XII. DOWN THE RABBIT HOLE OF INDIA'S ANTI-CORRUPTION PRACTICES

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ABSTRACT

White-Collar crime, first defined by Edwin Hardin Sutherland, has long since transcended the contours drawn by the American sociologist. India, as an emerging leader in the Global South, saw a decline in its ranking in the Corruption Perceptions Index, 2019 by Transparency International. The trend is alarming as it comes in the aftermath of the amended anti-corruption regime in the nation. The authors seek to particularly underline the peculiar democratic and political circumstances of India as the fountainhead of problems that lack of regulation and compliance bring about. Additionally, with almost zero protection afforded to the whistle-blowers under the Act, India seems to have nourished a generalized legislative framework that not only has inculcated fear in the minds of victims but also resulted in a poor performance in the Transparency Index. Through the paper, the authors also strive to critically analyse the ramifications of unregulated internal investigations and exemption of private entities from the Prevention of Corruption Act, 1988. For the purpose of a detailed understanding, the authors have first endeavoured to establish the preliminary premise of corruption as a white-collar crime. Further, the authors furnish a thorough analysis of The Prevention of Corruption Act, 1988 and the subsequent amendment and attempt to chalk out the lacunae in the government's claims of a flawless framework. The article is aimed at exploring the gaps in the legislative regime of India through a comparative lens. The relevance of the article remains in using the findings to mitigate the missing rungs of the Indian ladder to a robust anti-corruption law.

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I. INTRODUCTION

With democratic values and regimes across the globe being in a state of flux, the increasing instances of white-collar crimes serve to frustrate the trust of the masses. The term, first defined by Edwin Hardin Sutherland, has long since transcended the contours drawn by the American sociologist.[1] Sutherland endeavoured to define it as a "crime committed by a person of respectability and high social status in the course of his occupation."[2] It is abundantly evident that Sutherland's outlook, termed as "offender-based approach", on this particular brand of crimes focused on several key aspects: the social status of the criminal and the associated responsibility, occupational context, violation of trust, magnitude of financial costs, and civil and administrative violations. However, it must be noted that his views left a lot to be desired and developed in terms of the scholarship on white-collar crimes.

Taking stock of the developments in the analysis of the term, due regard must also be paid to Edelhertz's "offence-based approach" which was initially offered as a contrast to Sutherland's idea and now presents itself as a

[1] EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 9 (NEW YORK: THE DRYDEN PRESS, 1949).
[2] *Id.*

tool to broaden the understanding of white-collar crimes.[3] Even though it is sharply criticised for trivializing one of the key features of white-collar crimes - social status of the offender - it serves to establish that the scope of white-collar crimes is wider than what was envisioned by Sutherland.

The modern understanding of the term "*white-collar crime*" draws lessons from both approaches. Some scholars remain inclined to the school that it primarily refers to the acts of respected and powerful individuals and organisations that are corrupt and exploitative. While the others refer to it as an economic transgression, the operating principle behind it is deception.[4]

The central instrument for this article, the *Corruption Perceptions Index* ("CPI") by Transparency International, attempts to include abuse of power and wrongful gain in its standards for corruption. It defines corruption as "the abuse of entrusted power for private gain" and further classifies it into three categories viz. grand, petty, and political.[5] International organisations such as the International Monetary Fund and the World Bank also present a definition in consonance with Transparency International by characterising it as "the abuse of public office for private gain."[6] The article underscores the need to aid the incorporation of seasoned standards for anti-corruption practices.

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[3] HERBERT EDELHERTZ, THE NATURE, IMPACT, AND PROSECUTION OF WHITE-COLLAR CRIME, (U.S. GOVERNMENT PRINTING OFFICE, 1970).
[4] MICHAEL L. BENSON ET AL., THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME, (OXFORD UNIVERSITY PRESS, 2016).
[5] *Together Against Corruption*, TRANSPARENCY INTERNATIONAL (2015), https://images.transparencycdn.org/images/TogetherAgainstCorruption_Strategy2020_EN.pdf.
[6] *Helping Countries Combat Corruption: The Role of the World Bank*, (1997), WORLD BANK, http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf

In pursuance of the objectives of this article, an amalgamation of the two approaches is used to comprehend the commonly shared problem that the world is facing - corruption. The United Nations Organisation has made arduous yet continued efforts since 2000, when the General Assembly recognised the need for an international instrument to combat corruption and established an *ad-hoc* committee for negotiation of such an instrument.[7] After several years of deliberations, the United Nations Convention Against Corruption ("UNCAC") as adopted in 2004, is perhaps the only globally acknowledged instrument that lays down comprehensive anti-corruption measures, standards, and practices that all member countries can apply in pursuance of creation of a framework to combat corruption. The Convention aims to forge an expansive international alliance and calls for State Parties to bring about stringent preventive and redressal measures in both public and private sectors. While not defining corruption explicitly, the Convention seeks to create higher standards of accountability and ethics at the global level so that the State Party can legislate domestically.

The Global South East's struggles with corruption are perhaps one of the most well documented in the history of humankind.[8] India, an emerging voice in the subcontinent, has witnessed a litany of such instances where the faith reposed by the public in offices that are expected to conform to higher standards of integrity and ethics has been incredulously outraged. Incidents

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[7] *G.A. Res. 55/61, An Effective International Legal Instrument Against Corruption (Dec. 4, 2000)*, GENERAL ASSEMBLY, https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/2000-2009/2000/General_Assembly/A-RES-55-61.pdf.

