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ECONOMIC OFFENCES: DEFINITION AND GENESIS

While commemorating its golden jubilee in 1995, one of the key commitments of countries at the United Nations was the urgent need for international cooperation in countering transnational crime. In the 20th century, while the most common forms of transnational crime are economic offences, the exact nature and ambit of such offences has not been clarified in any international forum, thus far. While several attempts have been made to formulate a comprehensive definition for what constitutes an 'economic offence' or an 'economic crime', none have proved to be universally accepted. This is because different national regimes treat economic offences differently, making it difficult to have a uniform definition of such offences. Notwithstanding, it is possible to draw upon certain general principles from different regimes, which are instrumental in identifying and understanding an economic offence.

The Eleventh United Nations Congress on Crime Prevention and Criminal Justice (Bangkok, April 2005) (hereinafter "UN Congress") attempted to broadly define an "economic crime" as those activities which involved one or other form of economic gain or financial or material benefit. In the opinion of the UN Congress, economic crimes included economic fraud and all identity-related crimes, except for those that did not necessarily contain an economic element or motive. While specifically

noting that there was an absence of any comprehensive definition of economic crimes, the UN Congress attempted to identify the key components of such crimes, by defining specific crimes within the ambit of such offences.

Hence, for instance, the crime of fraud, which forms part of economic crimes, was observed to have two meanings. While in most countries, legislation has limited the offence of "fraud" to cases where there was economic loss to victims, the terms "fraud" and "fraudulent" were observed to be commonly used by officials, academics and others to describe general conduct involving the use of dishonesty or deception, but not necessarily causing any financial benefit or loss. Instances where genuine identity information or documents are secretly taken or misappropriated without the knowledge of the person concerned, were described as "identity theft". Furthermore, other instances where identities were used to deceive individuals and institutions were referred to as "identity fraud".

The term "financial crime" was defined to include all crimes that are committed using major financial systems or are committed against those systems themselves. Such crimes were observed to be closely related to economic crimes, and were said to include money-laundering, certain forms of corruption affecting financial institutions, and other major economic crimes that are perpetrated by means of such financial structures. The terms of "commercial crime" and "commercial fraud" were also defined and were said to include any form of criminal activity involved in a monetary or barter transaction, ranging from large commercial dealings to small bargains in the marketplace.

Although the exercise of defining the various manifestations of economic crimes was useful in understanding the broad features of such crimes, it also ran the risk of

overly fragmenting the approach to addressing such crimes. The UN Congress also noted that, while it was difficult to comprehensively define economic crimes, the broad understanding of such crimes that was captured in most jurisdictions was of any action or omission that either ran counter to public economic policy, or threatened basic principles of public economic order.

In an article titled "The Boardroom to the Cellblock: The Justifications for Harsher Punishment of White-Collar and Corporate Crime" by J. Scott Dutcher (37 Ariz. St. L.J. 1295 (2005)), the rationale for criminal punishment for white collar crimes, which are a form of economic crimes that are committed by individuals with a high social status, was explained comprehensively. According to the author, white collar crimes are an invention of globalisation. The offenders of such crimes occupy powerful positions and are driven by personal interest and greed. The example of Raj Rajaratnam and Rajat Gupta both convicted in the United States on charges of insider trading provide a classic case in point.

While the sophistication of these crimes makes them difficult to trace back to the individuals who committed them, the financial losses that such crimes instigate make them a nightmare for individual businesses and policy-makers. Consequently, the author is of the view that such crimes require harsh punishments that would deter offenders, who are powerful and educated individuals, from taking the risk of committing them.

White collar crimes constitute one of the most grievous forms of economic offences and are capable of toppling over businesses and pushing back economies. The huge financial gains and losses involved in white collar criminal activities are the primary

reason for this. Consequently, States are encouraged to put in place adequate measures to deter the commission of crimes of such magnitude.

