

CORRUPTION AND HUMAN RIGHTS: PROMOTING TRANSPARENCY IN GOVERNANCE AND THE FUNDAMENTAL RIGHT TO CORRUPTION-FREE SERVICE IN INDIA*

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“Just as it is impossible not to taste the honey or the poison that finds itself at the tip of the tongue, so it is impossible for a government servant not to eat up, at least a bit of the king’s revenue. Just as fish under water cannot possibly be found out either as drinking or not drinking water, so government servants employed in the government work cannot be found out taking money.”

- Kautilya, 300 B.C.¹

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¹ R. Shama Sastry, Kautilya’s Arthashastra 71 (Mysore Printing and Publishing House 8th ed. 1967). See also Upendra Thakur, *Corruption in Ancient India* (Abhinav Publications 1979).

“Corruption and hypocrisy ought not to be inevitable products of democracy, as they undoubtedly are today.”

- Mohandas Karamchand Gandhi (1869-1948).

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I. INTRODUCTION

Corruption ² is an all-pervasive phenomenon in the administrative system of India.³ It has reached such alarming proportions that the entire governance⁴ structure of India is affected by the social, economic and political consequences of corruption, leading to the misallocation⁵ of resources.⁶ Corruption affects India at all levels of decision-making and in the distribution of the state's largesse.⁷ According to the *Global Corruption Report 2003*, prepared by Transparency International, India is ranked 71st out of 102 countries in the Corruption Perception Index, 2002.⁸ Corruption is a major obstacle to development. In the context of India, there are estimates, which suggest that only seventeen percent of funds allocated

² The article does not go into the definitional issues concerning "corruption" as there are numerous debates surrounding the very definition of the concept of corruption. For further reading, see Michael Johnston, *The Search for Definitions: The Vitality of Politics and the Issue of Corruption*, 149 INT'L SOC. SCI. J. 321, 321-336 (1996).

³ For a very interesting reading on the impact of corruption on the rule of law in India, see Christophe Jaffrelot, *Indian Democracy: The Rule of Law on Trial*, 1 INDIAN REV. 17, 17-121 (2002).

⁴ For understanding the problem of corruption from a governance standpoint, see Hongying Wang & James N. Rosenau, *Transparency International and Corruption as an Issue of Global Governance*, 7 Global Governance, 25, 25-49 (2001).

⁵ In a personal interview with me, Dr. Prannoy Roy, Chief Executive, New Delhi Television (NDTV), India observed that corruption in India has negative economic consequences as a result of misallocation of resources.

⁶ See Bhikhu Parekh, *A Political Audit of Independent India*, 362 The Round Table 701, 701-709 (2001).

⁷ See Mahesh K. Nalla & Kornel Swaroop Kumar, *Conceptual, Legal, Ethical and Organizational Dimensions of Corruption in India: Policy Implications*, <http://www.unisanet.unisa.edu.au/StaffPages/RickSarre/Poland%20papers/Nalla%20Korni.pdf> (last visited 19 November 2003).

⁸ Transparency Int'l, *Global Corruption Report 2003* (2003).

by the government for poverty reduction finally reach the poor.⁹ Former Prime Minister Rajiv Gandhi estimated that only 15 paise of 1 rupee spent by the government on anti-poverty programs actually reached the intended beneficiaries. Furthermore, out of the remaining 85 paise, at least 40 paise went into overheads and administrative costs, while 45 paise disappeared into the corruption column. Corruption in India not only poses a significant danger to the quality of governance, but also threatens in an accelerated manner the very foundation of India's democracy, rule of law and statehood.¹⁰ There have been efforts taken at different levels in India to tackle the problem.¹¹ Until recently, most of these efforts have tended to focus on the problem of corruption from the standpoint of criminal law. Law enforcement agencies have been targeting corruption at different levels of government -central, state and local- to punish the wrongdoers.¹²

Recent approaches to attacking corruption in India have moved beyond the notions of perceiving corruption as a law enforcement problem that deserves only a criminal law response. Corruption is a manifestation of a crisis in "governance."¹³ The crisis can be dealt with partly through the development of greater transparency in governance¹⁴ and through greater accountability at all levels of governmental decision-making. As part of promoting transparency in governance, the right to freedom of information has been actively promoted in India and has resulted in the passing of a new law.¹⁵ Such a strategy to tackle corruption is based upon the objective of empowering the Indian citizenry to seek transparency and accountability in the government. The law enforcement approach to attacking corruption is useful to the extent that bribery is not

⁹ Bunker Roy, *The Power of Information – A Grassroots Organization in India Defeats Corruption*, www.dse.de/zeitschr/de202-11.htm (last visited 9 November 2003)

¹⁰ Jaffrelet, *supra* note 3.

¹¹ See Sunil Sodhi, *Combating Corruption in India – The Role of Civil Society*, Paper prepared for the XVIII World Congress of International Political Science Association (2000).

¹² See Nagarajan Vittal, *Corruption and the State – India, Technology, and Transparency*, HARV. INT'L REV. 20, 20-25 (2001).

¹³ For some useful insights on the development of governance discourse, see Thomas G. Weiss, *Governance, Good Governance and Global Governance: Conceptual and Actual Challenges*, 21 Third World Q. 795, 795-814 (2000). See also, See Philip Alston, United Nations Development Programme, *Governance, Human Rights, and the Normative Areas*, <http://unescap.org/huset/gg/governance.htm> (last visited 19 November 2003); Yash P. Ghai, *The Rule of Law, Legitimacy and Governance*, 14 INT'L J. Sociology of L. 179, 179-208 (1986).

¹⁴ See Saladin Al-Jurf, *Good Governance and Transparency: Their Impact on Development, Transnational Law and Contemporary Problems* (1999), WL 9 TRNATLCP 193.

¹⁵ For further reading, see Bunker Roy, *The Right to Information – India's Struggle against Grass-Roots Corruption*, 1 UN CHRON. (2000).

institutionalized. However, in the Indian context, corruption has already been institutionalized. This institutionalized form of corruption can only be tackled through a multi-pronged attack on all elements of the governmental decision-making process with a view to empower the citizens.¹⁶

This article argues that the problem of corruption in India needs to be analyzed in the context of its potential implications for human rights. There are numerous connections between corruption discourse and human rights discourse.¹⁷ Corruption dilutes human rights in a significant way, although it is rarely observed and understood from this perspective. The institutionalized form of corruption creates mass victimization, which threatens the rule of law, democratic governance and the social fabric of any society. Human rights discourse offers powerful resistance to violations of various rights, and the problem of corruption can be addressed by framing it as a human rights violation. The benefit of regarding corruption as a human rights issue will enhance efforts to contain corruption, due to the development of international human rights law as an important aspect of international law, as well as national developments in constitutional, legal, and judicially recognized rights. The corruption problem, when framed as a human rights issue, can empower the judiciary to enforce certain rights for the citizenry, demand a transparent, accountable and corruption-free system of governance in India, and help establish a basis to monitor this process. The right to information for promoting transparency and accountability is one instance in which the corruption issue has been elevated from a public policy matter to a higher level of political discourse by invoking the right to freedom of information of the Indian citizenry. Further, I believe that the Indian citizenry should be empowered and granted a fundamental right to corruption-free service.¹⁸ The Constitution of

¹⁶ See Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press 1999).

¹⁷ For a comprehensive paper on the linkages between corruption and human rights, see Zoe Pearson, *Human Rights and Corruption*, http://www.cdi.anu.edu.au/research_publications/research_downloads/hrc.pdf (last visited 19 November 2003).

¹⁸ For a similar and persuasive argument at the international level, see Ndiba Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Rights: Elevating Official Corruption to a Crime under International Law*, 34 INT'L LAW 19 (2000), WL 34 INTLLAW 19. For further reading, see Balakrishnan Rajagopal, *Corruption Legitimacy and Human Rights: The Dialectic of the Relationship*, 14 CONN. J. INT'L L. 495 (1999), WL 14 CTJIL 495; Nihal Jayawickrama, *Transparency Int'l, Corruption – A Violator of Human Rights?*, (1998), <http://www.transparency.de/documents/work-papers/index.html> (last visited 19 November 2003);

India, which is famous for its progressive provisions and for its liberal interpretations by courts that have judicially expanded the rights set forth in it, should recognize this right.¹⁹ The fact that corruption remains an important problem even after fifty-five years of independence in India and continues to eat away the precious resources of the country, and that all forms of victimization result from civil, political, economic and social rights violations, is enough justification for formulating new strategies to address corruption.

The present article, *firstly*, provides a jurisprudential foundation for the corruption-human rights nexus, based on the argument that a human rights approach to corruption delineates rights as a part of the process of empowering people.

Secondly, the article gives an overview of the problem of corruption in India, from both a historical and a contemporary perspective, to understand the true implications of corruption for governance administration in India.

Thirdly, it examines the relationship of corruption to human rights and analyses the international human rights framework²⁰ specifically from the standpoint of human rights discourse. It also provides an overview of the present international law framework²¹ for corruption prevention²² and outlines the difficulties in enforcing these regulations.²³

Lawrence Cockcroft, Transparency Int'l, *Corruption and Human Rights: A Crucial Link*, (1998), <http://www.transparency.de/documents/work-papers/index.html> (last visited 19 November 2003); See also, United Nations Development Programme (UNDP), *Fighting Corruption to Improve Governance* (1999); C. Raj Kumar, *The Benefit of a Corruption-Free Society*, Hong Kong LAW. 39, 39-46 (2002). See also Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law*, 34 INT'L LAW 19 (2000), WL 34 INTLLAW 19.

¹⁹ For further reading, see B.P.Jeevan Reddy & Rajeev Dhawan, *The Jurisprudence of Human Rights*, in *Human Rights and Judicial Review – A Comparative Perspective* 175, 175-226 (D.M. Beatty ed., Kluwer Academic Publishers 1994).

²⁰ For further reading, see Henry Steiner & Philip Alston, *International Human Rights in Context*, (Oxford University Press 2000).

²¹ For further reading, see Susan Rose-Ackerman, *Corruption and the Global Economy*, in United Nations Development Programme, *Corruption and Integrity Improvement Initiatives in Developing Countries* (UNDP 1998).

²² *Existing International Legal Instruments, Recommendations and Other Documents Addressing Corruption: Report of the Secretary General*, U.N. Office on Drugs and Crime, Commission on Crime Prevention and Criminal Justice 10th Sess., U.N. Doc. E/CN.15/2001/3, (2001).

