

# The Lokpal Act of 2014

## An Assessment

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The Lokpal and Lokayuktas Act of 2014 can be said to be a positive step forward, subject to certain weaknesses related to the provision on Lokayuktas and the autonomy of investigating authorities, among others.

The Lokpal and Lokayuktas (L&L) Act 2014<sup>1</sup> was passed by Parliament in December 2013, and got Presidential assent on 1 January 2014. It aims to prevent and control corruption through the setting up of an independent and empowered body at the central level, called the Lokpal that would receive complaints relating to corruption against most categories of public servants and ensure that these are properly investigated and, where warranted, effectively prosecuted. All this is envisaged in a time-bound manner, with the help of special courts set up for the purpose. The Act also makes it incumbent for each state to pass, within a year, a law setting up a body of Lokayuktas at the state level, but leaves it to the states to work out the details.

### Brief History and Salient Features

The process leading to the enactment of the L&L Act started in 2010, when the government formulated a new Lokpal Bill. This bill, however, was widely criticised for being weak.<sup>2</sup>

In December 2011, the revised and renamed Lokpal and Lokayuktas Bill, 2011 was introduced in, and subsequently passed by, the Lok Sabha. However, this bill could not be passed in the Rajya Sabha due to objections by some of the opposition parties to various sections of the bill.

In May 2012, the bill was referred to a Select Committee of the Rajya Sabha to try and develop a consensus on the disputed issues. After the report of the Select Committee was submitted in November 2012, the bill was again taken up in the Rajya Sabha and passed, with several amendments, on 17 December 2013. The amended bill was sent back to the Lok Sabha, which passed it on 18 December 2013. The bill received the assent of the

president on 1 January 2014, thereby becoming the L&L Act of 2014.

**Process of Investigating and Prosecuting Complaints of Corruption:** The L&L Act 2014 provides for setting up a body called the Lokpal at the central level to have complaints of corruption against various categories of public servants enquired into, investigated, and prosecuted, as warranted. The bill makes it mandatory for states to set up Lokayuktas within one year of the passage of the bill, but the nature and type of Lokayukta is left to the discretion of the state legislatures.

The legislation envisages that the Lokpal would receive complaints of corruption against the prime minister, ministers, Members of Parliament (MPs), officers of the central government (all levels), and against functionaries of any entity that is wholly or partly financed by the government with an annual income above a specified limit, and also, all entities receiving donations from foreign sources in excess of 10 lakh per year.<sup>3</sup>

The Act states that on receipt of a complaint against any public servant, except for officers from groups A, B, C or D, the Lokpal will order a preliminary inquiry against the public servant. The inquiry may be done by its own inquiry wing, provided for this purpose,<sup>4</sup> or the Lokpal may direct the Central Bureau of Investigation (CBI)<sup>5</sup> or any other agency to do the preliminary inquiry. The preliminary inquiry has to ordinarily be completed within 60 to 90 days<sup>6</sup> and a report has to be submitted to the Lokpal. For complaints against public servants belonging to groups A, B, C or D, the Lokpal will refer the complaints to the Central Vigilance Commission (CVC) for preliminary inquiry. After the completion of the preliminary inquiry, the CVC will submit its report to the Lokpal in respect of public servants belonging to group A or B, while in cases of public servants belonging to group C or D, the CVC will proceed in accordance with the provisions of the CVC Act, 2003.<sup>7</sup>

Upon receiving the report of the preliminary inquiry (for groups A and B officers and other public servants,

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including ministers and MPs), the Lokpal will give an opportunity to the public servant to be heard, and if it decides that there exists a prima facie case, order an investigation by the CBI (or any other agency) or order departmental proceedings against the concerned public servant. The investigation has to be ordinarily completed within six months, extendable to one year, and a report has to be submitted to the appropriate court having jurisdiction, with a copy being sent to the Lokpal.<sup>8</sup>

Every investigation report must be considered by a bench consisting of not less than three members of the Lokpal and, after obtaining the comments of the public functionary, the Lokpal may grant sanction to its own prosecution wing, or to the investigating agency, to file a charge sheet before the special court, or direct filing of a closure report, or direct initiation of departmental proceedings against the concerned public servant.

