

Promoting transparency and good governance

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CORRUPTION has serious implications for both protecting the rule of law and ensuring access to justice. It is pervasive in our system of governance, severely undermining the effectiveness of all institutions. Since independence, though successive governments have taken numerous measures to reduce the levels of corruption in the country, including legislative and institutional, an absence of political will and sincerity in taking concrete steps to eliminate corruption has resulted in most of these measures not achieving the intended results.

Corruption in India is not merely a law enforcement issue where the existing laws of the state are violated and can be remedied by more stringent law enforcement. Rather, corruption is a far more fundamental problem that undermines the very social fabric, political and bureaucratic structure of the Indian society. Thus, while it is necessary for the law enforcement machinery to be empowered, the larger issue concerning corruption is how it violates human rights, in particular the *constitutional* rights guaranteed under our Constitution.

The existing anti-corruption framework in India places far too much emphasis on the criminal justice system for dealing with the malaise, though that system is itself facing a crisis due to corruption and other problems. Thus, fighting corruption also becomes essential for restoring the

people's faith in the Indian criminal justice system. That said, however, the legal strategies proposed should focus more on the promotion of transparency and accountability in governance. Empowerment of the citizenry needs to be the foundation for legal and institutional reforms to address corruption.

Generally, the initiatives that have so far been undertaken have met with limited success. However, the development of the right to information in India, with the objective of empowering the citizens and ensuring transparency is worth mentioning, given its positive outcomes. A critical analysis of the right to information law and the workings of the Central Information Commission (CIC) and the State Information Commissions (SICs) set up to enforce the right to information shows how these new institutions are carving out their own political space, with the power to create transparency and accountability. However, the need of the hour is to establish an independent commission in order to provide a stronger and effective legal and institutional framework for fighting corruption in India.

The fundamental problem of empowering our citizenry in the fight against corruption has so far been largely neglected in India. Understanding the linkages between corruption and access to justice involves recognizing that certain acts of corruption are human rights violations. One may well argue that numerous human rights violations take place in India every day, and so, even if corruption is recognized as a human rights violation, how would it help in the larger fight

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against corruption. Thus the central question becomes – to what extent does the recognition of corruption as a violation of human rights help in the fight against corruption?

Human rights violations have assumed great significance and received attention in societies around the world. With reference to the enforcement of economic and social rights, Audrey Chapman argues that ‘...A “violations approach” is more feasible precisely because it does not depend on the availability and public release of extensive and appropriate statistical data or on major improvements in states’ statistical systems. The monitoring of human rights is not an academic exercise; it is intended to ameliorate human suffering resulting from violations of international human rights standards...’¹

The mere recognition of human rights violations, followed by actions that will help in the enforcement of human rights, could in itself be an effective tool in the fight against corruption. Corruption needs to be recognized not only as a violation of specific human rights, but also as an issue that undermines the ability of governments to create conditions for the fulfilment of *all* human rights. Under this paradigm, the focus is on the people who are affected by acts of corruption and the efforts to eliminate it, which will place them at the centre.

Corruption has a profound impact on the implementation of civil, political, economic, social and cultural rights. The normative framework of law and the institutional apparatus that

law creates for enforcing the rule of law are critical for ensuring access to justice. Access to justice encompasses a variety of aspects, but primarily it deals with the ability of people in a society to have proper systems in place that can ensure justice. These can be created by the civil and criminal justice systems, administrative regulations and institutions, and by the judiciary and other quasi-judicial apparatuses.

However, what really matters is the *effectiveness* of these institutions for ensuring access to justice. Access to justice cannot be achieved in Indian society without eliminating corruption, since the role of the state and its instrumentalities continues to be significant when it comes to formulating and implementing policies. The Indian citizenry continues to be hugely dependent upon the government and the powers that it exercises, which are inevitably characterized by corruption.

Having recognized the human rights implications of corruption, I propose a cohesive multi-pronged approach to fighting it. At the first level, this would require the recognition of a *fundamental right* to corruption-free governance in Part III of the Constitution. Former Chief Vigilance Commissioner, N. Vittal, has supported the evolution of such a right, observing that, ‘Corruption totally distorts the machinery of government namely, the executive, and makes a mockery of the human right for good governance.’² This right is expected to empower Indian citizenry to rightfully claim that governmental conduct needs to be free from corruption. If not, it is a violation of their constitutionally recognized rights.

