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Vigyan Bhawan, New Delhi

Speech of Shri P Chidambaram, Finance Minister on "BUILDING A CRIMINAL JUSTICE SYSTEM TO DEAL WITH FINANCIAL CRIMES" in International Conference on "Evolving Common Strategies to Combat Corruption and Crime" (XXth Conference of CBI & State Anti-Corruption Bureaux)

I am happy to address this international conference organised by the CBI on "Evolving common strategies to combat corruption and crime", and I thank you for the invitation.

The Central Bureau of Investigation is the premier investigating agency of India. It owes its existence to the Delhi Special Police Establishment Act, 1946. To begin with, it had a limited mandate, namely, to investigate cases of corruption. Over the years, its mandate has expanded. Today, it has three wings: anti-corruption wing, special crimes wing, and economic offences wing. The offences that may be investigated by the CBI are notified by the Central Government under section 3 of the Act.

Apart from cases of corruption involving public servants and serious conventional crimes, CBI has the power to investigate a number of offences that pertain to what can be broadly described as the financial sector. I may make particular reference to some offences that fall within the jurisdiction of CBI. They are:

Cases in which the interests of the Central Government or of any public sector project or undertaking, or any statutory corporation or body set up and financed by the Government of India are involved

Breaches of import and export control orders

Serious cases of fraud, cheating and embezzlement relating to public joint stock companies

It is evident that the scope of the jurisdiction of CBI is quite large. It extends to the core of the financial system which comprises tax authorities, banks, insurance companies, provident fund and pension fund authorities, regulators such as SEBI, IRDA and PFRDA, and other important players in the financial sector. Besides, there are no financial crimes which do not also attract the provisions of laws dealing with conventional crimes such as the Indian Penal Code. Virtually every serious financial crime will also attract one or more IPC provisions such as section 192 (fabricating false evidence), section 405 (criminal breach of trust), section 415 (cheating), section 463 (forgery) etc.

New Challenges in a Market Economy

Since 1991, we have transited from a closed and controlled economy to an open and market economy. The transition has brought in its wake both new opportunities and new challenges. Our laws have lagged behind. Hence, as you are perhaps aware, in March 2011, Government constituted the Financial Sector Legislative Reforms Commission "with the view to rewriting and cleaning up the financial sector laws to bring them in tune with the current requirements." The Commission submitted its report in March, 2013. One of the recommendations of the Commission is on 'market abuse'. 'Market abuse' has been defined as meaning insider trading, abuse of information and securities market abuse. The Commission has recommended that market abuse and attempting or abetting market abuse must be made offences and must be punished with penalties extending to three times the illegitimate gains made or losses caused as well as with imprisonment. It will therefore be evident that as new challenges emerge, new laws will be made, new offences will be defined, and new responsibilities will fall on investigating agencies.

A Time to Dispel Some Myths

Before I continue with the topic of my speech, forgive me for a brief digression. There are several myths about the CBI ranging from the celebrated epithet "caged bird" to the abusive nomenclature "Congress Bureau of Investigation". None of the descriptions is correct or even well-meaning. Some myths are carefully fostered and propagated in order to serve an immediate or narrow self-interest. In a lighter vein, I may say that sometimes the CBI itself pretends to be a "helpless victim" when it pleads for more powers and greater autonomy! Hardly anyone seems to notice the contradiction when the same person pleads in favour of 'more powers to CBI' and also rails against the alleged 'excesses of the CBI'. And hardly anyone pauses to ask how could the CBI do the bidding of a political party that has not been in government during 12 years out of the last 35 years!

In my view, the CBI is as good an investigating organisation as any other in the world. We are proud of the achievements of the CBI. It has performed a difficult role especially when the primary responsibility for enforcement of laws lies with the State Governments. Let me also remind you that, save in certain cases, an offence falling under the jurisdiction of the State Police cannot be investigated by the CBI without the express consent of the State Government concerned. The best testimony to CBI's credibility is the numerous demands that are made for cases to be 'taken over' by the CBI rather than be investigated by the State Police. Every such demand is a tribute to the CBI.

