Corruption in India: A Violation of Human Rights
Promoting Transparency and the Right to Good Governance

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TABLE OF CONTENTS

INTRODUCTION[1]

Corruption in India is a problem that has serious implications for both protecting the rule of law and ensuring access to justice. Corruption is pervasive in the system of governance in India, undermining the effectiveness of all institutions of governance. Since independence, successive governments have attempted to take numerous measures to reduce the levels of corruption in the country, including legislative and institutional measures. However, absence of the political will and sincerity in taking concrete steps to eliminate corruption has resulted in most of these measures not achieving the results that were intended.

Corruption in India is not merely a law enforcement issue where the existing laws of the state are violated and can be remedied merely by more stringent law enforcement. Rather, corruption in India is a much more fundamental problem that undermines the very social fabric, and 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 in India is how it violates the human rights — and, in particular the *constitutional* rights — guaranteed under the Constitution of India. Further, corruption in India violates the constitutional foundations of Indian democracy, on the basis of which a rule of law society in India was meant to be established. However, the promises made by the writers of the Indian Constitution have been broken over the years by a scourge of corruption in every institution, which has led to a blot in the governance apparatus from top to bottom.

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

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[1] The Introduction is reprinted from a previous work with minor revisions for consistency, C. Raj Kumar, *Promoting Transparency and Good Governance*, 625 SEMINAR: COMBATING CORRUPTION (Sept. 2011), http://www.india-seminar.com/2011/625/625_c_raj_kumar.htm.

people's faith in the Indian criminal justice system. That said however, legal controls relating to corruption 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 been undertaken so far in this regard have not been successful. However, the development of the right to information in India with the objectives of empowering the citizens of India 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") shows how these institutions are new initiatives in India that are indeed carving their own political space, with the power to create transparency and accountability and to enforce the right to information. However, the need of the hour is to establish an independent commission against corruption in India in order to provide a stronger and effective legal and institutional framework for fighting corruption.

I.   NEW LEGISLATIVE AND INSTITUTIONAL REFORMS FOR ELIMINATING CORRUPTION IN INDIA

A.   *Legislative Measures Required*[2]

The problem of corruption needs to be addressed urgently if the efforts to improve governance and seek development are to succeed. Since a number of past efforts in this regard have not achieved their intended results, there is a need to seek new legislative and institutional reforms for eliminating corruption.[3] The cornerstone of these new reforms is the empowerment of the citizenry for the fight against corruption.[4] Past legislative efforts have dealt with corruption as a crime,[5] but not necessarily as a problem that undermines the enforcement of human rights. Human rights violations of the nature created by corruption require radical reforms of the state apparatus

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[2]   Section A is reprinted with minor revisions for consistency from C. Raj Kumar, *Promoting Transparency and Good Governance*, 625 SEMINAR: COMBATING CORRUPTION (Sept. 2011), *available at* http://www.india-seminar.com/2011/625/625_c_raj_kumar.htm.

[3]   *See* Alan Doig & Stephanie McIvor, *Corruption and Its Control in the Developmental Context: An Analysis and Selective Review of the Literature*, 20 THIRD WORLD Q. 657, 661-64 (1999).

[4]   *Id.* at 662.

[5]   *See* UPENDRA BAXI, LIBERTY AND CORRUPTION 53-65 (1989) [hereinafter LIBERTY].

and 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") are long-awaited as well. For instance, under section 197 of the CrPC no court can take cognizance of any offense alleged to have been committed by a public servant without prior sanction of the government in whose affairs he is employed.[6] Thus, Professor Upendra Baxi laments the fact that "the protection given by the colonial law-makers to the public servants in the Code of 1898, still continues."[7] While corruption continues to be a crime and indeed affects the law enforcement mechanisms, the impact of corruption on the enforcement of human rights in India needs to be recognized. This recognition will pave the way for developing strategies to fight corruption that was hitherto not considered.

B.   *Rights-Based Approaches to Anti-Corruption Measures*[8]

Having recognized that corruption affects human rights and the rule of law, it is important to develop the right to corruption-free governance through a number of rights-based strategies in India. Rights-based approaches to governance are those strategies that rest on the conceptual foundation that social and economic goals do not remain policy objectives, but get transformed into rights that are vested with the citizenry, thereby increasing incentives for public vigilance.[9] In this conception there are "right-bearers" and "duty-holders." Evolving rights-based approaches to governance will also help India to achieve the Millennium Development Goals. The people of India would then actually be able to enjoy rights relating to social and economic goals that were hitherto described as policy objectives.[10] Government representatives will be vested with the duty of ensuring the protection and promotion of the particular rights. It is not that the rights-based approaches to anti-corruption measures will automatically ensure corruption-free governance, nor is it that this approach is itself free from problems relating to enforcement. Rights by their very nature are claims on the government or its

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[6] *See* Prevention of Corruption Act, 1947, No. 2 of 1947, CODE CRIM. PROC. (1973).

[7] BAXI, LIBERTY, *supra* note 5, at 53.

[8] Section B is reprinted with minor revisions for consistency from C. Raj Kumar, *Corruption, Development and Good Governance: Challenges for Promoting Access to Justice in Asia*, 16 MICH. ST. J. INT'L L. 475, 550-51 (2008) [hereinafter *Corruption, Development*].

[9] Doig & Mclvor, *supra* note 3, at 662.

[10] Kumar, *Corruption, Development*, *supra* note 8, at 550.

representatives to act in a particular manner.[11] There are numerous legal, jurisprudential, and philosophical bases for rights to be enshrined in the constitution or for that matter to be used effectively for promoting democratic governance. By the same token, there are criticisms of rights-based approaches to constitutional governance, particularly in the area of economic, social, and cultural rights.[12] Even while recognizing the inherent limitations of rights-based approaches, it needs to be noted that the empowering dimensions of such an approach far outweigh its weaknesses.

The real bone of contention is whether rights ought to be expanded so as to include economic, social and cultural rights. Some commentators have observed that it is important to limit rights so that expanding the notion of rights and their attendant non-enforceability does not result in the dilution of traditional rights.[13] But in the context of India, the judiciary has significantly developed the notion of rights without diluting these traditional rights. There is little skepticism or doubt in the mind of the judiciary on continuing its interventions when these rights are violated either in a constitutional sense or by legislation. In fact, the development of the "right to life" jurisprudence is one such example in which the courts have not hesitated to include new rights as a part of the evolving nature of human rights and human dignity.[14]

In another example, the fundamental right to education was initially recognized by the Supreme Court of India and was followed by a constitutional amendment that specifically incorporated this right into the constitution.[15] While the notion of rights-based approaches to development and governance is not one without controversy or criticism, the conceptual basis for such an approach is useful for formulating effective anti-corruption measures. In this regard, there is a case for developing a fundamental right to corruption-free service in India. The formulation of such a right, along with the development of

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[11] *Id.*

[12] *Id.*

[13] *See generally* Terry Collingsworth, *Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183 (2002).

[14] The Supreme Court has developed a robust jurisprudence in regard to the expansion of the right to life. *See, e.g.*, Olga Tellis v. Bombay Municipal Council, (1985) 3 S.C.C. 545 (India) (holding that the right to life under article 21 of The Constitution of India includes the right to livelihood).

[15] *See* A.S. Anand, *Public Interest Litigation as Aid to Protection of Human Rights*, (2001) 7 S.C.C. (J) 1 (India), *available at* http://www.ebc-india.com/lawyer/articles/2001v7a1.htm.

other rights-based approaches to development, will help in eliminating corruption and promoting integrity and good governance.[16]

C.   India's Domestic Anti-Corruption Legal Framework[17]

The institutional approach to corruption has been quite successful in Hong Kong[18] due to the work of the Independent Commission against corruption ("ICAC").[19] There have been human rights concerns[20] raised regarding the activities of the ICAC in its law enforcement measures. However, these concerns have been by and large duly addressed through appropriate checks and balances.[21] In India, various attempts have been made to tackle the problem of corruption. Institutional measures have been taken by adopting legal and administrative regulations to ensure that corrupt individuals are punished under the law.[22] Before India's independence, the British established the Delhi Special Police Establishment ("DSPE") to control corruption, which was rampant during the Second World War.[23] The Prevention of Corruption Act was passed in 1947 and an Administrative Vigilance Division ("AVD") was formed in the Ministry of Home Affairs in 1955.[24] This led to the appointment of vigilance officers in each ministry to inquire into charges of corruption against employees in various organizations.[25] Interestingly, the First Five Year Plan in 1952 dealt with the issue of integrity in public life, and observed that corruption "not only inflicts wrongs which are difficult

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[16]   Kumar, *Corruption, Development*, *supra* note 8, at 551.

[17]   Portions of Section C are drawn from C. Raj Kumar, *Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India*, 17 Colum. J. Asian L. 31, 63-65 (2003) [hereinafter *Corruption and Human Rights*].

[18]   Alan Lai, *Building Public Confidence in Anti-Corruption Efforts: The Approach of the Hong Kong Special Administrative Region of China*, 2 F. ON CRIME & SOC'Y 135, 136 (2002).

[19]   *See* Thomas Chan, *Corruption Prevention — The Hong Kong Experience*, UNAFEI RES. MATERIAL SERIES NO. 56, at 365 (2000), *available at* http://www.unafei.or.jp/english/pdf/PDF_rms/no56/56-26.pdf.

[20]   Daniel R. Fung, Anti-Corruption and Human Rights Protection: Hong Kong's Jurisprudential Experience, Address to the 8th International Anti-Corruption Conference (Sept. 9, 1997), *available at* http://8iacc.org/papers/fung.html.

[21]   *Id.*

[22]   For some insightful critical analysis on this, see BAXI, LIBERTY, *supra* note 5.

[23]   S.S. GILL, THE PATHOLOGY OF CORRUPTION 237 (1998).

[24]   *Id.*

[25]   *Id.*

to redress, but it undermines the structure of administration as well as in public life."[26]

The fact that corruption potentially affects development was perceived by the early planners of India,[27] but the legal and institutional measures that were attempted to address the issue were half-hearted, ineffective, and lacked enforcement mechanisms.[28] In one of the earliest methodical approaches to tackle corruption in India, the Santhanam Committee Report[29] recommended the establishment of the Central Vigilance Commission ("CVC"), which would be independent of ministerial control. The CVC was formed in 1964.[30] Amendments to the Prevention of Corruption Act were initiated to broaden the definition of criminal misconduct to include those in possession of assets beyond known means of income for which no satisfactory information was available. The creation of the Central Bureau of Investigation ("CBI") in 1963, which incorporated the DSPE as its investigation and anti-corruption division, was also one of the outcomes of the Santhanam Committee Report.[31] Since there is very little political consensus on issues relating to processes of combating corruption, the institutional approaches that were attempted largely failed in controlling corruption.[32]

Commenting on the efforts in investigating corruption, A.G. Noorani has observed that "the initiation of an investigation into crime or an inquiry into charge[s] of corruption or maladministration must not depend on the wishes of the men in power. If it does, it ceases to be government according to the rule of law."[33] The legal and institutional approaches to the issue of corruption have vested the power to initiate investigation into allegations of corruption with the very people who are in power and who may themselves be involved in the corrupt governance system.[34] The independence of the investigative authority is therefore critical in ensuring that all

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[26] Krishna K. Tummala, *Corruption in India: Control Measures and Consequences*, 10 ASIAN J. POL. SCI. 43, 51 (2002).