²³ For understanding the methods of gathering evidence in corruption cases, see Nihal Jayawickrama, Jeremy Pope, & Oliver Stolpe, *Legal Provisions to Facilitate the Gathering of Evidence in Corruption Cases: Easing the Burden of Proof*, 2 Forum on Crime and Society 23, 23-31 (2002).

Fourthly, it examines the issue of transparency in governance and accountability of administrators. This will be done by vetting the Freedom of Information Act in India and its implications for the right to freedom of information being recognized both as a constitutional and a legal right.

Fifthly, it examines corruption in India through certain institutional rethats have been attempted in confronting the problem. This will be addressed by studying the weakness of institutional and criminal law responses in tackling corruption and by underlining the need for the integration of the corruption and human rights discourses.

Sixthly, it argues that there should be a fundamental right to corruption-free service in India, fully recognized by the Constitution of India. This may result in the real empowerment of civil society and the citizenry by providing a solid foundation for pursuing their struggles against corruption. Preventing corruption and ensuring empowerment of citizens by recognizing a constitutional right to be free of corruption would bring the problem of corruption to the center of political discourse in India and could potentially transform the governance system, thus strengthening democracy in India.

Seventhly, it gives an analysis of the consequences of formulating the right to corruption-free service in India, particularly from the standpoint of the implementation of this right. Lastly, the article concludes by arguing that the institutionalized form of corruption prevalent in India and other developing countries have serious implications for governance²⁴, the rule of law and democracy. If these values are not to be undermined, it is necessary that the corruption problem be addressed not just as a criminal law problem, but also as a violation of human rights, human dignity and humane governance.²⁵ The fundamental right to corruption-free service has the potential to ensure that corruption will not be tolerated at any level of governance, as it would amount to a constitutional violation. The

²⁴ For a critical perspective on the good governance approach, see James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFF. HUM. RTS. L. REV. 107 (1999), WL 5 BFHRLR 107. See also Obiora Chinedu Okafor, *Re-Conceiving "Third World" Legitimate Governance Struggles in our Time: Emergent Imperatives for Rights Activism*, 6 BUFF. HUM. RTS. L. REV. 1 (2000), WL 6 BFHRLR 1.

²⁵ To have better understanding on the concept of good governance, see, Sakiko Fukuda-Parr & Richardo Ponzio, United Nations Development Programme, *Governance: Past, Present, Future - Setting the Governance Agenda for the Millennium Declaration*, <http://www.undp.org/governance/docsaccount/gov-past-present-future.pdf>, (last visited 19 November 2003) See also, Richard Falk, *On Humane Governance* (Polity Press 1995).

Indian judiciary, as well as institutions of the state and the central government that are working towards curbing corruption, and all other actors of civil society would be greatly assisted by the development of such a fundamental right. Rights bring with them obligations, and there will be obligations assigned to various individuals and institutions to ensure that there is zero tolerance for corruption and that violations will not go unpunished. The National Human Rights Commission in India will also have jurisdiction over violations that arise due to corruption, as it will be fulfilling its mandate provided under law by ensuring that corruption does not affect governance or violate human rights.²⁶

II. JURISPRUDENTIAL FOUNDATIONS OF THE CORRUPTION-HUMAN RIGHTS INTERFACE

The nexus between corruption and human rights needs to be examined from the standpoint of governance. Arbitrary exercise of power facilitates corruption and indeed, violations of human rights. But the problem of corruption is more than it being a human rights violation. The concept of the 'rule of law'²⁷ embraces within its framework a number of factors including: a. accountability of government decisions; b. proper exercise of discretionary powers; and c. protection of human rights.²⁸ Corruption in government undermines the rule of law, as government decisions are not accountable to any systemic checks and balances. The unchecked corrupt actions of government officials clearly violate the principles of the rule of law which provides the basis on which democratic societies sustain and develop. Government exercises certain discretionary powers, and if these powers are not exercised in a fair, just and reasonable manner, then it has the potential to promote corruption. Governmental corruption in the form of improper exercise of discretionary powers perpetrates nepotism and violates the rule of law. Human rights are violated when corrupt actions take place in a widespread and systematic manner. Systemic corruption affects the entire public administration system and thereby undermines the growth of

²⁶ For understanding the role of human rights commissions in promoting good governance policies, see Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1 (2000), WL 13 HVHRJ 1.

²⁷ See William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723 (2000) WL 2000 WILR 723.

²⁸ *Id.*

efficiency, productivity and development. For a rule of law society to exist, human rights ought to be protected. The corruption problem inevitably violates human rights as it allocates resources on the basis of unfair considerations, resulting in discrimination which poses a serious threat to the rule of law when inflicted upon society as a whole because of systemic and institutionalized corruption.

Probity in governance is a *sine qua non* for an efficient system of administration and for the promotion of socio-economic and political development. An important requirement for ensuring probity in governance is the absence of corruption. The other requirements may be effective laws, rules and regulations governing every aspect of public life coupled with effective law enforcement and criminal justice systems. The corruption-human rights nexus is unique and distinctive in its attempt to understand and explore whether some constitutional and legislative measures can be useful and indeed, are necessary to ensure probity in governance. Furthermore, it may be examined as to how far there is a need to include a fundamental human right to a corruption-free service and how that may be helpful in curbing the social evil of corruption. This question of constitutionalization of corruption-free service rights is relevant in the context of judicial enforcement of human rights becoming a norm in numerous legal systems.

Ronald Dworkin in his book, *Taking Rights Seriously*²⁹ has argued that:

“The institution of rights against the Government is not a gift of God, or an ancient ritual, or a national sport. It is a complex and troublesome practice that makes the Government’s job of securing the general benefit more difficult and more expensive, and it would be a frivolous and wrongful practice unless it served some point. Anyone who professes to take rights seriously, and who praises our Government for respecting them, must have some sense of what that point is. He must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. The second is the more familiar idea of political equality”.

²⁹ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978).

Dworkin's fundamental argument is that a person has a fundamental right against the Government, only if that right is necessary to protect his or her dignity, or equal entitlement to concern and respect. Corruption undermines the fundamental values of human dignity and the political equality of the individual and hence, there is an imminent need to formulate a fundamental human right to corruption-free service in order to ensure that democratic governance is meaningfully achieved.³⁰ For human rights to be protected and promoted, it is necessary to ensure a certain degree of probity in governance. Absence of corruption at every level of the decision-making process is necessary to ensure that governmental decisions are not made in an arbitrary and capricious manner.

III. CORRUPTION IN INDIA – HISTORICAL AND CONTEMPORARY PERSPECTIVES

The problem of 'corruption'³¹ in India was prevalent even during the presence of the English East India Company in the seventeenth and eighteenth centuries.³² It is useful to quote Mr. Cornwall Lewis, a member of the British House of Commons: "...no civilized Government existed on this earth which was more corrupt, more perfidious and more rapacious than the Government of the East India Company from 1765-84."³³ The servants of the Company were notorious for corruption, abusing their powers and enriching themselves in this process. In fact, it has been observed that this

³⁰ See C. Raj Kumar, *The Benefit of a Corruption-Free Society*, Hong Kong LAW. 39, 39-46 (2002).

³¹ The Central Vigilance Commission in India had observed in a report written in 1960s that there are 33 modes of corruption. These were listed under two categories: practices involving the public, and those internal to administration. The former include bribery over tenders, contracts, quotas, licenses; acceptance of substandard stores; forgery and conniving at false assessments of claims and income-tax; irregularities in transport-bookings; intentional delays in order to obtain "speed-money"; bribery for performance of what should be normal duties, or for their non-performance; acceptance of gifts to use influence; misuse of powers; and carrying in private business under cover of official duties. Corrupt practices internal to the administration cover misappropriation of public money and of stores; production of false claims for allowances and reimbursement, and of forged certificates of age, community, educational qualifications, etc., abuse of official position or powers; acceptance of illegal gratification in recruitment, postings, transfers and promotions; misuse of government employees for private work; misuse of advances sanctioned for purchases and leave travel concessions; cheating in connection with the sale and purchase of land; and unauthorized occupation and sub-letting of government residential quarters. See Report of Central Vigilance Commission, 1966 (CVC, 1967), pp.15-16 and 32-33. This was referred to in Jaffrelot *supra* note10, note 18.

³² Leslie Palmier, *Corruption and Probity*, 8 Asian J. POL. SCI. 1, 1-12 (2000).

³³ See Jaffrelot *supra* n.10. This was quoted in M.V. Pylee, *Constitutional History of India: 1600-1950*, 4 (Asia Publishing House (P) Ltd. 1980).

practice led to war in 1763, and to the destruction of company servants.³⁴ Palmier has observed that the corruption that took place during that time basically occurred through the exploitation of the Indian custom of giving gifts to superiors from whom various requests were put.³⁵ Perturbed Governors prohibited the receipt of gifts. These orders were later followed by the India Act of 1784, which made the receipts of gifts punishable as extortion.³⁶ The problem of corruption during colonial rule was enhanced by its recruitment policy. Prior to 1914, recruits belonged to middle-class families and those who were connected to trade and commerce.³⁷ But from after 1914, appointments were given only to nominees of the Directors, resulting in favoritism and corruption.³⁸ However, the Charter Act of 1793 ended these abuses by legislating that all vacancies in civil offices had to be filled by local servants, and that long service was a requirement for higher pay.³⁹ Furthermore, the institution of Directors was reformed and after appointment, Directors were obliged to take an oath that they would not accept any sort of gratification for making a nomination.⁴⁰ The passing of the Charter Act in 1853 culminated in the civil service being opened for competitive examination, lessening arbitrary discretion in the appointment process. Palmier has observed, "to summarize, then, the attack on corruption in the East India Company consisted of, in the short term, removal of nepotism as a basis for appointment, as also of incentives and opportunities for corruption, together with severe sanctions for defaulters."⁴¹

With the dawn of India's independence in 1947, it was hoped and expected that the government would accept the responsibility of governing India in a transparent, accountable and corruption-free environment. While there were concerns even during the Constitution-making process about the political honesty and integrity of the government, there was very little effort to ensure that such concerns found a place in the Constitution. Interestingly, the Constituent Assembly (CA) attempted to ensure a check on the assets of government representatives. However, these attempts were not fruitful,

³⁴ Jaffrelot *supra* note 10.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

as the CA “felt that they were too easy to dissimilate and left it to public opinion to marginalize dishonest politicians”.⁴² While India’s first Prime Minister, Mr. Nehru, and most members of his cabinet were persons of integrity and rectitude, the laxity and indifference to corruption is said to have begun during his regime.⁴³ During the initial days of India’s independent rule, allegations of corruption began to appear and little effort was made to ensure that proper investigations were conducted and punishments meted out to the wrongdoers. The practice of giving scant regard to the reports of commissions of inquiry relating to corruption began during the initial years of independence. This tradition sadly continues even today. Unfortunately, those responsible for corruption were not seriously examined because of a lack of interest of the government in inquiry commissions that were appointed in the 1950s to assess and check corruption in the bureaucracy and the public sector.