[8] *Corruption Perceptions Index 2019*, TRANSPARENCY INTERNATIONAL (2019), https://images.transparencycdn.org/images/2019_CPI_Report_EN.pdf.

such as the Bofors Scam[9] with its roots reaching up straight to the Prime Minister's Office; or the Telgi Stamp Paper Scam,[10] with the figures running into over 200 Billion Rupees; or the ever-infamous CWG[11] as unearthed by the Central Vigilance Commission point to the simple undercurrent that the disregard for the faith reposed by public runs deep in the bureaucratic vein.

The CPI by Transparency International is a globally recognised instrument that gauges the extent of corruption in a country's public sector.[12] India's performance in the Index can thus be perceived as a direct reflection of the effectiveness of its anti-corruption regime. The nation's ranking previously under a freefall between 2010 to 2013, witnessed fluctuations in the intermediate years until The Prevention of Corruption (Amendment) Act, 2018,[13] ("Amendment") was enacted to put the proverbial meat on the bones of the anti-corruption system and to synchronise India's international obligations that arose by virtue of its ratification of UNCAC in 2011. Interestingly and quite unfortunately, the Amendment was not quite the end of the troubles as the fall in India's ranking in the CPI, 2019 ushered in a rude

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[9] R.K. Raghavn, *Bofors Scandal Is Example of Genuine Case Sabotaged by Party With Lot To Hide: Former CBI Chief R K Raghavan*, OUTLOOK, https://www.outlookindia.com/website/story/india-news-bofors-scandal-is-example-of-genuine-case-sabotaged-by-party-with-lot-to-hide-former-cbi-chief-r-k-raghavan/362654 (last visited Jan. 24, 2020)

[10] PTI, *Abdul Kareem Telgi: From a vegetable vendor to scam mastermind*, THE ECONOMIC TIMES (Oct. 26, 2017), https://economictimes.indiatimes.com/news/politics-and-nation/abdul-kareem-telgi-from-a-vegetable-vendor-to-scam-mastermind/articleshow/61248396.cms?from=mdr (last visited Jan. 24, 2020).

[11] PTI, *Day-to-day trial in CWG scam case as per Supreme Court verdict*, THE HINDU, https://www.thehindu.com/news/national/daytoday-trial-in-cwg-scam-case-as-per-supreme-court-verdict/article5952846.ece (last visited Jan. 24, 2020).

[12] Christopher Knaus, *Australia's Global Corruption Ranking Sparks Urgent Calls for Federal Integrity Body*, THE GUARDIAN, (Jan. 29, 2019), https://www.theguardian.com/australia-news/2019/jan/29/australias-global-corruption-ranking-sparks-urgent-calls-for-federal-integrity-body.

[13] INTERNATIONAL, *supra* note 8.

awakening. The regime in its current form is in need of fundamental systemic changes.

India's anti-corruption regime comprises a curious cocktail of legislations that seek to address and mitigate the plague of corruption.[14] However, the authors through this article undertook a pointed appraisal of The Prevention of Corruption Act, 1988 ("POC Act") and the Amendment along with relevant provisions of The Whistle Blowers Protection Act, 2014. This involved an evaluation of the POC Act as also the Amendment which uncovered how they failed to be the umbrella solution to the plague of corruption. The authors first present a three-pronged criticism of the anti-corruption regime in the background of the prevailing peculiar institutional, socio-economic, and political circumstances of India. The authors propose that the key to clearing the murky waters of India's practices lies in a comparative analysis, and learnings from its contemporaries. Thus, the authors don the comparative lens to examine the practices in other nations and carve out unique solutions to India's maladies.

II. ANALYSIS OF THE INDIAN LEGAL FRAMEWORK ON CORRUPTION

Enacted with the aim of mitigating the alarming trends in India's corruption statistics, the POC Act sought to serve as a panacea to all the issues ailing the anti-corruption regime.[15] The POC Act operates to crack down on

[14] MARK F MENDELSOHN, THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW 158 - 162 (8th ed. 2019).

[15] Riya Chopra et al., *White collar and Investigations: India & Globally*, MONDAQ (Feb. 13, 2019), https://www.mondaq.com/india/white-collar-crime-anti-corruption-fraud/780342/white-collar-and-investigations-india-and-globally (last visited Sept. 15, 2020).

public servants involved in corrupt practices and establishes the procedure to prosecute and punish. It is pertinent to note that while the Act was a step in the right direction, it was far from the all-encompassing statute that the nation needed. The POC Act in its existing form needed sharper teeth and pointier talons to bring defaulters to justice. Corrective efforts were thus made to remedy both the offender-based (inclusion of commercial organisations, bribe givers, and public officials) and the offence-based (time extension and stringent punishments) aspects of the legislation.[16] Thus, with an objective of widening its scope, and tightening the contested knots of the anti-corruption fabric, the Amendment was passed in the year 2018.[17] The Amendment sought to criminalise bribe-giving and to bring about a far more nuanced system of giving immunity to those who are victims of coercion into giving such bribes unlike the practice adopted in the originally enacted legislation.[18] Further, it also cracked down on corporate officers by affixing personal criminal liability in the event of their involvement in bribery.[19] The stakes for companies were also raised as the Amendment created a distinct offence for corrupt conduct by "Commercial Organisations", thus bringing about the hopes for far more microscopic scrutiny of any undue advantages extended to public servants by such organisations.[20]

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[16] Prevention of Corruption (Amendment) Act, No. 16, Acts of Parliament, 2018, §9 [hereinafter **"**POCA**"**].