[27] Doig & Mclvor, *supra* note 3, at 659-60.

[28] *Id.* at 674.

[29] *See* Christophe Jaffrelot, *Indian Democracy: The Rule of Law on Trial*, 1 INDIA REV. 77, 80 (2002).

[30] GILL, *supra* note 23.

[31] *Id.*

[32] BAXI, LIBERTY, *supra* note 5, at 1-17.

[33] A.G. Noorani, *Commissions of Inquiry*, *in* CORRUPTION IN INDIA: AGENDA FOR ACTION 218, 221 (S. Guhan & Samuel Paul eds., 1997).

[34] BAXI, LIBERTY, *supra* note 5, at 1-17.

allegations of corruption against government representatives are handled in an impartial, fair and unbiased manner.[35]

In India, the conferral of statutory status to the CVC in the wake of the Supreme Court judgment in *Vineet Narain* v. *Union of India*[36] is a step in the right direction to ensure that investigative agencies like the CVC are not directly subject to pressures from the political class while dealing with cases of corruption. This judgment also endowed the CVC with wider powers including supervision over the CBI and the Enforcement Directorate ("ED"). This will help reduce the unpredictability surrounding the investigation of corruption cases and their effects on the rule of law.[37] The realization of rule of law requires a certain level of predictability that violations of law will be met with certain consequences.[38] This predictability has not been supported in cases relating to corruption in India and hence, it is important to take steps to reform the criminal and civil justice systems with a view to infuse predictability in and remove uncertainty from the protection of the rule of law.[39] Although the recent passing of a Right to Information Act has helped to ensure transparency in governance,[40] India does not have the necessary legal and institutional frameworks for whistleblower protection. The government of India did examine a proposed piece of legislation in 2002 called The Public Interest Disclosure and Protection of Informers Bill, which was drafted by the Law Commission of India.[41] In light of the recommendations, the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) passed a resolution to give protection to whistleblowers.[42]

While the protection that is granted under this resolution is not similar to statutory protection, it may be useful to provide a minimal degree of confidence to whistleblowers. The resolution authorized the CVC as the Designated Agency to receive written complaints or disclosures on any allegation of corruption or misuse of office by any employee of the Central Government or of any corporation established by or under any Central Act, government companies, societies or local

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[35] Kumar, *Corruption and Human Rights*, *supra* note 17, at 65.

[36] (1998) 1 S.C.C. 226 (India).

[37] *See* Noorani, *supra* note 33.

[38] *See id.*

[39] BAXI, LIBERTY, *supra* note 5, at 160-70.

[40] S.P. SATHE, RIGHT TO INFORMATION 131-60 (2007).

[41] *See* Government of India Resolution No. 89, 2004, Gazette of India, part I, section I (Apr. 21, 2004).

[42] *Id.*

authorities owned or controlled by the Central Government.[43] The limitation of "owned or controlled by the Central Government" has clearly excluded private companies, corporations and private institutions within the ambit of whistleblower protection, thereby adopting a narrow approach of protection, unlike similar Japanese legislation. Section 6 of the resolution says that if a person is aggrieved by any action on the ground that he is being victimized due to the fact that he had filed a complaint or disclosure, he may file an application before the designated agency seeking redress.[44] Section 7 provides for witness protection.[45] However, this is based on the opinion of the designated agency that the witness needs protection. Overall, the protection that is granted to whistleblowers by way of policy regulations is very minimal and grossly underestimates the need for protection for whistleblowers.[46]

D. *Whistleblower Protection Act*

The Whistleblower Protection Act[47] was recently passed by the Parliament. It is important to understand the Act in the context in which it approaches the problem of tackling corruption in India.

1. Recognition

The recognition of corruption as a serious issue that violates human rights undermines the rule of law and distorts the development process.[48] This is the starting point for the discussion relating to the possible responses for fighting corruption. The CVC, the Central Information Commission ("CIC"), the CBI, and non-governmental organizations like Transparency International in India may all be helpful in the fight against corruption.[49] But these institutions are to a large extent crippled in the fight against corruption without a vibrant and active civil society.[50]

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[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] Kumar, *Corruption, Development*, *supra* note 8, at 546.

[47] *See* SATHE, RIGHT TO INFORMATION, *supra* note 40, at 27-57.

[48] Doig & McIvor, *supra* note 3, at 659.

[49] *See* SATHE, RIGHT TO INFORMATION, *supra* note 40, at 137-41.

[50] Kumar, *Corruption, Development*, *supra* note 8, at 547.

2. Response

The case for a whistleblower protection law in India was based on the need for a protective system for people who are willing to take the risk of exposing acts of corruption.[51] The notion of a whistleblower has a number of aspects embraced into it. It has been observed that there are three pre-requisites for whistleblowing:[52]

(1) Whistleblowers must be confident that they will be protected if they do so, and that the decision to blow the whistle will not result in any adverse effects either on their employment or legal liability. This is necessary not only to instill confidence in employees, but also to create an environment of mutual trust and a culture of integrity. Further, given the nature of corrupt acts committed by powerful and well-connected individuals, there is a good chance that those with information about acts of corruption may fear retaliation. A system must exist to ensure physical and legal protection against retaliation;

(2) Whistleblowers must believe that blowing the whistle will achieve some good and that appropriate action will be taken by the agency. This is a question of institutional credibility. The legitimacy of any anti-corruption institution is dependent upon the confidence it can generate from its stakeholders. Whistleblowers will blow the whistle if they know that their act will result in appropriate action. This is dependent upon the reputation of the agency and factors like impartiality, objectivity, functional independence, operational efficiency and financial autonomy of the institution. There is a need to ensure that these factors are in place so that the whistleblower is encouraged to come forward with the relevant information that may be useful for fighting corruption;

(3) Whistleblowers must be aware that they can make disclosures and know how they should go about doing so, including to whom, how and what information can be

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[51] *Id.*

[52] Chris Wheeler, *Drafting and Implementing Whistleblower Protection Laws*, *in* CONTROLLING CORRUPTION IN ASIA AND THE PACIFIC 127, 127-45 (Asian Development Bank 2004), *available at* http://www.oecd.org/site/adboecdanti-corruptioninitiative/regionalseminars/35137772.pdf.

released as a part of their acts. This is a crucial factor for whistleblowing to be successful. Most of the time, there is no proper guidance available as to what type of information is not confidential or the release of which is appropriate. Also, there is a tendency among governments to use secrecy and confidentiality as a tool to ensure that little information is available in the public domain as to how the government functions. This approach has begun to change in India with the passing of the right to information law and the establishment of the central and state information commissions.[53]

3.   Empowerment

One of the difficulties encountered in fighting corruption, particularly at the lower end of government services, is that the victims of corruption are disempowered in the sense that they are helpless and are forced to pay bribes. The bribe receivers, or those who are the perpetrators of corruption, wield enormous power and are able to abuse it with little control on their exercise of powers.[54] Further, there exist only a few oversight or supervisory mechanisms for the exercise of these powers, and even if such bodies exist, corruption seems to have entered into these bodies as well. In this context, any approach to fight corruption ought to bear in mind that the trust and confidence deposed on individuals and institutions should be minimal. There is a need, to as great an extent as possible, for a broad based anti-corruption mechanism with many institutions acting as a check on the exercise of powers. It is in this context that the system of whistleblower protection is extremely valuable. The fundamental rationale for supporting the notion of whistleblower protection is that whistleblowers can be useful for bringing information relating to acts of corruption to the knowledge of the investigation officials or to the concerned institutions.[55] However, whistleblowers need to be truly empowered so that their zeal and enthusiasm to support corruption-free governance is legally and institutionally protected.[56]

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[53]   *Id.*

[54]   BAXI, LIBERTY, *supra* note 5, at 1-17.

[55]   *See* Moshe Maor, *Feeling the Heat? Anticorruption Mechanisms in Comparative Perspective*, 17 GOVERNANCE 1, 1-28 (2004).

[56]   *See* SATHE, RIGHT TO INFORMATION, *supra* note 40, at 27-57.

The whistleblower could be anybody, including, but not limited to, somebody who is a victim of corruption or a person who has some knowledge or information relating to a corrupt transaction; someone within the government who has received information relating to acts of corruption, but is not within his or her mandate to take any action on the particular complaint; a press reporter; an anti-corruption activist; or an NGO representative working in the field of corruption. The objective is to expand the base of persons who could be whistleblowers. In a truly democratic society, there is a need for every concerned citizen to act as a whistleblower, and it ought to become a central duty and responsibility of citizenship.[57] But the state cannot expect its citizens to discharge these types of duties of responsible citizenship until and unless there is a proper legal and institutional mechanism that provides protection to the whistleblower.[58] The final enactment of the Whistleblower Protection Bill is therefore, an important step in empowering both regular members of civil society and anti-corruption activists.

II.   ESTABLISHING AN INDEPENDENT COMMISSION AGAINST CORRUPTION[59]

A.   *Creating the Right Political Environment for Combating Corruption*

Fighting corruption has inevitably become the most urgent need for addressing all major challenges of governance in India. While a number of approaches have been tried to fight corruption in India, none of them have been very effective so far. 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.[60] The proposal to establish an Independent Commission Against Corruption ("ICAC") in India recognizes the inherent challenges of any institutional approach to seeking reforms in India, given the bottlenecks and obstacles for enforcement of the rule of law. A number of institutions entrusted with the responsibility of fighting corruption and ensuring probity in governance have not been

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[57] *See* Jon S. T. Quah, *Corruption in Asian Countries: Can It Be Minimized?*, 59 PUB. ADMIN. REV. 483, 483-94 (1999).

[58] Kumar, *Corruption, Development*, *supra* note 8, at 549.

[59] Part II is reprinted with minor revisions for consistency from C. RAJ KUMAR, CORRUPTION IN HUMAN RIGHTS IN INDIA 171-88 (2011) [hereinafter CORRUPTION IN HUMAN RIGHTS].

[60] *See* Maor, *supra* note 55.

successful.[61] Establishing an ICAC in India will not be the panacea for all ills relating to corruption. There has to be a multi-pronged strategy to fight corruption, which will have the legal framework, the institutional mechanism, the investigation and prosecution machinery, the public awareness and education strategy, and civil society empowerment approaches.[62] The fight against corruption will work 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.[63]

Transparency International in its TI Source Book 2000 describes the necessary framework for a successful anti-corruption agency:

- Committed political backing at the highest levels of government;
- Adequate resources to undertake its mission;
- Political and operational independence to investigate even the highest levels of government;
- Adequate powers of access to documentation and for the questioning of witnesses;
- "User-friendly" laws (including the criminalisation of "illicit enrichment"); and
- Leadership which is seen as being of the highest integrity.[64]

The proposal to establish an ICAC in India needs to address each of the above institutional challenges so that the ICAC is duly empowered to fight corruption. It is useful to briefly discuss these challenges here.

