authority in

Section 17A cannot be subjected to the screening mechanism of the Lokpal/Lokayukta.

102. This interpretation will also address the discriminatory situation that would prevail if with regard to information received under Section 17A, Government/authority competent to remove is the screening authority and with regard to complaints directly addressed to the Lokpal/Lokayukta, the Lokpal/Lokayukta becomes the authority to proceed with after following the screening mechanism under the Act. The Lokpal is an independent body headed by people who have held high offices and who will bring to bear on the discharge of their duty a great deal of independence which the judgments in **Vineet Narain (supra)** and **Subramanian Swamy (Supra)** exhort.

103. If Section 17A is invalidated on the ground that prior approval should not exist at all, the immediate consequence would be that any complaint alleging corruption in official decision-making could straightaway result in a police inquiry

or investigation. This would permit immediate registration of FIRs, commencement of investigation and resort to coercive steps in cases involving recommendations and decisions in discharge of duty, regardless of whether the complaint is frivolous, motivated, or based on hindsight. Such a result would be regressive.

104. Under Section 20 of the Lokpal Act, the Lokpal may order a preliminary inquiry or may direct investigation. The use of the word “may” is significant. It reflects a deliberate legislative choice to vest the Lokpal with discretionary gatekeeping power at the very threshold of the process. The Lokpal does not automatically direct investigation upon receipt of a complaint. Instead, it exercises institutional judgment, often through a preliminary inquiry, before deciding whether further escalation is warranted. This demonstrates that screening is treated as an indispensable safeguard, even when oversight is exercised by an independent statutory body.

105. If Section 17A is struck down, there would be an anomalous situation:

- Complaints routed through the Lokpal would continue to be subject to screening and escalation whereas,
- Complaints routed through the police would face no screening at all.

This would create a structural imbalance, where identical allegations involving the same category of public servants are treated differently solely based on the fora chosen by the complainant. Such structural imbalances would result in parties bypassing the Lokpal Act to deny the public servant the benefit of the screening mechanism. This would result in undermining the Lokpal's role as an independent gatekeeper apart from perpetuating a dichotomy in procedure.

106. The Prevention of Corruption Act and the Lokpal Act operate in the same normative field. Both address allegations of corruption against public servants, both recognize the need for screening, and both seek to balance accountability with protection against misuse. My Sister B.V. Nagarathna, J., has

raised a hypothetical question as to what if the Lokpal Act of 2013 is repealed. If that were the line of enquiry, then one may as well ask the question – What if the Prevention of Corruption Act, 1988 itself is repealed? The constitutional validity of Section 17A has to be judged in the context of the existing legal regime and not on such hypothetical considerations.

107. Section 17A is textually neutral. It applies to any “public servant” in relation to a decision or recommendation taken in the discharge of official functions. The provision does not classify public servants by rank, level, or seniority. Protection under Section 17A depends not on who the public servant is, but on what the public servant did.

108. The assumption that lower-level officers merely perform clerical tasks and do not make recommendations is factually incorrect and inconsistent with administrative practice. In governance and administration:

- File notings, scrutiny reports, technical evaluations, and compliance assessments constitute recommendations in law;
- Numerous statutory and regulatory frameworks vest recommendatory power in officers below senior ranks;

The expression “recommendation” is deliberately broad and is not confined to final policy decisions alone.

CONSTRUCTIVE APPROACH TO REMOVE DICHOTOMY:

109. This Court in **Vishundas Hundumal and Others** vs. **State of Madhya Pradesh and Others**¹⁷ adopting a constructive approach to remove discrimination held as under: -

“6. Conceding that this was discrimination unconsciously indulged into by inadvertence or oversight on the part of a governmental agency, by this order we only propose to rectify the same and not reject the whole scheme. Such an approach would be destructive of a wholesome effort towards nationalisation of bus transport which is generally undertaken in public interest. When discrimination is glaring the State cannot take recourse to inadvertence in its action resulting in discrimination. The approach is, what is the impact of State action on the fundamental rights of citizen. In this case denial of equal protection is complained of. And this denial of equal

¹⁷ (1981) 2 SCC 410

protection flows from State action and has a direct impact on the fundamental rights of the petitioners. **We, therefore, propose to take a constructive approach by removing the discrimination by putting the present petitioners in the same class as those who have enjoyed favourable treatment by inadvertence on the part of the Regional Transport Authority.**

7. Accordingly we hereby direct that the order/conditions in permits curtailing the permits of the petitioners prohibiting them from passing over the overlapping portion of their route with the notified route be quashed and declared to be of no consequence till all the operators including those excluded and similarly situated are similarly treated.”