The growth of white collar crimes amongst a plethora of economic offences is a relatively recent phenomenon in India. This is not to say that economic offences did not exist previously– however, while economic crimes in pre-independence India were primarily traditional offences of theft, fraud and cheating, the nature of such crimes has changed considerably over the years. As a result both methods of investigation, prevention and adjudication of such offences need to keep pace. This is the main theme of this discussion below.

THE PRE-INDEPENDENCE ERA

The Ministry of Home Affairs, Government of India, defines economic crimes to mean criminal acts done either solely or in an organised manner with or without associates or groups with intent to earn wealth through illegal means, and carry out illicit activities violating the laws of the land, other regulatory statutory provisions governing the economic activities of the Government and its administration.

While drafting the Indian Penal Code, Lord Macaulay included the crimes of theft, smuggling, cheating, counterfeiting, criminal breach of trust, fraud or larceny and misappropriation or embezzlement in economic crimes. Macaulay's motivations for including such crimes within the Indian Penal Code present an interesting justification. The traditional economic offences of theft, extortion, robbery and dacoity, criminal misappropriation of property, criminal breach of trust, receiving of stolen property, cheating, fraudulent deeds and disposition of property, mischief and criminal trespass are found under the Chapter on "Offences against Property" in the Indian Penal Code. These offences are made punishable on the ground that they constitute violations of the right to property.

According to Lord Macaulay, the right to property was a creature of law that required the sanction of penal law to remedy "imperfect or obscure" operation of civil law over such right. As evident in "The Indian Penal Code: With Notes" by W. Morgan and A.G. Macpherson, Esqrs., Lord Macaulay noted in respect of offences against property that :

> *The substantive civil law, in the instances which have been given, is different in different countries and in the same country at different times. As the substantive civil law varies, the penal law, which is*

added as a guard to the substantive civil law, must vary also. And while many important questions of substantive civil right are undetermined, the Courts must occasionally feel doubtful whether the provisions of the Penal Code do or do not apply to a particular case.

I shall elucidate upon the nature of some of the offences, as envisaged by Lord Macaulay under the Indian Penal Code, for more clarity over the rationale for their inclusion. The crime of theft, for instance, as mentioned under Sections 378 to 382 of the Indian Penal Code, includes the individual crime of theft itself, theft in dwelling house, theft by clerk or servant of property in possession of master, and theft after preparation made for causing death, hurt or restraint in order to commit theft. As per notes on the Indian Penal Code, Courts were required to have regard to the principles of civil law while ruling upon the crime of theft. Thus the most common economic offence essentially had no independent jurisprudence but operated as a civil law matter would.

The crime of extortion, as mentioned under Sections 383 to 389 of the Indian Penal Code, deals with (1) general crime of extortion, (2) putting person in fear of injury in order to commit extortion, (3) extortion by putting a person in fear of death or grievous hurt, (4) putting person in fear of death or of grievous hurt, in order to commit extortion, (5) extortion by threat of accusation of an offence punishable with death or imprisonment for life, etc, and (6) putting person in fear or accusation of offence, in order to commit extortion. The notes on the Indian Penal Code describe the crime of extortion, like theft, to belong to those classes of offences that involve wrongful gain. However, as rightfully observed by Lord Macaulay:

The dishonest intention to obtain property is common to both these offences; but in theft, the object of the offender is to take property which is in the possession of a person out of that person's possession, and it is part of the definition that the offender's intention should be to take "without that person's consent".

The offence of extortion is distinguished from theft by this obvious circumstance that it is committed by the wrongful obtaining of a consent, and not without consent. It is distinguishable from robbery by this feature that the property is obtained by means of such fear of injury as does not amount to the fear of instant death or personal hurt, which is part of the offence of robbery.

The criminal misappropriation of property includes the dishonest misappropriation of property and dishonest misappropriation of property possessed by deceased person under Sections 403 and 404 of the Indian Penal Code respectively. As mentioned in the notes on the Indian Penal Code:

In the offence of criminal misappropriation, there is not necessarily an invasion of the possession of another person by an attempt to take from him that which he possesses. The offender is already in possession of the property; and is either law-fully in possession of it, because either he has found it or is a joint owner of it, or his possession, if not strictly lawful, is not punishable as an offence, because he has acquired it under some mistaken notion of right in himself or of consent given by another.