Apart from providing the Lokpal with its own prosecution wing,<sup>9</sup> the bill provides for amending the Delhi Special Police Establishment Act, 1946 to set up a Directorate of Prosecution headed by a Director of Prosecution under the overall control of the CBI director.<sup>10</sup>

For the purpose of deciding cases arising out of the Prevention of Corruption Act (PCA), 1988, the bill provides for setting up of special courts. All trials in the special courts have to be ordinarily completed within one year, extendable to two years for reasons to be recorded in writing.<sup>11</sup>

**Selecting Members of the Lokpal:** The Lokpal chairperson and its eight members will be selected by a committee consisting of the prime minister, the speaker of the Lok Sabha, the leader of opposition in the Lok Sabha, the chief justice of India (CJI) or a judge of the Supreme Court nominated by the CJI, and one eminent jurist, as recommended by the other four members of the committee.<sup>12</sup>

A search committee of at least seven members will be constituted to shortlist a panel of eligible candidates for the post of chairperson and members of the Lokpal. This panel would be put up to

the selection committee. At least half the members of the search committee,<sup>13</sup> and of the Lokpal,<sup>14</sup> must be from amongst persons belonging to the scheduled castes, the scheduled tribes, Other Backward Classes, minorities and women.

### Critique of the Act

The appropriateness and efficacy of the Act can be determined by applying the five-point test: are the institutions and processes proposed to be set up under the Act:

- (a) Adequately independent of the government and others whom they are mandated to scrutinise, so that they can function without interference, pressure, and conflict of interest;
- (b) Adequately empowered to detect, investigate and prosecute cases of corruption;
- (c) With adequate jurisdiction, so that no category of public servant is exempt from effective scrutiny;
- (d) Adequately accountable to the people of India; and
- (e) Yet, practical and realistically workable?

### Independence

**Superintendence and Administrative Control over the CBI:** Though the L&L Act envisages that the Lokpal may use any agency it chooses to enquire or investigate complaints under its jurisdiction, in actual fact there are very few choices at the moment apart from the CBI. But, in order to ensure that such investigations, many of which might involve very senior and powerful members of the government, are fair and professional, the CBI must be functionally independent of the central government.

To some degree this independence has been achieved by the L&L Act changing the process of selecting the director of the CBI,<sup>15</sup> who would now be selected by a committee consisting of the prime minister, leader of opposition of the Lok Sabha, and the CJI or a Supreme Court judge nominated by him. Prior to this, the CBI director was appointed by a committee dominated by functionaries of the incumbent government.

The Act also envisages that the Lokpal will have powers of “superintendence” over the CBI.<sup>16</sup> However, experience has shown that such powers are meaningless without instruments to ensure actual administrative control. The Act empowers the Lokpal with partial administrative control over the CBI as it states that transfer of CBI officers investigating cases referred by the Lokpal can be done only with the approval of the Lokpal.<sup>17</sup> Unfortunately, all this is still not adequate to provide the required functional independence to the CBI.

The central government still controls the budget of the CBI, appoints its officials, and is the receiving authority for the annual confidential reports of senior CBI officials, thereby making them vulnerable to pressure from the government. It would have been much better if the CBI had been brought under the comprehensive administrative and financial control of the Lokpal, whose own expenditure is chargeable to the consolidated fund of India.<sup>18</sup> Or at the very least, the appointment and removal of senior CBI officers should have required the approval of the Lokpal and for officers working on cases referred by the Lokpal, the chairperson of the Lokpal should have been the receiving authority for the annual confidential reports. These measures were suggested by various civil society groups, but ignored by the government.<sup>19</sup>

### Empowerment

**Arbitrary Time Frame for Completion of Trial:**<sup>20</sup> The Act, in Section 35, specifies that any trial before the special court must be completed in two years. While it is a welcome move towards ensuring time-bound completion of trial, the Act does not specify what would happen in those rare cases where, despite best efforts, this was not possible. This ambiguity could lead to the proceedings being abandoned just because they could not be completed in time, and the accused getting off scot-free. This would also give an incentive for the accused to delay the proceedings. Therefore, a caveat to prevent benefit or undue advantage to the accused should have been included in the Act.

