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## An economic analysis of justice in corruption cases

It is not the wisest course of action for a court of law, suspecting corruption, to declare award of licences and grants by the government as unconstitutional on the basis of arbitrariness

Last Published: Thu, Apr 12 2018. 01 12 PM IST

Khagesh Gautam |

Ashish Bharadwaj

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If it is proved in a criminal court that an award of licences by the government is fraudulent, then, along with punishing erring parties, such licences and grants should be cancelled. Photo: Pradeep Gaur/Mint

Economics has now decidedly changed the nature of legal scholarship, the understanding of legal rules and institutions, and even the practice of law. Economic analysis of law is

extremely important as it meaningfully fills a vacant niche in the intellectual ecology of the law. In this context, an important question that India has to grapple with is whether wrongdoings preclude a law and economic analysis.

It is beyond dispute that bribery and corruption are serious public wrongs that erode public confidence in the government while jeopardizing the rule of law. Public officials engaging in such activities should be strictly dealt with to maintain people's faith in public institutions. But this is easier said than done.

Consider an instance of bribery to manipulate an ongoing criminal investigation. There can be no two opinions about the fact that this problem needs to be dealt with firmly. Now consider a situation where an industrial firm urgently needs to expand production in response to rising demand from the markets. It needs to get different approvals from various government departments to expand the unit size. Perhaps the government also decides how much the firm can expand. In the end, monies are exchanged, approvals are granted, the unit is expanded and the public demand for the product is satisfied. Could this instance be possibly compared with the bribery situation?

What if the firm did not need expansion, but effective utilization of existing production capabilities? While production patterns are governed by market demand, the production capacities in India are utilized and run to only half of their actual ability. Persistence of sub-optimal capacity utilization in large-scale industrial plants stalls the circular flow of money and investment in an economy. It is a problem akin to surgeons not being able to operate on critical patients due to lack of equipment. The cocktail of efficiency-diminishing actions and reactions is a recipe for crony capitalism. In attempting to draw parallels in both cases, there is scope for reasoned disagreement.

Some see legislation's role only as purveyor of justice, but a new perspective that views law as a mechanism for changing behaviour is warranted. Judicial decision-making affects the behaviour of parties and lawyers more than anyone else. But now economic

analysis of law, grounded in precise theories and empirically sound methods, provides a scientific method. Human ingenuity allows us to predict the effects of legal sanctions and judicial decisions on human behaviour. More importantly, economic analysis of law brings forth a useful normative standard for evaluating law, policy and decisionmaking.

The elephant in the room that nobody is comfortable talking about is the fact that an allegation of bribery or corruption of the sort alleged in the coal block case, for example, that is litigated before the Supreme Court in writ proceedings initiated via a public interest litigation, is perhaps not the best forum for these matters to be litigated in the first place. The reason is a peculiarly legal one.

Writ proceedings were envisaged by the founding fathers of our Constitution as proceedings where laws and executive acts by the government would be questioned on the grounds of their suspect constitutionality. The manner in which rules of evidence work in such proceedings is completely different than their proceedings in a criminal court.

An act of bribery or corruption on the part of government officials and ministers is first and foremost a criminal act and must be dealt with accordingly. A judicial order quashing a licence or a grant made by the government, allegedly as a result of corruption, is a consequential order. Its legal validity depends on the act of bribery or corruption having been proven to the satisfaction of a court. This satisfaction, in our republic, has to be beyond all reasonable doubt. The only place where this ought to be done is a criminal court. High courts or the Supreme Court are not the places where the factual correctness of such alleged acts should be examined.

The appropriate course of action in matters like these should be to first direct a criminal inquiry, followed by a criminal trial, to be conducted expeditiously (perhaps on a day-to-day basis). Following this, the decision on cancellation of licences or grants should be based on the decision of the criminal court.

The problem with this idea, however, is the slow speed with which our trial courts work. This is not the right place to talk about the problem of judicial delays but it is not unrelated with the problems our society faces. Because the court trial of a case in our country takes a long time, the writ courts, influenced by heavy suspicion of malfeasance in these matters, end up equating this suspicion with arbitrariness and consequently strike down the award of licences and grants by the government. The result is massive efficiency loss, or in an economic sense, creation of substantial deadweight loss.

If it is proved in a criminal court, beyond reasonable doubt, that an award of licences by the government is fraudulent, then, along with punishing erring parties, such licences and grants should be cancelled. Further, all consequent benefits accrued to such parties should be appropriated by the government.

It is not the wisest course of action for a court of law, suspecting corruption, to declare award of licences and grants by the government as unconstitutional for being arbitrary. More so when the court, constrained by its own rules of procedure, is not capable of reaching a positive factual conclusion of bribery and corruption in the first place.

*Khagesh Gautam and Ashish Bharadwaj are, respectively, an associate professor of law and an associate professor of law and economics at the Jindal Global Law School.*

First Published: Sun, Apr 08 2018. 10 49 PM IST

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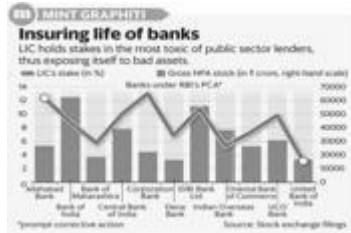
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