The dishonest intention to appropriate the property of another is common to theft and to criminal misappropriation. But this intention which in theft is sufficiently manifested by a moving of the property must in the other offence be carried into action by an actual misappropriation or conversion.

The offence of criminal breach of trust includes the general offence of criminal breach of trust, criminal breach of trust by carrier, criminal breach of trust by clerk or servant, and criminal breach of trust by public servant, or by banker, merchant or agent as mentioned under Sections 405 to 409 of the Indian Penal Code. As mentioned in the notes on the Indian Penal Code:

This offence like the offence of Criminal Misappropriation is characterised by an actual fraudulent appropriation of property. There is not originally a wrongful taking or invoking as in theft, but the offence consists in a wrongful appropriation of property, consequent upon a possession which is lawful.

The offence is distinguishable from Criminal Misappropriation, because the subject of it is not property, which by some casualty or otherwise, but without criminal means, comes into the offender's possession; but property which is entrusted to the offender by the owner or by other lawful authority and which the offender holds subject to some duty or obligation to apply it according to the trust.

From a reading of the above-mentioned offences, it is evident that Lord Macaulay carefully delineated distinct economic offences based on their nature and applicability. At the same time, severe criminal punishments were not envisaged

since they were essentially envisaged *'as a guard to the substantive civil law'*. In ***Rajendra Prasad v. State of Uttar Pradesh, (1979) 3 SCC 646***, the Supreme Court discussed Lord Macaulay's intentions while drafting the Indian Penal Code, by stating that:

> *The basic principle of the nineteenth century Indian Penal Code, said Lord Macaulay who drafted it, is 'the principle of suppressing crime with the smallest possible amount of suffering'. He lays this down as an unassailable axiom rather than as a contention for debate.*

Hence, the above discussion demonstrates that the traditional economic offences under the Indian Penal Code were not codified by Lord Macaulay with the intention of imposing harsh punishments on the perpetrators of such crimes. Rather, these offences were solely intended to punish crimes against the property of a person, which were not regarded to be of as serious nature as crimes against the body but consequently not adequately deterred by civil penalties. Hence they operated as a halfway house between civil law and criminal law that penalised offences against the body. This interpretation of economic offences was, however, slated for a change after India's independence in 1947.

THE LICENCE RAJ

In a paper titled "The Unequal Effects of Liberalization: Evidence from Dismantling the License Raj in India" (Philippe Aghion, Robin Burgess, Stephen J. Redding, and Fabrizio Zilibotti, *American Economic Review*, 98(4): 1397-1412), the authors discuss the period preceding liberalization in India at length. According to the facts noted in the paper, immediately following its independence in 1947, India embarked on a period of centrally planned industrialization. The centerpiece of this plan was the Industries (Development and Regulation) Act, 1951, which made it mandatory to procure a license to run any industry in India and promoted industrial development in a controlled manner. Since the Government of India had complete control over the grant of licenses to Indian industries under the Act, the phase during which the Act was in operation is also known as the period of the license raj.

Both private and public companies were required to obtain a license and register with the Government during the license raj regime. These licenses were aimed at meeting production targets under the five-year development plans of the newly independent India. The Government control over industrial development was also intended to accelerate industrialization and economic growth in targeted areas and to reduce regional disparities in income and wealth across different regions in India.

Under the Industries Act, an industrial license was required to (i) establish a new industrial unit, (ii) carry on business in an existing unlicensed industrial unit ,(iii) significantly expand an existing industrial unit, (iv) start a new product line in the

unit or, for that matter,(iv) change the location of the unit. Applications for obtaining the industrial license were required to be made to the Ministry of Industrial Development and then reviewed by an inter-ministerial Licensing Committee. The socialistic leaning of the Indian Government immediately post independence was the primary reason for the license-raj.

