EFFECTIVE LEGAL AND PRACTICAL MEASURES FOR COMBATING CORRUPTION: A CRIMINAL JUSTICE RESPONSE – AN INDIAN PERSPECTIVE –

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I. INTRODUCTION

India is a large country with a population of over a billion people. It is the second most populous country in the world after China. It is one of the fastest growing economies in the world and is attracting huge investments from developed countries. In spite of the healthy growth indices, a vast population still lives in poverty and does not have access to basic sanitation, healthcare and education. The country's progress is seriously hampered by all pervasive corruption. It is preventing the benefits of development from reaching the deprived sections of society. Weeding out corruption today is a major challenge before Indian society.

The lawmakers of India have always been conscious of this problem. The British enacted the first codified law, The Indian Penal Code, in 1860. It had a chapter dealing with offences committed by public servants involving corruption and corrupt practices. Later, a special piece of legislation was enacted, i.e. The Prevention of Corruption Act 1947, to deal specifically with the problem of corruption in public life. Amendments were made from time to time to keep pace with the changing times. Later on, in 1988, it was replaced by a more comprehensive and broad piece of legislation - The Prevention of Corruption Act 1988.

Apart from this Act, India is a signatory to the United Nations Convention against Corruption (UNCAC). It has signed Extradition and Mutual Legal Assistance Treaties in Criminal Matters with a number of countries to ensure mutual co-operation in matters pertaining to investigation of corruption and other criminal cases. Co-operation is sought from other countries under these treaties through the instrument of Letters Rogatory (LRs).

This paper aims to give a brief overview of the Indian laws dealing with the problem of corruption. The main law, i.e. The Prevention of Corruption Act 1988, is discussed in brief. Provisions pertaining to confiscation of ill-gotten wealth and asset recovery have also been referred to. The established mechanisms for collecting information about corruption are also discussed. The problems and challenges faced by the country in the fight against corruption are also highlighted in brief.

II. LAWS AND PROVISIONS TO TACKLE CORRUPTION

A. The Prevention of Corruption Act, 1988

The Prevention of Corruption Act 1988 (hereinafter referred to as "the Corruption Act") was enacted to consolidate different anti-corruption provisions from various pieces of legislation under one umbrella and to make them more effective. The Corruption Act, *inter alia*, widened the scope of the definition of a "public servant"; enhanced penalties provided for offences in earlier laws; incorporated the provisions of freezing of suspected property during trial; mandated trial on a day-to-day basis, prohibited the grant of stay on trial; etc. Since the Corruption Act is the main law for dealing with offences pertaining to corruption in India, its salient features are discussed below.

1. Definition of "Public Servant"

The Corruption Act deals with corruption in the public sector by public servants. Though the Corruption

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Act does not cover corruption in the private sector, the definition of "public servant" in sec. 2 of this Act even covers certain categories of people who are not employed by the government. The Corruption Act does not only cover persons employed by the government or in the regular pay of the government but also *persons remunerated by fees or commission for the performance of any public duty by the Government but not employed by it*. The latter category is very important in my opinion because, by virtue of their position, such persons enjoy considerable power and can abuse the same to indulge in corrupt activities. The Corruption Act thus includes the Ministers, members of Parliament, State Legislative Assemblies, Municipal Corporations, State Cooperative Societies etc. in its fold. Even office bearers of non-governmental organizations that receive financial assistance from the government are defined as public servants.

2. Offences and Penalties under the Corruption Act

Various acts of omissions and commissions defined as offences under the Corruption Act can be broadly divided into the following categories:

(i) Bribery of Public Servants: punishable by secs. 7, 10, 11 & 12 of the Corruption Act (Article 15 of the UNCAC)

Sec. 7 punishes a public servant or a person expecting to be a public servant, who accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act. The important point to note is that even the sheer demand of a bribe or agreeing to accept a bribe is an offence under this law. Actual exchange of a bribe is not an essential requirement to be prosecuted under this law. A willing *bribe giver* is also punishable under sec. 12 of the Corruption Act. Further, those public servants who do not take a bribe directly, but through middlemen or touts, and those who take *valuable things* from a person with whom they have or are likely to have official dealings, are also punishable as per sec. 10 and 11 respectively. It is obvious that there is zero tolerance for corruption by public servants in the law and the Corruption Act demands exemplary conduct from them.