[17] Auroshree, *Prevention of Corruption Act - Before and after Amendment [A Comparison]*, THE SCC ONLINE BLOG (July 27, 2018), https://www.scconline.com/blog/post/2018/07/27/prevention-of-corruption-act-before-and-after-amendment-a-comparison/ (last visited Sept. 20, 2020).

[18] Calvin Chan & Jun Yi Ho, *India: Significant Updates To India's Anti-Corruption Law*, MONDAQ (Oct. 19, 2018), https://www.mondaq.com/india/white-collar-crime-anti-corruption-fraud/747460/significant-updates-to-india39s-anti-corruption-law (last visited Sept. 15, 2020).

[19] *Id*.

[20] *POCA*, § 9

These legislative lacunae aggravate and present viciously in the peculiar political and institutional environment of India. There are two primary irritants that frustrate any legislative advancements to curb the alarming increase in corruption-related crimes in India.[21] First is the indoctrination of corruption in the institutional framework that presents itself uniquely in India. On one hand, we see that corruption has become the norm and not the aberration - it has transcended the bounds of a crime and become the expected practice. This is evident from the fact that the stratification in the societal fabric has become far more strenuous and thus only a select chunk of the populace can afford to sustain this practice as the masses continue to live in penury.[22] On the other hand, this socio-economic disparity has further convoluted the ethical ties in the society. Those equipped to offer bribes manage to do so at a minimal personal cost which in most likelihood is accepted by the members of the lower strata on account of their dismal living conditions. Hence, the contrasting position of the members of the society has created a quagmire causing corruption to become an indispensable feature of the Indian institutional set-up. This problem is further aggravated due to the absence of an anti-corruption ombudsman in our country.[23]

Unsurprisingly, the 2018 Amendment misses the bull's eye by a mile. A deeper look at the amendments and objectives that prompted them reveals

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[21] Tabish Khair, *The Root cause of corruption*, THE HINDU (Jan. 20, 2019), https://www.thehindu.com/opinion/columns/the-root-cause-of-corruption/article26038081.ece (last visited Sept. 20, 2020).

[22] *Id.*

[23] G. Seetharaman, *Delay in appointment of Lokpal & Lokayukta: Who will bell the graft*?, THE ECONOMIC TIMES (Nov. 10, 2018), https://economictimes.indiatimes.com/news/politics-and-nation/why-there-is-no-lokpal-at-centre-and-lokayukta-in-many-states/articleshow/66570168.cms?from=mdr (last visited Sept. 21, 2020).

that the problems that it sought to remedy still plague the system.[24] For the purpose of a specific and in-depth understanding, the authors have fashioned their criticism of the scheme including the amendment, in a trident. These three elements have been carefully picked up by the authors as they cover the areas where the Indian government turned out to be unsuccessful. The first spear is the non-application of the POC Act to foreign officials and private entities. The second is the unregulated internal investigation system in India, with the last being the lack of protection afforded to the whistle-blowers in India which subsequently results in their victimization.

A. Violation of The Corporate Veil Principle

While the legislators achieved a commendable feat by bringing commercial organisations under the purview of the POC Act, the authors are of the view that it was a job half done. Commercial organisations have been given an inclusive definition wherein "bodies, partnerships or any other association of persons incorporated within and outside India which carry on at least a part of their business in India are subjects of scrutiny under the POC Act."[25]

Following the Amendment, the POC Act seeks to punish any functionary of such organisation be it a director, manager, or any other officer

[24] An Overview of Anti-Corruption Laws in India: A Legal, Regulatory, Tax and Strategic Perspective, NISHITH DESAI ASSOCIATES (2020), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Overview-of-Anti-Corruption-Laws-in-India-Web1.pdf (last visited Oct 20, 2020).
[25] POCA, §9(3)(a)(i).

who performs services on behalf of the commercial organisation and is proven to have committed or consented to the said offence.[26]

The punishment comprises imprisonment for a minimum of three years which could be extended to a period of seven years along with a fine.[27] The corporate veil, in the instance where the consent of a director is proved in a court,[28] is pierced and results in the prosecution of that person. However, the investigating authorities, on account of their inability to sever the identity of the company from that of its directors, often drag innocent directors into the case.[29] Not only does it victimise such members and directors but it also has a devastating impact on the commercial organisation. For cases such as these, the only defence that can be availed by the affected parties is to prove before the courts that they have "adequate procedures" in place.[30] As a customary practice, the companies ought to introduce manuals and guidance notes so as to keep a tab on the level of corruption in the company. Furthermore, it is incumbent upon them to educate and sensitise their employees about the provisions of the POC Act to ensure its adherence across all levels. Failure in any of the aforementioned compliances can attract the liabilities under the Amendment. However, with the Amendment not laying down any contours for such procedures, taking this defence inevitably creates another conundrum for both the directors and the courts. The absence of a benchmark or threshold by the POC Act with respect to what exactly constitutes adequate procedures