110. In D.S. Nakara and Others vs. Union of India,¹⁸ while reading down the office memoranda and refusing to set aside the entire liberalized pension scheme, this Court again adopted a constructive approach and held as under:-

“58. Now if the choice of date is arbitrary, eligibility criteria is unrelated to the object sought to be achieved and has the pernicious tendency of dividing an otherwise homogeneous class, the question is whether the liberalised pension scheme must wholly fail or that the pernicious part can be severed, cautioning itself that this Court does not legislate but merely interprets keeping in view the underlying intention and the object, the impugned measure seeks to subserve? Even though it is not possible to oversimplify the issue, let us read the impugned memoranda deleting the unconstitutional part. Omitting it, the memoranda will read like this:

¹⁸ (1983) 1 SCC 305

“At present, pension is calculated at the rate of 1/80th of average emoluments for each completed year of service and is subject to a maximum of 33/80 of average emoluments and is further restricted to a monetary limit of Rs 1000 per month. The President is, now, pleased to decide that with effect from March 31, 1979 the amount of pension shall be determined in accordance with the following slabs.”

If from the impugned memoranda the event of being in service and retiring subsequent to specified date is severed, all pensioners would be governed by the liberalised pension scheme. The pension will have to be recomputed in accordance with the provisions of the liberalised pension scheme as salaries were required to be recomputed in accordance with the recommendation of the Third Pay Commission but becoming operative from the specified date. It does therefore appear that the reading down of impugned memoranda by severing the objectionable portion would not render the liberalised pension scheme vague, unenforceable or unworkable.

59. In reading down the memoranda, is this Court legislating? Of course “not”. When we delete basis of classification as violative of Article 14, we merely set at naught the unconstitutional portion retaining the constitutional portion.

60. We may now deal with the last submission of the learned Attorney-General on this point. Said the learned Attorney-General that principle of severability cannot be applied to augment the class and to adopt his words “severance always cuts down the scope, never enlarges it”. We are not sure whether there is any principle which inhibits the court from striking down an unconstitutional part of a legislative action which may have the tendency to enlarge the width and coverage of the measure. Whenever classification is held to be impermissible and the measure can be retained by removing the unconstitutional portion of classification, by striking down words of limitation, the resultant effect may be of enlarging the class. In such a situation, the court

can strike down the words of limitation in an enactment. That is what is called reading down the measure. We know of no principle that “severance” limits the scope of legislation and can never enlarge it. To refer to the *Jaila Singh case* [(1976) 1 SCC 602 : AIR 1975 SC 1436 : 1975 Supp SCR 428] , when for the benefit of allotment of land the artificial division between pre-1955 and post-1955 tenant was struck down by this Court, the class of beneficiaries was enlarged and the cake in the form of available land was a fixed quantum and its distribution amongst the larger class would pro tanto reduce the quantum to each beneficiary included in the class. Similarly when this Court in *Randhir Singh case* [(1982) 1 SCC 618 : 1982 SCC (L&S) 119] held that the principle of “equal pay for equal work” may be properly applied to cases of unequal pay based on no classification or irrational classification it enlarged the class of beneficiaries. Therefore, the principle of “severance” for taking out the unconstitutional provision from an otherwise constitutional measure has been well recognised. It would be just and proper that the provision in the memoranda while retaining the date for its implementation, but providing “that in respect of government servants who were in service on March 31, 1979 but retiring from service on or after that date” can be legally and validly severed and must be struck down. The date is retained without qualification as the effective date for implementation of scheme, it being made abundantly clear that in respect of all pensioners governed by 1972 Rules, the pension of each may be recomputed as on April 1, 1979 and future payments be made in accordance with fresh computation under the liberalised pension scheme as enacted in the impugned memoranda. No arrears for the period prior to March 31, 1979 in accordance with revised computation need be paid.”