### **Power to Order Inquiry or Investigation without Seeking Government Approval:**

Unfortunately Section 6A of the Delhi Special Police Establishment Act of 1946, which specifies that the CBI cannot inquire or investigate into any offence committed by an officer of the rank of a joint secretary or above of the Government of India, and of equivalent rank in government-owned or controlled bodies, without the previous approval of the central government<sup>21</sup> has not been specifically amended or overridden in this Act. Though in Section 23(1) of the L&L Act of 2014 it is specified that the Lokpal shall have the right to order prosecution, notwithstanding anything contained in Section 6A referred to above, it does not similarly talk about inquiry or investigation. However, this appears to be an oversight as the general tenor of the L&L Act and many other sections suggest that the Lokpal should be able to order the CBI to inquire or investigate without seeking permission of the central government. Nevertheless, it needs to be corrected, otherwise it could make the Lokpal a non-starter for, though the Lokpal can ask agencies other than the CBI to inquire or investigate, presently there are very few such at the central level.

### **Jurisdiction**

**Power and Jurisdiction of the Lokayuktas in States:** The biggest shortcoming of the Act is that while it makes it mandatory for Lokayuktas to be set up in each state within one year, state legislatures will be free to determine the powers and jurisdiction of the Lokayukta.<sup>22</sup> The apprehension is that this could result in very weak and ineffective Lokayuktas being set up in many of the states, with limited jurisdiction. As much of the corruption that affects the common person, especially the poor and marginalised, occurs under the jurisdiction of the state government, the absence of strong and effective state Lokayuktas would deny the majority of Indians, especially those who are most in need of relief, any respite from rampant corruption.

Admittedly, this is one of the most politically sensitive issues. In fact, perhaps the main reason why the earlier bill was

objected to by many of the opposition parties and even some of the constituent and support parties of the UPA, was because it provided for the simultaneous setting up of Lokayuktas in the states along the same lines as the Lokpal invoking Article 253 of the Constitution.

However, in the revised bill the government had the option of invoking Article 252 of the Constitution, which would allow each state to decide whether it wanted to enact a Lokayukta law or not. However, the law, when enacted, would have been identical to the central Act in terms of jurisdiction and efficacy. This would have been a preferred alternative.

### **Statute of Limitation**

The Act envisages that the Lokpal “shall not inquire or investigate into any complaint, if the complaint is made after the expiry of a period of seven years from the date on which the offence mentioned in such complaint is alleged to have been committed.”<sup>23</sup> This seems to be unnecessarily restrictive, especially in relation to some of the large and complex scams that are exposed from time to time. Scams are often unearthed only after a political regime change, especially if they involve high level public functionaries. If a complaint is accompanied with credible proof, there is no reason why it should not be examined by the Lokpal.

### **Coverage of the Private Sector**

The jurisdiction of the Lokpal covers all complaints under the PCA 1988. Unfortunately, the PCA is weak insofar as fixing responsibility of the private sector is concerned. Recent events have shown that even where companies or other private entities are in receipt of government patronage in the form of illegitimate profit-making opportunities, unless it can be proved that they had bribed or otherwise benefited a public servant, it is almost impossible to indict them under the PCA. It had, therefore been suggested by the civil society organisation, the National Campaign for People’s Right to Information (NCPRI) that the L&L Act, while making various amendments to various existing laws,<sup>24</sup> including the PCA, make the following

addition to the PCA (to Section 12 of the PCA):

Where any entity, including but not restricted to a private body, corporation or profit seeking entity, or any NGO that receives from any public authority any grants, concession or dispensation or executes an agreement to carry out a public service, including but not restricted to licences, subsidies, contracts, orders, quotas, allocations, clearances, etc, or any opportunity to make profits, where either such a receipt, is in violation of the law or of any prevailing rules and attains or causes illegitimate benefits from such violations, it would be deemed to have abetted an offence under this Act.