[26] Avik Biswas & Yeshasvi Narasimhan, *The Prevention of Corruption (Amendment) Act, 2018 – Key Highlights*, MONDAQ (Aug. 09, 2018), https://www.mondaq.com/india/white-collar-crime-anti-corruption-fraud/726890/the-prevention-of-corruption-amendment-act-2018-key-highlights (last visited Sep. 21, 2020).
[27] The Prevention of Corruption Act, No. 49, Acts of Parliament, 1988, §§9,10.
[28] Sunil Bharti Mittal v. Central Bureau of Investigation, 2015 (4) SCC 60.
[29] Iridium India Telecom Ltd. v. Motorola Incorporated, AIR 2011 SC 20.
[30] POCA, §9(b).

creates complex uncharted territory, thereby paving the way for highly subjective interpretation of a clause of paramount importance.

B. Problems with Internal Investigation in Private Sector

For legislations to be coloured as effective and reasoned, the key requirement is testing it against certain set standards. In India, barring the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, there are no statutory mandates or procedural directives for conducting internal investigations in a company. The problem that surfaces in such micro-systems is one of arbitrariness and subjective interpretation that frustrates the very purpose of the legislation. With no standards to adhere to, internal investigations remain highly unregulated with each corporate adopting its own *modus operandi*. Most listed companies,[31] as of date, provide for a grievance mechanism, whistle-blower policy and a vigil mechanism for the directors, which is usually inclusive of an investigation procedure and the internal code of conduct governing the entity, without any minimum standard.

The POC Act, in specific, provides for defences based on "adequate procedures" and "due diligence" to prevent corruption without delineating the terms, hence creating a breeding ground for dubious practices. One of the major reasons why India's anti-corruption regime fails to withstand the test of effectiveness is also its disregard of the need to include preventive policies, thus making the POC Act a misnomer.

[31] Companies Act, No. 18, Acts of Parliament, 2013, § 177.

C. Lack of Protection to the Whistle-blowers

Whistleblowing can be defined as an act of "revealing secret information regarding some wrongdoing or an unethical, illegal activity going on in an organisation for the benefit of the masses."[32]

In its most literal sense, the term encompasses an act of 'blowing a whistle' which inevitably brings the mishaps of a company to the forefront. Whistleblowing plays a pivotal role in exposing scams and scandals. Under Section 4(d)(iv) of the SEBI (Listing Obligations and Disclosure Requirements), 2015 every listed entity is mandatorily required to devise an effective whistle-blower policy that allows all the stakeholders including individuals and representatives to freely express their concerns regarding any illegal or unethical practice.[33]

Additionally, details of such policies must also be displayed on their official website for everyone to access and read.[34] Upon the establishment of such mechanisms, it shall be the duty of the Audit Committee to review the functioning of the whistle-blower mechanism in the company.[35] In addition, the codes of conduct of most companies provide for reporting norms through a set internal mechanism. The Whistle Blower Protection Act, 2014 ("Whistle Blower Act") provides safeguards against victimisation of the person making complaints relating to the disclosure on any allegation of corruption or wilful

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[32] Trishna Chaturvedi et al., *Whistleblower's Protection Act 2011, India: A Critical Analysis*, 4 INT' J. ADV. RES. COMP. SCI. 136 (2020).
[33] Securities And Exchange Board of India (Listing Obligations And Disclosure Requirements) Regulations, 2015, GOVT. OF INDIA, §4(d)(iv).
[34] *Id*. at §46(2)(e).
[35] *Id*. at §18(3).

misuse of power or wilful misuse of discretion against any public servant.[36] The Whistle Blower Act aims at protecting the identity of the whistle-blower.

However, with the non-implementation of the Whistle Blower Act to date, corporate or private whistle-blowers are not granted adequate protection.[37] Primarily due to the non-committal stance of the government, the 2015 bill lapsed, leaving certain questions regarding the public interest disclosures and scope of inquiry by the competent authority inadequately addressed.[38] As of date, the Act stands in limbo, being a valid law yet to be implemented[39] and enforced across the country so as to provide a proper mechanism for whistle-blower protection.

Problems escalate due to the fact that there are no provisions for whistle-blower policy in the private sector. As such, the maximum protection which the Whistle Blower Act envisages is the concealment of identity and nothing beyond. Circumstances heat up as several corporate or private whistle-blowers are not granted adequate protection in our country.[40] A known example of the above deficiencies would be the assassination of Mr. Satyendra Dubey, a project director at the National Highways Authority of India ("NHAI"). He had exposed misappropriation of funds being carried out in the

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[36] Whistle Blower Protection Act, No. 17, Acts of Parliament, 2014, §5.
[37] JP et. al, *Comparison of Whistleblower Protection Mechanism of Select Countries*, 11 IND. J. CORP. GOV. 62, (2018).
[38] *The Whistleblowers Protection Act, 2014: Comparison of the 2015 Bill with the 2013 amendments*, PRS LEGISLATIVE RESEARCH, https://www.prsindia.org/sites/default/files/bill_files/whistleblowers_bill-_comparison_of_2013_and_2015_amendments_0.pdf (last visited Oct 3, 2020).
[39] *Where the Law stands on Whistle-blowers in India*, THE ECONOMIC TIMES (Oct. 26, 2019), https://economictimes.indiatimes.com/news/company/corporate-trends/where-the-law-stands-on-whistleblowers-in-india/infosys-episode/slideshow/71770940.cms (last visited Sept. 25, 2020).
[40] *Id.*

name of the Golden Quadrilateral Project. However, right after the disclosure, he was assassinated in 2003 as an act of revenge by the parties whose wrongdoings were revealed.[41] Therefore, the crucial understanding remains that mere concealment of identity is not, by itself, an adequate measure for the purpose of safeguarding the interests of the whistle-blowers. The Government ought to go the extra mile to ensure that the subsequent implementation of the Whistle Blowers Act lives up to its name and vision of protecting the whistle-blowers.