111. In the present case, there is no need to resort to the principle of severance. Section 17A has to be brought in line

with the pronouncements in ***Vineet Narain (supra)*** and ***Subramanian Swamy (Supra)*** so that while section remains on the statute book it ensures that there exists a screening mechanism by an independent agency before the grant or refusal or approval by the government and the recommendations of the independent agency are binding on the government. This will ensure that the otherwise salutary provision in preventing frivolous complaints against honest public servants is not completely set at naught.

112. Recently, in **Association of old settlers of Sikkim and Others vs. Union of India and Another**¹⁹, while interpreting explanation to Section 10 (26-AAA) of the Income Tax Act, it was held as under (M.R. Shah, J.):-

“43. In view of the above and for the reasons stated above, we are of the firm opinion that Section 10(26-AAA) to the extent it excludes the Old Indian Settlers, who have settled in Sikkim prior to the merger of Sikkim with India on 26-4-1975, but whose names are not recorded as “Sikkim Subjects”, from the definition of “Sikkimese” is ultra vires, being arbitrary, discriminatory and violative of Article 14 of the Constitution of India. The definition of “Sikkimese” in **Section 10(26-AAA) of the Income Tax Act shall also include all Indians, who have permanently settled in Sikkim prior to the merger of**

¹⁹ (2023) 5 SCC 717

Sikkim with India on 26-4-1975 irrespective of the fact that whether their names have been recorded in the register maintained under the Sikkim Subjects Regulations, 1961 or not. Therefore, it is held that the “Sikkimese” like the petitioners, who are Old Indian Settlers and who have settled in Sikkim prior to the merger of Sikkim with India on 26-4-1975 shall also be entitled to the exemption under Section 10(26-AAA) of the Income Tax Act, 1961.”

113. In the same judgment, B.V. Nagarathna, J. in an erudite opinion had the following to say on the explanation to Section 10 (26-AAA):-

“146. Hence, it has to be directed that till such amendment is made to the down the Explanation to Section 10(26-AAA) of the IT Act, 1961, all individuals domiciled in Sikkim up to 26-4-1975 shall be entitled to the exemption under the said provision. This direction is being issued in exercise of powers under Article 142 of the Constitution so as to eliminate discrimination and disparity in respect of the aforesaid category of Sikkimese, who subsequently have become citizens of India w.e.f. 26-4-1975 and to save the Explanation from being rendered unconstitutional vis-à-vis such individuals who form a small percentage of Sikkimese and who are also entitled to such an exemption. Such as approach is being adopted rather than striking down the Explanation to Section 10(26-AAA) of the IT Act, 1961 which would have the effect of withdrawing the benefit of exemption even from those categories of persons who are presently eligible for the same.

147. Hence, until the amendment is made, the following clause shall be read as a part of the Explanation to Section 10(26-AAA) of the IT Act, 1961, possibly as sub-clause (iv) thereof:

“(iv) any other individual, whose name does not appear in the Register of Sikkim Subjects but it is established

that such individual was domiciled in Sikkim on or before 26-4-1975.”

This provision would extend the benefit of exemption to those individuals, domiciled in Sikkim on the day it merged with India i.e. 26-4-1975.

148. In the result, the writ petitions are disposed of in the following terms:

148.1. That the benefit of income tax exemption presently is restricted only to those Sikkimese who fall within the three clauses of the Explanation to Section 10(26-AAA) of the IT Act, 1961, or those persons domiciled in Sikkim, or are Sikkimese as covered under the 1961 Regulations.

148.2. In terms of the Sikkim (Citizenship) Order, 1975 as amended by the Sikkim (Citizenship) Amendment Order, 1989, issued by the Government of India any person who was a Sikkim Subject under the 1961 Regulations was to be deemed to be a citizen of India w.e.f. 26-4-1975. Conversely, it is held that all citizens of India, having a domicile in Sikkim on the day it merged with India i.e. 26-4-1975 must be covered under the Explanation in order to avail the benefit of the exemption under Section 10(26-AAA) of the IT Act, 1961.