For example, the Gorwala Commission submitted its “Report on Public Administration” in 1951; Mr. J.B. Kripalani submitted another report as Chairman of the Railway Corruption Inquiry Committee in 1955.⁴⁴ Both these reports were not taken seriously and hence, there was no legal, administrative and institutional response to the findings of these reports relating to corruption in the early phase of India’s governance. The third inquiry commission, the Santhanam Commission in 1962, observed that between April 1957 and December 1962, 44,238 civil servants were penalized for corruption.⁴⁵ The report of the Santhanam Commission demonstrated that corruption prevalent in India was systemic, largely owing to the “licence-quota-permit-raj” that gave discretion to bureaucrats and politicians in exercising power.⁴⁶ State control over the economy created a class of bureaucrats, politicians and businessmen who flourished on the basis of mutual dependence and institutional abuse of power structures.⁴⁷ This trend continued and multiplied during successive governments in the 1970’s and 1980’s until the beginning of the 1990’s, when a new economic policy liberalized the Indian economy. Around this same timeframe,

⁴² Nalla & Kumar, *supra* note 7. See Debate of Dec. 31, 1948, 7 Constituent Assembly Debates 1180-1189. This was referred to in Parekh, *supra* note 66.

⁴³ For a comprehensive reading on the subject of corruption from a historical and contemporary perspective, see S.S. Gill, *The Pathology of Corruption* (Harper Collins 1998).

⁴⁴ Nalla & Kumar, *supra* note 7.

⁴⁵ *Id.*

⁴⁶ See S.Vishvanathan & H.Sethi, *By Way of a Beginning*, Foul Play, Chronicles of Corruption, 1947-1997 (S.Vishwanathan & H.Sethi, eds., Banyan Books 1998).

⁴⁷ See A.Kumar, *The Black Economy in India* (Penguin Books 1999).

corruption became intertwined with another ugly ally known as the 'criminalization of politics',⁴⁸ resulting in a further blow to the development of good governance policies for India's development. Some observers⁴⁹ are of the view that the 18 months of Internal Emergency (1975-'77) gave a quantum boost to the politician-criminal nexus in the highest echelons of government and gave rise to a musclem-lumpen culture that is now a ubiquitous feature across the political spectrum of India. Former Central Vigilance Commissioner N.Vittal has identified four fountainheads of corruption in India- the *neta* (corrupt politician), the *babu* (corrupt bureaucrat), the *lala* (corrupt businessman), and the *dada* (criminal).⁵⁰ The fact that the issue of 'criminalization of politics' emerged onto the national scene during a period of 'suspension of fundamental rights and democracy' is instructive and can help understand the possible relationship between the criminalization of politics and the suspension of fundamental rights. The rule of law is being eroded due to corruption and this erosion strengthens the mafia-politician marriage, which in turn deepens denial of justice to the disempowered citizenry.

While the proliferation of corruption in governance was happening in India, there was also a shift in the structure of economic management due to liberalization. It was earnestly hoped that corruption would decrease due to the greater transparency and openness in the economic affairs of India, along with the reduction and elimination of undue discretion of the government in economic affairs. However, all these expectations were shattered quite early in the phase of liberalization. As it was seen later, liberalization did not in any way reduce corruption or, for that matter, ensure good governance. Ironically, it has been the main recipe of multilateral lending institutions like the IMF that the abolition of the licence-raj system would result in corruption-free governance.⁵¹ While efficiency in government functioning may have improved due to liberalization, this had not in any way resulted in lesser corruption. The IMF's 1997 document titled, "Pourquoi faut-il s'inquieter de la corruption" ("Why we must worry about corruption"), demonstrates that the IMF regarded

⁴⁸ See C.Mitra, *The Corrupt Society: The Criminalization of India from Independence to the 1990s* (Viking 1998).

⁴⁹ See for instance, N.K.Singh, *The Politics of Crime and Corruption: A Former CBI Officer Speaks* (Harper Collins India 1999).

⁵⁰ N.Vittal, *Corruption in India, The Roadblock to National Prosperity* 88 (Academic Foundation 2003).

⁵¹ Nalla & Kumar, *supra* note 7.

trade regulations and administrative restrictions as the main factor behind corruption in the world.⁵² However, these recommendations failed to appreciate that liberalization policy may have its own ill effects on corruption.⁵³ Commenting on the impact of corruption on the rule of law in India, Jaffrelet has observed that, “one of the root causes of the rising level of corruption in India may well be the liberalization and globalization process, which has aggravated this phenomenon rather than reduced it. This is an important factor of corruption on the supply side.”⁵⁴ It is noteworthy here that although absolute government control over production and investment decisions has subsided, there is talk of the licence-permit raj being replaced by an ‘inspector raj’ (Confederation of Indian Industries), where regulatory authorities and spot-checking inspectors are heavily bribed by entrepreneurs, both big and small.

IV. PREVENTION OF CORRUPTION – CRIMINAL LAW APPROACH VERSUS CONSTITUTIONAL PROHIBITION

The prevention of corruption in India has traditionally been the forte of criminal law and the penal statutes have prohibited bribery. The preamble to The Prevention of Corruption Act, 1988 (PCA) observes that it is “an act to consolidate and amend the law relating to the prevention of corruption and for matters connected therewith”.⁵⁵ In the statement of objects and reasons as part of the PCA, it was observed that, “the Bill is intended to make the existing anti-corruption laws more effective by widening their coverage and by strengthening the provisions”.⁵⁶ This bill recognizes that there were provisions in Chapter IX of the Indian Penal Code to deal with public servants and those who abet them by way of criminal misconduct.⁵⁷ In addition, there are also provisions in the Criminal Law Amendment Ordinance, 1944, to enable confiscation of ill-gotten wealth obtained through corrupt means, including from transferees of such wealth.⁵⁸ Thus, the

⁵² Id. *Le Monde Economie*, Oct.21, 1997, at p.III. This was referred to in Nalla & Kumar *supra* note 7 in note 17.

⁵³ Nalla & Kumar, *supra* note 7.

⁵⁴ Id. See A. Kumar, *The Black Economy: Missing Dimensions of Macro Policy-Making in India*, *Economic and Political Weekly*, March 10, 1999, at 681-94.

⁵⁵ For a comprehensive commentary in the anti-corruption law in India, see P.V. Ramakrishna, *A Treatise on Anti-Corruption Law in India 1563* (S.Gogia & Company 9th ed.), 2003.

⁵⁶ Id. at 2.

⁵⁷ Id.

⁵⁸ Id.

PCA seeks to incorporate all these provisions with modifications so as to make them more effective in combating corruption among public servants.⁵⁹ A legal framework was established in India through developing a criminal law approach whereby corruption was recognized as a crime to which the criminal justice system must respond with punishment. Sections 7, 8 and 9 of the PCA discuss the nature of the offences covered under the Act.

Section 7: Public servant taking gratification other than legal remuneration in respect of an official act: Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, Corporation or Government Company referred to in clause (c) of Sec.2 or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine.”

Explanation (b) to this section observed that the word “gratification” is not restricted to pecuniary gratifications or to gratifications estimable in money. In *Tirlochan Singh v Karnail Singh*⁶⁰, the question arose as to whether a particular promise or act amounted to gratification, within the meaning of the PCA. The court observed that two tests have to be satisfied.⁶¹ First, that the gratification must be something which is calculated to satisfy a person’s aim, object or desire and second, such gratification must be of some value, though it need not be something estimable in terms of money.⁶²

⁵⁹ *Id.*

⁶⁰ A.I.R. 1968 S.C. 1292, 1968 Cr. L.J. 1484, (1968) 3 S.C.R. 563.

⁶¹ Ramakrishna, *supra* note 55, at 352.

⁶² *Id.*

Section 8: Taking gratification, in order, by corrupt or illegal means, to influence public servant: Whoever accepts or obtains or agrees to accept, or attempts to obtain, from any person for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant, whether named or otherwise, to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, Corporation or Government Company referred to in clause (c) of Sec.2 or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine.”

This section is meant to complement section 7 and is intended to reach the abettors of the offence and hence, extends to all persons whether or not they are public servants. Notwithstanding the fact that the legal framework for the fight against corruption has been established, the effectiveness of these laws is far from satisfactory. The criminal justice system has not sufficiently responded to ensure that the corrupt actually gets punished. One commentator notes that the government failed to accept two important recommendations of the Santhanam Committee: first, to establish a Directorate of Central Complaints and Redress under the Central Vigilance Commission (CVC) to look in to grievances of citizens against the administration; second, to centralize all powers and responsibilities in disciplinary matters in the Commission.⁶³ The work of the Central Bureau of Investigation (CBI), which is a central nodal agency to control administrative corruption, has not been effective. In 1972 it registered 1349 cases as against 231 in 1992.⁶⁴ Of these 300 cases ended in conviction in 1972 and only 164 in 1992.⁶⁵ H.L. Mansukhani has observed that the Prevention of Corruption Act turned out to be a

⁶³ S.S. Gill, *The Pathology of Corruption* 238 (Harper Collins 1998).

⁶⁴ *Id.*

⁶⁵ *Id.*

“puerile piece of legislation”,⁶⁶ as it merely emphatically recognized several forms of bribes and corruption, but did not prevent the occurrence of these actions.⁶⁷ He has argued that, it only created a new branch of evidentiary law whose objectives are neither moderate, nor practical.⁶⁸ Experience has demonstrated that albeit the fact that the PCA has legal provisions that are intended to ensure that corrupt acts are detected and corruption is punished, the inherent weaknesses in the law enforcement machinery in India, coupled with the lackadaisical approach of the criminal justice system has created a weak enforcement system in regard to corruption.