In addition to the aforementioned problems, the Whistle Blowers Act is limited in its ambit with regards to bribery of foreign public officials escaping the mandate of the law. Contrasting the provisions of the Act with more matured jurisdictions, like the U.S.A. and U.K., the Act misses the mark and does not recognise illegal gratification paid to foreign government officials or officers of a public international organisation. By virtue of this, India stands in violation of its international obligations under the aegis of the UNCAC which specifically prohibits giving undue advantage to "any foreign public official or official of a public international organisation."[42]

III. CROSS JURISDICTIONAL ANALYSIS

In a world that has emerged as a result of hyper globalisation and liberalisation, borders do not hold the same meaning as they previously did.[43]

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[41] *Three Convicted in Satyendra Dubey Murder case*, THE TIMES OF INDIA (Mar. 22, 2010), https://timesofindia.indiatimes.com/india/Three-convicted-in-Satyendra-Dubey-murder-case/articleshow/5712476.cms (last visited Sept. 25, 2020).

[42] United Nations Convention Against Corruption art.16, ¶ 1, Oct.31, 2004, U.N.C.A.C. 17.

[43] Anja Baum et. al, *Governance and SOEs: How Costly Is Corruption?*, INTERNATIONAL MONETARY FUND, WORKING PAPER, https://www.imf.org/en/Publications/WP/Issues/2019/11/22/Governance-and-State-Owned-Enterprises-How-Costly-is-Corruption-48800.

The exchange of information and ideas is free-flowing and consequently, this article finds its purpose in the shared learnings that world systems have to offer. These lessons surface in the backdrop of the unique intersection of the system of governance, socio-political sensibilities, and economic conditions among the countries perused below and India. This section of the article bears an analysis of three countries viz. Germany, Australia, and Bhutan, and proposes certain unique solutions for the Indian framework. The countries have been carefully selected upon an evaluation of their anti-corruption practices as well as on account of their geopolitical circumstances bearing similarities to India. The authors have undertaken an analysis of Germany owing to its consistent performance in the CPI and the recent developments that it instituted. Further, Australia has been chosen as a subject of scrutiny owing to its similar geopolitical sensibilities and its updated standards for whistle-blower protections. Lastly, an in-depth appraisal of Bhutan has been attempted to understand how realigning civilisational goals can be the key to an effective regime.

A. Taking the Lead: Germany

Germany, unlike India, is marked by an explicit distinction among the several forms of bribery. With the intention of differentiating between active and passive forms of bribery, the German legislative regime divides corruption into three forms, namely – "bribery in business dealings,[44] bribery of public officials,[45] and bribery in connection with the health sector."[46]

[44] Strafgesetzbuch [StGB] [Penal Code], §299-302, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.pdf (Ger.).
[45] *Id.*, § 331-337.
[46] *Id.*, § 108(b)-108(e).

Further, the *Strafgesetzbuch* ("StGB"), the German Criminal Code, mandates that the presence of an illegal agreement is a *sine qua non* for establishing criminal liability. The design of the legislation addresses certain key concerns that India can imbibe. Understanding the gravity being accorded to the public sector bribery only serves half the purpose. In a country with varied interactions and the potential criminality in them, appropriately penalising private sector bribery is a crucial takeaway.[47]

Additionally, as opposed to India, the provisions of the StGB extend the bounds of the country and apply at the European level. This came in the aftermath of the Amendment in the year 2015.[48] European Union ("EU") office holders, such as officials or civil servants of EU institutions, as well as other parties that carry out EU duties, are now explicitly covered under Section 11 (1) No. 2a of the legislation. Moreover, the provisions that deal with bribery of public officials within the country also apply to public officials and other employees of the International Criminal Court ("ICC").[49] In its quest to become a leading global voice, India will do well to legislate on the question of liability in the event of corruption involving foreign public officials.

Having said that, concerns have been flagged at the international front which have reflected the challenge of collecting evidence of any bribery which occurred on foreign soil.[50] The gravity of the matter was duly considered by

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[47] MENDELSOHN, *supra* note 14, at 130-135.

[48] Strafgesetzbuch [StGB] [Penal Code], §11(1), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.pdf (Ger.).

[49] *Id.* § 11(1).

