

**CORPORATE LOBBYING: THE MEANS AND ENDS OF  
CORPORATE BRIBERY**

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**ABSTRACT**

Bribing and lobbying are two distinct and separate concepts of influencing the Government or officials of the Government. But in India, lobbying has been equated to bribing and is considered as an illegal act. Lobbying in India is in a nascent stage and there are no laws governing it. It is neither legal nor illegal but is considered to be unlawful in India. Corporations are the best vehicles to do business and their interests matter a lot to the economy. The corporations lobby the Government but it ends up as a crime of corporate bribery as there are no checks on the activity of lobbying. This article will explain how corporate lobbying, when not regulated, paves the way to the crime of corporate bribery which is an impediment to do business in India. The author has attempted to establish the proposition better with a recent example of lobbying activity of the 5/20 rule in the airline industry.

**1. INTRODUCTION**

The gravity of democracy in a country is based on the participation of the people in the governance of the country. People of a country have a

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say in the governance and can also influence the decisions of the Government. This influence can be labelled as lobbying the Government. Lobbying can be defined as an influential action, motivated by particular interests without any counterpart to it which is notified to the Government official who is capable of influencing the decision of the Government. A lobbyist can only suggest, or propose, without any compensation. However, the reality is that, lobbying is done with the help of money and lobbying of one pressure group becomes repugnant to the other. The corporations are one of the pressure groups in the democracy. Corporate lobbying is prominent in India, though in a nascent stage, and has become the way of doing business in India. It is regarded as corporate bribery, a white-collar crime which needs to be checked in the current political scenario. This article will explain how corporate lobbying has become a way of doing business in India and no letter of law notices it.

## **2. DISTORTED DEMOCRACY**

The dependence of a political system on wealth is based on the nature of the political system. The political system opens the potential of creating inequalities in wealth to become political inequalities. Wealth, power, and influence give rise to prestige and status in the society but this combination of wealth, power, and influence in politics is an unhappy combination for a democracy. Influence of wealth in politics has a corrupting effect. The lobbying of the Government by the wealthy will result in non-egalitarian policies. There will be no equality found in the

pure capitalist democracy. The term Capitalist Democracy is an oxymoron in itself. Democracy is egalitarian and Capitalism is in-egalitarian.

The concern about the concept of equality in lobbying is about whether some lobby groups can exert more influence than others by virtue of having more money and political connections. Paying government officials for voting or influencing laws is illegal in India. Some groups might lobby for changes that are detrimental or repugnant to other groups. Both are representing the views of citizens who have the right to petition the government, so it can appear to the less successful group that the other might only have won its case by spending more money. Since individuals can rarely afford to lobby, they often question whether corporations with much deeper pockets have vastly more political power than they should<sup>1</sup>. This kind of lobbying would distort the democracy and make it purely capitalist and the concept of being egalitarian would fail and the concept of welfare cannot be thought of. In this process of securing welfare for the investors, the welfare of the other pressure groups falls low.

India is a mixed economy, as termed by the first Prime Minister, Jawaharlal Nehru. Socialist and capitalist economic principles are combined for the welfare of the people in the democracy. In this capitalist democracy, the welfare of the capitalist must not be the sole concern through lobbying which ends up in corporate bribery. This activity of lobbying helps the wealthy or the corporate, to not get detected under the

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<sup>1</sup> Evangeline Marzec, *What Is Corporate Lobbying?*, CHRON (Oct. 26, 2018), <https://smallbusiness.chron.com/corporate-lobbying-11729.html>.

radar of fraud. In the United States of America, lobbying is regulated and, a study with the help of statistical data has proved that corporate lobbying results in less amount of fraud detection.

A research paper by Frank Yu and Xiaoyun Yu examines the relation between corporate lobbying and fraud detection in the United States. Using data on corporate lobbying expenses between 1998 and 2004, and a sample of large frauds detected during the same period, they have found that the firms' lobbying activities make a significant difference in fraud detection when compared to non-lobbying firms. On an average, firms that lobby have a significantly lower hazard rate of being detected for fraud, evade fraud detection 117 days longer, and are 38% less likely to be detected by regulators. In addition, fraudulent firms on an average spend 77% more on lobbying than non-fraudulent firms, and they spend 29% more on lobbying during their fraudulent periods than during non-fraudulent periods. The delay in detection leads to a greater distortion in resource allocation during fraudulent periods. It also allows managers to sell more of their shares<sup>2</sup>. The authors of the above-stated research conclude by stating that,

*We also wish to point out that our results should not be interpreted as evidence of the inefficiency of corporate lobbying in general. In fact, lobbying is one of the main means by which various groups promulgate their views to legislators. Just as a corrupt election does not invalidate an entire voting system, our evidence in this study imposes no implication that we should ban*

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<sup>2</sup> Frank Yu & Xiaoyun Yu, *Corporate Lobbying and Fraud Detection*, 46 J. FINANCIAL AND QUANTITATIVE ANALYSIS 1865 (2011).

