OPED THE TRIBUNE DEBATE

POINT
There are compelling arguments for empowering the Lokpal to investigate charges against the PM
Nobody is above the law, not even the PM
C. Raj Kumar

The Union Cabinet has taken the decision to keep the Prime Minister outside the purview of Lokpal's jurisdiction till he demits office. The Anna Hazare movement for establishing the Lokpal as an independent institution to fight corruption has generated huge expectations and the civil society is bound to be disappointed with this decision.

One of the critical issues that has come to the forefront of the debate is whether the Lokpal be empowered to investigate allegations of corruption against the Prime Minister while he is in office.

There is a strong opinion within the government that the Prime Minister is too important an institution for it to be covered by the jurisdiction of the Lokpal and that the inclusion of the Prime Minister will lead to unnecessary, unwarranted and frivolous investigations and vexatious litigations undermining the stability of the government and the Office of the Prime Minister.

There may be some justification in this argument as the Prime Minister is not only the most important face of the government within India but also represents the people of India in the international community. Any investigation of allegations of corruption against the Prime Minister would affect the effectiveness of a critical institution of Indian democracy.

However, it is also important to recognise that nobody is above the law and if India were to establish a society based on the rule of law, nobody, including the Prime Minister, should be excluded from the purview of any anti-corruption investigation. The Constitution of India does not provide for any immunity for the Prime Minister, Chief Minister or Ministers.

Under Article 361 of the Constitution of India, immunity from criminal proceedings is available to the President and the Governor only during the term of his or her office. But even these provisions are subject to interpretation as to what is the scope of the immunity that is available and arguably, this immunity need not be available for acts of corruption, which are not in any way related to the legitimate exercise of constitutional powers by these authorities.

Further, it needs to be mentioned that public office, including that of the Prime Minister, comes along with critical scrutiny for the exercise of all powers. The mere possibility of misuse of such investigative powers by the Lokpal is a woefully weak argument to exclude the Prime Minister from the Lokpal's jurisdiction.

The global trend on the question of seeking accountability is to recognise one of the fundamental principles of
the rule of law - however high a person is, the law is above him. The Lokpal Bill should ensure that there are adequate checks and balances to limit the instances of frivolous cases being brought against the Prime Minister. The Bill ought to envisage a separate process for seeking the investigation and prosecution of the Prime Minister by adding a higher level of scrutiny and review mechanism by an Independent Operations Review Board. The purpose of this additional level of mechanism that will have the power to sanction the investigation against the Prime Minister on the basis of prima facie evidence is to ensure that the investigation is not a wild goose chase, but rather based on concrete evidence subject to further verification. This will also provide the necessary checks and balances for the independent functioning of the Lokpal.

In my view, the Prime Minister should be within the jurisdiction of the Lokpal's investigation. The Constitution of India has provided a very strong framework to ensure the right to equality and equal protection of laws. In the past, there have been instances when the Prime Minister of India and his actions have come for serious scrutiny, including leveling of allegations of corruption. Due to the lack of independent investigative mechanisms for dealing with allegations of corruption against the Prime Ministers, a fertile ground has been created for politicisation of corruption leading to the Indian citizenry losing faith in the legal system's ability to effectively deal with corruption. There is a historic opportunity to establish an institution in India that will not only address the issue of corruption but also, more importantly, seek to restore the faith of the Indian citizenry in democracy and the rule of law. Rule of law in India cannot be protected, if corruption is not addressed with all sense of honesty and integrity by the government.

The Lokpal Bill, in my view should bear in mind that the institution of Lokpal has the ability to transform the governance paradigm in India and even inspire other institutions to work more effectively. While the inclusion of the Prime Minister within the Lokpal's jurisdiction will ensure due empowerment of the institutional machinery to fight corruption, the very exclusion of the Prime Minister will affect both the credibility and the legitimacy of the institution. Lokpal's jurisdiction should not be limited by excluding the Prime Minister when the Prime Minister plays a critical role as the Chair of the Cabinet in the decision-making processes relating to the government's functioning.

**Keeping judiciary out**

There is a deep concern that corruption in judiciary has affected the judicial process and people's faith in the Indian legal system to deliver justice has indeed been shaken. Since the existing institutional machinery does not provide a robust framework for seeking accountability of the judiciary, there is a case for establishing an institutional framework for the fight against corruption.

However, Lokpal will not be a suitable institution for investigating allegations of corruption against the judiciary. The nature of judiciary as an institution under the existing scheme of constitutional governance in India puts the judiciary in a special situation for it has the power to adjudicate on the constitutional validity of all legislation and the powers exercised by the government. It will also be involved in adjudicating on the constitutional validity of the powers exercised and the decisions taken by the Lokpal under its statutory obligations.