[50] Gloria González Fuster & Sergi Vázquez Maymir, *Cross-border Access to E-Evidence: Framing the Evidence*, CEPS (2020), https://www.ceps.eu/wp-content/uploads/2020/03/LSE2020-02_Cross-border-Access-to-E-Evidence.pdf (last visited Oct 15, 2020).

the EU and an attempt was thus made to tackle the offshore issues. Consequently, the EU moved a proposal for a regulation on the European production and preservation orders for electronic evidence in criminal matters[51] ("the E-Evidence Regulation") and an accompanying directive.[52]

Curiously, the German inclination to streamline the level of protection extended to anonymous whistle-blowers with the EU requirements has also surfaced in the aftermath of the recently published draft EU directive on whistle-blower protection.[53] The directive sparks the hopes of increased instances of such whistle-blowers reporting legal violations such as corruption.[54] Germany is perhaps one of the few parties to the Convention to have regularly uncovered foreign bribery cases through its tax authorities who play a pivotal role in this regard.[55] A significant number of cases have also been detected through mutual legal assistance and self-reporting by companies.[56]

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[51] Commission Proposal for a Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COD, EUROPEAN COMMISSION (2018) 225 Final (April 17, 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A225%3AFIN.

[52] Commission Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, COD, EUROPEAN COMMISSION (2018) 226 Final (April 17, 2018).

[53] Directive 2018/225, of the European Parliament and of the Council of 17 April 2018 on European Production and Preservation Orders for electronic evidence in criminal matters COM, EUROPEAN COMMISSION (2018) 225, 2018. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A225%3AFIN (last visited Sept. 29, 2020).

[54] Andre M. Szesny, *Germany: Anti-Corruption & Bribery Comparative Guide*, MONDAQ (June 22, 2020), https://www.mondaq.com/germany/criminal-law/861122/anti-corruption-bribery-comparative-guide (last visited Sept. 27, 2020).

[55] Josephine Moulds, *These are the world's least – and most – corrupt countries*, WORLD ECONOMIC FORUM (Feb. 05, 2019), https://www.weforum.org/agenda/2019/02/least-corrupt-countries-transparency-international-2018/ (last visited Sept. 29, 2020).

[56] OECD Working Group on Bribery, *Implementing The OECD Anti-Bribery Convention. Phase 4 – Germany*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

B. Sweeping Cultural Reforms: Australia

A closer look at Australia's anti-corruption framework is necessitated by its performance on the Corruption Perceptions Index. In 2019, Australia ranked 12 out of a 180-country pool with a score of 77, well above the global average of 43/100.[57] It was recently hailed for effecting sweeping reforms in its Treasury Laws Amendment (Enhancing Whistleblower Protections) Act, 2019. The reforms are touted to be a leading example for countries across the globe. The Amendment Act aims to bring about a shift in culture in terms of how whistle-blowers are dealt with. It focuses on revolutionising the quant and the manner in which legal protection is extended to the whistle-blower.

The Act lays down firm principles to prevent whistle-blowers from experiencing reprisals. The curious shift from corrective to preventive measures is truly aspirational for nations like India that afford little to no protection. Companies are now required under the law of the land to sufficiently show how they will "*support and protect*" those who reveal wrongdoing before they are subjected to any repercussions.[58]

With these reforms, Australia furthers the vision and recommendations of Transparency International with regards to whistle-blowing.[59] The definition of what kinds of wrongdoings can be reported has been massively

(OECD) (2018), http://www.oecd.org/corruption/anti-bribery/Germany-Phase-4-Report-ENG.pdf (last visited Oct. 18, 2020).

[57] WORLD BANK, *supra* note 6.

[58] A.J. Brown, *Whistleblowing Reforms in Australia Show the Way*, TRANSPARENCY INTERNATIONAL, (Feb. 22, 2019), https://voices.transparency.org/whistleblowing-reforms-in-australia-show-the-way-7c4e373ef660 (last visited Oct. 01, 2020).

[59] *International Principles for Whistleblower Legislation*, TRANSPARENCY INTERNATIONAL (2013), https://images.transparencycdn.org/images/2013_WhistleblowerPrinciples_EN.pdf (last visited Oct. 01, 2020).

expanded and clarified.[60] The scope of who is covered has also been widened to include not only employees, but former employees, contractors, volunteers, and the spouses and dependents of employees.[61] Importantly, it will now be easier for whistle-blowers to get compensation and other remedies if they suffer because of speaking out.[62] The necessary caveat while juxtaposing Australia's framework to India is to ensure that a tiger on paper does not become a paper tiger in effect.[63] The core requirement that presents itself would be the effective implementation of such provisions.

Furthermore, a distinct mention of similar experiences in dealing with the political hot potato of foreign political financing is necessitated when drawing parallels between the two. Both countries have made headlines regarding the effectiveness of norms in place to regulate such inflow of money. Serena Lillywhite, Chief Executive, Transparency International Australia also emphasised the "corrosive" influence that money with dubious paper trails have on government integrity.[64] With recent amendments leading towards instituting transparency as a requisite for such contributions by devising

[60] Georgie Farrant & Michael Michalandos, *Australian Parliament passes Whistleblowing Bill*, GLOBAL COMPLIANCE NEWS (Mar. 26, 2019), https://globalcompliancenews.com/australian-parliament-passes-whistleblowing-bill-20190219/ (last visited Oct. 01, 2020).

[61] Corporations Act, 2001, § 1317AAA (Australia).

[62] Brown, *supra* note 58.

[63] Transparency International Australia, *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017*, TRANSPARENCY INTERNATIONAL AUSTRALIA (2018), https://transparency.org.au/wp-content/uploads/2019/10/18_02_26_Treasury-Laws-Amendment-Bill-2017_Submission-FINAL.pdf.