However, due to the overly bureaucratic nature of the licensing process, there was considerable uncertainty regarding the process of license-approval. According to the Hazari Committee set-up under the chairmanship of Dr. R.K. Hazari, who was a consultant with the Planning Commission, to review Industrial Licensing, 35% of license applications in the year 1959-1960 were rejected, with the rejected applicants accounting for approximately 50% of the investment value of all applications. The inordinate delays in the approval process of the license were also very common during the time. Neither were the applicants provided explicit criteria for the award of the license, nor were they given an opportunity to defend their license application prior to its cancellation. In fact, the Licensing Committee reviewed license applications on a sequential, first-come, first-serve basis in view of the five-year development goals.

The operation of this system suffered from several drawbacks. The principal among them was the rampant corruption in the grant of licenses. The Licensing Committee always tended to favor the larger industrial houses, which were not only better informed, but were also instrumental in submitting multiple applications early on in order to foreclose the planned number of applications required to be received. The

poor also suffered significantly due to the rampant corruption, which led to the diversion of public funds intended for social welfare.

To combat these evils, the first major law titled Prevention of Corruption Act (PCA), 1947, was enacted to prevent unauthorized encashment of postwar reconstruction funding. The Anticorruption Bureau was also established by the Parliament in 1961 to investigate violations of the PCA. The punishment under the PCA entailed a maximum term of 5 years. In the case of ***C.I. Emden v. State of Uttar Pradesh,*** *AIR 1960 SC 548,* the constitutional validity of Section 4(1) of the Prevention of Corruption Act, 1947 was challenged before the Supreme Court of India. The said section stated that *"if any trial of an offence punishable under s. 161 or s. 165 (offences relation to public servants that were repealed by the PCA of 1988) of the Indian Penal Code, it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained or agreed to accept or attempted to obtain, that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in the said section 161, or as the case may be, without consideration or for a consideration which he knows to be inadequate."* While upholding the validity of the said Section, the Supreme Court observed that:

> *Mr. Anthony, for the appellant, contends that this section offends against the fundamental requirement of equality before law or the equal protection of laws. It is difficult to appreciate this argument. The scope and effect of the fundamental right guaranteed by Art. 14*

has been considered by this Court on several occasions; as a result of the decisions of this Court it is well established that Art. 14 does not forbid reasonable classification for the purposes of legislation; no doubt it forbids class legislation; but if it appears that the impugned legislation is based on a reasonable classification founded on intelligible differentia and that the said differentia have a rational relation to the object sought to be achieved by it, its validity cannot be successfully challenged under Art. 14.

Legislature presumably realised that experience in courts showed how difficult it is to bring home to the accused persons the charge of bribery; evidence which is and can be generally adduced in such cases in support of the charge is apt to be treated as tainted, and so it is not very easy to establish the charge of bribery beyond a reasonable doubt. Legislature felt that the evil of corruption amongst public servants posed a serious problem and had to be effectively rooted out in the interest of clean and efficient administration. That is why the Legislature decided to enact s. 4(1) with a view to require the raising of the statutory presumption as soon as the condition precedent prescribed by it in that behalf is satisfied.

In addition to PCA, which was later amended in 1988, several other statutes to regulate economic offences, including the Monopolistic and Restrictive Trade Practices Act, 1969, and the Foreign Exchange Regulation Act (FERA), 1973, were also enacted during the license-raj. Some of these acts entailed harsh punishments

for economic offences; however, harsh penalties as a legislative trend was still in its nascent stages.