The law enforcement machinery of the state is generally weak and the accused persons in corruption cases abuse the legal loopholes. This has created a situation where the institutions that are vested with the task of investigating charges relating to corruption are weakly positioned. It is acknowledged that corruption in India has become a low-risk, high-profit business. Corruption has become so institutionalized in India that it is not sufficient that it be handled by criminal law. From the enforcement standpoint, there may be valid justifications for evolving a criminal law approach to address the problem of corruption, as it is essentially an economic offence. However, systematic looting of the state's resources and massive corruption in the form of abuse of power by government officers, bureaucrats and politicians through bribery and corruption demand a more serious and affirmative response from the Indian society. The constitutional approach to dealing with the problem of corruption presupposes that corruption threatens the very foundation of Indian democracy and acknowledges that the Indian state is beginning to lose the faith of its people. Moreover, corrupt acts in every department of the government as well as at every level of government creates a vicious environment that undermines the rule of law and the social fabric of Indian society. Indian democracy will lose its defining qualities if the problem of corruption is not approached from its impact on constitutional governance in India. Critics of this approach may suggest that since numerous laws in India are not enforced and the criminal justice system is weak and suffers from numerous

⁶⁶ H.L. Mansukhani, *Corruption and Public Servants* (Vikas Publishing House 1979).

⁶⁷ See Krishna K. Tummala, *Corruption in India: Control Measures and Consequences*, 10 Asian J. Pol. Sci. 43, 43-69 (2002).

⁶⁸ Mansukhani, *supra* note 66. This was referred to in Tummala, *supra* note 67, at note 51.

bottlenecks, addressing the problem of corruption from a constitutional standpoint may not provide the necessary solutions to the problem.

V. PUBLIC INTEREST LITIGATION (PIL)⁶⁹ IN INDIA AND ITS RELEVANCE FOR CONSTITUTIONALIZATION OF THE RIGHT TO CORRUPTION-FREE SERVICE

The Constitution of India provides a robust framework for the protection of human rights and fundamental freedoms. The fundamental objectives of the framers of the Indian Constitution were to build a new social, economic and political order where there would be social, economic, and political justice. To this effect, the Constitution provides comprehensive chapters on the Fundamental Rights and the Directive Principles of State Policy. Further the principle of judicial review is well entrenched in Indian constitutional jurisprudence, as the Supreme Court of India as well as the High Courts have been constitutionally empowered to exercise jurisdiction in enforcing fundamental rights. This has resulted in the judiciary taking an active role⁷⁰ on matters that affect good governance in India. In fact, the essential task of enforcing fundamental rights has been assigned to the Supreme Court of India and the High Courts. Moreover, article 32 of the Indian Constitution has ensured that the right to move the Supreme Court for enforcement of fundamental rights is in itself a fundamental right. The judiciary has taken its constitutionally mandated role quite seriously, and the functions of the Indian judiciary have dramatically evolved over time. The liberalization of standing rules by the Supreme Court of India marked the beginning of the recognition of the inherent weakness of the Indian legal system and the lack of access to justice for the needy, the poor, the marginalized and the weaker sections of the Indian society. Poverty had so completely disempowered the Indian people that their problems needed to be brought to judicial recognition through some alternative mechanism. For the marginalized sections of Indian society, fundamental rights in the Constitution meant nothing, as they

⁶⁹ For further reading, see Chief Justice A.S. Anand: Public Interest Litigation as Aid to Protection of Human Rights, M.C. Bhandari Memorial Lecture (2001) in (2001) 7 S.C.C. 1.

⁷⁰ Upendra Baxi, *The Avatars of Judicial Activism: Explorations in the Geography of (In) Justice*, in Fifty Years of the Supreme Court in India: Its Grasp and Reach 156-209 (S.K. Verma & Kusum, eds., Oxford University Press & Indian Law Institute, 2000).

did not have the capacity to assert those rights. The judicial system in India was ineffective in addressing their needs, and existing rules of *locus standi* prevented the judiciary from entertaining litigations concerning fundamental rights violations. The Supreme Court of India moved toward broadening access to justice by ensuring that where a legal wrong or a legal injury is caused to a person or to a class of persons who by reason of poverty, disability, or socially or economically disadvantaged position, cannot approach the court for relief, any member of the public, social action group, or interest group, or a concerned citizen, acting in good faith can maintain an application in the High Court or the Supreme Court, to seek judicial redress for the legal wrong or injury caused to such person or class of persons.⁷¹ Public interest litigation (PIL) rests on a jurisprudential foundation that law is an instrument for social change and social engineering, and that it is important that the principles of justice should ensure that judicial procedure does not come in the way of constitutional empowerment. The PIL movement in India has by and large been successful particularly in promoting a certain degree of governmental accountability, as well as ensuring that the constitutional rights of the Indian citizenry are duly protected, regardless of their social, economic and political status. However, there have also been cases of misuse of PIL by certain vested interests and simultaneous efforts have been taken by the courts to ensure that PILs do not become political tools for people settling scores against each other. Such misuse will undoubtedly result in abuse of the judicial process, besides creating serious bottlenecks in the justice delivery system in India.⁷² The present approach of courts toward entertaining PIL has been that before the court accepts the case, it asks the petitioners to disclose in an affidavit their concern and purpose in filing the case.⁷³ The Supreme Court of India adopted this approach when a PIL⁷⁴ was filed by two petitioners alleging large-scale corruption in the functioning of the Garhwal Water Institute established to provide potable drinking water to the hilly towns and villages of the Garhwal region in Uttar

⁷¹ See Upendra Baxi, *The State and the Human Rights Movements in India*, in *People's Rights: Social Movements and the State in the Third World* 335-352 (Manoranjan Mohanty et al. eds., Sage Publications, 1998).

⁷² For a critical reading, see Upendra Baxi, (1989), *Taking Suffering Seriously: Social Action Litigation Before the Supreme Court of India*, in *Law and Poverty: Critical Essays* 387-415 (N.M. Tripathi, 1989).

⁷³ S. Muralidhar, India – Public Interest Litigation – Survey 1997-1998, 33-34, *Annual Survey of Indian Law* 525, (1997).

⁷⁴ Mahesh Chand Bisht v. Union of India, 1997 S.C.A.L.E. SP-22.

Pradesh.⁷⁵ As a response to moves by lawmakers to regulate the institution of PIL and its alleged misuse, the then Chief Justice A.S. Anand, differentiated “judicial activism” on the one hand and the role of the courts in entertaining PIL on the other, and observed that, “It would be wrong to call it as an act of judicial activism when the judiciary in discharge of its constitutional powers seeks to protect the human rights of its citizens in case after case where a citizen has been deprived of his life or liberty otherwise than in accordance with the procedure prescribed by law or when the courts insist upon “transparency and accountability” in respect of the orders made or action taken by public servants. The requirement that every State action must satisfy the test of fairness and non-arbitrariness are judicially evolved principles which now form part of the constitutional law”.⁷⁶

Thus, PIL can be used to ensure that the judiciary effectively checks upon the corruption and bribery of public officials. The constitutionalization of the right to corruption-free service in India would mark the beginning of the Supreme Court of India and the High Courts playing a far more constructive role in ensuring greater governmental transparency and accountability. Corruption as an abuse of power would be clearly perceived to be an affront to human rights and dignity, and the courts would be empowered to intervene on matters that affect governance in India.

Although the Indian judiciary has intervened on corruption matters from time to time, until recently, the issue of corruption was not dealt with forthrightly by the Indian courts. In *Vineet Narain & Ors v. UOI & Ors*⁷⁷, the Supreme Court of India commenting on the issue of corruption held, “Of course, the necessity of desirable procedures evolved by court rules to ensure that such a litigation is properly conducted and confined only to matters of public interest is obvious. This is the effort made in these proceedings for the enforcement of fundamental rights guaranteed in the Constitution in exercise of powers conferred on this Court for doing complete justice in a cause”⁷⁸.

⁷⁵ *Id.*

⁷⁶ Dr. Justice A.S. Anand: Justice N.D. Krishna Rao Memorial Lecture: Protection of Human Rights – Judicial Obligation or Judicial Activism (1997) in (1997) 7 S.C.C. 11.

⁷⁷ (1998) 1 SCC 226.

⁷⁸ The Supreme Court of India has used Article 142 of the Constitution of India in a number of cases to ensure governmental accountability and enforcement of orders of the court. For further reading, see Dr.R. Prakash, *Complete Justice Under Article 142*, <http://www.ebc-india.com/lawyer/articles/2001v7a3.htm> (last visited 19 November 2003).

Article 142 of the Constitution of India reads:

It cannot be doubted that there is a serious human rights aspect involved in such a proceeding because the prevailing corruption in public life, if permitted to continue unchecked, has ultimately the deleterious effect of eroding the Indian polity."⁷⁹ The court did indirectly refer to the possible connections between corruption and human rights. However, there was no reference to the fact that corruption violates human rights and hinders the full exercise of fundamental rights under the Indian Constitution. Interestingly, in a recent judgment against a public servant for receiving bribes, the Supreme Court of India has once again brought the issue of corruption to the central focus of judicial intervention. In that case against a public servant, V. Vasudeva Rao, the Supreme Court of India observed that, "the tentacles of corruption are spreading fast in the society corroding the moral fiber and consequentially in most cases the economic structure of the country. It has assumed alarming proportions in recent times,"⁸⁰ On the issue of the institutionalized form of corruption prevalent in India, the court further observed that, "corruption is one of the most talked about subjects today in the country since it is believed to have penetrated into every sphere or activity. It is described as wholly widespread and spectacular. Corruption as such has reached dangerous heights and dangerous potentialities. The word corruption has wide connotation and embraces almost all the spheres of our day-to-day life the world over."⁸¹

VI. CORRUPTION AND HUMAN RIGHTS – DEVELOPING AN INTEGRAL APPROACH

The problem of corruption and the need for protection and promotion of human rights⁸² has been discussed independently in scholarly writings. However, there has been very little work done in examining the relationship of corruption to human rights and vice versa.

"142. *Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.*-(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

⁷⁹(1998) 1 SCC 226.

⁸⁰ State of Andhra Pradesh v. V. Vasudeva Rao, 2003 SCALE Vol.9, pp.566-577. For more information on this judgment, see *Corrupt Public Servants Must Face Consequences*, The Hindu, November 15 2003, <http://www.hindu.com/2003/11/15/stories/2003111502351100.htm> (last visited 19 November 2003).