148.3. The Union of India shall make an amendment to the Explanation to Section 10(26-AAA) of the IT Act, 1961, so as to suitably include a clause to extend the exemption from payment of income tax to all Indian citizens domiciled in Sikkim on or before 26-4-1975. The reason for such a direction is to save the Explanation from unconstitutionality and to ensure parity in the facts and circumstances of the case.

148.4. Till such amendment is made by Parliament to the Explanation to Section 10(26-AAA) of the IT Act, 1961, any individual whose name does not appear in the Register of Sikkim Subjects but it is established that such individual was domiciled in Sikkim on or before 26-4-1975, shall be entitled to the benefit of exemption.

148.5. This direction is being issued in exercise of powers under Article 142 of the Constitution so as to eliminate discrimination and disparity in respect of the aforesaid category of Sikkimese, who subsequently have become citizens of India w.e.f. 26-4-1975 and to save the Explanation from being rendered unconstitutional vis-à-

vis such individuals who form a small percentage of Sikkimese.

148.6. The proviso to Section 10(26-AAA), insofar as it excludes from the exempted category, “a *Sikkimese woman who marries a non-Sikkimese man after 1-4-2008*” is hereby struck down as being *ultra vires* Articles 14, 15 and 21 of the Constitution of India”.

114. By a process of reading down and with no need to resort to Article 142, Section 17A can be aligned, in the present case, with ***Vineet Narain (supra)*** and ***Subramanian Swamy (Supra)***.

In view of the precedents set out hereinabove, there is enough legal support for the course of action adopted.

ANALOGY WITH JUDICIARY – NOT TENABLE

115. One contention that the learned Solicitor General so strongly urged was the analogy drawn with the screening mechanism for the judiciary. The comparison is completely unjustified. The very nature of the functioning of the judiciary and the need for it to be completely insulated from the executive, demands the nature of protection that ***Veeraswami (Supra)*** envisaged. ***Vineet Narain (Supra)*** and ***Subramaniam Swamy (supra)*** have both dealt with similar contentions advanced and rejected the same. The learned Solicitor

General is right that the screening mechanisms provided are not confined to the constitutional court judges but to the members of the judiciary across the board. That does not denude the reasoning in *Subramanian Swamy (Supra)* and the ratio decidendi therein. Nothing more needs to be said on this aspect of the matter.

EXISTENCE OF JUDICIAL REVIEW – NOT ADEQUATE TO PASS THE SUBRAMANIAN SWAMY (SUPRA) TEST

116. Equally, the argument that orders granting or refusing approval being subject to Judicial review, there is enough check against the misuse of power by Government is not a tenable argument. Though attractive at first blush, it does not survive a deeper probe. The parameters for judicial review are well known and need no reiteration. A court in judicial review is primarily concerned not so much with the decision itself but the decision-making process. Unless the safeguard of a screening by Lokpal/Lokayukta is read into the validity of the section, it cannot be sustained in view of the binding earlier rulings of larger Benches. A court in judicial review

will only look at the screening done by the Government to uphold or reject the challenge. Hence, this argument of the learned Solicitor General, cannot be accepted.

POSTSCRIPT AND DIRECTIONS:

117. In a democracy governed by the rule of law, each organ of the State plays a significant part. Ultimately, as was echoed in the Constituent Assembly by late Shri Babu Rajendra Prasad and Dr. Babasaheb Ambedkar, the functioning of the organs will depend upon the persons who work them. Work they must do and do it well, for if they don't, the progress of the nation may come to a standstill.

118. One essential component of the executive wing are the bureaucrats and officers who engage in its operation and keep the wheels of governance moving. It is presumed that official acts are regularly performed and there is statutory backing too for the same.