While interpreting statutes enacted during the license raj, the judiciary at the time, also considered it expedient to give higher deference to the intent of the legislature in the specific context of economic statutes. For instance, in the case of ***R.K. Garg and Ors. v. Union of India (UOI) and Ors.***, *(1981) 4 SCC 675*, where the Supreme Court was asked to rule upon the constitutional validity of the Special Bearer Bonds (Immunities and Exemptions) Act, 1981, it was observed by P.N. Bhagwati J. that:

> *Another rule of equal importance is that laws relating to economic actives should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrine or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislature judgment in the field of economic regulation than in other areas where fundamental human rights are involved.*

In another case of ***Akadasi Padhan v. State of Orissa***, *AIR 1963 SC 1047*, where the constitutional validity of a provincial act that prohibited all persons except the Government or its officers and agents to purchase or transport 'kendu' leaves was under challenge, the Supreme Court noted that:

In interpreting such a provision, it is essential to bear in mind the political or the economic philosophy underlying the provisions in question, and that would necessarily involve the adoption of a liberal and not a literal and mechanical approach to the problem. With the rise of the philosophy of Socialism the doctrine of State ownership has been often discussed by political and economic thinkers. Broadly speaking, this discussion discloses a difference in approach. To the socialist, nationalisation or State ownership is a matter of principle and its justification is the general notion of social welfare. To the rationalist, nationalisation or State ownership is a matter of expediency dominated by considerations of economic efficiency and increased output of production.

These decisions that economic offences committed during the license raj were primarily of the traditional kind contained in the IPC. The higher judiciary, which had not yet reached its activist phase, also showed greater deference to the intent of the legislature at the time as well. All of these trends, however, changed after the liberalization of the Indian economy.

GLOBALISATION AND LIBERALISATION OF THE INDIAN ECONOMY

Post-1991, industrial licensing was abolished in India in almost all industries and a policy of liberalization was adopted. Specifically, tariff and non-tariff barriers were slashed to open up the Indian economy for the inflow and outflow of international goods. As noted in the book titled "Indian Economic Reforms: An Assessment" by K. C. Reddy, the rationale for liberalization was to actively encourage and assist Indian entrepreneurs to exploit and meet the emerging domestic and global opportunities and challenges. The inflow of foreign direct investment into India in the 1990s, not only increased the role and importance of the private sector in the Indian economy but has also heightened the need for focus on business ethics and corporate integrity. To understand the various corporate governance issues in the financial sector, the Naresh Chandra Commission was set-up by the Department of Company Affairs under Ministry of Finance in 2002. One observation made by this commission was that unlike in many other countries, effective corporate governance in India did not emerge from financial crisis, but rather from increasing international competition that resulted from liberalization.

In view of this, a range of economic statutes such as the Prevention of Corruption Act, 1988, Prevention of Money Laundering Act, 2002 and Foreign Exchange Management Act, 1999 (FEMA) were enacted during this time. These acts created new economic offences of money laundering and smuggling of foreign currency and created relatively harsher punishments than the acts during the license raj. Moreover, a trend of self-regulation also began to gain momentum in view of the reduced control of the Government and increased control of the market and the private sector.

In the case of *Attorney General for India and Ors. v. Amratlal Prajivandas and Ors, AIR 1994 SC 2179*, the constitutional validity of two enactments, namely, Conservation of Foreign Exchange and Prevention of Smuggling Act, 1974 (COFEPOSA) and Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA) was challenged before the Supreme Court. While upholding the validity, the Supreme Court made several pertinent observations, namely:

> *Till the wind of liberalisation started blowing across the Indian economic landscape over the last year or two, the Indian economy was a sheltered one. At the time of independence, India did not have an industrial base worth the name. A firm industrial base had to be laid. Heavy industry was the crying need. All this required foreign exchange. The sterling balances built up during World War II were fast dissipating. Foreign exchange had to be conserved, which meant prohibition import of several unessential items and close regulation of other imports. It was also found necessary to raise protective walls to nurture and encourage the nascent industries. These controls had, however, an unfortunate fall-out. They gave rise to a class of smugglers and foreign exchange manipulators who were out to frustrate the regulations and restrictions - profit being their sole motive, and success in life the sole earthly judge of right and wrong. As early as 1947, the Central Legislature found it necessary to enact the Foreign Exchange Regulation Act, 1947 and Imports and Exports (Control) Act, 1947. Then came the import (Control) Order, 1955 to place the policy regarding import on a surer footing. In the year 1962,*

a new Customs Act replaced the antiquated Sea Customs Act, 1878. The menace of smuggling and foreign exchange violations, however, continued to rise unabated. The Parliament then came forward with the conservation of Foreign Exchange and Prevention of Smuggling Act, 1974 (COFEPOSA). It provided for preventive detention of these anti-social elements.

