LOKPAL SELECTION: NEED FOR A BROAD-BASED APPROACH

Has the Government 'Managed' the Process?

Anjali Bhardwaj and Amrita Johri*



The Lokpal and Lokayuktas Act, 2013 (L&L Act), was passed by Parliament in December 2013 and received Presidential assent on January 1, 2014. The law was enacted to set up an independent and empowered anti-corruption ombudsman, which would work without fear or favour to tackle cases involving allegations of corruption against public servants. The law came into force on January 16, 2014 through notification in the Official Gazette.[1] However, the Chairperson and members of the Lokpal were appointed in 2019,[2] more than five years after the law was enacted. Also, the appointments were done in a manner that raised serious questions about the credibility of the selection process. In 2016, even before the Lokpal became functional, amendments were made to weaken key provisions of the legislation relating to asset disclosures by public servants.

Selection Committee with a Preponderance of Representatives from the Ruling Party

The L&L Act provides for the appointment of the Chairperson and members of the Lokpal by the President based on the recommendations of a committee consisting of the Prime Minister (Chairperson), Speaker of the House of the People, the Leader of Opposition in the House of the People, the Chief Justice of India (CJI) or a Judge of the Supreme Court nominated by him/her and an eminent jurist, as recommended by the Chairperson and other members.

After the 2014 general elections, no one was recognised as the Leader of Opposition (LoP) in the Lok Sabha. An important principle for ensuring

* *Anjali Bhardwaj and Amrita Johri are social activists working on issues of transparency and accountability.*



independence of bodies like the Lokpal is that the selection committee responsible for making appointments to these institutions should not have a preponderance of representatives of the government and the ruling party. In order to ensure a balanced selection committee in keeping with the spirit of the legislation, the government needed to bring a single amendment to modify the composition of the selection committee by substituting the recognised LoP with the leader of the single largest opposition party in the Lok Sabha. This problem was not unique to the Lokpal law. The Delhi Special Police Establishment (DSPE) Act, which lays down the procedure for the appointment of the Director of the Central Bureau of Investigation (CBI), also included the recognised LoP as a member of the Selection Committee. The requisite amendment was promptly brought in the case of the DSPE Act for the appointment of the CBI Director.[3] In the case of the L&L Act however, the government introduced a 10-page amendment bill in December 2014, which instead of limiting itself to amending the composition of the selection committee, sought to fundamentally dilute the original law.[4] Given the controversial nature of amendments, the bill was referred to a Parliamentary Standing Committee and was never enacted.[5]

The matter of non-appointment of the Lokpal was agitated in the Supreme Court.[6] In its judgment dated April 27, 2017, the Court recorded that the Attorney General stated that an amendment to alter the composition of the selection committee was pending in Parliament. Recognising its limitation in directing the legislature to pass the amendment,[7] the Court held that in light of Sub-section (2) of Section 4 of L&L Act, which states that the appointment of Chairperson or a member of the Lokpal will not become invalid merely because of any vacancy in the Selection Committee, the L&L Act was an eminently workable piece of legislation and the appointment could be made with a truncated selection committee without the leader of opposition.

Despite the ruling of the Supreme Court, the government did not initiate the appointment process, leading to a contempt petition being filed in the apex court in January 2018.[8] Finally,

> ***"The selection committee responsible for making appointments to institutions should not have a preponderance of representatives of the government and the ruling party."***

the selection committee headed by Prime Minister Narendra Modi met for the first time in March 2018, nearly 45 months after the BJP formed the government.[9]

The PM, Speaker and the Chief Justice of India (CJI) appointed Mukul Rohatgi, who served as Attorney General during the BJP regime, as the eminent jurist on the selection panel. In the absence of the LoP, the selection of the Chairperson and members of the Lokpal came under a cloud with doubts arising about an inherent bias towards selection of candidates favoured by the government. Mallikarjun Kharge, leader of the largest opposition party in the Lok Sabha, was invited for the meetings of the selection committee as a 'special invitee.' He declined the invite on the grounds that a special invitee "would not have any rights of participation in the process of selection."[10]

The PM-led Selection Committee constituted an eight-member

> ***"Transparency in the functioning of the selection panel could have helped allay fears that the committee was merely rubber stamping the government's choice of candidates."***

search committee as per Section 4(3) of the L&L Act to short-list candidates.[11]

Sub-section 4 of Section 4 of the L&L Act mandates that the Selection Committee should regulate its own procedure in a transparent manner. The provision states, "(4) The Selection Committee shall regulate its own procedure in a transparent manner for selecting the Chairperson and Members of the Lokpal." Transparency in the functioning of the selection panel could have helped allay fears that the committee was merely rubber stamping the government's choice of candidates. However, the functioning of the committee was shrouded in secrecy and no details of the selection process were placed in the public domain.