B.   *Committed Political Backing at the Highest Levels of Government*

There is an urgent need for political backing at the highest levels of government in India. While civil society activism and the citizenry seeking accountability of the government can help in creating circumstances for developing a political consensus to fight corruption, the much-needed political backing is important so that the top political brass in India is convinced of the seriousness of the problem of corruption, its huge impact on development and governance, and

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[61] *See generally id.*

[62] *See generally id.*

[63] *See* Doig & Mclvor, *supra* note 3.

[64] TRANSPARENCY INTERNATIONAL SOURCE BOOK 2000, CONFRONTING CORRUPTION: THE ELEMENTS OF A NATIONAL INTEGRITY SYSTEM 96 (2000) [hereinafter TI SOURCE BOOK 2000], *available at* http://archive.transparency.org/publications/sourcebook.

gives its fullest commitment to find ways to fight corruption.[65] This is exactly how it happened in Singapore when the political leaders made extraordinary efforts to wage a war-footage exercise against corruption. The political consensus that needs to be developed should not be limited to the ruling party, but also should cut across other political parties including the political opposition. The need for highlighting the negative effects of corruption on the Indian economy and development of various states cannot be underestimated.[66] This will not only raise awareness of the ill effects of corruption among the parliamentarians and legislators, but will also give an opportunity to exert pressure on the citizens belonging to different constituencies to persuade their elected representatives to support this initiative. The biggest challenge in developing political consensus among the politicians in India to support the establishment of an ICAC is their own sense of insecurity that such a move will create tougher legal and institutional frameworks that will impose higher standards of transparency and accountability on their conduct and actions. The proposal needs to come from the highest echelons of government backed by detailed policy framework and implementation agenda including a projection of possible results in the form of economic benefit, development dividend and governance reforms that could be the possible outcome of an independence and effective ICAC.

C.   *Adequate Resources to Undertake its Mission*

Establishment of an ICAC will need dedicated resources so that it can function effectively. Resources are critical for the effectiveness of institutions.[67] The proposed ICAC in India should have its resources allocated in a manner that does not in any way compromise and undermine its autonomy. The ICAC needs huge resources for putting together a comprehensive framework for investigation and prosecution of crimes relating to corruption.[68] As discussed earlier, the nature of crimes relating to corruption is such that a range of experts needs to be hired from different disciplines including, but not limited to, finance, criminology, forensic sciences, money laundering, besides police and law enforcement officials with proven experience in dealing with financial crimes. There is also a need for developing a robust infrastructure for the ICAC as it should be fully empowered to be able

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[65]   *See* Doig & Mclvor, *supra* note 3.

[66]   *Id.*

[67]   *See* Maor, *supra* note 55.

[68]   *See generally id.*

to take all steps that are needed to fight corruption.[69] The resources that are needed for the ICAC are not only confined to the infrastructure and people, but are also needed to develop a powerful campaign that will galvanize support to the ICAC and to its ideals among the Indian citizenry. Gathering the support of the civil society in India is central to the success of ICAC.[70] This is also one of the reasons for keeping the policing and law enforcement functions of the police from the anti-corruption initiatives of ICAC. The staff of ICAC should be fully dedicated to fight corruption at all levels of government and that is where there is a need for resources.

D. Political and Operational Independence to Investigate Even the Highest Levels of Government

There is an inextricable link between each of these requirements for the success of an anti-corruption agency. Political and operational independence to investigate cases relating to corruption, however high up the political ladder a person is, becomes essential for maintaining the legitimacy of the ICAC. It is in this context that there is a need for general political reforms so that other forms of accountability are infused into the political process. In India, most of our institutions have become politicized and are therefore suffering from a credibility crisis.[71] There is a need to ensure that the independence of the ICAC does not develop into an institution that is not accountable to any other institution and may itself assume an agenda without proper checks and balances to control the abuse of power. The TI Source Book 2000 has recognized this problem and has noted:

> [J]ust as an Anti-Corruption Agency can be susceptible to those at the highest levels of government, it can also be used as a weapon with which to persecute political opponents. Even where the independence of the office is respected and an Agency is able to operate freely, it occupies extremely difficult terrain. Imaginative thought has to be given as to how a powerful and independent anti-corruption body can itself be

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[69] *See generally id.*

[70] Sunil Sondhi, Combating Corruption in India: The Role of Civil Society 18-26, Paper for the XVIII World Congress of International Political Science Association (Aug. 2000), *available at* http://www.sunilsondhi.com/resources/Combating+Corruption.pdf.

[71] *See generally* UPENDRA BAXI, THE CRISIS OF THE INDIAN LEGAL SYSTEM (1982) [hereinafter THE CRISIS].

made accountable, and corruption within the organisation minimised.[72]

The power to investigate the highest levels of government ought to be given to the ICAC so that it can function in an independent manner. Any exception to this principle will weaken the institution in the first place and in due course provide opportunities for undermining the investigative process.

E. *"User-Friendly" Laws (Including the Criminalization of "Illicit Enrichment")*

The legal framework that establishes the ICAC should include all aspects of dealing with corruption. In addition to the criminalization of "illicit enrichment," the law should have provisions that outline the framework for enforcement of the rule of law.[73] The proposed ICAC should be able to access other legal and judicial institutions so that the enforcement regime for fighting against corruption favors the efforts taken by the ICAC.

F. *Leadership of the Highest Integrity*

The leadership of the ICAC and the officers who constitute the ICAC should be of the highest integrity. It is important that they be able to function in an independent and professional manner. Time and again, it has been noted in India that the law enforcement agencies are not allowed to function in an impartial and independent manner. Their work is constantly intervened in by political and other vested interests leading to the guilty going scot-free. Brian C. Harms has observed:

> No matter how effective the machinery one builds, without the proper foundation and support it will most certainly collapse . . . . The legal and policy initiatives create disincentives to be corrupt, and incentives to combat corruption. International financial institutions and Transparency International help to educate the people to develop their own country's internal reform and stop accepting corrupt behavior. Such internal reforms will establish a foundation upon which further anti-corruption efforts can be built.[74]

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[72]   TI SOURCE BOOK 2000, *supra* note 64, at 103-04.

[73]   Doig & McIvor, *supra* note 3.

[74]   Brian C. Harms, *Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy To Combat Corruption*, 33 CORNELL INT'L L.J. 159, 209 (2000).

Further, it is important to recognize that the police and other law enforcement agencies in India are themselves perceived to be hugely corrupt and face a crisis of credibility. Credible institutions are not only important for all stakeholders in the society to have confidence in the independence and impartiality of the institution, but also necessary for their effective functioning. Credibility of the anti-corruption mechanism is critical for its success.

Moshe Maor has observed that "[a] credible judgment by either a public official or an agency requires a wide range of resources which revolves around three ongoing government commitments, namely, a commitment for independence, a commitment for guaranteed operational capacity, and a commitment for wide jurisdiction."[75] The proposed ICAC in India has to be established on the basis of these three fundamental institutional requirements. In fact, these prerequisites are *sine qua non* for the establishment of the ICAC and their public legitimacy will depend upon how the government is able to deliver on the above-mentioned commitments.

The commitment of the institution is necessary not only to ensure fairness in the process, but also to protect it from both internal and external threats that may question its integrity. Anti-corruption institutions like human rights institutions cannot be friendly with the government as it is part of their responsibility to keep a check on governmental abuse of power. To maintain a certain degree of autonomy and independence, these institutions have to take tough decisions, which may be adverse to both individuals and in some cases departments of the government. It is in this context that the credibility of an institution like that of the proposed ICAC is critical for its effectiveness in the fight against corruption. Further, Moshe Maor has noted:

> "Credibility" in the context of integrity management presumes these commitments, thus increasing public faith in decisions by public officials or agencies. Once one or more of these commitments is undermined, the result may be a creeping shadow of doubt in the public mind regarding decisions by public officials or agencies. The absence of this doubt is the essence of credibility.[76]

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[75]   Maor, *supra* note 55, at 4.

[76]   *Id.*

A substantial part of the efforts to establish an ICAC in India ought to focus on the need for maintaining credibility that will bolster public confidence and faith of the media and civil society in the institution.[77]

In the fight against corruption in any society, the trust and confidence of the people is critical. The citizenry ought to feel that the fight against corruption through any approach adopted by the government, including through the effort of a specialized institution in the form of an ICAC, is inherently legitimate and is genuinely aimed at improving governance and creating a rule of law society. Thus, the investigation, prosecution and the judicial proceedings relating to corruption ought to be fair and transparent.

One of the major challenges in India in its past efforts to fight corruption has been the lack of legitimacy of anti-corruption initiatives due to the problem of politicization of crime in all its dimensions.[78] Serious anti-corruption efforts have been undermined due to the lack of an impartial and unbiased approach to investigation and prosecution of cases relating to corruption.[79] Unfortunately, anti-corruption cases have become a tool for politicians and political parties to pursue against opposition parties and politicians belonging to other parties with a view to scoring political mileage, rather than any genuine sense of seeking the truth, punishing the guilty and upholding justice.[80]

There have been a number of instances when anti-corruption commissions have been established with a view to fighting corruption. But their effectiveness or otherwise will depend upon a number of factors. There is no doubt that the independence and autonomy of the anti-corruption commission is a significant factor that will determine the effectiveness of the commission. John Heilbrunn has observed:

> Evidence of dysfunctional anti-corruption commissions is manifest in the numerous agencies that lack independence from the executive, receive no budgetary support from the legislature to investigate venal officials, and have no procedures for forwarding cases of corruption for prosecution by the relevant judicial authorities. Herein lays the dilemma for policymakers who want to reduce corruption and improve governance: whereas it may be desirable to enact policies to reduce corruption, a hollow commission leads to a reputation

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[77] *See id.*

[78] *See* BAXI, LIBERTY, *supra* note 5, at 1-17.

[79] *See id.*

[80] *See id.*

for token reforms, which undermines the political leadership's credibility. Indeed, it is easy to explain why anti-corruption commissions fail in so many places; it is far more difficult to explain why any succeed.[81]

The effort to establish an ICAC in India is the culmination of the Indian society's desire to eliminate corruption. The citizens of India are indeed desirous of reducing, if not totally eliminating, corruption as it directly affects their lives. The recent Anna Hazare campaign, and the resulting social movement to institute a Lokpal is but one reflection of the citizenry in India waking up and demanding a cure to the democratic deficit created by corruption.[82] However, there is neither a political consensus in terms of corruption being the most important governance issue, nor a reference to the approaches that need to be adopted to fight corruption.[83] Under these circumstances, any institutional approach to fight corruption is unlikely to emerge. However, it is important to develop a framework so that when the issue of corruption comes to the center stage of politics and governance in India, there is greater understanding of the viable approaches to fight corruption. Heilbrunn has commented that there are four types of anti-corruption commissions. In his view,

> [F]irst is the *universal model* with its investigative, preventative, and communicative functions. The universal model is typified by Hong Kong's Independent Commission Against Corruption (ICAC). Second, the *investigative model* is characterized by a small and centralized investigative commission as operates in Singapore's Corrupt Practices Investigation Bureau (CPIB). Both the universal and investigative models are organizationally accountable to the executive.[84]

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[81] John R. Heilbrunn, *Anti-Corruption Commissions: Panacea or Real Medicine to Fight Corruption?*, WORLD BANK INST. 1-2 (2004), *available at* http://siteresources.worldbank.org/WBI/Resources/wbi37234Heilbrunn.pdf.