⁸¹ *Id.*

⁸² For a critical view on human rights, see Makau Wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996).

Human rights are basic rights in the form of right to life, liberty, equality and dignity. Depending on the country, they acquire the status of legal and constitutional rights. The growth and development of international human rights law through the passing of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) have provided great impetus to the enforcement of human rights.⁸³ The purpose of an integral understanding of corruption and human rights is to examine: first, whether corruption affects human rights and if so, in what way; second, whether the human rights discourse can help ensure a corruption-free society; and third, the use of the international human rights framework to argue that corruption involves serious abuse of power and breach of trust based on lack of transparency. Corrupt acts are basically human rights violations and the legal system ought to respond to such violations. Cockcroft has observed that there is a lot of common ground between the struggles for upholding human rights and the fight against corruption.⁸⁴ There is little doubt that a corrupt government that lacks transparency and accountability is also not going to protect the human rights of its citizens. Thus the mechanisms to ensure a corruption-free government through the development of transparency and accountability in the governance process are also needed to ensure the protection and promotion of human rights.

One of the basic premises on which the human rights movement has expanded over the years is the concept of human dignity. The expanding notions of the international human rights framework through the development of economic, social, civil and political rights have much to do with ensuring human dignity. Corruption violates human dignity as it hinders the proper fulfillment of other basic rights. The right to a society free of corruption is an inherent human right because life, dignity, equality, and other important human rights and values significantly depend upon this right.⁸⁵ That is, it is a right without which these essential rights lose meaning, as well as their actualization. Kale has argued that the right to a corruption-free society originates and flows from the right of

⁸³ For a critical perspective on the effectiveness of international human rights, see Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT'L L. 121 (2001). See also David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002).

⁸⁴ Lawrence Cockcroft, Transparency Int'l, *Corruption and Human Rights: A Crucial Link*, <http://www.transparency.de/documents/work-papers/index.html> (last visited 19 November 2003).

⁸⁵ See C. Raj Kumar, *Corruption and Human Rights*, Frontline, Sept. 14-27, 2002, available at <http://www.flonnet.com/fl1919/19190780.htm> (last visited 19 November 2003); See also C. Raj Kumar, *Corruption and Human Rights – II*, Frontline, Sept. 28-Oct.11, 2002, available at <http://www.frontlineonnet.com/fl1920/stories/20021011008607500.htm> (last visited 19 November 2003).

people to exercise permanent sovereignty over their natural resources and wealth, that is, their right to economic self-determination, recognized in the common article of the ICCPR and ICESCR.⁸⁶ Thus, the state would be in violation of the right to economic self-determination if it engages in the corrupt transfer of ownership of national wealth to those selected power holders. It is here that the concept of transparency and accountability fits in well with an integral understanding of the problem of corruption and the need for protecting human rights. When the government engages in corrupt activities, it is abusing power, disrespecting law and thereby violating the human rights of its citizenry. This violation by the state also results in a situation where people are denied, both individually and collectively, their right to freely use, exploit and dispose of their national wealth in a manner that advances their development.⁸⁷

International Legal Framework for Prevention of Corruption

Official corruption has become a universal phenomenon and hence there have been efforts taken at the international level to curb this activity. On 31 October 2003, the United Nations General Assembly approved the first internationally negotiated treaty against corruption, which included a clause under which governments will be obligated to repatriate any stolen assets bought under their jurisdiction.⁸⁸ The anti-corruption treaty, which will be opened for signature at a High-level Political Signing Conference from 9 to 11 December 2003 in Merida, Mexico, will enter into force 90 days following the deposit of the instrument of ratification by the thirtieth state.⁸⁹ This treaty, which took the 130 UN member delegations two years to draft, is made up of 71 articles covering topics that include public procurement, bribery, illicit enrichment, embezzlement, misappropriation, money-laundering, protection of whistle-blowers, freezing of assets and cooperation between states.⁹⁰ The importance of

⁸⁶ Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime Under International Law*, 34 INT'L LAW 19 (2000).

⁸⁷ See Gill, *supra* note 43.

⁸⁸ See UN News Centre, *General Assembly Approves International Treaty Against Corruption* (31 October, 2003), at <http://www.un.org/apps/news/story.asp?NewsID=8750&Cr=corruption&Cr1=> (last visited 19 November 2003).

⁸⁹ *Id.*

⁹⁰ See UN News Centre, *New Anti-Corruption Treaty Helps the Poor – Annan* (31 October, 2003), at <http://www.un.org/apps/news/story.asp?NewsID=8744&Cr=corruption&Cr1=> (last visited 19 November 2003).

the treaty is demonstrated by the statement of the UN Secretary General, Mr. Kofi Annan, on the adoption of the United Nations Convention Against Corruption by the General Assembly: "Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organized crime, terrorism and other threats to human security to flourish."⁹¹ Prior to this recent remarkable development, the UN had taken efforts in 1996 to ensure that governmental and institutional corruption is eliminated by formulating the Declaration Against Corruption and Bribery in International Commercial Transactions.⁹² This declaration called upon the member states to criminalize corrupt acts in transnational settings.⁹³ In addition to this declaration, there are a number of other international anti-corruption instruments that have been signed by international bodies over the last several years.⁹⁴ The following represents a partial list:⁹⁵ a. International Code of Conduct for Public Officials;⁹⁶ b. General Assembly Resolution 54/128, in which the Assembly subscribed to the conclusions and recommendations of the Expert Group Meeting on Corruption and its Financial Channels, held in Paris from March 30 to April 1, 1999;⁹⁷ c. Report of the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders;⁹⁸ d. Recommendation 32 of the Senior Experts Group on Transnational Organized Crime endorsed by the Political Group of Eight in Lyon, France, on June 29, 1996;⁹⁹ e. The Twenty Guiding Principles for the Fight against Corruption adopted by the Committee of Ministers of the Council of Europe on November 6,

⁹¹ See United Nations Secretary-General Kofi Annan, Statement On The Adoption By The General Assembly of the United Nations Convention Against Corruption (31 October, 2003), http://www.unodc.org/unodc/speech_2003-10-31_1.html (last visited 19 November 2003).

⁹² *United Nations Declaration Against Corruption and Bribery in International Commercial Transactions*, G.A. Res. 51/191, U.N. GAOR, 51st Sess., Annex, Agenda Item 12, U.N. Doc. A/RES/51/191 (1996).

⁹³ See Luz Estalla Nagle, *The Challenges of Fighting Global Organized Crime in Latin America*, 26 FORDHAM INT'L L.J. 1649 (2003).

⁹⁴ *Id.*

⁹⁵ *Id.* See *An Effective International Legal Instrument Against Corruption*, G.A. Res. 55/61, U.N. GAOR, 55th Sess., Annex, at 2-4, U.N. Doc A/RES/55/61 (2001).

⁹⁶ *International Code of Conduct for Public Officials*, G.A. Res. 51/59, U.N. GAOR, 51st Sess., Annex, U.N. Doc. A/RES/51/59 (1996).

⁹⁷ G.A. Res. 54/128, U.N. GAOR, 54th Sess. Paras. 1-14, U.N. Doc. A/RES/54/128 (2000).

⁹⁸ See Report prepared by the Secretariat, Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Apr. 10-17, 2000).

⁹⁹ Follow-up to the Naples Political Declaration and Global Action Plan Against Organized Transnational Organized Crime, ESCOR, 36th Plenary Mtg., U.N. Doc. 1997/22, Annex I (1997).

1997;¹⁰⁰ f. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the Organization for Economic Cooperation and Development ("OECD Convention"), opened for signature December 18, 1997;¹⁰¹ g. Agreement Establishing the Group of States against Corruption, adopted by the Committee of Ministers of the Council of Europe on May 1, 1999;¹⁰² h. Criminal Law Convention on Corruption adopted by the Committee of Ministers of the Council of Europe on November 4, 1998;¹⁰³ i. Joint Action on corruption in the private sector adopted by the Council of the European Union on December 22, 1998;¹⁰⁴ j. Declarations made by the first Global Forum on Fighting Corruption, held in Washington, D.C., from February 24-26, 1999, and the second Global Forum held in the Hague in 2001;¹⁰⁵ k. Civil Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on September 9, 1999;¹⁰⁶ l. Model Code of Conduct for Public Officials, adopted by the Committee of Ministers of the Council of Europe on May 11, 2000;¹⁰⁷ and, m. Principles to Combat Corruption in African Countries of the Global Coalition for Africa.¹⁰⁸

The state parties to the Criminal Law Convention acknowledged that "corruption threatens the rule of law, democracy and human rights, undermines governance, fairness and social justice, distorts competition, hinders economic growth and endangers the stability of democratic institutions and moral foundations of society".¹⁰⁹ In the Summit of the Americas Declaration of Principles and Plan of Action in 1994, the heads of state of thirty-four nations of the southern hemisphere clearly established a link between the survival

¹⁰⁰ See Council of Europe, Texts Adopted by the Committee of Ministers of the Council of Europe, 1997, Resolution (97)24 (2000).

¹⁰¹ See Corruption and Integrity Improvement Initiatives in Developing Countries, U.N. Sales No. E.98.III.B.18.

¹⁰² See Official Gazette of the Council of Europe: Committee of Ministers, part-volume No. V - May 1999, Resolution (99)5.

¹⁰³ See Europ. T.S. No. 173.

¹⁰⁴ See Joint Action on Corruption in the Private Sector, 1998 O.J. (L 358).

¹⁰⁵ For the Declaration of the First Global Forum on Fighting Corruption: Safeguarding Integrity Among Justice and Security Officials, see <http://usinfo.state.gov/topical/econ/integrity/document/declare.htm> (last visited 19 November 2003); For the Final Declaration of the Global Forum on Fighting Corruption and Safeguarding Integrity II, see <http://usinfo.state.gov/topical/econ/bribes/gf2declaration.htm> (last visited 19 November 2003).

¹⁰⁶ See Europ. T.S. No. 174.

¹⁰⁷ See Official Gazette of the Council of Europe: Committee of Ministers, part-volume No. V - May 1999, recommendation R (2000) 10.

¹⁰⁸ See *Principles to Combat Corruption in African Countries* (Feb. 23, 1999), available at www.gca-cma.org/ccorrupt.htm#prin. (last visited 19 November 2003).