*corporate lobbying. Instead, our findings shed light on the recent debate about whether to improve the transparency in corporate political spending. By providing evidence that political spending does affect the welfare of investors, our study suggests a need for more transparency in corporate political spending.*<sup>3</sup>

The author concurs with the views expressed by Frank Yu and Xiaoyun Yu with regards to, not banning the lobbying activity but simply regulating it. The above-mentioned study was based in a country where lobbying is regulated, yet they require more transparency in corporate lobbying. This is because, the political spending by the corporate results in distortion of resources, even if lobbying is regulated in India, it would still be a social problem. Regulating lobbying in India would mean encouraging corporate political spending which includes corporate bribery. This white-collar crime of corporate bribery through lobbying is not governed by the legal systems in the current regulatory framework and corporations continue to distort the democracy.

### **3. THE PRESSURE GROUP PROBLEM**

The government lobbied by the wealthy leads to the destruction of the middle class. Corporate executives who bend the rules and citizens who break the rules; their lobbyists, who work to change the rules; and the politicians who change in their favour are the reason for the destruction. The middle class is the ladder which poor people use to climb out of

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<sup>3</sup> *Id.*

poverty. A robust middle class is required to stop the lobby forces in their tracks, take back our democracy and create a middle class that's more vibrant and inclusive than ever.

The interests of the rich men are protected through lobbying. The poor's interests are not protected but are masked by the development programmes that are implemented to cover this vote bank. The middle class has no say in the governance of the nation, they do not participate in the democratic process as they are not rich enough to lobby the Government and not poor enough to avail the subsidies and benefits. They are the neglected group in the governance because of the factor of wealth. There must be equality of influence in an egalitarian society. India is egalitarian by the very spirit of Article 14 of the Constitution of India. Article 14 must be upheld and the inequality that arises from this activity of lobbying must be reduced. The main element of this inequality arises from income inequality and the failure of the Government to recognize everyone's interests. The interest of the corporations when recognized causes social harm. But corporate lobbying has become a part and parcel of doing business in India. Government needs to be cautious in its approach of checking when corporate lobbying results in corporate bribery.

#### 4. THE CHALLENGE

The challenges faced by the corporations, the Government personnel, and the legal system to avoid corporate bribery, will be discussed as follows.

##### 4.1. BY CORPORATIONS

Corporations face the challenge of the need to bribe in the capitalist democracy. Corruption has become the new corporate challenge in the globalized era. The fear of not being able to secure a tender leads to bribery. Every private player pays an unaccountable price for the tender. It has become a custom of business and, is not regarded as a crime in the competitive world.

This custom results in distortion of resource allocation. A competitive market in a democracy like India is not just about making money, it is about resource allocation. Corporate-bribery results in misallocation of these resources, which eventually leads to a loss to the exchequer of the Government. The welfare schemes fail because of these losses which occur more frequently.

One such loss that occurred through lobbying, which resulted in corruption, is the case of the 2G spectrum. Mr Raja, the then Telecom Minister, ignored the recommendations of Telecom Regulatory Authority of India (TRAI) and gave unwarranted benefits to the companies Swan Telecom and Unitech which caused loss to the public exchequer. The company Swan was not supposed to be allotted spectrum by Telecom

Ministry, but it did so under the undue favour of the then Telecom minister. The first come first served basis was a result of corporate bribery. The companies had bribed the government officials, to secure the spectrum. If market mechanisms were adopted like an auction, they would have to compete with the other private players and the expense of bribery will be more than they spend under the non-market mechanism. This was regarded as a case of corruption and not lobbying, which was the main element of bribing the Minister. The corporations have committed the crime of corporate bribery through the process of lobbying.