As we look forward to the next 50 years, the need for an independent, impartial and capable central investigation agency is more imperative than ever. Whether we think about corruption or financial crime or terrorism, the challenges faced by India will be greater than ever. Therefore, it is time to outline the contours of the challenges that an investigating agency will face and what the investigating agency will be required to do in the next 50 years. It is time also to start rethinking the legal foundations of the agency so as to achieve clarity on objectives, powers and accountability.

Financial Crimes

My focus today will be on financial crimes.

Yesterday, the Prime Minister made a thoughtful speech and drew the line between policy-making and policing. I urge all of you to reflect on that speech carefully. In my speech today I wish to go into some detail on the legal and technical issues that are involved in the apparent conflict between policy-making and policing.

Safety is a 'public good'. Public good is defined around two tests: non-rival and non-excludable. Safety is non-rival: my safety while walking on a street does not reduce your consumption of safety. Safety is non-excludable: when one more child is born into the world, it is not possible to exclude that child from the umbrella of safety. Safety satisfies both tests and it is a public good. *A fortiori*, safety of the financial system is a public good. Safety is the pre-requisite for an open or market economy, which is the highway to prosperity. If we fail on safety, we will fail to get growth. Providing safety is the job of the Government. A sound criminal justice system must ensure safety of the financial system. It must protect the financial system against theft, fraud, forgery, mis-selling, money laundering, hacking, cyber attacks etc. Registration and investigation of offences is the starting point of a sound criminal justice system. Hence the need for a first rate investigating agency.

An investigating agency must build capacity. I have no doubt that a trained police officer is capable of handling financial crimes. There is a strong degree of commonality among all kinds of crimes, and enforcement processes are similar. I was told that an IPS officer was brought into SEBI some years ago as an Executive Director and he pioneered many new methods of investigation which yielded permanent improvements in the manner in which SEBI works. The point that I wish to make is the need for bringing a variety of skilled persons into the investigating agency. In the case of CBI, it must recruit bankers, accountants, lawyers, insurers, fund managers and securities experts, train them in the substantive and procedural laws, and turn them into first rate investigators. Conversely, since police officers are highly educated and many hold post graduate or doctoral degrees in a variety of subjects, they could be trained in financial laws and equipped to deal with financial crimes. It is the integration of skills possessed by police officers and skills possessed by subject matter experts that will make the CBI a first rate investigating agency.

The second limb of capacity is technology. Financial crimes are committed using the most advanced technology, including sophisticated software. The investigating agency must have technological capability matching the offender's capability. It must have software that is able to search millions of pieces of information and locate and unravel the source of the crime, the key persons, and the complex web of activities that constitute the crime.

Financial crimes are no longer confined to the boundaries of a State. Many financial crimes span several countries. Even if the key criminals belong to one country, they use banks, post offices, telecom service providers, servers, satellite links, airlines and money exchanges to rob and cheat people and to launder and stash illegal money. These criminal networks cannot be exposed by

an agency acting alone. There must be a robust mechanism for exchange of tax and financial information among the countries of the world. Fortunately, more countries are entering into agreements for tax information exchange and mutual assistance in criminal matters. CBI, as the nodal agency in India for Interpol, is best placed to join a network of investigating agencies around the world for exchange of information and for mutual assistance in criminal matters. The instruments that are now available to CBI, including the agreements referred to, must be strengthened.

I may also point out that there are usually three groups of persons involved in financial crimes. Firstly, there are the core conspirators. Then there are accomplices in the financial system and, finally, there are their accomplices in Government departments or regulatory bodies. Any thorough investigation must uncover all the groups of persons and all the links that made the conspiracy possible. All the groups must suffer punishment. Usually, the face of the crime is the face of the principal offender and with his/her arrest and arraignment the excitement usually dies. Unfortunately, this will let the other conspirators get away – only to commit more financial crimes after lying low for some time. It is therefore important that the investigating agency identifies all the individuals who collaborated in the crime and brings to justice every one of them. That alone will establish deterrence.

Summing up, an investigating agency must have a variety of skilled persons, advanced technology, good collaboration with other investigating agencies and standard operating procedures that will uncover all the participants involved in a financial crime.