Minutes of meetings of the selection panel, sought under the Right to Information Act (RTI Act), were denied. The reply stated, "as regards the minutes of the meetings it is submitted that the authorship of such documents which include 3-5 high level dignitaries does not vest in the Department of Personnel & Training and same have been shared as secret documents.[12] Thus copies of the said documents cannot be provided." The denial of information was not in keeping with the provisions of the RTI Act, as none of the clauses listed in Section 8 or 9 of the law, which can be invoked to exempt information, were relied on.

Lack of transparency, despite the statutory provision in the L&L Act, was highlighted in the contempt petition filed before the Supreme Court. However, the bench headed by the CJI in its order dated March 7, 2019 held that it was the Court's considered view that no direction should be issued in this regard and that the matter should be left for determination by the selection committee.[13]

The Supreme Court's reluctance to give any directions on the issue was at odds with the progressive stance taken by it in directing transparency in the appointment of other oversight bodies. In February 2019, the Court gave a landmark judgment to ensure transparency in the appointment of information commissioners under the RTI Act.[14] It directed the proactive disclosure of details of applicants, short-listing criteria adopted by the search committee, names of short-listed candidates and details of meetings of the search and selection committees.

The composition of the Selection Committee, and the lack of transparency in the selection process by which the Chair and members of the Lokpal were finally appointed in March 2019, have raised doubts about the independence of the Lokpal.

The 2016 Amendments

The Lokpal has been established to receive and inquire into complaints related to offences punishable under the Prevention of Corruption Act, 1988 (PCA). One of the grounds of criminal misconduct under the PCA relates to a public servant, or any person on his/her behalf, being in possession of pecuniary resources or property disproportionate to his known sources of income.[15] As illegally amassed assets are often handed over to family members, Section 44 of the L&L Act required all public servants under the jurisdiction of the Lokpal to declare their assets and liabilities and those of their spouses and dependent children. These were required to be proactively disclosed on government websites. Public disclosure of assets and liabilities of public servants was important to ensure that people could make informed complaints to the Lokpal.

The declarations were to be furnished within 30 days of the Act coming into force. However, on February 15, 2014, one day prior to the expiration of the deadline, the government,

invoking Section 62 of the Act which gives it power to remove difficulties through an order published in the Official Gazette, extended the deadline to six months of the Act coming into force.[16] Subsequently, the deadline was extended several times on the pretext that the Lokpal covered various categories of public servants and multiple rules regulating their asset disclosure norms needed to be amended to bring them in consonance with the Lokpal law.[17]

The government introduced amendments to the L&L Act in Parliament on July 27, 2016, to dilute the provisions related to asset disclosure and the amendment bill was hurriedly pushed through. The bill was brought to Parliament without any public consultation and was passed in Lok Sabha the same day it was introduced without a detailed discussion on its provisions. Subsequently, the amendments were also cleared by Rajya Sabha and assented to by the President on July 29, 2016.[18] The L&L Act was thus amended, even before the Lokpal started functioning.

The amendments severely diluted the asset disclosure provisions of the Lokpal Act. The amended Section 44 of the law allows for the form and manner of disclosure of assets and liabilities of public servants to be prescribed by the central government through rules. Following the amendments, the Department of Personnel & Training (DoPT) issued an Office Memorandum dated December 1, 2016, stating that the government was in the process of finalising a new set of rules on asset declarations.[19]

The need for a thorough asset disclosure regime for public servants is globally recognised as an important element in an anti-corruption framework.[20] Despite overwhelming public interest in comprehensive disclosure of assets, the 2016 amendments diluted the relevant provisions.

The Way Forward

In order to ensure proper functioning of the Lokpal, and to instil public trust in the institution, several urgent measures are required. The composition of the selection panel needs to be appropriately amended to provide for the inclusion of the leader of the largest opposition party in the Lok Sabha as a member of the committee, in case no one is recognised as the LoP. The Selection Committee must adopt a robust procedure to ensure transparency in the appointment process as envisaged in Section 4(4) of the L&L Act. The procedure should mandate public disclosure of particulars of applicants, shortlisting criteria, records of deliberations, including minutes of meetings of the Search and Selection Committee and material showing how the selected candidates fulfil the eligibility criteria. All records pertaining to the appointment of the Chairperson and members of the Lokpal made in 2019 must also be placed in the public domain to enable scrutiny of the appointment process.