All these offences are punishable with a minimum imprisonment of six months, extendable up to five years, and also with a fine.

(ii) Embezzlement, Misappropriation of Property by Public Servants: punishable by sec. 13 (1) (c) of the Corruption Act (Article 17 of the UNCAC)

Sec. 13 (1) (c) punishes public servants who dishonestly or fraudulently misappropriate or convert to their own use any property entrusted to them as a public servant.

This offence is punishable with a minimum imprisonment of one year, extendable up to seven years, and also with a fine.

(iii) Trading in Influence: punishable by secs. 8 & 9 of the Corruption Act (Article 18 of the UNCAC)

Secs. 8 & 9 punish middlemen or touts who accept or obtain or agree to accept or attempt to obtain, gratification as a motive or reward for inducing by corrupt or illegal means, (sec. 8) or by exercise of personal influence (sec. 9), any public servant, to do or forbear to do any official act.

These offences are punishable with a minimum imprisonment of six months, extendable up to five years, and also with a fine.

(iv) Abuse of Functions by Public Servants: punishable by sec. 13 (1) (d) of the Corruption Act (Article 19 of the UNCAC)

Sec. 13 (1) (d) punishes public servants who abuse their official position to obtain for themselves or any other person, any valuable thing or pecuniary advantage (*quid pro quo* is not an essential requirement).

This offence is also punishable with a minimum imprisonment of one year, extendable up to seven years, and also with a fine.

(v) Illicit Enrichment of Public Servants: punishable by sec. 13 (1) (e) of the Corruption Act (Article 20 of the UNCAC)

Sec. 13 (1) (e) punishes public servants, or any person on their behalf, who are in possession, or who have been in possession, of pecuniary resources or property disproportionate to their known sources of income, at any time during the period of their office. Known sources of income have further been explained as income received from any lawful source only. It is a very important provision, particularly for booking public servants in senior positions because often there are not many complaints against them related to bribe seeking or abuse of official position.

This offence is also punishable with a minimum imprisonment of one year, extendable up to seven years, and also with a fine.

(vi) Habitual bribe seekers are punishable under sec. 13 (1)(a)& (b) of the Corruption Act with a minimum imprisonment of one year, extendable up to seven years, and also with a fine.

(vii) Persons who habitually act as middlemen or touts, or who pay bribes, are punishable with a minimum imprisonment of two years, extendable up to seven years, and also with a fine, as per sec. 14.

(viii) Attempt at Certain Offences by Public Servants: punishable by sec. 15 of the Corruption Act (Article 27 of the UNCAC)

An attempt at committing offences pertaining to criminal misappropriation of property or abuse of official position by a public servant is punishable with imprisonment for up to three years and also with a fine, under sec. 15.

3. Determination of Quantum of Fine - sec. 16 of the Corruption Act

Sec. 16 mandates that while fixing the amount of a fine as part of penalty for committing an offence under this Act, the court will take into consideration the value of the properties which are proceeds of crime, and in case of disproportionate assets, pecuniary resources or property for which the accused is unable to account satisfactorily.

4. Necessity of obtaining Previous Sanction/Permission for Prosecution

Sec. 19 mandates that the investigating agency, after completing an investigation of a case for offences under secs. 7, 10, 11, 13 and 15 of this Act acquires the prior approval of the authority competent to remove the public servant from his or her present post, before launching prosecution in a court of law. No court can take cognizance of above offences unless such a sanction accompanies the report of the investigating agency filed in the court of law.

Hence, after completing investigation, the investigating agency forwards its investigation report, containing detailed findings of the investigation, to the competent authority to provide sanction for launching prosecution against the accused public servant. The investigation report is filed in a court of law along with such sanction to enable the court to initiate prosecution. This has been done with a view to save public servants from frivolous prosecution or from prosecution for acts done in good faith while discharging an official function. This is applicable only to incumbent public servants.

B. Freezing, Seizure and Confiscation of Properties - The Criminal Law (Amendment) Ordinance, 1944 (Article 31 of UNCAC)

This is an important law on freezing, seizure and confiscation of properties which are proceeds of crime, including offences under the Corruption Act. Such properties identified during investigation can be frozen under this law. Properties can remain frozen till disposal of the case by the court after completion of the investigation. If the alleged offence is proved in the court of law and the property is proved to be the proceeds of crime, the court will order its confiscation.