[82] *See Bring Private Sector Under Lokpal Bill*, HINDU (Apr. 15, 2011), http://www.thehindu.com/todays-paper/tp-national/bring-private-sector-under-lokpal-bill/article1698085.ece. For a good analysis of this issue, see Shamnad Basheer, *Hazare and the Potential Curing of a Democratic Deficit?*, LAW & OTHER THINGS (Apr. 19, 2011, 9:53 PM), http://lawandotherthings.blogspot.com/2011/04/hazare-and-potential-curing-of.html. For a critique of the Lokpal Bill, see Iftikhar Gilani, *The Fatal Flaws in the Government's Lokpal Bill,* TEHELKA (Apr. 5, 2011), http://www.tehelka.com/story_main49.asp?filename=Ws050411ACTIVISM.asp.

[83] *See* BAXI, THE CRISIS, *supra* note 71, at 1-40.

[84] Heilbrunn, *supra* note 81, at 3.

In the Indian context, it is important to recognize that there have been various institutional approaches to fight corruption that have not met with success. If a new approach is formulated, it should encompass all aspects of the process relating to investigating and prosecuting cases relating to corruption, in addition to educating and empowering people in the fight against corruption. The Hong Kong model and certain tenets of Singaporean model with a certain degree of adaptability to the Indian context can be more suitable for India.[85] Heilbrunn has also commented on two other models:

> [T]he *parliamentary model* includes commissions that report to parliamentary committees and are independent from the executive and judicial branches of state. The parliamentary model is epitomized by the New South Wales Independent Commission Against Corruption that takes a preventative approach to fighting corruption. Finally, the *multi-agency model* includes a number of offices that are individually distinct, but together weave a web of agencies to fight corruption. The United States Office of Government Ethics with its preventative approach complements the Justice Department's investigative and prosecutorial powers in a concerted effort to reduce corruption.[86]

The Parliamentary model that prevails in Australia and the multi-agency model that is in the United States are not suitable for India. Both of these models presuppose a certain degree of credibility of democratic institutions.[87] Unfortunately, the Indian institutions suffer from a large credibility crisis and will not able to function in an independent manner unless this independence is provided under the Constitution or by way of legislation. There have been huge challenges to maintain the independence of democratic institutions.[88] While electoral democracy has been strongly established in India, we are far from developing a democratic culture that respects the autonomy of institutions.[89] In the Indian context, democracy does not in itself provide an effective antidote for corruption. In this regard, Susan Rose-Ackerman has observed: "Democracy is not a cure for

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[85] For a similar argument for establishing the ICAC in Japan, see C. Raj Kumar, *Corruption in Japan: Institutionalizing the Right to Information, Transparency and the Right to Corruption-Free Governance*, 10 New Eng. J. Int'l & Comp. L. 29 (2004).

[86] Heilbrunn, *supra* note 81, at 3.

[87] *See id.*

[88] *See generally id.*

[89] Harms, *supra* note 74, at 165-68.

corruption, but democratic structures can provide the conditions needed for anti-corruption policies to succeed."[90]

The legal system of a country needs to play an important role to strengthen the institutions and the rule of law that is the cornerstone of a democracy.[91] In this regard, Claes Sandgren has observed,

> The role of the legal system is to provide the institutional framework — rules as well as institutions that apply the rules — for good governance . . . . The legal system is the warrant for this type of governance that counteracts corruption. Criminal law has a role to play, even though it is not as prominent as one may assume.[92]

Accountability of anti-corruption institutions is vital in India, given the fact that a large number of institutions and law enforcement agencies have been politicized and their decisions have been marred with controversy.[93] Due checks and balances need to be provided so that the ICAC does not become an all-powerful institution. Claes Sandgren has further observed,

> In addition, the legal system also has the vital role of overseeing the institutions that fight corruption and to hold them accountable. Only if this task is accomplished in an effective way, and is seen as being effective, is it possible to gain and maintain the confidence of the public. Without such confidence, citizens cannot be expected to reject corruption and abstain from using bribes. In the end, the attitude of the public at large is crucial to the prospect of success for any effort to fight corruption.[94]

The need for establishing an Independent Commission Against Corruption in India is based upon two factors:

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[90] Susan Rose-Ackerman, *Political Corruption and Democracy*, 14 CONN. J. INT'L L. 363, 378 (1999).

[91] *See id.*

[92] Claes Sandgren, *Combating Corruption: The Misunderstood Role of Law*, 39 INT'L LAW. 717, 730 (2005).

[93] *See* BAXI, THE CRISIS, *supra* note 71, at 1-40.

[94] Sandgren, *supra* note 92, at 730-31.

1. Lack of Faith among Citizenry in Government's Anti-
    Corruption Initiatives

Even though there is massive corruption in India and people acknowledge the ill effects of it, there is lesser faith in the ability of the government and many of the existing institutions to fight corruption. This lack of faith and confidence in the government's ability to fight corruption in an impartial and unbiased manner has undermined its credibility.[95] Investigations relating to corruption have, by and large, suffered due to political intervention or other forms of biases that affect the integrity of the criminal justice process.[96] The legal system is also marred with huge problems of delay and unpredictability, which have also affected anti-corruption efforts.[97] While police and law enforcement agencies are at the vanguard of anti-corruption efforts, their role and functions need to be subjected to intense scrutiny, given the history of abuse of power, corruption and other problems that police as an institution face in India.[98] This has resulted in a situation where the existing police system is not in a position to successfully carry out anti-corruption investigations and prosecutions. This is the case even with regard to one of India's highest investigative bodies, the CBI. The Supreme Court of India in *Vineet Narain v. Union of India* noted:

> The sum and substance of these orders is that the CBI and other Governmental agencies had not carried out their public duty to investigate the offences disclosed . . . . Even after this matter was brought to the court complaining of the inertia of CBI and the other agencies to investigate into the offices because of the alleged involvement of several persons holding high offices in the executive, for quite some time the disinclination of the agencies to proceed with the investigation was apparent . . . . The continuing inertia of the agencies to even commence a proper investigation could not be tolerated any longer. In view of the persistence of that situation, it becomes necessary as the proceedings progressed to make some orders which would activate the CBI and the other agencies to at least commence a fruitful investigation.[99]

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[95] *See* BAXI, THE CRISIS, *supra* note 71, at 1-40.

[96] *See id.*

[97] *See* BAXI, LIBERTY, *supra* note 5, at 1-17.

[98] *See id.*

[99] Vineet Narain v. Union of India, (1997) 1 S.C.C. 226, 4 (India), *available at* https://www.escr-net.org/sites/default/files/caselaw/vineet_narain_others_vs_union_

University of California, Davis   [Vol. 49:741

The judgment of the Supreme Court of India in the above case is a reflection of the lack of independence of the investigative agencies in the fight against corruption. Citizens have little faith in the criminal justice system, given its inability to provide justice in timely, fair and efficient manner.

The civil society activism in fighting corruption has significantly expanded in the recent years.[100] The Global Integrity Report published by the Center for Public Integrity has noted in relation to India:

> Citizen groups and civil society initiatives are today carving out a space for themselves in the fight against corruption and misuse of authority . . . .The police have traditionally enjoyed tremendous power and patronage from the political elite. Among the various public institutions, the police are rated as having the lowest credibility by the general public. The politicization of the police force is a matter of serious concern often resulting in the high-handedness, corruption, and arbitrary behavior on the part of the police force. While some efforts are today being made to improve the image of the police, the public perception of the police remains largely unchanged.[101]

The effectiveness of anti-corruption initiatives is dependent upon an active and vibrant civil society.[102] But for the civil society to play a dynamic role in the government's efforts to fight corruption, it should have the confidence that the government and its anti-corruption institutions are not only serious about fighting corruption, but also have a properly devised plan and strategy to fight corruption.[103] At each stage of the investigative process, there may be a need for inputs from the citizenry and this information cannot be generated through coercion or undue influence. The Indian citizenry ought to feel socially obligated to share whatever information that they may have in relation to not only assisting the investigative process, but also to taking efforts to reduce the incidence of corruption in the future.[104]

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of_india_another_on_18_december_1997.pdf.

[100] *See* Sondhi, *supra* note 70, at 20-21.

[101] Sandeep Shastri, *Integrity Assessment*, *in* 7 GLOBAL INTEGRITY: AN INVESTIGATIVE REPORT TRACKING CORRUPTION, OPENNESS AND ACCOUNTABILITY IN 25 COUNTRIES: INDIA (Center for Public Integrity ed., 2004).

[102] *See* Sondhi, *supra* note 70, at 20-21.

[103] *See id.* at 22-23.

[104] *See id.* at 22-25.

Community involvement in anti-corruption initiatives is least witnessed in India. Corruption is a problem that cannot be addressed solely by the law enforcement machinery or for that matter, the ICAC. There needs to be a multi-pronged and participatory strategy for fighting corruption and only that will ensure that the anti-corruption efforts of the ICAC are duly supplemented by the support of the public at large. Successful anti-corruption institutions have engaged with the community and have recognized the role of the civil society as a vital mechanism in the fight against corruption.

2. Separating Anti-Corruption Initiatives from Other Police Functions

Police and law enforcement agencies themselves are perceived to be corrupt in India.[105] Any anti-corruption strategy including the establishment of a separate specialized institution to investigate and prosecute crimes relating to corruption, ought to focus on the nature of the institutional framework that needs to be created. Corruption in the police at all levels of their interaction with the public has left the latter with little faith in this institution, which is supposed to be the protector and guardian of the security of the people.[106] The nature and extent of corruption in police is observed by Arvind Verma:

> The elitist nature of the police leadership, the politicization of the department, the unaccountability to the people and outdated management practices have all combined to make corruption endemic and even acceptable within the organization. The persistence of open corrupt practices by officers is clearly indicative that the organization itself has become deviant.[107]

Therefore, the need for separating anti-corruption initiatives totally from policing is essential to maintain the independence of the anti-corruption institution.

In the Indian context, the pool of officers who are drawn for anti-corruption work are people who, either before or after their tenure in this work, will be engaged in policing. This approach poses a number of problems for pursuing serious anti-corruption work. First, the work relating to anti-corruption has become much more specialized and

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[105] *See* BAXI, LIBERTY, *supra* note 5, at 1-17.

[106] *See id.*

[107] Arvind Verma, *Cultural Roots of Police Corruption in India*, 22 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 264, 271 (1999).

officers involved in this work may need to have knowledge of not only the law, but also in many cases finance as well as training in investigation relating to money laundering. Corruption today is not confined to petty corruption where even the proceeds of corrupt transaction are negligible and confined to India. While all cases relating to corruption ought to be pursued, it is important to develop a dedicated civil service mechanism with officers who will be trained and vested with the responsibility of fighting corruption. This is critical for the success of the institution.

Second, while policing involves a range of activities relating to protecting the law and order and to ensure that persons who have committed crimes are brought to justice, the nature of corruption is such that there is an important element of abuse of power inherent in any corrupt transaction. The persons who are engaged in public corruption, besides violating the law, are also abusing the power that is vested with them by way of them being government officials. A sound understanding of anti-corruption law as well as the rules and regulations of civil service and the techniques of investigation, collection of evidence as well as developing a fool proof case for seeking conviction of the accused persons are all essential and can be done effectively only if there is a dedicated team of staff whose sole responsibility is to take these matters to its logical conclusion.