Nandini Rajagopalan and Yan Zhang in the book ‘The Convergence of Corporate Governance’, have discussed the major institutional impediments that corporate India faces and how those impediments contribute to the significant gaps between governance on paper and governance in practice. They say that, “some industries were at one stage so strongly permeated by the black money that it was almost impossible to carry on business without using the black money”.<sup>4</sup>

Corruption and black money is an institutional impediment in corporate governance, rather than a custom. This impediment is overcome through the process of lobbying.

#### **4.2. CHALLENGE BY THE GOVERNMENT PERSONNEL**

Humans respond to incentives, that is where the concept of property rights comes in. Government official who is lobbied with valuable

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<sup>4</sup> NANDINI RAJAGOPALAN & YAN ZHANG, CORPORATE GOVERNANCE IN INDIA: THE CONVERGENCE OF CORPORATE GOVERNANCE 106.



resources will act in favour of that wealthy-power, but above all, ethics needs to be practised by the Government officials. The challenge of the officials to say no to the gifts of the wealthy and to govern the country without expecting anything in return from the pressure groups is a natural challenge that every official faces in the current political scenario. This challenge needs to be faced without giving way to corporate bribery. Such challenges need to be met with the democratic spirit. In reality, the challenges are faced with the capitalist spirit and so, the influential actions lead to a loss to the exchequer, which is a major reason for arrested-development in the country despite numerous welfare schemes. Indian Government struggles to face this challenge.

#### **4.3. BY LEGAL SYSTEM**

The challenges faced by the legal system with regard to corporate bribery is that it is difficult to prosecute a wealthy corporation. The criminal law approach has a major limitation. It requires proof that an offender meant to commit the illegal act and did so with a guilty mind. The prosecution needs to prove the *mens rea* involved. When the defendant is an organisation instead of an individual, it is frequently difficult to utilize the criminal law against the violator.<sup>5</sup> The criminal liability of a corporation is not well defined in law. This is the major challenge that the judiciary faces in prosecuting a corporation. Legal remedy for corporate bribery should not be limited to the criminal system.

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<sup>5</sup> MICHAEL L. BENSON & SALLY S SIMPSON, WHITE COLLAR CRIME: AN OPPORTUNITY PERSPECTIVE 184-90 (2009).

The regulatory structure should be strengthened. The fragmented regulatory structure is also an institutional impediment identified by Nandini Rajagopalan and Yan Zhang. This current regulatory framework in India gives rise to regulatory overlap and weakens enforcement, often leading to regulatory arbitrage where the regulated take advantage of the differences in jurisdiction and inconsistency across regulators.<sup>6</sup>

## 5. THE NEW APPROACH

The legal system has to face the challenges that arise from the white-collar crime of corporate bribery through new approaches. The legal remedy for white collar crime can be from the criminal law system, civil law system or the regulatory justice system. The limitations of the criminal law system had been laid down above about the challenges the judiciary faces in prosecuting a corporation. Celia Wells, the author of the book ‘Corporations and Criminal Responsibility’ observes that: “The language of the law assumes that state coercion is to be exercised against an individual and that the harm which that individual might bring about will injure other specific individuals. Corporate activities do not fit that paradigm.”

The civil law enforcement is another legal remedy. This approach is easier to use in comparison to the criminal law system. It requires a lower standard of evidence to prove responsibility rather than proof beyond reasonable doubt. Both individuals and the state can file a suit

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<sup>6</sup> *supra* note 4.

against the corporation. The limitation of the civil law approach is with regard to the sanctions and it is difficult to determine the particular victim. Corporate bribery is an offence against society. Civil wrongs are against a particular person. It is difficult to determine the victims in the crime of corporate bribery and so a civil suit faces this limitation to hold a corporation liable.

The third and feasible approach is the regulatory justice system. This is an existing approach in a fragmented and influenced form. This regulatory law when framed gets influenced by the lobbyists. The law ends up protecting the interests of the corporations, which is secured by lobbying. Corporations in India are not scarce of resources. As Sutherland says the rich and the power demand and receives preferential treatment. So does, the corporations get their preferred regulatory laws. This regulatory justice system must be free from lobbying and more importantly free from the political influence. Regulation and politics must not be intertwined as business and politics are. The new approach towards corporate bribery through the regulatory system must provide stronger corporate governance in India.

It must be given a new shape. Regulation is considered the most effective legal remedy as, under regulation when a corporate is detected under the radar of fraud, the regulatory agency can subject the corporate offenders to criminal or civil sanctions, if given the authority. This regulatory system is an effective solution provided that it is free from the political clutches. The investigation officers of the regulatory structure

must be independent to act against the corporate offenders. This would control the unregulated lobbying activity and avoid corporate bribery.