C. Criminal Procedure Code 1973 together with Mutual Legal Assistance Treaties (MLAT) in Criminal Matters and Extradition Treaties

Sec. 166 A and 166 B of the above code empower the crime investigation agencies of India to make requests to other countries as well as to entertain requests from other countries to render assistance in the

investigation of crime registered in the respective countries. Such letters of request are popularly known as *Letters Rogatory*. Such Letters Rogatory are executed on the basis of Mutual Legal Assistance Treaties and Extradition Treaties India has signed with other countries. To date India has Mutual Legal Assistance Treaties in Criminal Matters with 20 countries and Extradition Treaties with 25 countries. The Mutual Legal Assistance Treaties invariably have a chapter on asset recovery and sharing the same. With other countries, international co-operation is sought on the basis of guarantee of reciprocity.

In a case currently under trial in my region, we have effectively made use of these instruments in tracking proceeds of crime in a foreign country. National Fertilizer Ltd., an important public sector enterprise, placed an order for supplying 0.2 million metric tons of urea fertilizer to a Turkish firm. Advance payment of approximately 38 million US dollars was also made to the firm. With the connivance of public servants, the proprietors of this firm siphoned off the whole amount and did not supply any fertilizer. The Central Bureau of Investigation registered a criminal case in 1996. During investigation, the CBI was able to track a big part of the misappropriated amount to certain bank accounts in Switzerland and other countries. Resorting to Letters Rogatory as per the Criminal Procedure Code, it has been possible to track the money lying in such bank accounts. On conclusion of trial of this case, the proceeds of crime are expected to be returned to the firm.

D. The Prevention of Money Laundering Act 2002 (Article 23 of the UNCAC)

Many public servants are able to hold their ill-gotten wealth in foreign countries, which they subsequently transfer to their homeland through money laundering, disguising them as funds, apparently from a legal source. This Act empowers the Directorate of Enforcement, India, and Financial Intelligence Unit, India, both agencies of the Government of India, to investigate and prosecute such persons under the said Act.

E. The Foreign Exchange Management Act 1999

Middlemen or touts, who take huge commissions for brokering deals pertaining to purchases from foreign suppliers, often transfer such money in foreign currencies, claiming it to be the proceeds of some business abroad. This Act empowers the Directorate of Enforcement, India to investigate and prosecute such persons under the said act.

F. The Right to Information Act 2005

It is a well-known fact that too much secrecy in public administration breeds corruption. The Right to Information Act aims at ensuring efficiency, transparency and accountability in public life. This Act requires all public authorities, except the ones that handle work relating to national security, to publish all information about their functioning at regular intervals through various means of communication, including the Internet. Now any person can seek any information from the concerned public authority just by filing an application at almost at no cost. The public authority has to reply to the application compulsorily within 30 days. If the information sought is denied, the applicant has a right to agitate further before the appellate authorities under this Act. This can indeed be described as a revolutionary step towards the eradication of corruption from public life.

G. India and the United Nations Convention against Corruption 2003 (UNCAC)

India has welcomed the UNCAC, which provides for international co-operation and mutual legal assistance in investigating cases of corruption and recovery of assets. India signed the UNCAC in December 2005. By signing the Convention India has reiterated its resolve to strengthen international co-operation as envisaged in the Convention. It is in the process of enactment of requisite enabling legislations by the concerned Ministries or Departments before ratifiying the Convention. Once ratified, the Convention will boost India's effort and commitment to fight corruption at both domestic and international level.

III. INVESTIGATION, PROSECUTION AND ADJUDICATION

A. Investigation

India is a union of States as per the Indian Constitution. Crime is a State subject under the Constitution. Investigation and prosecution of crimes, including corruption cases, which happen within the territorial jurisdiction of the State, therefore remain the basic responsibility of the State agencies. As per the federal setup of the Indian Constitution, besides States, there are certain territories, known as Union Territories, which are directly administered by the Government of India. In order to investigate and prosecute crimes in

these areas, primarily the corruption cases, the Government of India has set up the Central Bureau of Investigation. The main agencies to probe corruption cases in India are as outlined below.