Third, the prosecution needs to be assisted by the investigating team in an effective manner so that the cases relating to corruption are brought to justice. If there are vested interests that work at this stage, there is good reason for anti-corruption efforts to fail. This is a real danger particularly when the incidence of police corruption is as high as it is the case in India.

Given the extent of police corruption in India, the anti-corruption institution may frequently be involved in the investigation of cases relating to corruption against police officials.[108] There is thus a need for fundamental reforms in policing and this should take place regardless of the anti-corruption mechanisms being created independent of the policing functions. In this context, Arvind Verma has observed:

> The role and function of any police department is adversely affected if the prevailing norms and traditional ways of doing things encourage corrupt practices. Accordingly, the way to control corruption and reform system is to make change in the way things are being done. This calls for a major

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[108] *Id.* at 264.

transformation, of organizational structure, management practices, supervision procedures, decentralization of power, creation of local accountability system, even a change in role and functions of the police in the society.[109]

A major policy change needs to take place for anti-corruption initiatives to be effective in India. Under the current system, the work relating to anti-corruption is pursued by the police and other law enforcement agencies, and in many cases there is a sufficient degree of overlap between these two functions.[110] Further, the people involved in this work may simultaneously be involved in other aspects of policing. If fighting corruption is to take serious priority, as it should, then it is important to differentiate all efforts to fight corruption from other equally important and responsible ways of maintaining law and order and investigation and prosecution of all other crimes. At the state level, the Department of Vigilance and Anti-corruption that is currently under the administrative system of the Director General of Police needs to be re-examined. In India, there are both central and state level agencies that are entrusted with the task of fighting corruption. Given the vastness of the country, this is inevitable, but there is an urgent need to re-examine the nature, scope, functions, jurisdiction, composition, and overlap of powers of these bodies with a view to infusing a greater degree of accountability, autonomy as well as effectiveness in the fight against corruption.

III.   VISUALIZING THE INDEPENDENT COMMISSION AGAINST CORRUPTION[111]

The institutional approach to fighting corruption is an attractive proposition given the focused approach to fighting corruption. When there are too many institutions responsible for undertaking similar tasks, there is bound to be confusion and in many instances turf war between the institutions as to who is more powerful in dealing with cases relating to corruption. The fundamental rationale for establishing a separate institution for dealing with corruption is to bring together the functioning of certain institutions already working in the field of corruption, and to create a single nodal institution with

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[109]   *Id.* at 271.

[110]   *Id.* at 266-67.

[111]   Parts III and IV are reprinted with minor revisions for consistency from KUMAR, CORRUPTION IN HUMAN RIGHTS, *supra* note 59, 188-99.

all the powers, functions, and responsibilities to investigate and prosecute cases relating to corruption.

Establishing an ICAC in India could be one of the most effective ways to fight corruption.[112] Hong Kong provides a useful model for an ICAC. The OECD[113] has explained the procedure for investigation and prosecution in the Hong Kong ICAC Model:

(1) ICAC Report Centre receives a complaint (by individuals, legal persons, ICAC Regional Offices or by other governmental departments) about corruption;

(2) The complaint is examined by ICAC and categorized with a view to pursue or not pursue further action;

(3) For complaints with further action recommended, investigations will be carried out by ICAC's Operations Department;

(4) For complaints with substantiated evidence, relevant details will be submitted for the institution of prosecution to the Secretary for Justice, head of the Department of Justice of the Hong Kong Special Administrative Region Government;

(5) Prosecution of corruption will be conducted by the two ICAC sections (public sector and private sector corruption) of the Commercial Crime and Corruption Unit, Prosecutions Division, Department of Justice. It advises ICAC and handles its prosecutions.

(6) Report will be subsequently made to ICAC's Operation Review Committee.[114]

A. Framework

The proposed ICAC in India should be a standalone institution and should not be 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. In fact, it would

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[112] For an analysis of the establishment and working of the ICAC in Hong Kong, see Jean A. Yeung, Fighting Corruption — The Hong Kong Experience, Presentation Paper for The Seminar on International Experiences on Good Governance and Fighting Corruption (Feb. 17, 2000), http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN002750.pdf.

[113] *See generally* OECD, SPECIALISED ANTI-CORRUPTION INSTITUTIONS: REVIEW OF MODELS (2006), *available at* http://www.oecd.org/corruption/acn/39971975.pdf.

[114] *Id.* at 45.

be appropriate for its establishment to be made through an amendment to the Constitution of India, which will provide a constitutional status to this commission. If that is not possible, given the political complexities of amending the constitution, it may be established by legislation. But the powers, functions and level of independence of ICAC 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 not enjoyed institutional independence or functional autonomy. All investigative bodies including police and law enforcement agencies have come under one or more ministries of the Government of India or the state government. This has made the independent and autonomous functioning of these institutions dependent upon the leadership and the 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. In the past, independence of the law enforcement agencies and the individual officers has been dependent upon two factors:

1. Honesty and Integrity of the Individual Officers and Heads of Anti-Corruption Institutions

The problem with this approach is that, it never helps to build a culture of institutional integrity as it far too much depends upon the individual officers who assume such positions. For anti-corruption efforts to be successful over a period of time there is a need for sustained approach to fighting corruption at all levels.[115] Institutional integrity and the public's trust 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.[116] 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.

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[115] Kumar, *Corruption and Human Rights*, *supra* note 17, at 65.

[116] *Id.*

2. Honesty, Integrity and in Some Cases, Benevolence of the
    Politicians and Bureaucrats

The independence or otherwise of the ICAC should not be dependent upon the personal integrity or the benevolence of the politicians and bureaucrats. Political and bureaucratic corruption in India is rampant. It is essential that the ICAC as an institution 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 a need to develop an institutional framework that leaves little room for powers to be abused.

B.   *Independence*

The ICAC needs to have a legal framework that ensures its independence and helps maintain its autonomy. Independence of the ICAC is the most important aspect of this institution that is relevant for its effective functioning. Police agencies in India are notoriously undermined by political intervention. The independence of the ICAC needs to be legally protected so that it does not depend upon the whim and fancy of the government in power. While independence of the ICAC is critical, its own institutional accountability needs to be ensured. Independence and accountability are two sides of the same coin. While independence of the ICAC for its effective functioning is essential for it to be able to undertake its function of investigation and prosecution without any fear or favor from other government agencies and politicians, there is a parallel need to ensure that the ICAC does not become an organization that is accountable to none. A fool-proof system of checks and balances needs to be introduced so that the functioning of the ICAC is independent from the executive, but will be overseen by an Independent Board of the ICAC, the membership of which will be mostly from outside the ICAC. This will ensure that the day-to-day activities of the ICAC are conducted by the officials and officers of the ICAC, but broad oversight of the functions of the ICAC is undertaken by another body whose members include a cross-section of the society and also some ICAC representatives. It is important that the structure and framework of ICAC is diligently drawn so that the powers and functions of this anti-corruption agency fulfill the objectives of fighting corruption.

A number of best practices that prevail in the world providing operational independence, can be of use here. The reporting mechanism and internal oversight procedures need to reflect a certain

degree of rigorousness that is needed for the ICAC to perform what will be an essentially sensitive set of duties and responsibilities. Along the same lines, the ICAC should have financial independence, and the funds that are needed for its effective functioning ought to be made available by the Parliament and not depend upon government discretion. A useful example relating to financial independence in the context of an institution in India is the Election Commission of India ("ECI"). It has been noted that, "It is a mark of ECI's independence that it has not faced any major funding problems . . . . [I]t is funded by the government budget through the Consolidate Fund . . . . The ECI's accounts are subject to audit by the Comptroller and Auditor General and its report is tabled in the Parliament. This ensures the financial accountability of the ECI, and had worked smoothly."[117] I propose that the ICAC's financial independence is ensured along the same lines as of the Election Commission of India so that no government in the future can interfere in the working of the ICAC and adversely impact its financial independence.

C.   Powers

The ICAC should be empowered to be 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 the work of the ICAC is limited to cases of corruption that are not petty in nature, but amounts to a certain degree of significance either in terms of financial implications, or in terms of their impact on the administration of justice, or nature of the abuse of power. The ICAC should be empowered to determine its investigative procedures and processes.

The establishment of the ICAC in India by way of a constitutional amendment is essential to tackle the problem of corruption. While passing a constitutional amendment is no easy task, there have been steps taken by way of passing an amendment to the constitution on matters relating to the right to education where there was a certain degree of political consensus. Political parties invariably raise issues of corruption and level charges against each other during election campaigns. These allegations are made when parties or individuals need to criticize the opposition. In this process, the importance of the issue and the need for fair and transparent methods to discover the

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[117] Vijay Patidar & Ajay Jha, *India: The Embodiment of EMB Independence*, INT'L IDEA 194-95, http://www.idea.int/publications/emd/upload/EMD_CS_India.pdf (last visited July 31, 2015).

truth and to seek punishment for the perpetrators of the crime of corruption is undermined. The credibility of the criminal justice process is significantly affected and crimes relating to corruption almost never end up in conviction let alone punishment.

The business of investigating cases relating to corruption and seeking the prosecution of accused persons is an extremely important and serious endeavor for a variety of reasons. The rule of law will be protected in India only if it is ensured that those who violate the law are given the punishment that is appropriate for that violation. Rule of law ought to 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 the most powerful and influential persons in the society are also investigated in a professional manner and justice is rendered.[118] There is no doubt that the criminal justice system in India is facing a huge crisis of credibility.[119]

D.   *ICAC and Human Rights Protection*

The fact that the activities of the proposed ICAC can potentially infringe upon human rights underlines the need for strengthening the human rights machinery in India. If anti-corruption efforts are not adequately provided with democratic checks and balances, the fairly effective institutional approach of anti-corruption that is being proposed could become politicized.[120] Politicization of the corruption issue does not bode well for law enforcement in India.[121] Selective or partial enforcement of law violates the principle of equality and non-discrimination and indeed threatens the foundations of the rule of law the ICAC is intended to serve.

E.   *Creating a Communications Office*

There is a need to create a communications office in the form of a public affairs division within the proposed ICAC. The purpose of creating a professionally organized and fully trained office that is responsible for providing the relevant information to the media and to the larger public domain is to increase the visibility of the commission. The fight against corruption has to involve the widest possible sections

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[118]   *See* BAXI, THE CRISIS, *supra* note 71, at 1-40.

[119]   *See id.*

[120]   *See id.*

[121]   *See* BAXI, LIBERTY, *supra* note 5, at 1-17.

of civil society in India,[122] and it is for this purpose that the interaction of the proposed ICAC with the local and international media is critical. There should be a system by which cases relating to corruption that the proposed ICAC is investigating, or has completed investigating, be brought to the public domain without breaching any rule of confidentiality, or releasing information that would in any way jeopardize the process of investigation. The information that the communications office or the public affairs division of the proposed ICAC provides to the media through a press conference or other appropriate methods is to keep the people of India informed about the workings of the proposed ICAC. Another important purpose is to ensure that corruption remains a firm and central issue within the social and political agenda of governance in India.