[64] Christopher Knaus, *Australia Among 21 Nations Where Perceived Corruption Has Worsened*, THE GUARDIAN, (Jan. 23, 2020), https://www.theguardian.com/australia-news/2020/jan/23/australia-among-21-nations-where-perceived-corruption-has-worsened (last visited Oct 01, 2020).

additional steps of registration and compliance, both nations continue to share the global spotlight in this regard.[65]

India, however, continues to deal with the consequences of a vague Electoral Bonds Scheme. The chief election regulatory authority, the Election Commission of India voiced its concerns that electoral bonds facilitate the anonymity of political donors and thus are detrimental to the "right to vote".[66] Furthermore, the Union Government in India recently amended its Foreign Contribution (Regulation) Act[67] leading to a myriad of heightened scrutiny measures around foreign funding received by non-profits operations in the country.[68] Checks and balances have been instituted to combat an expansive range of issues, such as prohibition on a wider range of individuals in public service from receiving such donations, transfer of foreign funds, reductions in usage of such funds for administrative purposes, and making Aadhaar identification of all office-bearers of such non-profits mandatory.[69] With recent amendments leading towards instituting transparency as a requisite for

[65] Dipanjan Roy Chaudhury, *Australia Shows the Way in Controlling Foreign Funding of Political Parties*, THE ECONOMIC TIMES, https://economictimes.indiatimes.com/news/politics-and-nation/australia-shows-the-way-in-controlling-foreign-funding-of-political-parties/articleshow/63564247.cms?from=mdr (last visited Oct. 03, 2020).

[66] Arihant Pawariya*, Foreign Funding of NGOs: Why Home Minister Amit Shah's Proposed Amendments To FCRA Matter*, SWARAJYA (Sep. 22, 2020), https://swarajyamag.com/politics/foreign-funding-of-ngos-why-amit-shahs-proposed-amendments-to-fcra-matter (last visited Oct 3, 2020).

[67] The Foreign Contribution (Regulation) Amendment Act, 2020, No. 33, Acts of Parliament, 2020.

[68] *The Foreign Contribution (Regulation) Amendment Bill*, 2020, PRS LEGISLATIVE RESEARCH, https://www.prsindia.org/billtrack/foreign-contribution-regulation-amendment-bill-2020 (last visited Jan. 23, 2020).

[69] Farrant, *supra* note 60.

such contributions by devising additional steps of registration and compliance, both nations continue to share the global spotlight in this regard.[70]

C. Know Thy Neighbour: Bhutan's Outlook

The Thunder Dragon Kingdom has recently joined the realm of democratic governance and has since not only established itself as a state that values integrity in the collective conscience but also given the world at large a chance to evaluate their own civilisational goals. The landlocked nation adopted Gross National Happiness as the unit of measure to evaluate the development and progress of the state in contrast to the adoption of only economic yardsticks.

Quoting the then Crown Prince, His Majesty Jigme Khesar Namgyel Wangchuck, the Fourth King of Bhutan, at the First International Conference on Gross National Happiness, Thimphu, Bhutan, February 2004, "I feel that there must be some convergence among nations on the idea of what the primary objective of development and progress should be – something Gross National Happiness seeks to bring about."[71]

The Gross National Happiness Index includes good governance as one of the four central pillars of the concept. The Centre for Bhutan Studies and

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[70] Dipanjan Roy Chaudhury, *Australia Shows the Way in Controlling Foreign Funding of Political Parties*, THE ECONOMIC TIMES, https://economictimes.indiatimes.com/news/politics-and-nation/australia-shows-the-way-in-controlling-foreign-funding-of-political-parties/articleshow/63564247.cms?from=mdr (last visited Oct. 03, 2020).

[71] Hans van Willenswaard, *Critical Holism: A New Development Paradigm Inspired by Gross National Happiness*, GROSS NATIONAL HAPPINESS: PRACTICE AND MEASUREMENT 632 (Dasho Karma Ura & Dorji Penjore 2009), http://www.bhutanstudies.org.bt/publicationFiles/ConferenceProceedings/4thGNH/34.4thGNH_HansvanWillenswaard.pdf.

GNH Research is committed to transcending the traditional notions of happiness as an individual centric concept and have characterised it as a collective goal. The Centre undertakes the survey of 8,000 randomly selected households across the country every five years to conduct elaborate questionnaires to gauge public perceptions. The *raison d'être* of success of Bhutan's anti-corruption policy thus lies in the integration in a broader ethical vision as well as having specific targets.[72]

Bhutan thus, has fashioned certain eye-catching methods for its neighbour next door. India, with a litany of its historical struggles with highly embarrassing corruption scandals, struggles with a highly convoluted image of its public offices. With cynicism at an all-time high, perhaps realigning or reassessing civilisational goals may have some solutions in-store. This is something that India, owing to its glorious civilisational history, must pay the most attention to, not just in an attempted exercise of decoloniality but an overall value-based social fabric.

Further, with Buddhism and its teachings virtually inseparable from the country's governance and policy-making fabric, Bhutan seeks to attack the instances of corruption by concerted efforts. Unlike the unregulated internal investigation system in India, Bhutan considers the same to be a multi-stakeholder concern. It goes the extra mile and invites people from a spectrum of backgrounds such as students, professionals, corporate executives, journalists, and civil servants at different levels to address and look at corruption from their own unique perspectives.