The inclusion of the judiciary within the Lokpal Bill will weaken the proposed institutional framework in its effort to seek transparency and accountability in governance. More importantly, the context of corruption in the judicial process as well as the members of the judiciary involved in acts of corruption deserves a separate but equally effective process, which ensures that accountability, is institutionalised. There is a case for strengthening the anti-corruption provisions of the Judicial Accountability Bill and all efforts need to be taken to ensure that there is no sense of tolerance or for that matter indifference when it comes to acts of corruption in the judiciary.

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COUNTERPOINT
Even now, the PM is not immune to prosecution
Several politicians like Narasimha Rao, Shibu Soren and Lalu Yadav were all prosecuted under existing laws.
Ashwani Kumar

THE Lokpal Bill, 2011 as approved by the Union Cabinet has been introduced in Parliament. Its scope, credibility and purpose have been the subject of intense public debate which is likely to continue while the processes of law-making are underway.

Indeed, the debate about the office of the Prime Minister in an evolving parliamentary democracy is never sterile. The exclusion of a serving Prime Minister from the jurisdiction of the Lokpal in the Government's Bill is a principal point of contention but is not without compelling logic when rationally examined.

The suggestion that our commitment to equality before law, as enshrined in Article 14 of the Constitution, requires that the Prime Minister not be treated differently in matters of investigation and prosecution is untenable considering that the equality clause itself permits rational classification. Having regard to the nature of the Prime Minister's duties and his position at the core of a parliamentary form of Government in which he is "the keystone of the cabinet arch" and not merely the first among equals, it is only fair to ensure that an incumbent Prime Minister is sufficiently protected against vexatious and malafide inquiries and prosecution.

In any case, it is not as if the Prime Minister cannot be proceeded against for corruption under the existing laws including the Prevention of Corruption Act. The difference is that under the existing anti-corruption regime in India, there cannot be an automatic triggering of a prosecutorial or inquisitorial mechanism against the Prime Minister as soon as any complaint, howsoever untenable, is lodged and rightly so.

The question we must, therefore, ask is whether the nation's resolve against corruption in public life gets diluted merely by excluding the Prime Minister from the ambit of the Lokpal and also whether there are enough weighty considerations attached to and inherent in the office of the Prime Minister to justify his exclusion from the special law being contemplated.

We must ponder whether it is necessary to debilitate institutions of parliamentary democracy while subserving the national agenda of combating corruption resolutely? The conventions of the Constitution, as also the processes and rules of governance which have evolved with the maturing of our democracy, need to be harnessed to further strengthen Constitutional mechanisms rather than sacrificing and negating the fundamental principles of our republican charter which "are the slow accretion of centuries, the outcome of patience, tradition and experience.....".

A combined reading of sections 17 and 23 of the proposed Lokpal Bill makes it clear
that as soon as any allegation of corruption is received by way of a complaint, the investigative/prosecutorial machinery of the Lokpal gets activated through the legislative mandate expressed in the words "shall enquire" in S.17 of the Government's Bill. Although Section 23 contemplates a preliminary inquiry or investigation into the complaint, the investigative process gets activated as soon as a complaint is received.

The decision to initiate such an investigation or inquiry against the Prime Minister, against which there is no efficacious and urgent recourse, will inevitably discredit and cripple the nation's chief political executive in whose hands the security of the nation and the conduct of war and international relations is Constitutionally entrusted. It is, therefore, only in the fitness of things that in the proposed Lokpal Bill, the Prime Minister has been excluded from its application.

The argument that corruption cases against serving Prime Ministers and Chief Ministers in the past have not led to political instability and considering that there was no change of government when the JMM and other cases were being investigated, misses the point in narrowly perceiving political instability in terms of regime change alone. Political instability is a function of perception of credibility deficit in the processes of governance and decision making at the highest level, which the nation can ill afford at any time.

The view that officers and institutions serving as part of the political establishment cannot be expected to freely and fearlessly discharge their functions in bringing to justice individuals in high places, is grossly unfair to those valiant defenders of our Constitutional conscience who have kept faith and vigourously prosecuted the high and mighty in the past.

The cases against a Prime Minister in the JMM case, serving Chief Ministers of Bihar and Jharkhand and more recently the Lokayukta's findings against a serving Chief Minister of Karnataka etc would demonstrate that no special law is required to deal with allegations of corruption against high political functionaries as long as we have men and women of character and integrity who will not dither in the discharge of their public duties. We know that the efficacy of any law depends upon the wisdom and sense of justice of those who administer it.

For all the above reasons, it is desirable that the Damocles' sword is not allowed to hang over the head of a Prime Minister even after his retirement in connection with acts performed as Prime Minister.

The fact that the Prime Minister is not immune from criminal liability under the existing laws, and that these have been invoked in the past coupled with examples of conviction of Prime Ministers in countries like Japan, Israel and Italy, decisively establish the point that the pervasiveness of corruption is not the consequence of inadequate laws. Rather, it is the general decline in standards of personal and political integrity that has on occasions put to shame a nation of a billion plus people which draws its inspiration from the national motto "Satyameva Jayate".

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