F.   Dissemination of the Procedures for Approaching the ICAC

Most of the time, even with a sound legal and institutional framework in many countries, there is little information disseminated to the wider public about the functioning of anti-corruption institutions. There is a need for publicizing through the mass media and all channels of communication the existence of the commission, along with the procedure that is in place for receiving complaints, the process of taking cognizance of complaints and the approximate time taken for investigation and response. There is a great deal of ingenuity and creativity required for successfully handling this matter as this will ensure citizen's participation in governance. The fight against corruption in India cannot be handled only by the proposed ICAC. It has to seek every possible encouragement and support from all individuals and institutions within and external to the government. And in particular, for getting the people involved, there is a need for constant education by using multiple channels of communication. The representatives of ICAC should be regularly invited to give talks and lectures by educational institutions. Also, a close relationship between officials of ICAC and academic circles of human rights, constitutional law, administrative law and criminal justice needs to be established.

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[122]   *See id.*

G.   *Invoking Strong Political Commitments to Reduce Corruption and Non-interference in Corruption Proceedings*

1.   People-centered Approach to Anti-corruption Work

The ICAC should work on the basis of a people-centric approach to fighting corruption. This means that the ICAC should pursue anti-corruption cases with a view to empowering the people of India who are actually the victims of corruption.[123] Earlier, it was noted that corruption disproportionately affects the poor and the disempowered. In developing societies like India, there are far too many people who are struggling to fulfill their basic needs. If corruption is brought to the central agenda of governance, it is possible to develop a consensus among the political parties, although genuine change relating to honesty and integrity in politics will take a long time. The need for commitments from politicians at the highest level in the government can be crucial particularly when the proposed ICAC is able to achieve key convictions in anti-corruption cases. Also, any form of interference in the proceedings besides violating existing laws and the independence that is guaranteed to the proposed ICAC under the law would also discourage the staff of the ICAC to pursue these matters with the commitment they would have otherwise had. The credibility of the proposed ICAC will also suffer if there is any form of interference or appearance of impropriety by the officials of the ICAC. Thus, the proposed ICAC has to steadfastly guard against any interference that may affect it in a direct or indirect manner in exercising its duties and obligations.

2.   Training of Parliamentarians

This is a subject which will take a fair amount of convincing to do. The proposed ICAC should interact with the Secretariat of the Parliament to provide suitable training programs on issues relating to corruption to the parliamentarians. Political corruption needs to be curbed in order to develop a good governance framework.[124] While every effort ought to be taken by the proposed ICAC to pursue the investigation, prosecution and conviction of corrupt individuals, whether they are politicians, bureaucrats, judges or any other individual or institution[125] in the Indian society under the functional

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[123]   *See id.*

[124]   *See generally* Maor, *supra* note 55.

[125]   *See generally id.*

jurisdiction of the proposed ICAC, equal efforts need to be taken to educate and train people on the ill effects of corruption and how it violates human rights, undermines the rule of law, and distorts the development process in India.[126]

IV.   ICAC AND ITS RELATIONSHIP WITH OTHER INSTITUTIONS — FORMAL AND INFORMAL

As discussed earlier, corruption is a problem that is multifaceted and has numerous dimensions. The response to corruption should also be holistic and hence, the proposed ICAC should work with and engage to the extent possible with other commissions and institutions in India, including, but not limited to, the National Human Rights Commission and Comptroller and Auditor General of India and other similar institutions. Obviously, the relationship and interaction, which the proposed ICAC expects to establish with each of these institutions will vary and depend upon the institutional mandate of the respective institutions. Nevertheless, there is a good argument to make that corruption affects the efficient functioning of government and violates the rights of people besides undermining the rule of law. It is in this context that anti-corruption efforts can acquire greater legitimacy both within and without the government and its institutions.

The proposed ICAC needs to work on partnerships with governmental institutions and non-governmental organizations in India and overseas. These partnerships would be of varied nature, and the purpose is to engage in capacity building so that the ICAC becomes a truly nodal organization to ensure corruption-free governance in ICAC. The officials of the ICAC should be in a position to conduct seminars/presentations and other forms of training programs in government departments in India. The ICAC should also work closely with the private sector, particularly on matters relating to corporate fraud and other forms of corruption that take place in corporations.

A.   Linkage with the Comptroller and Auditor General's Department

The Office of the Comptroller and Auditor General ("OCAG") is an extremely valuable institution, with which the proposed ICAC should have a close relationship for capacity building in terms of both knowledge and experience. There needs to be a broad level of engagement and interaction between the ICAC and the OCAG with a

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[126]   *See generally id.*

view to providing support in training. There is a need to institutionalize this relationship so that the interaction is not in an *ad hoc* capacity, but rather, is based on shared principles and values of institutions within government workings to ensure good governance.

B.   *Relationship with the Media*

The proposed ICAC should constantly work towards aggressively pursuing the anti-corruption agenda and involve the media in bringing to the public domain information on arrests, indictment, trial, and conviction. In free and democratic societies, the media plays an important role to expose acts of corruption and to insist on transparency in governance and accountability of administrators. Independence of media is essential for ensuring transparency. If it is not, then this may hinder the establishment of an open and transparent relationship with the media. The impartial and objective approach of the proposed ICAC can also help in influencing the media organizations themselves. In this context, it is important for the ICAC to maintain its independence and autonomy and to deal with cases relating to corruption in an impartial, objective, and efficient manner. This will generate greater confidence among the media on the working of the proposed ICAC.

C.   *Interaction with NGOs and Civil Society*

The proposed ICAC needs to expand its partnership with NGOs and the wider civil society in India for fighting corruption. The empowerment of NGOs and civil society is critical for ensuring that the fight against corruption has the credibility that is needed. Credibility is extremely important particularly when corruption is writ large in the society and people are generally cynical towards government initiatives that intend to eliminate corruption.[127]

Furthermore, since the institutional credibility of anti-corruption agencies in India has suffered in the past, there is a need to work closely with NGOs and civil society for achieving corruption-free governance.[128] Civil society, including the media, has to be involved in a significant manner in India to ensure that corruption-free governance does not remain purely a policy goal or an institutional aspiration. Civil society is best suited to perform this role as it can

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[127] Krishna K. Tummala, *Regime Corruption in India*, 14 ASIAN J. POL. SCI. 1, 19-21 (2006).

[128] *Id.*

exclusively devote itself to ensure that the decisions of the government are made in a transparent and socially accountable manner.[129]

Moreover, civil society in India is part of the democratic set-up and should be involved in both rural and urban India at the grassroots levels. The problem of most human rights commitments has been the existence of a gap between theory and practice, policy and reality.

Corruption-free governance should be part of civil society activism so that the people are empowered to seek transparency and accountability from decision-makers.[130] NGOs and civil society will be whistleblowers themselves, and working closely with the proposed ICAC will provide the right kind of trust for both. Working closely with NGOs does not mean that the proposed ICAC needs to accept or condone all approaches adopted by NGOs and civil society.

V.   CRITICAL EXAMINATION OF THE LOKPAL ACT

The Lokpal and Lokayuktas Act 2013[131] was passed in response to deafening demands for a legal framework committed to identify and address corruption. Birthed in a widespread movement which engaged both civil society and socio-political stakeholders, the institutions of the Lokpal and Lokayukta were supposed to be institutions of the highest integrity that would provide effective structural mechanisms to tackle corruption at every level of government. Unfortunately, the shape that the final Act took was inadequate in ensuring that the Lokpal and Lokayukta could realize their intended status as the defenders of democracy and accountability in the Indian state. Two critical issues that have not been adequately addressed and prevent the Act from having any meaningful impact in the fight against corruption must be understood.

A.   Selection Process of the Lokpal and Its Members

There have been many institutions involved in the fight against corruption in India. Laws and institutions have not made any impact whatsoever in dealing with corruption, leading to widespread and institutionalized forms of corruption across all institutions of governance in India. Under the 2014 Corruption Perceptions Index rankings published by Transparency International, India is ranked 85,

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[129] *Id.*

[130] *See* Quah, *supra* note 57.

[131] The Lokpal and Lokayuktas Act, 2013, No. 1 of 2014, INDIA CODE (2014).

clearly a country which is facing high levels of corruption.[132] Interestingly, in the TI report in 2011 India was ranked 95, and in 2009 it was ranked 84. One of the reasons for these stagnating corruption levels is the lack of adequate a legal framework and the weaknesses in the design of our institutions to effectively fight corruption. The most important aspect of any institution to be effective is the process of selecting its members, which constitutes the institution. This assumes significance in light of the fact that social expectations have been generated by the civil society movement leading to a higher level of citizens' consciousness in the fight against corruption. If Lokpal is to be effective, it needs to be independent from the government.

The Act in its final form failed to adequately address the question of independence of the institution in relation to the selection of its members. One would think that after the recent experience of the Supreme Court of India invalidating the appointment of the Central Vigilance Commissioner,[133] there would be greater circumspection on the part of the government in relation to the selection process of the Lokpal. Our past experience that mere representation of the leader of opposition in the Selection Committee may not be sufficient to ensure independence of the institution. The Act requires half of its eight members to have some prior judicial experience while the other half will be someone who meets the criteria of "a person of impeccable integrity and outstanding ability having special knowledge and expertise of not less than twenty-five years in the matters relating to anti-corruption policy, public administration, vigilance, finance including insurance and banking, law and management." The process of selection is vested with a Selection Committee that is chaired by the Prime Minister along with the Speaker of the Lok Sabha, the Chief Justice of India, or another Judge of the Supreme Court appointed by him and an "eminent jurist." Though conceptually there is room for a person who does not have a background in public service to sit on the committee, the Lokpal remains an institution comprised of persons who have exercised some form of public power, and who therefore represent the class of people under the Lokpal's scrutiny.

Unfortunately, our thinking has rarely moved beyond the persons involved in the three wings of the government. If Lokpal is to be

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[132] *2014 Corruption Perceptions Index*, TRANSPARENCY INT'L (2014), http://www.transparency.org/cpi2014.

[133] *See* Vineet Narain v. Union of India, (1997) 1 S.C.C. 226, 33-38 (India), *available at* https://www.escr-net.org/sites/default/files/caselaw/vineet_narain_others_vs_union_of_india_another_on_18_december_1997.pdf.

effective in the fight against corruption, and a large part of that fight will inevitably be in relation to the persons who exercise public power, then the Selection Committee should have persons who do not necessarily exercise such power. It is in this context that greater involvement of members from the civil society, media, and academia in the Selection Committee is critical for maintaining the legitimacy and credibility of the anti-corruption institution.

B.   *Lokpal's Power to Investigate Corruption*

The Lokpal and Lokayuktas Act as finally enacted as an independent institution to fight against corruption is dependent upon the CBI or the CVC for fulfilling its statutory obligations to fight corruption especially at the stage of preliminary investigation. This is a fundamental flaw in the design of the Lokpal. Experience has demonstrated that political parties have misused the police and investigative agencies. A number of independent commissions have come to the same conclusion that we need to provide greater independence to the institutions that are involved in the fight against corruption. The Act specifies that the Lokpal will have supervision over any investigative agency discharging investigative functions under the Act, which in most instances would be the CBI or the CVC. This essentially means that the Lokpal and Lokayukta become an additional master to an institution which is under great scrutiny for its structural incoherence.