119. Here is a case where Parliament in all its wisdom stepped in and engrafted a mechanism in the form of enacting Section 17A to give impetus to decision making by the administrative

machinery so that “policy paralysis” does not set in. The concern was that if it were not so, fearing that carefully built reputations could be casually tarnished, a “play it safe syndrome” may set in and decision making will be avoided, causing serious detriment to the progress of the nation.

120. The object of incorporating Section 17A of the Act was certainly not to condone official acts done for improper purposes or for extraneous considerations. The singular object is to protect bona fide recommendations and decisions taken by officials and bureaucrats.

121. For an honest person, personal integrity and reputation is priceless and is valued even higher than life. As was said in the sacred Bhagavad Gita -

“सम्भावितस्य चाकीर्तिर्मरणादतिरिच्यते”

" Sambhaavitasya cha akeerti, maranaat atirichyate "

"For a self-respecting man, death is preferable to dishonour."

In a similar vein, Divine Poet *Tiruvalluvar* said in his immortal work *Tirukkural*:

“மயிர்நீப்பின் வாழாக் கவரிமா அன்னார்
உயிர்நீப்பர் மானம் வரின்”

“Mayirñippin vālāk kavariṁā aṇṇār
Uyirñippar māṇam varin”.

“Just as a yak, which is shorn of its wool does not survive,
A man of honour will not live if he loses it.”

[Translated by Dr. S.M. Diaz and Dr. N. Mahalingam]

With the extent of public gaze prevalent today, propelled by social media, arrest and the consequential parading in court, of a honest person itself causes incalculable harm to the fair name and goodwill of the individual and the family. Even a subsequent exoneration in the investigation cannot redeem the permanent damage done to the integrity and reputation of the individual. It is no answer to say that protection is available at the stage of Section 19 when the file seeking sanction for prosecution is processed, for by then irreversible and immeasurable harm would have ensued.

122. If in the process of examining the validity of the said provision (Section 17A), to avoid dichotomy in procedure and to align it with the pronouncements of this Court, certain

safeguards are ensured for its implementation, that certainly does not tantamount to “substitution” or “judicial legislation”.

123. The safeguards provided for will not only strengthen the hands of honest officers but will also ensure that the corrupt are brought to book. More importantly, the safeguards would guarantee that the administrative machinery continues to attract the best of talent for the service of the nation.

124. For the reasons stated above, the writ petition is disposed of with the following directions:-

- i)** Section 17A of the Prevention of Corruption Act, 1988 inserted by virtue of Section 12 of the Prevention of Corruption (Amendment) Act, 2018 is constitutionally valid, subject to the condition that grant or refusal of the approval by the competent authority mentioned therein will depend on the recommendation of the Lokpal/Lokayukta (in case of States) respectively in accordance with the reasoning set out in the body of the judgment.

ii) The Union of India or State Governments and the authorities competent to remove set out in Section 17A will, on receipt of the information under Section 17A, immediately forward the information to the Lokpal/Lokayukta (insofar as the States are concerned) and the Lokpal/Lokayukta shall in accordance with the reasoning set out in the body of the judgment may have an inquiry on the information in accordance with the provisions of the Lokpal/Lokayukta statutes and forward the recommendation to the appropriate authority who shall be bound and shall act in accordance with the recommendation insofar as grant or refusal of permission under Section 17A is concerned.

Bodies not covered under the jurisdiction of Lokpal: -

iii) Insofar as the judiciary is concerned, already *Veeraswami (supra)* and *U.P. Judicial Officers Association (supra)* have provided a mechanism. Section 17A(c) could also be attracted in cases where the body/organization/public servant is not covered within

the jurisdiction of Lokpal. For such associations/bodies/public servants, when a scenario presents itself the authority competent to remove the public servant in question, would before grant or refusal of approval, commission any appropriate independent investigative agency to screen the information received and act in accordance with the recommendation of the said independent investigative agency.

- iv)** The time-limit stipulated in the proviso to Section 17A shall apply and all the authorities concerned will act in accordance with the time-limit laid out therein.
- v)** Needless to say, the Lokpal/Lokayukta while forwarding their recommendation, shall set out reasons for the said recommendation.

No order as to costs.

.....J.
[K. V. VISWANATHAN]

New Delhi;
13th January, 2026