¹⁰⁹ Council of Europe, Preamble to the Criminal Law Convention on Corruption, 2000.

of democracy to the eradication of corruption.¹¹⁰ “Effective democracy,” they declared, “requires a comprehensive attack on corruption as a factor of social disintegration and distortion of the economic system that undermines the legitimacy of political institutions”.¹¹¹ The United Nations General Assembly in 1996 adopted the United Nations Declaration against Corruption and Bribery in International Commercial Transactions.¹¹² The declaration describes the economic costs of corruption and bribery, and points out that a stable and transparent environment for international commercial transaction in all countries is a sine qua non for the attraction of investment, finance, technology, skills, and other resources across national borders.¹¹³ Member states pledged in the declaration to criminalize bribery of foreign public officials in an effective and coordinated manner and to deny the tax deductibility of bribes paid by any private or public corporation or individual of a member state to any public official or elected representative of another country.¹¹⁴ Further, corruption was also the subject of a 1997 United Nations General Assembly Resolution entitled Action Against Corruption. The resolution underscored the General Assembly’s concern about the serious problems posed by corrupt practices to the stability and security of societies, the values of democracy and morality, and to social, economic and political development.

Kale has argued that an emerging customary law norm that treats corruption as a crime under international law draws strong support from the following: a. consistent, wide-spread and representative state practice proscribing and criminalizing the practice; b. the wide-spread condemnation of acts of corruption reflected in the preambles of these multilateral anti-corruption treaties and in declarations and resolutions of international organizations; c. pronouncements by states in recent years that evidence a universal condemnation of corrupt practices by public officials; d. a general

¹¹⁰ Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime Under International Law*, 34 INT’L LAW. 149 (2000).

¹¹¹ *Id.*

¹¹² See C. Raj Kumar, *Corruption and Human Rights*, Frontline, Sept. 14-27, 2002, available at <http://www.flonnet.com/fl1919/19190780.htm> (last visited 19 November 2003); See also C. Raj Kumar, *Corruption and Human Rights –II*, Frontline, Sept. 28-Oct.11, 2002, available at <http://www.frontlineonnet.com/fl1920/stories/20021011008607500.htm> (last visited 19 November 2003).

¹¹³ *Id.*

¹¹⁴ *Id.*

interest in cooperating to suppress acts of corruption; and e. the writings of noted publicists recognizing corruption as a component of international economic crimes. Upon these factors, he has argued that there is a strong argument for treating corruption as a crime under international law for which individual responsibility and punishment attach.¹¹⁵

International Human Rights Framework and its Relevance to Corruption

To understand the growth and development of the international human rights framework in its present form, it is necessary to appreciate the human rights movement as a continuous negotiation among states on universally accepted principles and norms. However, the so-called universal conception of human rights has come under attack by arguments relating to the cultural relativism of human rights, most recently embodied in the “Asian Values” debate. While the international human rights framework has moved from its modest origins in creating norms to enforcing human rights obligations and institutionalizing human rights, it has also simultaneously expanded the notion of what constitutes human rights.¹¹⁶ This expansion has taken place prominently within the work of national courts in certain jurisdictions assuming the role of human rights arbiters and expanding constitutional rights to include a variety of economic and social rights in order to promote good governance. The human rights framework in the ICCPR and the ICESCR are very useful to develop corruption prevention strategies, particularly with regard to the protection of the rule of law and the right to equality and non-discrimination. These corruption prevention strategies would rest on the premise the human rights framework should provide a right to corruption free service based on the principle of freedom from corruption.

Article 1 of the ICCPR emphatically observes, “all people have the right of self-determination” and to “...freely pursue their economic, social and cultural development”.¹¹⁷ Corruption, as argued

¹¹⁵ Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime Under International Law*, 34 INT’L LAW 149 (2000).

¹¹⁶ For knowing more about the historical sequence of human rights instruments, see Roy, *supra* note 16, at 140.

¹¹⁷ Henry Steiner and Philip Alston, *International Human Rights in Context* (Oxford University Press 2d ed., 2000).

earlier clearly interferes in people's efforts to fulfill their economic self-determination. It also stifles the pursuit of economic, social and cultural development. The fact that corruption interferes in the free progress of people to realize their rights as mentioned in the ICCPR is a good starting point to integrate the human rights framework for developing corruption prevention strategies. Article 26 of the ICCPR observes that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law" and "...the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination..."¹¹⁸ The nature of official corruption is such that it clearly discriminates against people and favors bribe-givers over those who do not give bribes. These bribe-givers receive undue favored status and are able to sue against the resources of the state, which they may not otherwise be entitled to. Corruption does not allow for the development of equality before the law as it is fundamentally at odds with the principle of equal treatment. A governance system that is free from corruption does not discriminate against people as well as ensuring that the state's largesse is distributed fairly and that the governmental decision-making are based on factors that are fair, just and reasonable. Corruption results in a) favored or preferential treatment of certain persons who have managed to pay bribes or perform corrupt actions; b) unfair treatment or discrimination against people who refuse to pay bribes, resulting in their victimization. Corruption clearly divides society on the basis of unfair and illegal considerations, culminating in gross disrespect for law and moral degradation. In corruption discourses that have examined the problem from a public policy standpoint, there is very little emphasis on the discriminatory aspects of corruption. But in practical terms, it is a natural outcome of most corrupt transactions. Individual corruption in day-to-day governmental functioning have reached such alarming proportions in developing countries like India that corruption is institutionalized within the governance system itself.

The ICESCR, like the ICCPR, refers to the principle of equality and non-discrimination in the exercise of economic, social and cultural rights.¹¹⁹ The Committee on Economic, Social and

¹¹⁸ International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, art. 26, 999 U.N.T.S. 171.

¹¹⁹ Steiner & Alston, *supra* note 117.

Cultural Rights, in one of its General Comments¹²⁰, has referred to the legal obligation undertaken by state parties to the ICESCR. The non-discrimination aspect in article 2 of the ICESCR is the “undertaking to guarantee” that relevant rights “will be exercised without discrimination”. It may be argued that the states ought to take steps to ensure that there is no discrimination in the efforts of their citizens to exercise their rights to work, food, health, education and other rights that are mentioned in the ICESCR. Corruption in exercise of the above-mentioned rights is a clear violation of this obligation. It is apparent that numerous development-oriented activities of states have been affected by corruption. The economic and social rights of people are eroded due to the corrupt transfer of public wealth to a few power holders. This has created a situation of further deprivation and impoverishment. Article 2(1) of the ICESCR obliges state parties “to take steps” for the realization of rights. Steps taken should include also the removal of impediments in the realization of economic and social rights. As corruption is one of biggest obstacles in the fulfillment of economic and social rights, states are obliged to make efforts against it. ICESCR has also pointed that “all appropriate means, including particularly the adoption of legislative measures” may be taken to fulfill the legal obligations of member states under this covenant. The argument for freedom from corruption rests on the basic premise that other economic and social freedoms are significantly threatened by corruption. In particular, it is obvious that the democratic rights of the citizens under Article 25 of the ICCPR are deeply impinged by corruption in the electoral process. This may extend to other democratic rights if corruption is deeply imbedded in the political processes of the state. N. Vittal has remarked perspicaciously that “there is a need for explicitly articulating the corruption-free service as a patent fundamental right of the Indian citizen so that what is latent and lying hidden in the other provisions of the Constitution can be made explicit.”¹²¹

Need for promoting transparency and accountability has been noted as an important requirement for corruption-free governance. The Indian experience has demonstrated that the recognition of the right to information in India is an important step in ensuring a corruption-free service. Numerous factors played a part in the passage of a new law

¹²⁰ General Comment, Committee on Economic, Social and Cultural Rights, No.3 (1990) UN Doc.E/1991/23, Annex III. See *supra* note 15 at 265-266.

¹²¹ Emphasis mine, p.129 *op cit*.

that recognized this right, including a sound international human rights framework that provided for the right to information. India is a state party to the ICCPR and article 19 of the ICCPR protects the “freedom to seek, receive and impart information”.¹²² It is notable that during the first session of the UN General Assembly in 1946, it adopted resolution 59(1) which stated: “freedom of information is a fundamental human right and ...the touchstone of all the freedoms to which the UN is consecrated”.¹²³ The consequences of corruption on development are immense as the national and international funds that are allocated for development may be siphoned off due to corruption. Developing countries like India are provided with loans by other nations and multilateral lending institutions for various development-related activities. This has resulted in social expectations generated within the countries for development-related work. Corruption directly affects the pursuit of development work as the funds are misused, thereby delaying, and in numerous occasions deterring, the development process.¹²⁴

VII. TRANSPARENCY AND ACCOUNTABILITY IN GOVERNANCE THROUGH THE RIGHT TO INFORMATION

The good governance approach of administering states needs to focus on the principles of transparency and accountability. It is important that decisions are taken in a transparent manner and that the decision-makers are held accountable. The form of accountability, which is what the good governance approach of governmental decision-making promotes, is broader than that of electoral accountability. While democratic governance involves some form of accountability of the rules by the ruled electing them to office, accountability of governance seeks to ensure that the people who are making decisions are involving the public in the process of making that decision. This is possible only if the decisions are made in a transparent manner. Governmental decisions acquire legitimacy if the right to information of the people is duly protected and they are in a position to enforce this right. In order to ensure a corruption-free society, it is necessary to empower the people so that they can resist

¹²² *Supra*, note 118, art. 19.

¹²³ Article 19, *What you don't know can hurt you* <http://indiatogether.org/stories/art19.htm> (last visited 19 November 2003).