The Lokpal and Lokayuktas Act is ostensibly an institution to fight corruption. However, for this institution to be effective in the fight against corruption, it has to be significantly empowered, otherwise we run the risk of creating one more institution, which not only will fail but also will hugely give us a setback in our larger effort to create transparency and accountability in governance. Despite the fact that the Act was passed in 2014, the concerned bodies under the Act are yet to be constituted, and complaints for the forum are left in limbo.

Corruption continues to be a major challenge that has affected all aspects of governance in India. The ability to influence and seek illegal benefits through corrupt practices is widely spread across all sectors. The making of India should focus on infusing integrity and rectitude in governance. There is an urgent need for creating independent institutions focusing on fighting corruption. While the right to information and efforts to seek greater transparency in the functioning of government has made a positive impact, the country has a long way to go in ensuring that basic public services, which citizens are entitled to receive are free from corruption. It is unfortunate that even after the

law relating to Lokpal has passed in the Parliament, there is no consensus to ensure that it begins to function independently and effectively. It reflects poorly on our democratic institutions that we have not been able to constitute the Lokpal and support its effective functioning even after a law was passed to this effect. Corruption-free administration and accountability in administrators ought to be the central tenet for promoting good governance in India.

VI.   THE WAY FORWARD: A COHESIVE APPROACH TO COMBATING CORRUPTION[134]

The empire of corruption has done seminal damage to good governance and the rule of law in India.[135] This has resulted in human rights violations that have led to a lack of access to justice. Corruption is discriminatory, contagious, an assault on the human rights of people, and should be regarded as more than merely a criminal offense. It hinders the process of achieving access to justice and undermines the efforts to ensure human development.[136] We need to view corruption from the perspective of access to justice and human rights so that public institutions can be held accountable for abuse of power. We must encourage institutions like the National Human Rights Commission and State Human Rights Commissions in India to begin taking cognizance of corruption cases to raise the profile of this linkage with human rights. We must also develop a new language, including the right to corruption-free governance as a fundamental and non-derogable human right so that the ideal of constitutional governance is implemented.[137] There are various ways for the judiciary to eliminate corruption even as the legislative and executive branches dawdle and dissemble.[138]

Corruption *within* the judiciary, mainly at the lower levels, ought to be a target for elimination.[139] Anti-corruption work must involve grassroots civil society organizations along the lines of the Mazdoor Kisan Shakti Sangathan ("MKSS") in India, which succeeded in getting a law enacted for protecting and promoting the peoples' right to information. Since corruption is a disempowering force, the most

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[134] Part VI and the Conclusion are reprinted with minor revisions for consistency from KUMAR, CORRUPTION IN HUMAN RIGHTS, *supra* note 59, 200-13.

[135] *See* Kumar, *Corruption, Development*, *supra* note 8, 568.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.* at 569.

effective way to root it out is through the empowerment of citizens both through popular grassroots peoples' initiatives and through institutional mechanisms that exist in the legal system.[140] A holistic approach to fight corruption through legal and social action has been long overdue in India. Until such a movement comes about, corruption will continue to eat into the socio-economic development of India and exact a heavy human toll.[141]

I have argued in favor of a humanistic and liberal reinterpretation of "sovereignty" in the wake of new thinking and new developments in world affairs. Sovereignty exercised as an untrammelled power with irresponsible government institutions exploiting and disempowering the citizens, results in the lack of accountability. Sovereignty exercised as the responsibility of the governing with human development as the desired end is the wave of the future that sadly has not yet gained prevalence in India.[142] The way forward is to spread the notion of responsibility and accountability as imperatives for strengthening sovereignty, simultaneous to large-scale efforts of increasing the presence and participation of civil society in governance issues. A corruption-free state enhances its chances of perpetuation, reduces possibilities of unwarranted external interference, and attracts foreign talent and investments by raising its international stature. A population that is content, well-governed, and not discriminated against confers internal stability — a key requisite for projecting power externally.[143] Roping local civil society into this endeavor, in tandem with non-politicized international interventions, will produce tangible results.

It is possible for India to succeed in the fight against corruption and ensure that transparency in governance becomes the basis for the development of the country.[144] But for this to happen, there is a need, as discussed in this work, for a wide variety of actors playing important roles towards eliminating corruption from society.[145] The whistleblower protection laws that exist in a number of countries will provide a useful framework for India to demonstrate its commitment to ensuring corruption-free governance.[146]

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[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.* at 569-70.

But there is also a need to examine the workings of a number of institutions in Asia and foster close partnerships with such governmental institutions, non-governmental organizations, and civil society for the fight against corruption to succeed. No doubt, this is a long and arduous struggle, but the struggle is worth it as, along the way, many human rights will be protected and promoted and many people will be empowered.

The following specific suggestions are made to ensure that the problem of corruption receives the highest priority and attention for ensuring access to justice and promotion of development policies:

A. Laws

The legal framework for fighting corruption needs to be strengthened as a facet of both legal and judicial reforms. The existing legislative framework for fighting corruption in India needs to be thoroughly examined. Efforts ought to be taken to ensure that the laws, rules and regulations for fighting corruption are in place.[147] But it is important to note that anti-corruption laws will not be effective if the law enforcement machinery and the rule of law culture in a society is weak.[148] Hence, there is a need for taking efforts to protect the rule of law and empower the law enforcement machinery, including the police, prosecution and other agencies that may be involved in the fight against corruption.[149]

B. Institutions

The legal framework for fighting corruption should be supplemented by establishing and empowering institutions. A number of institutions are involved in varying capacities in the fight against corruption. Since corruption is inextricably connected to creating obstacles to access to justice and a lack of effective development policies, appropriate institutions should be in place to deal with it.[150] The judiciary and human rights commissions are best suited to deal with corruption as a violation of human rights that inhibits access to justice.[151]

But the consequences of corruption on development are profound. It is here that anti-corruption machinery needs to be strengthened and

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[147] *Id.* at 570.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*

the need for independent commissions against corruption becomes necessary.[152] Independent anti-corruption institutions, like the ICAC proposed in this article, have the potential to act as the watchdog for ensuring that corruption does not become a hindrance to development and the resources of the state are distributed in a fair and equitable manner.[153]

C. *Role of Judiciary and Adjudicative Mechanisms*

The judiciary and its adjudicative mechanisms have an important role to play in the fight against corruption. At times, the judiciary may be subject to criticism on the grounds that it is interfering in the affairs of the executive. However, the judiciary in India has not shied away from its responsibilities and remains an institution that enjoys tremendous moral legitimacy and constitutional status to intervene in human rights issues. It is important to recognize that the role of the judiciary in upholding the Constitution should not be overemphasized and will have its inherent limitations. The judiciary is far more effective when it comes to empowering other institutions than it is when taking upon itself the responsibility of fighting corruption.[154] It is in this context that the interface of corruption and human rights is useful for the judiciary to take steps to implement human rights.[155]

Constitutions at their best may provide the political and institutional venue for promoting a rights discourse. They are also written at a time when momentous political changes take place in a country and the framers objectively attempt to transform society. Constitutional guarantees cannot ensure human rights are protected, unless they succeed in engaging the democratic processes in society, an empowering function that should be the goal of constitutionalism. Corruption of the kind that prevails in India hugely disempowers individuals and institutions.[156] It is important that there are independent democratic institutions that function effectively in ensuring that the governance system adheres to the principle of rule of law and the Constitution. Constitutionalism should be understood as encompassing all such institutions. It is a principle that encompasses a

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[152] *Id.*

[153] *Id.*

[154] *See* Rajeev Dhavan, *Judicial Corruption*, Hindu (Feb. 22, 2002), http://www. thehindu.com/2002/02/22/stories/2002022200031000.htm.

[155] *Id.*

[156] Prashant Bhushan, *Judging the Judges*, Outlook (Jan. 21, 2009), http://www.outlookindia.com/article/judging-the-judges/239534.

variety of political theory ideals, demonstrating a framework of governance that is based upon human rights, fundamental freedoms, and human dignity.

The constitutionalization of human rights creates a theoretical framework for their protection and from it flow the various legal, judicial, democratic, and institutional mechanisms that ensure it. The judiciary will be able to best perform its constitutional functions only when the independence of other democratic institutions is guaranteed and the government adheres to certain principles of constitutional governance. Human rights and constitutional freedoms are central principles for liberal democratic societies.

Further, formal mechanisms for the protection of human rights through the constitutional apparatus and their enforcement by the judiciary can fail, particularly when these institutions operate under limitations.[157] There should be further space provided for democratic dissent and resistance to intrusions on human rights. This space is also typically addressed by liberal constitutions both in rights guarantees and democratic commitments. It should be an autonomous space for citizens to take upon themselves the task of protecting and promoting human rights and fundamental freedoms.[158] The right to information that is provided both as a constitutional and a legal right is one such example whereby the focus is on empowering the Indian citizenry to seek transparency in governance.[159] It is possible that resistance from citizens can actually serve as a check upon the democratic branches of the government to ensure that human rights are duly protected[160] and that violations of any nature, including acts of corruption are met with serious criticism in the form of democratic dissent. More importantly, there is a need for people's resistance and movements to ensure the protection and promotion of human rights.[161]

While a sound constitutional framework, an independent judiciary, and other democratic institutions are upholding the Constitution of India, the principles of constitutionalism have not yet permeated our political culture. It is here that we have a long way to go in ensuring that human rights, justice, and constitutional empowerment become the *sine qua non* of democratic governance in India.[162]

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[157] *See generally* BAXI, THE CRISIS, *supra* note 71.

[158] *See generally id.*

[159] *See* S.P. SATHE, RIGHT TO INFORMATION, *supra* note 40, at 19-20.

[160] *See id.*

[161] *See id.*

[162] *See* S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J.L. & POL'Y 29, 30 (2001).

The role of the judiciary in fighting corruption and improving governance is a central element of constitutionalism in Indian democracy.[163] The dialectical relationship between promoting constitutionalism and the development of judicial governance presents important challenges for understanding the role of law and institutional politics in India.

D. *Role of the Judiciary*

The judiciary is uniquely placed in the matrix of power structures within the system of governance. Judges are not elected but clearly have the power and indeed the responsibility to check the exercise of powers and actions of elected representatives and appointed officials. The judiciary as an institution is vastly respected, notwithstanding huge challenges in ensuring access to justice, judicial process and issues of transparency and accountability.[164] It is vested with ensuring that the rights and freedoms of the people are protected and the powers exercised by the government in adopting policies are in accordance with the Constitution and other legislations.[165]

In theory, if the different branches of the government adhere to the basic principle of separation of powers and function within their limits, it is considered a sound system of governance. In practice, however, a number of issues have emerged and challenges occurred. It is in this context that the three branches of the government — the legislature, the executive, and the judiciary — need to have a certain degree of trust in, and deference to, the actions of one another in matters within their respective jurisdictions.