1. Anti-Corruption Bureau of States

These police agencies of the States are meant mainly for investigating corruption cases within the States under the Corruption Act. They are responsible for the prevention, detection and investigation of corruption crime only and are not engaged in conducting other police duties such as handling conventional crimes and law and order. After investigating a crime, they file the investigation reports in a court of law to launch prosecution.

2. Ombudsman, known as '*Lokayuktas*'

Many Indian states have set up the office of *Ombudsman*, known as *Lokayuktas*, mainly to probe complaints against ministers and public servants pertaining to corruption.

3. Central Bureau of Investigation (CBI)

The CBI is an investigating agency set up by the Government of India to investigate crime, especially corruption cases, in Union Territories, which are directly administered by the Government of India. Over a period of time, it has become the premier corruption investigation agency in the country. It enjoys high credibility amongst the people of India. As a result even the States also refer sensitive and large-scale corruption cases to the CBI for investigation. The High Courts of various States and the Supreme Court of the country have powers under the Indian Constitution to entrust investigation of any crime to the CBI for investigation.

The CBI has a training academy of its own. It not only provides training to its own personnel but also organizes in-service training courses for the investigators and prosecutors of the State agencies. The State agencies look up to the CBI as an expert agency for guidance in matters relating to investigation and prosecution of corruption cases. The co-operation between the two sets of agencies is highly satisfactory.

4. The Directorate of Enforcement, India

Though it does not have powers to investigate and prosecute cases under the Corruption Act, the Directorate of Enforcement, India has powers to investigate and prosecute people involved in money laundering, including public servants, under the Prevention of Money Laundering Act 2002.

B. Prosecution

Prosecution of cases investigated by both the State Anti-Corruption Bureaus and CBI is undertaken by government-appointed prosecutors. In the CBI, there are entries at two levels for prosecutors designated as "Assistant Public Prosecutors" (APP) and "Public Prosecutors" (PP) respectively. They are recruited through a competitive examination. For appointment as an APP, the minimum qualification required is to hold a degree in law and to have a minimum of three years' experience practicing as an advocate in a court of law. For appointment as a Public Prosecutor, the requirement is to hold a degree in law and to have a minimum of seven years' experience practicing as an advocate in a court of law. After appointment, APPs and PPs are trained in the CBI academy.

Besides the above, there is another category of prosecutors, known as "Special Counsels". They are counsels who have experience of practicing as an advocate for more than ten years and are considered very skilled. They do not wish to join the public prosecution service on a permanent basis but are willing to take up individual cases on behalf of the CBI. The government prepares a panel of such senior lawyers, who conduct prosecution of individual cases assigned to them.

The system of appointment of prosecutors in the States is more or less the same as described above for the CBI.

Prosecutors are not only responsible for advocating on behalf of the State at trial, they also guide the investigating officers during investigation of the cases. Investigation officers are free to seek legal counsel on any point of law from the prosecutors at any stage of investigation. The evidence collected during investigation of a case is legally scrutinized by a prosecutor before it is filed in the court of law. The

prosecutor can suggest further investigation, if necessary.

Conducting prosecution is a joint responsibility of the police and prosecutors. Whereas the prosecutors lead the evidence in the court of law, police officers assist them in briefing the witnesses and prepare them for arguments on points raised by the other side.

C. Adjudication

1. Trial by Special Judges Only

As per sec. 3 of the Corruption Act, only judges designated "Special Judges", can conduct trial of cases falling under the Corruption Act. The government appoints Special Judges from serving senior judicial officers, designated as "Sessions Judge" (SJ) or "Additional Sessions Judge" (ASJ). The minimum qualification required to become an ASJ is to hold a degree in law and to have a minimum of seven years' experience as a practicing advocate in a court of law. The selection is made through a competitive examination. ASJ are promoted to the rank of Sessions Judge after serving as an ASJ for about 15 to 20 years.

The Corruption Act requires the Special Judges to hold trial on a day-to-day basis, as far as practicable.

2. Special Powers of Special Judges

(i) Power to Grant Pardon to an Approver

As per sec. 5, Special Judges can give a pardon to any person who has been involved in the commission of an offence under this Act with a view to obtaining his or her evidence, on the condition of him or her making a full and true disclosure of all the facts and circumstances related to commission of that offence and persons involved in the same, including him or herself.