¹²⁴ For understanding the impact of corruption on development, see Cheryl W. Gray & Daniel Kaufmann, *Corruption and Development*, Finance & Development, March 1998.

the practices of official corruption. From the perspective of civil society activism, such resistance to corruption needs to start with the empowerment of the citizenry and this is possible through the development of the right to information. For democratic governance to be meaningful, it is necessary that “citizens must have access to information about what their government is doing and how decisions have been reached”.¹²⁵

In the context of India, the recent struggles to curb corruption at all levels of governmental decision-making have taken the form of efforts to promote transparency and enforce accountability by promoting the right to information at the state and central levels. This effort began with the work of a grass-roots organization, which called itself the Mazdoor Kisan Shakti Sangathan (Labour Farmer Strength Organization or MKSS) in the Indian state of Rajasthan. The initial phase of the work of the MKSS was so small that it hardly attracted any attention. The members of the MKSS walked from village to village asking simple questions: did the people know the amount of development funds coming to their village? How was the money that came from different sources actually spent? Although these questions were relatively simple, they were questions the poor and impoverished of India had never dared to ask before.¹²⁶ After collecting this information, the MKSS went to the Government Block Office, which is the authority that administers development funding in about 100 villages, with a request for detailed information on development expenditure.¹²⁷ To this, they were told that there was no government rule that would allow villagers to demand and receive such information.¹²⁸ This resulted in the MKSS launching a people’s campaign in the state of Rajasthan. The focus of the campaign was on conducting numerous public hearings in which cases of corruption and misappropriation of public funds were opened to the public.¹²⁹ Ms. Aruna Roy of the MKSS has observed that the right to information in

¹²⁵ Lotte E. Feinberg, *Open Government and Freedom of Information: Fishbowl Accountability?*, in *Handbook of Public Law and Administration* (Philip J. Cooper & Chester A. Newland, eds., Jossey-Bass Publishers, 1997).

¹²⁶ Bunker Roy, *The Power of Information – A Grassroots Organization in India Defeats Corruption*, www.dse.de/zeitschr/de202-11.htm (last visited 19 November 2003)

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

Rajasthan was aimed at ending the arbitrary use of power.¹³⁰ The campaign by the MKSS demanded transparency in official records, a social audit of government spending and a mechanism of redress for people who had not been given their due.¹³¹ The result of this powerful, grass-roots mass civil society activism in the form of social struggle resulted in the state of Rajasthan passing a law on the right to information, as well as creating an environment in which corruption is tolerated less and accountability of government officials is enforced.¹³²

A nationwide movement to seek national legislation on the freedom of information followed the social activism generated by the work of the MKSS in Rajasthan. The critical link between the lack of transparency, absence of accountability and corruption provided the social and political impetus to seek the right to information.¹³³ The right to information law has now been passed in a few states in India, including Rajasthan, Madhya Pradesh, Maharashtra, Goa, Tamil Nadu, Karnataka, Delhi, Andhra Pradesh.¹³⁴ The Freedom of Information Bill 2002 was passed by the Lok Sabha (lower house of the Indian Parliament) on 3 December 2002 and by the Rajya Sabha (upper house of the Indian Parliament) on 16 December 2002.¹³⁵ The relevance of the right to information¹³⁶ in India is much more than allowing the free flow of information from the government to the public. It is about people exercising their right to seek necessary information from the government so that the government and its representative are held accountable to the public. The right to information ensures that governmental decisions are made in a transparent manner and that the people have the right to be informed of decisions that affect them. Interestingly, the right to know, "receive and impart information has been recognized within the right to freedom of speech and

¹³⁰ Kalpana Sharma, *Right to Information will check Corruption*, The Hindu, 24 February 2002, available at <http://www.hinduonnet.com/2002/02/24/stories/2002022400251200.htm> (last visited 19 November 2003)

¹³¹ *Id.*

¹³² *Id.*

¹³³ For further reading, see Karnataka Working Group's 2002 Report, *Reinventing Rural Governance* (2003), www.indiatogether.org/2003/jan/gov-karpri01.htm (last visited 19 November 2003).

¹³⁴ Prashant Bhushan, *India Approves Freedom of Information Law – The Freedom of Information Bill 2002* (2002) at www.freedominfo.org/news/india/ (last visited 19 November 2003).

¹³⁵ Neelabh Mishra, *A Battle Half Won*, at www.indiatogether.org/bin/pfriend/cgi (last visited 19 November 2003).

¹³⁶ Bela Bhatia & Jean Dreze, *Freedom of Information is Key to Anti-Corruption Campaign in Rural India* (1998) at http://www.transparency.org/working_papers/bhatia-dreze/bhatia-dreze.html (last visited 19 November 2003)

expression”¹³⁷ under article 19 (1)(a) of the Indian Constitution.¹³⁸ The Supreme Court of India has also held that “a citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for that purpose.”¹³⁹ The MKSS movement to seek the right to information came about due to a large-scale, rampant embezzlement of public funds. The consequences of these corrupt actions were, “non-employment of, or under-payment to, the local workforce and non-existent or bad quality assets on the ground, which were meant for education, housing or health facilities for the rural poor.”¹⁴⁰ The linkage between the human rights violations on account of institutionalized corruption and the lack of transparency and accountability¹⁴¹ in governance led the MKSS to establish a “connection between the manipulation of official records and denial of life opportunities to the rural poor”.¹⁴² This resulted in the movement to seek the right to access to official records as a part of the right to life and livelihood.¹⁴³

VIII. CORRUPTION IN INDIA – INSTITUTIONAL RESPONSES AND LEGISLATIVE CHALLENGES

The institutional approach of tackling the problem of corruption has been quite successful in Hong Kong¹⁴⁴ due to the work of the Independent Commission against corruption (ICAC).¹⁴⁵ There have been human rights concerns¹⁴⁶ 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. In India, there have been various attempts to tackle the

¹³⁷ S.P. Gupta v. Union of India, A.I.R. 1982 S.C.149 at 234; Secretary, Ministry of I&B, Government of India v. Cricket Association of Bengal (1995) 2 S.C.C. 161.

¹³⁸ Mahendra P. Singh, *Constitution of India*, (V.N Shukla, ed., Eastern Book Company, 10th ed. 2001 & Supp. 2003) .

¹³⁹ Cocksroft, *supra* note 84

¹⁴⁰ *Id.*

¹⁴¹ For further reading, see Karnataka Working Group’s 2002 Report, *Improving Accountability in Panchayati Raj* (2003) at www.indiatogether.org/2003/jan/gov-karpri02.htm (last visited 19 November 2003).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Alan Lai, *Building...China*, 2 F. ON CRIME & SOC’Y (2002).

¹⁴⁵ See Thomas Chan, *Corruption Prevention – The Hong Kong Experience, Resource Material Series No. 56*, Independent Commission Against Corruption (ICAC), Hong Kong.

¹⁴⁶ Daniel R. Fung, *Anti-Corruption and Human Rights Protection: Hong Kong's Jurisprudential Experience*, at http://www.transparency.org/iacc/8th_iacc/papers/fung.html (last visited 19 November 2003).

problem of corruption. Institutional measures have been taken by adopting legal and administrative regulations to ensure that corrupt individuals are punished under the law. Before India's independence, the British established the Delhi Special Police Establishment (DSPE) to control corruption, which was rampant during the Second World War.¹⁴⁷ The Prevention of Corruption Act was passed in 1947 and an Administrative Vigilance Division (AVD) was formed in the Ministry of Home Affairs in 1955.¹⁴⁸ This led the appointment of vigilance officers in each ministry to inquire into charges of corruption against employees in various organizations.¹⁴⁹ 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 to redress, but it undermines the structure of administration as well as in public life..."¹⁵⁰ The fact that corruption potentially affects development was perceived by the early planners of India, but the legal and institutional measures that were attempted were half-hearted, ineffective and lacked enforcement mechanisms. In one of the earliest methodical approaches to tackle corruption in India, the Santhanam Committee Report¹⁵¹ recommended the establishment of the Central Vigilance Commission (CVC), which would be independent of ministerial control. The CVC was formed in 1964.¹⁵² 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.¹⁵³ Since there is very little political consensus on issues relating to processes of combating corruption, the institutional approaches that were attempted largely failed to ensure corruption-free governance. Commenting on the efforts in investigating corruption, Mr. A.G.Noorani has observed that, "the initiation of an investigation into crime or an inquiry into charges

¹⁴⁷ See S.S. Gill, *The Pathology of Corruption* 237 (Harper Collins 1998), p.237.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See Krishna K. Tummala, *Corruption in India: Control Measures and Consequences*, 10 Asian J. POL SCI. 43, 43-69 (2002).

¹⁵¹ See Jaffrelot, *supra* note 3.

¹⁵² Gill, *supra* note 147.

¹⁵³ *Id.*

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.”¹⁵⁴ The legal and institutional approaches to the issue of corruption have vested the power to initiate investigation into corruption with the very people who are in power and who may themselves be involved in the governance system. The independence of investigative authority is important in ensuring that all allegations of corruption against government representatives are handled in an impartial, fair and unbiased manner.

IX. TOWARDS FORMULATING A FUNDAMENTAL RIGHT TO CORRUPTION FREE SERVICE

Corruption profoundly affects the exercise of rights in India. Rights are important political tools that are meant to empower people. The Constitution of India has sanctified rights to ensure that the populace is assured of certain protections, which they are entitled to as a matter of right. The Constituent Assembly debates in India are a rich source of materials to understand the hopes and expectations of the political leaders of that time in creating a Constitution that would pave way for a “social revolution”.¹⁵⁵ It needs to be noted that the framers of the Indian Constitution were themselves victims of gross human rights violations through the state apparatus of colonial rule in which the law was used to justify numerous actions in violation of human dignity. The framers of the Indian Constitution¹⁵⁶ provided for a comprehensive set of fundamental rights that could be enforced against the state.¹⁵⁷ There were also certain rights that could be enforced against private individuals.¹⁵⁸ The Constitution provided a robust framework to ensure that fundamental rights were duly protected and that the government could withdraw individual freedoms only under specific circumstances. Even these circumstances were subject to judicial review and needed to be fair, just and reasonable to

¹⁵⁴ A.G. Noorani, Lok Pal and Lok Ayukts, Corruption in India – Agenda for Action 221 (Guhan and Paul, eds., Vision Books, 1997) . This was referred to in Jaffrelot *supra* note 3.

¹⁵⁵ See Granville Austin, *The Indian Constitution – Cornerstone of a Nation* (Oxford University Press 1966). See also, Granville Austin, *Working a Democratic Constitution – The Indian Experience* (Oxford University Press, 1999).

¹⁵⁶ Mahendra P. Singh, *Constitution of India* (V.N Shukla, ed., Eastern Book Company, 10th ed. 2001 & Supp. 2003).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

be upheld.¹⁵⁹ Rights have evolved in India through the progressive and liberal interpretation given to them to ensure that they provided a meaningful basis for good governance and freedom from exploitation. Experience has demonstrated that the concept of rights have been used by civil and political society to negotiate their claims within the scheme of democratic governance. These struggles and negotiations have not always been successful from the standpoint of a constitutional system that bases itself on liberty, equality and dignity. Nevertheless, it has survived half a century of events that have unfolded and ensured that India remains a constitutional democracy.