Unfortunately, no such provision has been made in the PCA and therefore jurisdiction over the private sector will continue to be tenuous.

### **Accountability**

The Act falls short on several counts on ensuring the accountability of the Lokpal. Being a high-powered anti-corruption agency with powers of enquiry, investigation and prosecution, strong measures were required to ensure the accountability of the institution and officials of the Lokpal.

### **Parliamentary Oversight**

As per Section 48 of the Act, the Lokpal is required to send an annual report to the president on the work done by it which is to be laid before each house of Parliament. The Lokpal should have been made accountable to Parliament for the maintenance of ethical standards within the institutions, specifically maintaining impartiality in functioning, especially the absence of political, caste, class, gender and religious bias, the prevention of victimisation, and the avoidance of conflict of interests. This could have been ensured by constituting a multi-party Standing Parliamentary Committee which would have the responsibility of examining the functioning of the Lokpal and be empowered to receive complaints against the Lokpal and its members and officers regarding parameters of ethical functioning.

### **Complaints against the Chairman and Members of the Lokpal:**

The L&L Act envisages that any complaint against a member or chairperson of the Lokpal

will be taken cognisance of only if it is signed by at least a 100 MPs.<sup>25</sup> However, past experience has shown that this is very difficult to implement, especially as the matter often becomes politicised. Civil society groups had suggested that ordinary citizens also be empowered to make complaints against members of the Lokpal – a suggestion that was not accepted by the select committee and has not been included in the Act.<sup>26</sup> The select committee in its report has noted that it was felt that “empowering citizens to approach the Supreme Court directly would result in flooding the Supreme Court with large number of petitions”.<sup>27</sup>

**Complaints of Corruption against Lokpal Staff:** The Act envisages that the Lokpal would itself deal with complaints of corruption against its own staff.<sup>28</sup> Considering one of the basis of setting up an independent Lokpal is the principle that all complaints of corruption should be dealt with by independent bodies, and considering the type of powers the Lokpal has, there would be many opportunities by its staff to indulge in corrupt practices, the Act should have provided for a system that is independent of the Lokpal to deal with complaints of corruption against Lokpal staff. A suggestion made to the Standing Committee<sup>29</sup> was that an ombudsman be appointed by an independent committee, which would in a time-bound manner enquire into the complaints against Lokpal staff, and make recommendations to the Lokpal, which would be binding. However, the suggestion was not accepted.

## Workability

**Coverage of Public Servants Belonging to Groups C and D:** The Act envisages that all the nearly 30 lakh groups c and d public servants<sup>30</sup> would be covered by the cvc.<sup>31</sup> However, it does not specify how a cvc, located in Delhi, would receive complaints, conduct preliminary enquiries, and exercise superintendence and issue directions on investigations, against lakhs of employees who are spread across thousands of post offices and manned railway crossings, for example, in the villages of India. Would

they set up thousands of *thanas* in the villages and rural blocks of India, or would they expect villagers to come to Delhi, or to state or district headquarters, to lodge and pursue complaints and conduct enquiries and oversee investigations? And would it be desirable to have thousands of new cvc thanas all over the country? Would these prevent or promote corruption? The Act and the explanatory notes accompanying the Act do not clarify the envisaged process.

## Conclusions

All in all, the L&L Act of 2014 can be said to be a positive step forward, subject to the weaknesses described above. Perhaps that is why there has been little criticism of the Act, except by the Aam Aadmi Party (AAP). Their main objection seems to be that it is not the Jan Lokpal Bill that its parent movement, India against Corruption, had drafted. That it is not, but it is debatable whether the Jan Lokpal Bill is a preferred alternative.

If the L&L Act is properly implemented, it should provide a significant deterrent to corruption, especially the high level of corruption that seems to have become increasingly common in India. Of course, in order to achieve that, it has to be ensured that the right sorts of people are appointed to the Lokpal, that they and the agencies assisting them are provided adequate and appropriate human and financial resources, and that there is political will, especially among the top political and bureaucratic leadership, to make this institution succeed.