In another case of ***Manzoor Ali Khan v. Union of India (UOI)***, *AIR 2014 SC 3194*, the constitutional validity of Section 19 of Prevention of Corruption Act, 1988 (prior sanction), was under challenge before the Supreme Court of India. While upholding the section, the Supreme Court observed the following principles from its prior decisions:

The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. It also has adverse effect on foreign investment and funding from the International Monetary Fund and the World Bank who have warned that future aid to underdeveloped countries may be subject to the requisite steps being taken to eradicate corruption, which prevents international aid from reaching those for whom it is meant. Increasing corruption has led to investigative journalism which is of value to a free society. The need to highlight corruption in public life through the medium of public interest litigation invoking judicial review may be frequent in India but is not unknown in other countries.

The above decisions demonstrated a trend towards harsher punishments for economic offences such as bribery and smuggling in view of its deleterious effects

on the economy. This trend was a direct result of liberalization, which increased the wealth disparity among the masses and pushed India towards a more capitalist structure of governance. This was concomitant with the growth of an activist and populist Court.

In *Vineet Narain v. Union of India*, (1998) 1 SCC 226, popularly known as the Jain Diaries case, the Supreme Court began– what is now a common process in large-scale criminal investigations particularly in economic offences– a Court-monitored probe. On 25th March, 1991, an alleged official Ashfak Hussain of the terrorist organisation Hizbul Mujahideen, was arrested in Delhi. Subsequent to his interrogation, raids were conducted by the Central Bureau of Investigation (CBI) on the premises of Surender Kumar Jain, his brothers, relations and businesses. During the raid, the CBI seized two diaries and two note books from the premises. They contained detailed accounts of vast payments made to persons identified through their initials only. The initials, however, corresponded to the initials of various high-ranking politicians, in power and out of power, and of high ranking bureaucrats. However, no action was taken to investigate the contents of the diaries or the allegations against high profile persons. Consequently, writ petitions were filed in the public interest under Article 32 of the Constitution of India to direct the CBI to take action immediate action in the matter.

The key issue before the Court were whether judicial review was available for activating the investigative process, an executive function. Answering in the affirmative it issued wide-ranging directions not only to monitor the probe itself through a device known as the 'continuing mandamus' but also recommended steps for reform of the CBI and the CVC. It directed the government to make the latter a

statutory body and made the CBI accountable to it. The fact that the offences in question were economic weighed heavily with the Court:

> *"The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. It also has adverse effect on foreign investment and funding from the International Monetary Fund and the World Bank who have warned that future aid to under-developed countries may be subject to the requisite steps being taken to eradicate corruption, which prevents international aid from reaching those for whom it is meant."*

Similarly, in Dr. Subramanian Swamy v Director CBI (2014) 8 SCC 682, the issue before the Court was whether Section 6-A of the Delhi Special Police Establishment Act, 1946 requiring the CBI to take sanction from the appropriate government before commencing an enquiry against any public servant above the rank of a Joint Secretary is unconstitutional and contrary to the Right to Equality protected under Article 14 of the Constitution. According to the Supreme Court, Section 6-A of the DSPE Act, was unconstitutional for the reason that it created two classes of Government servant with no rational nexus to the purposes of the DSPE Act. The Court did not go into the question of the arbitrariness of Section 6-A but struck it down purely for reason that it created an unreasonable classification with no nexus to the purpose of the Act.

Due to the reasoning adopted, this judgment left open the possibility that the Government simply extends the protection of sanction before beginning inquiries to all Government servants and not just those who are of the rank of Joint Secretary and above. This is the leveling down problem in equality jurisprudence and an

unintended consequence of a judicial order that failed to appreciate the greater degree of protection that senior government officers require to perform their professional obligations freely and fairly.