However, trust and deference in relation to the actions of a particular branch should not undermine the judiciary's responsibility to adjudicate on the constitutional and legislative validity of the actions of the government. Clearly, this delicate balancing act of rightfully intervening when necessary requires a deeper understanding and appreciation of the principles of constitutionalism.[166] Rule of law is about all people and institutions respecting laws and acting in accordance with the law. The legislature and the executive as collective powerhouses are bound by these principles as much as ordinary citizens are. When acts of corruption are brought for adjudication to the judiciary, it is important for the judiciary as an

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[163] *See id.*

[164] *See id.*

[165] *See id.*

[166] *See id.*

institution to take all legislative and constitutionally available mechanisms for upholding the right to corruption-free governance. The credibility of the judiciary as an institution needs to be effectively used notwithstanding the fact that there have been recent issues of corruption within the judiciary that have undermined its reputation.[167]

E.   *Judicial Governance*

The term "judicial governance" in itself is subject to challenge as the judiciary is not supposed to be involved in "governance". However, the effort of the Indian judiciary to infuse accountability in the functioning of government institutions, and the growth and development of human rights jurisprudence, has demonstrated the central importance of judicial governance.[168] This has posed critical challenges to parliamentary accountability and executive powers and, more importantly, reinforced the need for improving efficiency and effectiveness of governmental institutions.

The need for social reform preceded the Constituent Assembly bestowing on the judiciary the role of guardian of individual rights. Hence, the protection of liberties within the constitutional framework needed to be balanced with achieving social reform. The Supreme Court perceived itself to be an institutional guardian of individual liberties against political aggression. In that process, it went beyond the framers' vision of achieving an immediate social revolution. It took upon itself a role similar to that of the United States Supreme Court as defined by Chief Justice Marshall in Marbury v. Madison.[169] This perception led the court to develop implied limitations on the powers of the political branch that is analogous to the U.S. judiciary's approach to the separation of powers. The best known of these implied limitations, the "basic features limitation," precludes the Indian Parliament from amending the Constitution in such a way as to displace its basic features.[170]

F.   *Civil Society Expectations*

Legal provisions relating to human rights as a normative framework provide little guidance and help for the masses in India who are

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[167]   Dhavan, *supra* note 154.

[168]   *See* SATHE, RIGHT TO INFORMATION, *supra* note 40, at 61-88.

[169]   For an excellent discussion of this, see S.P. SATHE, JUDICIAL ACTIVISM IN INDIA 25-100 (2003); *see generally* Marbury v. Madison, 5 U.S. 137 (1803).

[170]   *See* SATHE, JUDICIAL ACTIVISM IN INDIA, *supra* note 169, at 21 n.78.

aspiring to fulfill their basic rights, in particular their right to acquire and experience the basic needs of survival and existence. Civil society seeks to enforce good governance so that all human rights are promoted and protected.[171] It is imperative for the Indian society to work towards internalizing the values of constitutionalism so that the exercise of all powers is subject to accountability.[172]

Undoubtedly, the wider civil society has embraced the notion of judicial governance, given the fact that it provides certain social expectations for creating accountability. The relaxation of the rules of locus standi, recognition of a range of human rights under the "right to life" provision of the Constitution, and the development of public interest litigation[173] are important milestones in meeting civil society's expectations on the working of the judiciary.[174] However, given the range of injustices in our society, institutional responses, including those of the judiciary, need to be further expanded.[175] The Indian experience has demonstrated that the initial judicial recognition of human rights has culminated in the passage of an amendment, which guarantees the fundamental right to education.

If democracy is to become meaningful in India, it should be based on two important factors: the enforcement of the rule of law and the reform of the political system — each dwelling upon the other.[176] The judiciary is well suited to support both these initiatives.

G. Information

One of the most effective tools for reducing corruption in the functioning of governments has been the effective use of the right to information.[177] While there are bottlenecks in the right to information framework, this approach has great potential for throwing open the institutions of government to public accountability.[178] The right to information underlines the importance of transparency and

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[171] *See* Quah, *supra* note 57.

[172] *See id.*

[173] *See generally* Ashok H. Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*, *in* SUPREME BUT NOT INFALLIBLE — ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 159 (B.N. Kirpal et al. eds., 2000).

[174] *See* UPENDRA BAXI, COURAGE, CRAFT AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES 1-22 (1985).

[175] *See id.*

[176] *See* SATHE, RIGHT TO INFORMATION, *supra* note 40, at 1-26.

[177] *See id.*

[178] *See id.*

accountability in governmental functioning.[179] It ensures that the powers exercised by the state and its instrumentalities are subject to public scrutiny and, more importantly, serious accountability. Accordingly, a wide range of possibilities are available for using the information to create an accountable and transparent framework of governance.[180]

H.   Role of the Media

The role of media in the fight against corruption is critical. Worldwide, the media has played an important role in bringing to the public domain the instances of violations of access to justice. The media has played a dominant role in raising issues of development and how corruption has contributed to it. This role needs to be further improved and the media needs to take more responsible steps to act as a custodian of India's democracy and rule of law. There is a need for promoting the role of media as the availability and dissemination of information becomes complex. In many cases, there is a need for experts in different fields to understand the nature of investments made and the financial transactions involved in allegations of corruption.[181] The media has the necessary human and other resources to seek this information, analyze it and make it available for the public to understand. This role of media is critical for raising awareness and contributing to the empowerment of the wider civil society.[182]

I.   Role of Civil Society

The role of civil society is central to the fight against corruption. Corruption and the lack of access to justice are symptomatic of a larger problem within societies.[183] The only way to reduce corruption and provide for mechanisms that create greater access to justice is to empower the civil society.[184] The role of domestic and international civil society is important as it is best placed to situate the problem of corruption from an access to justice standpoint.[185] Once recognized in this manner, the strategies that may be adopted for fighting corruption

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[179] Kumar, *Corruption, Development*, s*upra* note 8, at 572.

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.* at 572.

[184] *Id.*

[185] *Id.*

may include a variety of democratic measures that will put pressure on governments to deal with the problem of corruption.

J. Training of Legal Officers

While the proposed ICAC will be engaged in the prosecution of persons against whom it has initiated proceedings, there needs to be an emphasis on the training of legal officers. In the past, many of the anti-corruption proceedings initiated in India have not resulted in convictions.[186] There are numerous reasons for this, many of which may be beyond the proposed ICAC's powers and mandate to investigate or rectify. But one of the reasons could be the lack of sufficient expertise and experience of its legal officers in handling such cases.

There is a need to provide for a regular, substantive and sustained training of its legal officers by both domestic and international experts with a view to enhancing the substantive and procedural knowledge relating to the legal framework and advocacy skills that may be useful to pursuing these cases in the courts. The training programs should become an ongoing feature and should become institutionalized within the working of the ICAC.

K. Training of Judges

There is a need to emphasize the training and sensitization of judges to deal with corruption cases. The judiciary is a very important organ wing of the government and is entrusted with the responsibility to ensure that the other wings of the government act in accordance with the constitution.[187] Thus, the judiciary becomes a custodian of the constitution. Corruption violates the spirit of the constitution besides undermining the democratic ideals and principles of the constitution.[188] The judiciary has to play a very important role in India to ensure corruption-free governance.[189] In this context, the proposed ICAC may have to work with the judicial training academy and other members of the judicial fraternity, including senior members of the judiciary, to impress upon the need for training judges to deal with cases relating to corruption.[190] The exact *modus operandi* of the training, including who will be responsible for the actual training, are

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[186] *See* BAXI, LIBERTY, *supra* note 5, at 1-7.

[187] *See* SATHE, RIGHT TO INFORMATION, *supra* note 40, at 1-26, 61-88.

[188] Bhushan, *supra* note 156.

[189] *Id.*

[190] Dhavan, *supra* note 154.

details that will have to be decided by the judiciary itself, and independence of judiciary should not be undermined in any way in this process.[191]

L.   *Creating Increased Citizen Awareness*

Creating increased awareness among citizens about corruption and its effects is another important element in combating corruption — particularly when this group awareness is accompanied by the public's ability to act as a group against corruption. The need for creating awareness through a wide range of mechanisms is critical for fighting corruption. The awareness should be focused on all aspects of the problem of corruption including its causes and consequences, and the government's efforts to eliminate corruption and information relating to the institutional mechanisms that are put in place in investigating allegations of corruption. The purpose of the awareness should be both to inform and to empower citizenry.

CONCLUSION

The problem of corruption when examined as a human rights issue produces an entirely new and indeed an important approach to ensure that good governance remains the goal of public administration in India. In the context of Hong Kong (or Singapore), the success achieved in combating corruption may not have been sustained, if it remained purely within the domain of law enforcement and public policy discourse. Community education and participation of the people in generating an attitudinal change was deemed one of the initial goals of the ICAC's approach. There is a need for the empowerment of the people of India to fight against corruption on the basis of developing certain rights against corruption.

The human rights approach to a corruption control mechanism makes the people of India central players in the corruption resistance movement. The law enforcement work of the government to ensure corruption-free governance ought to be perceived as a part of the rights of the people of India to seek a corruption-free government. Concomitantly, it then becomes the duty of the government to ensure that all of its affairs are conducted in a manner that promotes transparency, accountability, and integrity in public administration. The human rights approaches of corruption control mechanisms are expected to enhance the institutional approach of the proposed ICAC

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[191]   *Id.*

fighting corruption in India. Constitutional governance is an important dimension to the rule of law framework that needs to be established in India. If this framework needs to work in the context of various social, economic and political transitions that occur in India, the anti-corruption initiatives should be integrated with the human rights discourse to ensure good governance in countries that have successfully managed to curb the menace of corruption to a large extent.

Corruption is a significant impediment to achieve good governance in India.[192] While it has been noted that criminal law and public policy approaches to the problem have been met with mixed results, there has not been any serious effort to develop a human rights approach to corruption. The right to information in India needs to be integrated with the right to transparency[193] and the right to corruption-free governance. This integral approach of handling corruption will ensure that the political and bureaucratic machinery in India is accountable to its people.

Accountability is infused by building legal and institutional mechanisms so that official corruption is not tolerated at any level of the decision-making process.[194] The change of political culture in India is possible only if the right to corruption-free governance is guaranteed through the empowerment of the Indian citizenry.[195] It is in this context that the role of the media and other members of civil society become important. The media should expose the corrupt actions of politicians and bureaucrats. Strengthening of the judiciary should be accompanied by passing laws, rules, and regulations that are intended to punish acts of corruption. The problem of corruption has the potential to affect democratic decision-making, and has threatened the rule of law in India. While the foundations of democracy are deeply rooted in India, corruption has undoubtedly sowed the seeds of civic and political discontent. Furthermore, the lack of political and bureaucratic transparency and accountability culminate in a sense of callous indifference among the people. Indeed, these discouraging trends in Indian society must be thwarted by the rights-based approaches to fighting corruption, which is one way to extend accountability mechanisms for the promotion of good governance.

As civil society in India increases its involvement in political discourse, India has the unique opportunity to address corruption and put in place empowered institutions of integrity that are able to ensure

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[192] *See generally* Maor, *supra* note 55.

[193] *See generally id.*

[194] *See* SATHE, RIGHT TO INFORMATION, *supra* note 40, at 1-26.

[195] *See id.*

procedural fairness which is ideally the right of every citizen in a democracy. It is time for every element in the Indian political system to adopt a dynamic and result-oriented approach to tackle corruption at a structural level and ensure that the rule of law finds articulation in the life of every Indian citizen.