Though getting this far has been a major struggle for the people of India, they need to continue to be vigilant and to keep up the pressure on the government to ensure proper implementation. And the L&L Act by itself is only a part of the battle won, other legislations are required to ensure a comprehensive reform of the anti-corruption and grievance redress framework of the country. The three critical bills pending in Parliament are the Judicial Standards and Accountability Bill, the Whistle Blowers Protection Bill, and the Grievance Redress Bill. These need to be appropriately amended and urgently passed by Parliament.

## NOTES

- 1 [http://164.100.24.219/BillsTexts/LSBillTexts/PassedBothHouses/134F\\_2011\\_LS\\_Eng.pdf](http://164.100.24.219/BillsTexts/LSBillTexts/PassedBothHouses/134F_2011_LS_Eng.pdf)
- 2 See, for example, <http://www.dnaindia.com/india/report-social-activists-draft-new-lokpal-bill-1485559>
- 3 Section 14.
- 4 Section 11.
- 5 The Central Bureau of Investigation or CBI, as it is popularly known, is strictly speaking the Delhi Special Police Establishment set-up under the Delhi Special Police Establishment Act 1946.
- 6 There seems to be a discrepancy between Subsections 2 and 4 of Section 20, the former specifies the time frame as 60 days, while the latter as 90 days. The latter subsection also allows for a further period of 90 days.
- 7 Section 20.
- 8 Subsections 5 and 6 of Section 20.
- 9 Section 12.
- 10 Part II of the Schedule.
- 11 Section 35.
- 12 Section 4(1).
- 13 Section 4(3).
- 14 Section 3(2)(b).
- 15 The Schedule. Part II(1).
- 16 Section 25.
- 17 Section 25(3).
- 18 Section 13.
- 19 See, for example, submission made by the NCPRI and cited in the written submissions of Arun Jaitley, member, Select Committee, in *Report of the Select Committee of the Rajya Sabha on the Lokpal and Lokayuktas Bill*, Rajya Sabha Secretariat, New Delhi, November 2012, page 174.
- 20 Interestingly, the Parliamentary Committee (op cit) had also stated (Para 53 of Chapter 17): “The Committee believes that it cannot be the intention of the law that where acts and omissions by the accused create an inordinate delay in the preliminary inquiry and/or other factors arise which are entirely beyond the control of the Lokpal, the accused should get the benefit or that the criminal trial should terminate. For that purpose it is necessary to insert a separate and distinct provision which states that Clauses 23(2), 23(8) or other similar time limit clauses elsewhere in the Lokpal Bill, 2011, shall not automatically give any benefit or undue advantage to the accused and shall not automatically thwart or terminate the trial [Para 12.36(E)]”.
- 21 <http://cbi.nic.in/aboutus/dspe.php>
- 22 Section 63.
- 23 Section 53.
- 24 Part 1 to V of the Schedule.
- 25 Section 37(2).
- 26 Interestingly, the Standing Committee had accepted this recommendation and further recommended in their report that: “...the Committee recommends that Clause 8 (1) (iv) be added in the existing Lokpal Bill, 2011 to provide, specifically, that anyone can directly approach the apex court in respect of a complaint against the Lokpal (institution or individual member) and that such complaint would go through the normal initial hearing and filter as a preliminary matter before the normal bench strength as prescribed by the Supreme Court Rules but that, if the matter is admitted and put for final hearing, the same shall be heard by an apex court bench of not less than five members. It is but obvious that other consequential changes will have to be made in the whole of Section 8 to reflect the addition of the aforesaid Clause 8 (1) (iv). [Para 16.6A]”, Report of the Parliamentary Standing Committee.
- 27 Op cit, Select Committee Report, point 14.1.
- 28 Section 38.
- 29 See Report of the Parliamentary Standing Committee, op cit, page 571.
- 30 As estimated by the Standing Committee, paragraph 8.1 of their report (op cit).
- 31 Section 20.