These judgments demonstrate both the potential and pitfalls of the evolving judicial role in economic offences. While such a role carries great promise of ensuring probity and establishes high standards for rectitude in public life, it comes at the cost of the judiciary straying into areas that are beyond their legitimacy thereby leading to several unintended consequences. This is seen clearly from the *Subramaniam Swamy* case which in its alacrity to strike down a statutory provision, failed to take into account the protection from prosecution necessary for senior officials as envisaged in the Act. As a result, while its intention was lofty, the jurisprudence that it laid down was counter-productive– now, all government officers could also be protected by a sanction requirement before CBI commences investigation, were a law to such an effect passed.

This expansive judicial role is also manifested in a different way– in stricter judicial scrutiny of offences in money-laundering cases, even at the stage of grant of bail. In ***Union of India (UOI) v. Hassan Ali Khan and Anr.***, (2011) 10 SCC 235, which involved alleged money-laundering on a large scale, the Court cancelled bail despite the link at that stage between the accused, the large sums of money that had been seized, and possible purposes for which they may be used, being nebulous. It said,

> *"...It is true that at present there is only a nebulous link between the huge sums of money handled by the Respondent No. 1 and any arms deal or intended arms deals, there is no attempt on the part of the Respondent No. 1 to disclose the source of the large sums of money handled by him. There is*

no denying the fact that allegations have been made that the said monies were the proceeds of crime and by depositing the same in his bank accounts, the Respondent No. 1 had attempted to project the same as untainted money. The said allegations may not ultimately be established, but having been made, the burden of proof that the said monies were not the proceeds of crime and were not, therefore, tainted shifted to the Respondent No. 1 under Section 24 of the PML Act, 2002. ...

...The High Court having proceeded on the basis that the attempt made by the prosecution to link up the acquisition by the Respondent No. 1 of different Passports with the operation of the foreign bank accounts by the said Respondent, was not believable, failed to focus on the other parts of the prosecution case. It is true that having a foreign bank account and also having sizeable amounts of money deposited therein does not ipso facto indicate the commission of an offence under the PML Act, 2002. However, when there are other surrounding circumstances which reveal that there were doubts about the origin of the accounts and the monies deposited therein, the same principles would not apply...."

Again, in *Gautam Kundu v. Manoj Kumar, Assistant Director, Eastern Region, Directorate of Enforcement (Prevention of Money Laundering Act) Govt. of India,* Criminal Appeal No. 1706 of 2015 (Arising out of SLP (Crl.) No. 6701 of 2015), the Court held:

"... We have heard the learned Counsel for the parties. At this stage we refrained ourselves from deciding the questions tried to be raised at this

stage since it is nothing but a bail application. We cannot forget that this case is relating to "Money Laundering" which we feel is a serious threat to the national economy and national interest. We cannot brush aside the fact that the schemes have been prepared in a calculative manner with a deliberative design and motive of personal gain, regardless of the consequence to the members of the society..."

Though these are illustrative examples of the judicial attitude towards bail in PMLA cases, it is clear that in economic offences, the development of jurisprudence of courts has been such that courts have steadily expanded their own power, perhaps filling in for a retreating government, in widening the ambit of economic crimes. The concept of absolute liability for inherently dangerous industries (Oleum Gas Leak case), the widening remit of offences relating to the environment (continuing mandamus in the Godavarman case including a series of contempt orders) and a range of innovative and arguably expansive constitutional remedies (cancellation of all licenses in the 2G spectrum case) are all manifestations of such expansion.