There is an urgent need to undo the regressive amendments made to the asset disclosure provision in Section 44. The Lokpal must mandate a robust system of asset disclosures for public servants, their spouses and dependent children and these should be publicly available to enable people to participate in the fight against graft by making informed complaints.

Much of the corruption that affects common people, especially the poor and marginalised, is in state and local government agencies. Therefore, it is important to have effective Lokayuktas set up at the state level, along the same lines as the Lokpal at the Centre. In order to tackle corruption, it is important that the L&L Act be adequately amended to provide for setting up of Lokayuktas along the same lines as the Lokpal.

Finally, the L&L Act was legislated to address a major problem: the lack of an adequately independent and empowered body to look into allegations of corruption involving high ranking government functionaries who can influence cases of graft allegations. However, Section 14 of the Act, which lists the categories of public servants against whom the Lokpal would

receive complaints of corruption, extends the definition to include functionaries of entities that are wholly or partly financed by the government with an annual income above Rs 1 crore,[21] and of entities receiving donations from foreign sources in excess of Rs 10 lakh per year. Covering such a large number of persons under the Lokpal jurisdiction is wholly undesirable as it would inundate the institution with complaints and prevent proper action in cases of big-ticket corruption. Corruption involving high ranking public officials is usually of a complex and intricate nature and therefore, the Lokpal has been set up as a specialised agency with appropriate mechanisms to deal with it. Burdening the Lokpal with complaints against lakhs of persons associated with private, non-governmental bodies is not a good idea. These persons do not exercise the kind of influence and power as high ranking public functionaries. It will merely distract the agency and dilute its efficacy, thereby defeating the basic purpose for setting it up. The Act, therefore, needs to be amended to remove such functionaries from the definition of public servants under the law.

Note: This piece draws on a commentary titled, *Undermining the Lokpal*, written by the authors in the *Economic & Political Weekly* (*EPW*) journal.

(Endnotes)

1. Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training), Notification No. 407/4/2014-AVD-W(B)], available at https://bit.ly/2xDlJ89

2. Langa, Mahesh (2019, March 19) Justice P.C. Ghose appointed first Lokpal. *The Hindu*. Retrieved April 15,2019 from https://bit.ly/2XANysf

3. The Delhi Special Police Establishment (Amendment) Act, 2014 (No. 28 Of 2014)

4. The Lokpal and Lokayuktas and Other Related Law (Amendment) Bill, 2014

5. Parliament of India Rajya Sabha, Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law & Justice, 77th Report on The Lokpal and Lokayuktas and Other Related Law (Amendment) Bill, 2014, available at https://bit.ly/2Jm1Wkn

6. *Common Cause v. Union of India* WP(C) No. 245 Of 2014

7. ¶16 and ¶17 of *Id*.

8. *Common Cause v. Ajay Mittal* Conmt. Pet.(C) No. 714/2018 in W.P.(C) No. 245/2014

9. Live Law Team (2018, December 20) Centre Took 45 Months to Call First Meeting of Lokpal Selection Committee: RTI Reveals. *Live Law*. Retrieved April 15, 2019 , from https://bit.ly/2Jy37vQ

10. Indian National Congress, Twitter Post, March 2019, 12:39 PM, https://bit.ly/2XxP2s9

11. Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training), Order No. 407/02/2018-AVD-INTLM, available at https://bit.ly/2JnQIvS

12. *Supra* note 9

13. *Common Cause v. Ajay Mittal* (Conmt.Pet. (C) No. 714/2018 in W.P.(C) No. 245/2014) Order dated 7 March 2019

14. *Anjali Bhardwaj & Ors v. UOI & Ors*. [WP(C) 436 of 2018] Order dated 15 February 2019

15. Section 13 of the Prevention of Corruption Act,1988

16. Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training), Order no. [407/12/2014-AVD-IV(B)], available at https://bit.ly/2Lb3kZo

17. *Id*.

18. The Lokpal and Lokayuktas (Amendment) Bill, 2016

19. Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training), Order no. 407/16/2016-AVD-IV(LP), available at https://bit.ly/2LadWaM

20. World Bank (2012, November 8) Only 43% of Countries Disclose Public Officials' Financial Assets Says World Bank. *The World Bank*. Retrieved April 5, 2019 , from https://bit.ly/2G30yAX

21. Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training), Notification No. 407/02/2016-AVD-IV(Lokpal) Pt 1], available at https://bit.ly/2Xv8Pne