(ii) Freezing of Ill-gotten Properties during Trial

Though there is a separate law, The Criminal Law (Amendment) Ordinance, 1944, which deals with freezing, seizure and confiscation of properties, which are proceeds of crime, sec. 5 of the Corruption Act empowers the Special Judge to exercise all the powers and functions under the said law during trial.

IV. MECHANISM FOR SECURING INFORMATION OF CORRUPTION

Collecting reliable information about corruption, especially about people serving in senior positions, is an important task and challenge. In CBI, we have certain set mechanisms to obtain such information and subject the same to verification. It is described in brief as follows.

A. Complaints received from the Public

Due to the high credibility enjoyed by CBI, it receives a large number of complaints from the public every day. Such complaints are scrutinized and taken up for verification if found to contain verifiable allegations. Often such verifications result in registration of crime pertaining to corruption.

B. Information developed through Sources

Great emphasis is laid on developing information from persons who want their identities to be kept secret, otherwise known as sources. *The Whistle-Blowers (Protection in Public Interest Disclosures) Bill* meant for providing statutory protection to such persons has been passed by the Indian Parliament and is likely to become a law soon. In the CBI, the secrecy of the identity of such people is scrupulously guarded and is not compromised under any circumstance. Information thus obtained is discretely verified and registered as a crime if a criminal case is made out.

C. Cases referred by the Central Vigilance Commission (CVC) and the Chief Vigilance Officers (CVOs) of other Government Departments

The Central Vigilance Commission is a statutory body which monitors corruption in governmental departments. It supervises the work of Chief Vigilance Officers of all the departments of government and issues guidelines to them. The CVC also receives complaints from the general public about corruption. It refers such complaints to the CBI for verification and investigation if found to contain verifiable allegations.

The CVOs are in-house supervisors of government departments who monitor the conduct of personnel and enquire into complaints against them pertaining to corruption. If upon enquiry they conclude that a

criminal case under the Corruption Act appears to have been made out, they refer the case to the CBI for investigation.

D. Cases referred by High Courts and the Supreme Court

Any citizen can file a petition, known as Public Interest Litigation, in the High Courts and the Supreme Court, alleging corruption in the public sector. If the High Courts and the Supreme Court find the allegations credible, they can refer such cases to the CBI for further enquiry or investigation. Many big cases of corruption have been successfully investigated by the agency in the past on such references from these courts.

E. Annual Programme of Vigilance Work

In compliance with a circular issued by the government of India in 1966, an annual exercise is carried out by the CBI to identify corruption-prone departments and individual corrupt public servants at the beginning of each year. The Public Utility Departments, with whom the general public comes into frequent contact, are given a special focus in these exercises. This task is carried out with the co-operation of the Chief Vigilance Officer of the concerned Department. During this exercise, a list, known as an "Agreed List" is prepared. The list shows the names of the public servants who are perceived to be corrupt but there is no tangible information or material regarding the date to initiate legal action against them. Such officers are put under surveillance during the course of the year and their activities are kept under covert watch. Special emphasis is put on collecting discreet information about various assets acquired by such public servants. This often results in action under the law against such corrupt acts by public servants.

F. Use of Telephonic/Electronic Surveillance

The legal provisions relating to telephonic or electronic surveillance under the Indian Telegraph Act 1885 are effectively used by the CBI to gather accurate information about corrupt activities of the public servants. After ascertaining details about various phone numbers and email identifications used by the public servant, permission of the competent authority is taken to put the same under surveillance. Information gathered during such surveillance has been successfully used in exposing big scams.

V. PROBLEMS AND CHALLENGES

Despite adequate laws to fight corruption in the public sector, it is still one of the biggest menaces Indian society must deal with. The Indian criminal justice system has been facing many problems and challenges in its fight against corruption, some of which are highlighted below.

A. No Law to tackle Corruption in the Private Sector

The Prevention of Corruption Act 1988 is the existing law in India dealing with offences relating to corruption. This law, however, was essentially enacted to take care of corruption cases in the public sector and by public servants, whereas in fact, there is widespread corruption in the private sector also which seriously hampers the overall growth and development of the country.