Interpreting and Applying Laws

Let me now turn to the vexed question of interpreting and applying criminal laws to financial transactions. As a rule of criminal jurisprudence, a crime requires *mens rea*, that is a criminal state of mind. I am aware that there are exceptions and some offences are charged on the principle of 'strict liability'. In my view, the principle of strict liability may not apply without qualification to financial crimes, except in the small number of cases where there is a clear and unambiguous rule of conduct and the law unambiguously stipulates that any violation of that rule would be considered an offence. Ordinarily, a financial crime would arise from either unlawful gain or unlawful loss and, in such cases, the law could either stipulate proof of the state of mind or presume a state of mind to cause the unlawful gain or the unlawful loss. So, in financial crimes, *mens rea* or the state of mind must be invariably proved or presumed from certain facts. This, in my view, is the correct approach to financial crimes.

There are cases where the CBI – and sometimes the courts – have interpreted provisions of law to exclude *mens rea*. A frequently cited example is section 13(1)(d)(iii) of the Prevention of Corruption Act 1988. That provision reads as follows:

"If he, while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest"

A close reading of the above provision does not, in my view, rule out *mens rea*. The words "without public interest" imply that the offender must have committed the act although he knew that there was no public interest. In a case arising under this section, if the accused is able to show that there was indeed some public interest, in my view, the offence would not be made out and the accused would be entitled to an acquittal. I would once again commend the prudent approach to financial crimes that I outlined above, and that is the requirement of *mens rea* or state of mind, unless it is unambiguously excluded by the express language of the law.

Let me illustrate with reference to certain kinds of financial transactions. Banking is a business, so banks lend. In some cases they lend at the prime lending rate, in some cases below that rate, and in some cases at the base rate. Interest rates can be reset. Similarly, insurance companies invest funds by picking and choosing winners. They buy and sell financial assets. These decisions are taken based on facts and circumstances that are available at the time the decisions are taken. When market conditions change, a loan may turn into a non-performing asset. An investment may collapse in value and result in a loss. How should one characterise the original decision? It may have been a poor decision, it may be a decision that turned out to be a wrong decision, but does that make the decision an offence or the decision maker a criminal? I think an investigating agency should tread carefully before it reaches the conclusion that a business or commercial decision, taken on the basis of available facts, amounts to a crime. This is where the state of mind comes in. In my view, it would be wholly opposed to common sense and fairplay if the investigating agency ignored the state of mind and, absent any motive or criminal intent, jumped to the conclusion that a business or commercial decision amounted to a crime.

Policy Making vs Policing

Finally, I would caution investigating agencies to respect the line that divides policy-making and policing. An offence is committed when a prescribed rule of conduct is violated. If there is no prescribed rule, or if there is no violation of a prescribed rule, there is no offence. It is not the business of the investigating agency to lay down a rule of conduct; nor is it the business of the investigating agency to presume a rule of conduct. Even where a rule has been prescribed, if there is a policy behind that rule, it is not the business of the investigating agency to question the wisdom of that policy or to suggest a different policy that would be better in the view of the investigating agency. The investigating agency must confine itself to the question whether there has been a violation of a laid-down rule of conduct.

One good test whether a rule of conduct has been wilfully violated is to ask whether there is a speaking order in support of the decision that is the subject matter of investigation. Ordinarily, a speaking order should be a complete answer to a criminal investigation. A speaking order may be right or wrong on the merits of the case, but as long as there are reasons given in support of a decision, such reasons should ordinarily rule out any criminal state of mind. Unfortunately, there are a number of cases where investigating agencies, and other authorities like the C&AG, have overstepped their limits and

attempted to convert bona fide executive decisions into either crimes or abuse of authority.

The Three Pillars

In conclusion, let me state the fundamentals of how an investigating agency needs to be constructed in the emerging new India. There are three pillars:

- Clearly defined objectives
- Precisely enumerated powers
- Carefully designed accountability mechanisms

It is this approach which informs the FSLRC report to which I referred earlier. I would commend the same approach while redesigning our investigating agencies, of which the CBI is the premier agency.

I am happy to see the enthusiastic response to this Conference and the wide coverage it has received in the media. I wish your deliberations success and I wish the CBI many more years of good and dedicated public service.

Thank you for your patience and courtesy.