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[72] Bertrand Venard, *What the World Can Learn from Bhutan About Fighting Corruption*, QUARTZ INDIA, (Jan. 24, 2019), https://qz.com/india/1530839/what-bhutan-can-teach-india-and-others-about-fighting-corruption/ (last visited Oct. 05, 2020).

Perhaps the last lesson that India can take from Bhutan is that of honouring the spirit of scientific enquiry that it has already established in Article 51A (h) of the Constitution of India. Bhutan approaches the problem of corruption as a matter of research and analysis. It has conducted several scientific inquiries to understand the causes, consequences, and ways of reducing corruption.[73]

IV. CONCLUSION

Having conducted an in-depth appraisal of anti-corruption regimes across state lines, the authors have scoured for creative solutions to the problems endemic to the Indian regime. The article sought to understand the core issues faced by our country in the anti-corruption framework and the ways through which they have been tackled by some of the leading nations of the world. On critically analysing the Indian provisions, the authors zeroed in on three key lacunae that rot the system. This article was thus an attempt to address and mitigate such issues.

Corruption is an evolving civilizational problem and the remedy does not lie in trying to fashion a one-time cure. Dealing with corruption requires regular appraisal of laws addressing it and using scientific methods to address it. The authors while comparing world systems found certain countries to have addressed the ailments of the Indian framework. For example, Australia minimises the incentive behind being corrupt by allowing for minimal governance and reducing the discretionary powers of the policymakers. In addition, it endeavours to instil systemic reforms to create a culture of

[73] *Id.*

awareness and increased protections to the whistle-blowers, thus prompting them to report the wrongdoings.

An analysis of the German system presents an accurate attempt to tackle cases of corruption by foreign officials by taking E-evidence into account. Furthermore, the bifurcation of bribery into three forms, as has been discussed previously, further proffers clarity on the scope of the offence and the identification of the parties better and easier.

A long contemplative look at Bhutan may well present certain answers towards a robust state agenda against corruption. Inclusion of happiness in its national agenda and classifying corruption as detrimental to it goes a long way in guiding public values. The juxtaposition of such a measure to India, given the socio-economic fabric, presents a solution. Further, the emphasis of scientific analysis of corrupt practices may well be fruitful for India, bearing in mind the peculiar manifestations of the crime.

In addition to the aforementioned countries, lessons can also be drawn from The Whistle-blower Act in Ghana which not only extends protection to the whistle-blowers but also provides them with incentives.[74] The establishment of a full-fledged 'Whistleblower Reward Fund' provides for a reward if the disclosure leads to the arrest and conviction of the guilty. Additionally, in view of how the entire process of whistleblowing can take a toll on the whistle-blowers, the government may also extend psychological care to them and their families as is done in the Netherlands or Norway.[75] Similarly, narrowing down the wide ambit of adequate procedures

[74] The Whistleblower Act, 2006, § 20–27 (Ghana).
[75] Van der Velden et. al, *Mental Health Problems Among Whistleblowers: A Comparative Study*, 122 PSYCH. REP. 1, 13 (2019).

to certain standard principles such as due diligence, risk assessment, monitoring, reviewing, etc. would give a benchmark to the companies to follow. Not only would that bring an element of objectivity in the current system, but would also lay down guidelines that had been missing so far. Therefore, a clear and defined set of principles rather than a mere legislative enactment of simply stating adequate procedures, as is done in the U.K., could curb corruption in India as well.

While the above nations have something valuable to offer, a bare perusal of the overall anti-corruption framework across the globe discloses an element of imperfection in almost every nation. This also leads to an argument, the crux of which rests in the fact that ranking well on any global index measuring corruption is not, by itself, indicative of a perfect system. A country's fair performance in the index so far, does not, in any way, signify a utopian scheme of events. Thus, finding a country that has unimpeachable standards of integrity adhered to by politicians or tax evaders, becomes taxing. For instance, Denmark, the top most country in the index, has experienced recent corruption cases such as a money-laundering scandal surrounding Danske Bank, its biggest lender.[76] Furthermore, as quoted by Martin Hilti, the director of Transparency International, Switzerland, yet another global leader, happens to face serious deficiencies when it comes to handling cases relating to money laundering or catering protection to the whistle-blowers.[77] Similarly,

[76] Josephine Moulds, *These are the World's Least – and Most – Corrupt Countries*, WORLD ECONOMIC FORUM, (Feb. 5, 2019), https://www.weforum.org/agenda/2019/02/least-corrupt-countries-transparency-international-2018/ (last visited Oct. 10, 2020).

[77] Markus Berni & Philippe Monnier, *Anti-Corruption in Switzerland*, GLOBAL COMPLIANCE NEWS, https://globalcompliancenews.com/anti-corruption/handbook/anti-corruption-in-switzerland/ (last visited Oct. 10, 2020).

for the ones that have not performed up to the mark in the Index does not necessarily imply a complete or an absolute failure of the government.

While the figures regarding India may not portray a very optimistic figure, it cannot be said that there does not remain any hope for it to climb its way up in the ladder. India, unlike major western countries, is characterised by the presence of a considerably active youth population who are seeking to bring a change in the society. Therefore, to conclude, the authors are of the opinion that while India is marked by a list of issues that have been analysed in the above sections of the article, an effective utilization of the legislative measures and lessons from other countries can possibly extricate it from the quagmire it is currently placed at.