## **6. THE RECENT LOBBY**

The author had written this article in 2016 but a news article in 2018 has added scope to this research. The news of 'Air Asia (India) Limited' lobbying the Government to scrap the 5/20 rule has taken place because of the grey area that this article tries to point out. There was a hue and cry about Air Asia influencing the government for a favour. If there were laws on lobbying, the scenario would have been different. Let's imagine.

### **6.1. THE BACKGROUND**

The factual background of the lobbying activity is that Air Asia (India) Limited based in Bangalore owns 18 aircraft and is in operation in India since 2013. The company desperately wanted to go international. But the rule for airlines to go international from India is that they need to own 20 or more aircraft and has to be in operation for a minimum of 5 years in India. Air Asia wanted to start as a premature baby and couldn't wait to grow to meet the expectations of this rule. Rather they wanted to cut the line and so approached the Government officials to relax the 5/20 rule. The rule was relaxed and they started to fly internationally. Air Asia approaching the Government and Government ruling in their favour was not a transparent decision to the public. Charges have been framed against the airline's Company for such an act. So, it is not yet proved that Air Asia

lobbied the Government, it is only a news that has brought lobbying into the picture recently.

## **6.2. THE PRESENCE OF LAW**

The author makes an attempt to explain the activity of lobbying, if regulated in India. Disclosure of Lobbying Activities Act in India will make a great difference in case of above-mentioned scenarios. Air Asia (India) Limited, one of the private players in the market approaches the civil aviation ministry, expressing their desire to fly international and explaining how 5/20 rule is a hindrance to their desire. The government will hear their plea and then consult with the expert bodies and consider the market situation with other private and dominant players in the market. If the Ministry deems it fit to encourage competition or to discourage monopoly in the market, or if the economy is going to benefit in a larger way, it will agree to lobby on behalf of Air Asia. This intention of the Ministry has to be written down in the lobby register before the Minister or official of that Ministry represents the interest of the airline company. Through a ministerial declaration or through parliamentary proceedings, the Ministry can ensure that the interest of the lobby group is heard. It can also be put for public voting. After all this procedure, the Government can either give a thumbs-up or a thumbs-down to Air Asia (India) Limited. It becomes a transparent process and, no issue of bribery is involved.

This is how lobbying activity needs to work. It is neither legal nor illegal as there are no laws related to it. But in India, it is considered as

illegal when wealthy corporate lobby the Government officials with money. The problem is with the usage of the term 'lobbying'. If this term does not come into the picture, it will just be 'bribery'. Corporate lobbying is not bribery and should not be equated with it. It becomes derogatory and is considered illegal to lobby the Government, in the absence of a law governing lobbying. This grey area needs to be coloured soon to prevent the lobbying activity from becoming corporate bribery to speed up the ease of doing business in India.

## 7. CONCLUSION

Lobbying in India is not recognized by the legal system. Until 2013, the Disclosure of lobbying activities Bill, introduced in the Lok Sabha as a private member's bill equated lobbying with influencing government's decision with money and stated that lobbying forms an integral part of democratic functioning. This integral part of the democracy cannot be defined as an influential activity with payment. This would mean bribing the official. The act of payment should not be included in the definition of lobbying. The corporations must approach the Government and convey their interests. The interest must be conveyed not through cash or in kind. The parliamentarians or the Government personnel, who are in a position to influence the decisions of the Government, have the liberty to recognize the interests of the pressure groups. This liberty must not be limited to the wealthy corporate, every interest of different pressure groups must be taken into consideration. The

decision taken based on the interests of the pressure groups should be efficient and, welfare of the citizens must not be ignored. In this research paper, the author has tried to establish that lobbying leads to corporate bribery in absence of lobbying being recognised in India. In a country where there is rampant corruption, will making lobbying legal work? Legalising lobbying in a democracy would lead to legalising corruption, which would legalize corporate bribery in India. There is a dire need for regulating the corporate lobbying activity in order to prevent the democracy from becoming distorted by the influence of the corporations as India stands at the global corporate map. A mechanism needs to be introduced to avoid the freedom of lobbying to be converted into the freedom of bribery. A new approach of the regulatory justice system with an independent monitoring mechanism needs to be incorporated into the regulatory system in order to avoid the conversion of corporate lobbying into corporate bribery and to ensure that it is not an impediment to carry out business activities in India.