However there is one continuing similarity in the jurisprudence, both in the licence Raj and in the post-liberalisation era—judicial deference in not striking down key legislation as unconstitutional has continued unabated. Like the *Bearer Bonds* case described above or *Delhi Cloth and General Mills v. Union of India*, AIR 1983 SC 937 where the Court upheld the restriction on companies having to deposit 10% of their maturing deposit in a scheduled bank, government security etc., even in the current scenario, courts are slow to strike down legislation that has a direct bearing on economic matters, including offences, as unconstitutional. In J. ***Jayalalitha v.***

U.O.I. & Anr., (1999)5 SCC 138, the question before the Court was whether Section 3 of the Prevention of Corruption Act, 1988 insofar as it empowered the State Government to appoint as many Special Judges as may be necessary "for such case or group of cases" as may be specified in the notification, was violative of Article 14 for vagueness. Repelling this contention, the Court held:

> *"...In order to achieve the object of the Act, how many special judges would be required in an area could not have been anticipated by the legislature as that would depend upon various factors. The number of judges required for an area would vary from place to place and from time to time. So also requirement of a separate special Judge for a case or group of cases in addition to the area special judge who could have otherwise dealt with that case or those cases would also depend upon various variable circumstances. Therefore, no fixed rule or guideline in that behalf could have been laid down by the legislature. The legislature had to leave it to the discretion of the Government as it would be in a better position to know the requirement."*

Taken together, the evolving jurisprudence is a sign of a legal and judicial system attempting to cope up with the dynamic nature of economic offences in post liberalisation India. As is evident, both the nature of such offences in law and judicial approaches to interpretation are changing, attempting to keep up with the ever-changing nature of such crimes themselves. One can only recall the words of the Santhanam Committee Report (1964) which was well ahead of its time in dealing perceptively with economic crimes:

The advance of technology and scientific development is, contributing to the emergence of "mass society" with a large rank and file and small controlling elite, encouraging the growth of monopolies, the rise of a managerial class and intricate institutional mechanisms. Strict adherence to high standards of ethical behavior is necessary for the event and honest functioning of new social, political and economic processes. The inability of all sections of society to appreciate the need, results in the emergence and growth of White Collar Crimes, and renders enforcement of laws, themselves not efficiently deterrent, more difficult. This type of crime is more dangerous, not only because the financial stakes are higher but also because they cause irreparable damage to public morals. Tax-evasion and avoidance, share-pushing, mal-practices in the share market and administration of companies, monopolistic control, usury, under-invoicing or over-invoicing, hoarding, profiteering, sub-standard performance of contracts of construction and supply, evasion of economic laws, bribery and corruption, election offences and mal-practices are some examples of white collar crime.

Today, it is an unarguable fact that this list of economic offences identified by the Santhanam Committee has only increased and become more sophisticated. This is primarily owing to two factors- the quicker march of technological advancement the slower march of the law and jurisprudence. Courts have admirably attempted to fill the gap but their responses too are not based on the level of technical sophistication that is necessary. As a result, jurisprudence in this area has moved from deferential to expansive. This is a necessary but not sufficient condition to combat economic crimes.

This is thus a time for deep introspection and boundless initiative to ensure that the challenges India faces today– sophisticated white collar crime, newer forms of cyber crime and a general rise in complex economic offences can only be met by strong and appropriate responses from the Indian state. This needs the Parliament, Government and Judiciary acting in concert to fulfil the expectations of the people of India. This is an urgent need both to preserve the strength of the Indian economy as well as to ensure a high degree of moral probity in financial matters in public life.

Epilogue

As the economy has transformed from the 'Licence Raj' to a liberalised era, the nature of the offences has changed. The world economy has today integrated. Technology is a great facilitator. It also facilitates in economic crime. Money laundering, bank frauds, corruption, market manipulation, taxation frauds, are operations which are frequently seen in the liberalised era. The investigative agencies have to continuously upgrade their skills to be ahead of the perpetrators of these crimes.

I end with a note of caution. The Prevention of Corruption Act, 1988 was a pre-liberalisation law. It fails to distinguish between the corrupt decisions and an erroneous decision. Erroneous decisions which cause loss to the Government, are with the wisdom of hindsight, brought within the purview of the Act. This dissuades civil servants from taking correct and bold decisions in the interest of the economy. Defence purchases, commercial decision making, dis-investment and privatisation are examples of decisions which have suffered on this count. There is, thus, an

urgent need to expedite review and amend the Prevention of Corruption Act to bring it in tune with the requirements of the liberalised economy.

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