After the liberalization of the Indian economy in the early 1990s, the private sector has expanded greatly. The problem of corruption in the private sector is increasing with the expansion of the private sector. Today it has assumed alarming proportions. It has become the single biggest menace to Indian society. Efforts are underway to enact laws to deal with corruption in the private sector as envisaged in the UNCAC.

B. Inherent Delays in the Criminal Justice System

The system is painfully slow and punishments are not swift. As explained earlier, sec. 19 of the Corruption Act requires prior permission of the authority competent to remove a public servant from his or her post before launching prosecution against him or her in court. This often delays the launch of a prosecution. Upon receiving reports from the investigating agencies seeking approval for a prosecution, the concerned authorities often take considerable time to grant such permission. Also, permission is sometimes denied on political and other grounds.

The Corruption Act provides for trial of corruption cases under the act exclusively by the Special Judges. The number of Special Judges is highly insufficient compared to the number of corruption cases filed in their courts. As a result, these courts are overburdened and there is a large discrepancy in the number of cases

disposed by the investigating agencies and the number of cases disposed by the courts, adding to the backlog each year.

During trial of offences, adjournments are often taken or granted on various grounds. Further, the proceedings in the trial court are challenged at various stages by parties filing petitions in the same court as well as in higher courts. Appeals and revisions filed in higher courts against the order of the trial court often take years to be concluded.

C. Hostile Witnesses

In order to convict a corrupt public servant, the prosecution has to prove its case beyond doubt. This is a strict legal requirement as per the Indian Evidence Act, the general law on evidence in India. There is no exception to this requirement even for corruption cases. Prosecution has to depend heavily on the testimony of witnesses to prove its case beyond doubt. However, witnesses often do not support the prosecution case because of influence, allurement and intimidation from the other side. There is no witness protection scheme, nor are there provisions for quick and effective action against witnesses who become hostile. As a result, witnesses frequently become unco-operative and spoil the prosecution case. Punishments are, therefore, not swift and effective under the Corruption Act and don't deter corrupt public servants.

D. Ineffective Asset Recovery

Though there are legal provisions for confiscation and recovery of property acquired as proceeds of crime, such recovery is not easy. Corrupt public servants often acquire properties with the proceeds of crime in the names of their friends, relatives, family members and other acquaintances. Therefore, it is not easy to prove in court that such properties are the proceeds of crime. Such properties are quite often held offshore under strict privacy laws and it is not easy to trace and recover them, especially in the absence of desired international co-operation.

VI. CONCLUSION

There are adequate laws in India to fight corruption in the public sector. The Prevention of Corruption Act 1988 is a comprehensive law which covers all possible acts pertaining to corruption and corrupt practices by public servants. There are laws relating to tracking, seizing, and confiscating proceeds of such crimes, both inside and outside the country. India has signed mutual legal assistance and extradition treaties with 20 and 25 countries respectively to facilitate international co-operation in the fight against corruption. Ratification of the UN Convention against Corruption by India will further strengthen its resolve to fight against corruption by providing and obtaining international co-operation.

Despite all these measures and laws, the country is still not free from the scourge of corruption. Corruption is still one of the biggest impediments to extending the benefits of development and progress to the poorest of the poor. The Indian criminal justice system is facing many problems and challenges in its fight against corruption. At present, there is no law to deal with corruption in the private sector, which has grown in leaps and bounds in last two decades, as envisaged in the UNCAC. Offenders take advantage of the very strict requirements of Indian courts to prove every point beyond doubt. The system suffers from inherent delays; as a result punishment is not swift. Corruption is considered a 'high profit-low risk' activity by corrupt public servants. Recoveries of assets, which are proceeds of crime, remain a big challenge. Such assets are often held offshore and getting them back is a Herculean task, especially in the absence of desired international co-operation.

The fight against corruption is, therefore, not an easy one. We need to join forces against this enemy, with all resources at our disposal to achieve better and more effective results. The United Nations Convention against Corruption can be seen as a watershed in the resolve of the international community to fight corruption. The provisions relating to asset recovery in the UNCAC are the most important, in my opinion. Effective use of the same by signatory countries will, therefore, go a long way to achieving better results in this regard. International co-operation to fight corruption as envisaged in the UNCAC is therefore inescapable and a requirement of the hour.