Constitutional sanctity has acquired legitimacy in the Indian con-

text largely due the fact that the country has functioned as a constitutional democracy from its independence. While corruption in all forms – political, administrative, bureaucratic, and corporate – is rampant and has steadily increased in the last fifty years, our political system has by and large been stable. But this cannot be taken for granted. It is conceivable that shattered social expectations, maladministration, and poor governance policies over a period of time, would endanger the rule of law and the social fabric.³ Corruption in India has affected development policies, depriving the Indian citizenry of their economic and social rights. The right to corruption-free service demands good governance, integrity and probity in administration from those in power.⁴

At the second level, this needs to be followed by the formulation of new legal and institutional mechanisms to combat corruption. The difficulty of enforcing the rule of law is the greatest impediment to the effectiveness of anti-corruption laws, and thus the larger issue of establishing a rule of law society in India needs urgent attention. This requires progressive efforts towards revamping the enforcement machinery and empowering the citizenry. The cornerstone of these new reforms is the focus on the empowerment of the citizenry in the fight against corruption.⁵ Past legislative efforts have primarily dealt with corruption as a crime,⁶ but not necessarily as a problem that undermines the enforcement of human rights.

Human rights violations of the nature created by corruption require both radical reforms of the state appa-

1. Audrey R. Chapman, ‘A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights’, *Human Rights Quarterly* 18(1), February 1996. Human Rights Dialogue, Carnegie Council, 1997, http://www.carnegiecouncil.org/resources/publications/dialogue/1_10/articles/580.html# (last visited April 2011).

2. N. Vittal, *Corruption in India: The Roadblock to National Prosperity*. Academic Foundation, Delhi, 2003.

3. See, Upendra Baxi, *Liberty and Corruption*. Eastern Book Co., Delhi, 1989.

4. *Ibid.*

5. *Ibid.*

6. *Ibid.*

ratus and a galvanized civil society activism in a manner that is not the case with regard to crimes. Undoubtedly, certain reforms in the Criminal Procedure Code (CrPC), 1973 are long awaited as well. For instance, under section 197 of the CrPC, no court can take cognizance of any offence alleged to have been committed by a public servant without prior sanction of the government in whose affairs he is employed.⁷ Thus, Upendra Baxi laments the fact that ‘the protection given by the colonial lawmakers to the public servants in the Code of 1898, still continues.’⁸ Unfortunately, while corruption is treated as a crime that affects the law enforcement mechanisms, its impact on the enforcement of human rights still needs to be recognized. This recognition will pave the way for developing strategies to fight corruption that were hitherto not considered.

At the third level are institutional reforms – strengthening institutions like the National Human Rights Commission (NHRC), the Central Information Commission (CIC) and the Central Vigilance Commission (CVC). There is need for the NHRC to revamp its mandate in light of massive institutionalized corruption that has left no institution in India untouched.⁹ The NHRC must ensure that its investigations take due note of the fact that corruption is the root cause of potential violations of human rights. In this regard, the NHRC may have to work in cooperation with anti-corruption agencies like the Central Vigilance

Commission. The purpose of the NHRC’s new initiatives should be to ensure the protection of human rights and promotion of corruption-free administration as a *sine qua non* for good governance.

Fighting corruption has inevitably become the most urgent need for addressing all major challenges of governance in India. While a number of approaches to fight corruption have been tried, none of them have so far been particularly effective. Given the complexities of multi-layered police and other law enforcement agencies that are working in India, it is important to develop a more focused approach to combating corruption.¹⁰ The proposal to establish an Independent Commission Against Corruption (ICAC) in India recognizes the inherent challenges of any institutional approach to seeking reforms, given the bottlenecks and obstacles for enforcement of the rule of law.

Most institutions entrusted with the responsibility of fighting corruption and to ensure probity in governance have not been particularly successful. Establishing an ICAC in India will in itself not be a panacea for all ills relating to corruption. What we need is a multi-pronged strategy combining interventions in the legal framework, the institutional mechanism, the investigation and prosecution machinery, the education strategy for public awareness, and civil society empowerment approaches.¹¹ The fight against corruption will succeed only if all the above strategies are formulated bearing in mind that corruption is a serious problem of governance that violates human rights and undermines development.¹²

10. Moshe Maor, ‘Feeling the Heat? Anti-corruption Mechanisms in Comparative Perspective’, *Governance* 12(1), 2004.
11. *Ibid.*

The proposed ICAC should be a stand-alone, autonomous institution, and not under any ministry of the government, including the Prime Minister’s Office. The ICAC should be established as an institution akin to the Election Commission of India, preferably through an amendment to the Constitution providing it a constitutional status. If that proves difficult, given the political complexities of amending the Constitution, it may be established by legislation. But its powers, functions and level of independence should be in conformity to the guarantees that are provided to the Election Commission of India.

Historically, anti-corruption institutions that have been established in India have enjoyed neither institutional independence nor functional autonomy. All investigative bodies, including police and law enforcement agencies, come under one or more ministries of the central or state governments. This has made their independent and autonomous functioning dependent upon the leadership, integrity and impartiality of the heads of these institutions. While this is necessary and critical for the success of the ICAC, it is important to develop a more sustainable process and procedure-oriented institutional mechanism for ensuring independence.

An excessive dependence on the honesty and integrity of individual officers and heads of anti-corruption institutions does not help build a culture of institutional integrity. For anti-corruption efforts to be successful over a period of time there is need for a sustained approach to fighting corruption at all levels. Institutional integrity and

12. See Alan Doig and Stephanie McIvor, ‘Corruption and its Control in the Developmental Context: An Analysis and Selective Review of the Literature’, *Third World Quarterly* 20(14), 1999, p. 657.

7. See also Prevention of Corruption Act, 1947, p. 6.

8. Upendra Baxi, *op cit.*

9. See, South Asia Human Rights Documentation Centre, ‘Judgment Reserved: The Case of the National Human Rights Commission of India’, 2001, (which provides a working assessment of the Indian NHRC).

the trust and confidence of the citizenry in the institution cannot be built overnight. The institutional apparatus, the organizational framework and the need for maintaining honesty and integrity of the anti-corruption investigative process ought to be deeply ingrained within the ICAC. Typically, institutions in India that are involved in the fight against corruption are under tremendous pressure from different vested interests and their independence is only in rhetoric and hardly in practice.

Similarly, the independence or otherwise of the ICAC should not be dependent upon the personal integrity or the benevolence of the politicians and bureaucrats. Given rampant political and bureaucratic corruption, it is essential that the ICAC be established bearing in mind the practical problems that are faced by agencies such as the CBI and the CVC, which undermine their independence and efficiency in fighting corruption. There is need to develop an institutional framework that leaves little room for abuse of powers.

The ICAC needs to have a legal framework that ensures independence and helps maintain its autonomy and not depend upon the whims of the government in power. Simultaneously, while independence of the ICAC is critical, so too is its own institutional accountability. While independence is essential for it to undertake investigation and prosecution without any fear or favour from other government agencies and politicians, there is a parallel need to ensure that ICAC itself does not become an organization that is accountable to none. A system of checks and balances needs to be introduced so that its functioning is independent from the executive, but will be overseen by an independent board, the membership of which will be mostly from outside the ICAC.

The composition of the ICAC should be similar to that of the Election Commission of India. It should be given a constitutional status so that the level of engagement and interaction of its members is not only deemed, but also perceived to be important. The appointment of members should follow the same process that is currently followed for the National Human Rights Commission. This will ensure that there is broad political consensus in the appointment of its members.

The ICAC should be empowered to serve as a nodal institution for undertaking the investigation and prosecution of all cases relating to corruption under the state and central government. But it is important that its work is *limited* to cases of corruption that are not petty in nature, but significant either in terms of financial implications or in their impact on the administration of justice. The ICAC should be empowered to determine its investigative procedures and processes.

Political parties invariably raise issues of corruption and level charges against each other during election campaigns; often these are of a partisan nature. In this process, both the importance of the issue and the need for fair and transparent methods to discover the truth and seek punishment for the perpetrators of the crime stand undermined, significantly affecting the credibility of the criminal justice process. No wonder, crimes relating to corruption rarely result in conviction, let alone punishment.

The rule of law will be protected in India only if it is ensured that those who violate it are given the punishment that is appropriate for that violation. Simultaneously, it must ensure that the legal system and the institutional mechanisms that are available, treat all people in a fair and just manner and that acts of corruption committed by

even the most powerful and influential persons in society are investigated in a professional manner and justice rendered.

Even as this article is being written, Indian civil society activism against corruption is witnessing a major upsurge in the form of Anna Hazare's campaign that has proposed the establishment of an independent, powerful and effective institutional mechanism in the form of a Lokpal. While this is not the first time that our civil society has been galvanized to fight against corruption and seek transparency and accountability in governance, this particular movement, unlike the previous ones, has managed to capture the popular imagination to an unprecedented degree.

It needs to be recognized that people have begun to lose faith in the ability of parliamentary institutions and the political process to ensure good governance. The effort to establish an independent Lokpal is thus important, not only because of the need to fight against corruption, but also to help restore the trust and faith of the Indian citizenry in parliamentary democracy. Corruption has reached such alarming proportions in India that it has undermined the foundations of democratic governance.

There is little doubt that the institutional design of a Lokpal as an independent, impartial and effective mechanism will be the sole determinant for its success. The social expectations generated, not just by the Anna Hazare movement but also by the human rights violations committed against people on account of corruption, have created a strong urge among many Indians to fight against corruption. The institution of a Lokpal is similar to the ICACI have proposed. We should not lose the moment.