The question of corruption as a violation of human rights demands a constitutional response. The fact that the entire constitutional governance system and processes of administration are tainted by corruption vindicates the contention that it is time that India provided to its people a constitutionally guaranteed fundamental right to a corruption-free service. The Indian experience in recognizing constitutional rights, judicially enforcing those rights, and empowering the citizenry have not been always encouraging.¹⁶⁰ The public interest litigation¹⁶¹ movement in India has given some encouraging signals on upholding rights through the constitution by means of an independent judiciary that is socially sensitive and activist.¹⁶² But all these developments have their limitations and have fallen short of the social expectations they generated when the process began.¹⁶³ The fact that constitutional democracy itself is a tireless pursuit to ensure that rights and freedoms of individuals are duly protected and that individuals are offered legitimate channels to allow the free expression of frustration and disappointments gives hope that the governance system in India will improve. However, these hopes have been shattered numerous times in the recent past due to the widespread prevalence of institutionalized corruption, as political morality and character are

¹⁵⁹ *Id.*

¹⁶⁰ For further reading, see Upendra Baxi, *The Avatars of Judicial Activism: Explorations in the geography of (In) Justice, in Fifty Years of the Supreme Court of India: Its grasp and Reach* 156-209 (S.K. Verma & Kusum, eds., Oxford University Press & Indian Law Institute, 2000).

¹⁶¹ See Chief Justice A.S. Anand, *Public Interest Litigation as Aid to Protection of Human Rights*, M.C. Bhandari Memorial Lecture, (2001) 7 S.C.C. 1..

¹⁶² Upendra Baxi, *The State and the Human Rights Movements in India, in People's Rights: Social Movements and the State in the Third World*, 335-352 (Manoranjan Mohanty et al. eds., Sage Publications, 1998).

¹⁶³ See Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation Before the Supreme Court of India, in Law and Poverty: Critical Essays* (N.M. Tripathi, 1999).

becoming pipedreams and watchdogs are ineffective due to lack of operational independence and institutional autonomy.

In this situation, the Indian judiciary has responded more than once to ensure that the independence of investigative agencies are protected and that they are free from extraneous influences while handling investigation of corruption allegations and other gross abuses of power. These instances of court interference have obviously drawn swift and succinct responses from the executive to ensure that power of supervision and control of the investigative agencies rests with the political executive. In terms of corruption in governance and integrity in administration, India is in a quagmire. There is no single solution to the problem of corruption in India. The constitutional response in the form of formulating a fundamental right to corruption-free service would be an important starting point to bring the problem of corruption from the realm of public policy and criminal law enforcement to the central level of political discourse in India. An example of constitutional empowerment of the citizenry in India with the recognition of economic and social rights is with reference to the right to education. The right to education was originally recognized in India as a part of the right to life. Later, the human rights movement and civil society activism helped in creating a distinct constitutionally recognized fundamental right to education.

The fundamental right to corruption-free service in India would form part of chapter III of the Constitution of India. Former Chief Vigilance Commissioner, Mr. N.Vittal has supported the evolution of such a right. He has observed that, "corruption totally distorts the machinery of government namely, the executive, and makes a mockery of the human right for good governance."¹⁶⁴ This right is expected to empower Indian citizenry to rightfully claim that governmental conduct needs to be free from corruption. If it is not, it is a violation of their constitutionally recognized rights. Constitutional sanctity has acquired legitimacy in the Indian context largely due the fact that India has been functioning as a constitutional democracy from its independence. While corruption of all forms – political, administrative, bureaucratic, and corporate - is rampant in India and has steadily increased in the last fifty years, the political system has by and large been stable. But this cannot be taken for granted. It is conceivable that shattered social expectations, maladministration, and

¹⁶⁴ N. Vittal, *Corruption in India - The Roadblock to National Prosperity*, (Academic Foundation, 2003).

poor governance policies over a period of time would endanger the rule of law and the social fabric. Corruption in India has affected development policies and the Indian citizenry have been deprived of their economic and social rights.

The right to corruption-free service would demand good governance, integrity and probity in administration from those in power. The fundamental right to corruption-free service in India should be recognized for a variety of reasons: first, it would be a landmark development from the standpoint of constitutional governance as it would be recognized by the lawmakers as an issue of foremost importance for ensuring good governance; second, it would provide for obligations on the part of political executive to ensure that they need to take positive steps for realizing this fundamental right; third, Indian courts are well positioned to develop progressive jurisprudence relating to corruption-free rights, given the fact that there are numerous cases in the past particularly with reference to other fundamental rights in the Constitution of India where courts have interpreted and developed rights; fourth, the non-enforcement of the fundamental right to a corruption-free service has the potential to invite judicial scrutiny and the courts may recommend legal, administrative and institutional measures and reforms to ensure that freedom from corruption, as provided in the Constitution, is meaningfully realized; last, it gives a powerful tool to national and international civil society movements to ensure that corruption at every level of governance in India is duly addressed and measures are taken to curb this menace.

X. IMPLEMENTATION OF THE RIGHT TO CORRUPTION FREE SERVICE IN INDIA – STRATEGIES TO REDUCE THE INCIDENCE OF CORRUPTION

The problem of corruption has been hitherto handled in India mostly through formal mechanisms. The present article argues that reliance on formal mechanisms of law enforcement, such as the legal and institutional approaches to reduce corruption, has its own weaknesses. The proposal for formulating a constitutional right to a corruption-free service in India is rooted in the process and development of social empowerment. Rights have played an important role in empowering the Indian citizenry and judicial enforcement of human rights has been quite successful. This is not to suggest that this

is the best method to create a corruption-free society, or for that matter, that it is the only method. But given the fact that many other strategies for corruption prevention have largely been unsuccessful and that there is little political will to tackle the problem as a part of good governance, constitutionally empowering the Indian citizenry with certain rights against the government for corrupt activities may be helpful. The consequence of formulating a fundamental right to corruption free service in India can be summarized in the following ways:

A. Constitutional Obligation:

It will become the obligation of the government of India and all the state governments to ensure that the activities of the government officials are corruption-free. As a constitutional democracy, the government of India ought to conduct its affairs in accordance with the Constitution. When the Constitution is abrogated, there are systemic checks and balances that result in the intervention of the courts, particularly by the High Courts and the Supreme Court of India. The inclusion of a fundamental right to a corruption-free service will be a remarkable step in the direction of constitutional empowerment, as it becomes the direct responsibility of the government to ensure that its conduct is in accordance with the Constitution. Moreover, with an established and well-developed system of public interest litigations in India, it is quite conceivable that this provision will be used to approach the courts of law when corrupt acts of government come to light either due to personal victimization or as a matter of public interest. At the same time, governments trying to avoid this risk may act to put administrative and other enforcement measures into practice, improving both the criminal enforcement of corruption controls, while developing a rights culture around this problem.

B. Citizens Empowerment:

The fact that Indian citizens will be able to approach the High Courts and the Supreme Court of India for violation of their fundamental right to corruption free service can be remarkably useful. The impunity with which government officials in India perform corrupt acts creates massive victimization due to violations of civil and political rights and economic, social and cultural rights. The citizens

will be truly empowered due to the fact that corrupt acts will no longer be just a case of criminal law or a government regulation, but will instead be deemed a “constitutional violation”. The use of public interest litigation may start as a phenomenon among some members of the legal community and civil society in India. However, in time, as past experience has demonstrated particularly in the area of environmental protection, judicial insistence and enforcement of standards have been quite effective. It is believed that the problem of corruption can be better solved if the judiciary is allowed to enforce the constitutional right of the Indian citizenry to seek corruption-free governance. Simultaneously, the problem of judicial corruption¹⁶⁵ must be resolved, as there are clear indications that the judiciary, at least at the lower level, is as corrupt as government officials.

C. *Strengthened Institutions:*

A well-governed society ought to ensure that its democratic institutions are free from corruption and indeed work towards the protection and promotion of human rights, transparency and accountability. Human rights can be protected through a legal system that responds to violations on the basis of its laws, judiciary and other institutions. However, the need for ensuring transparency and promotion of accountability is quite complex. The right to corruption free service in India hopes to target the need for transparency in governance. On the face of it, transparency means that government decisions are open and available for public scrutiny. The right to information law in India is expected to fulfill this objective. But transparency also means that the government does not engage in any sort of corruption and if certain functionaries of the government are involved in such activities, there has to be institutional checks. This is possible only if there are strong and independent democratic institutions whose task is to ensure accountability and monitor the level of transparency in government decisions. The institutions themselves need independence and autonomy in their functioning.

¹⁶⁵ Rajeev Dhavan, *Judicial Corruption*, The Hindu, 22 February 2002, <http://www.hinduonnet.com/2002/02/22/stories/2002022200031000.htm> (last visited 19 November 2003). See also, P.P. Rao, *The Judiciary*, The Hindu, 15 May 2003, <http://www.hinduonnet.com/thehindu/2003/05/15/stories/2003051500361000.htm> (last visited 19 November 2003); Rajeev Dhavan, *Judicial Propriety and Tehelka*, The Hindu, 29 November 2002, <http://www.hinduonnet.com/thehindu/2002/11/29/stories/2002112901181000.htm> (last visited 19 November 2003).

Hence, typically, if the fundamental right to corruption free service in India is included within the Constitution of India, the government may need to pass enabling legislation. This legislation needs to propose a comprehensive legal and institutional framework that will create strong and independent institutions both at the state and central levels that will be exclusively vested with the task of ensuring transparency and accountability in governance.

XI. CONCLUSION

Corruption is a form of abuse of power, similar to other abuses of power in the form of human rights violations. The fact that human rights discourse has powerfully attempted to demand due process considerations in governmental interaction supports the integration of corruption prevention strategies by law enforcement and the development of human rights through constitutional reform. Developing countries like India face significant resource constraints posed by macro- and micro-economic problems. The corruption factor heavily burdens the governance machinery, resulting in a form of impoverishment that can be avoided through good governance policies.

There have been institutions created at all levels of government to exclusively handle charges of corruption against individuals and organizations. However, these efforts have enjoyed little success as there is a lack of political consensus *first*, to recognize corruption as the most important problem affecting India that significantly damages the economic, social and political foundations of Indian democracy; *second*, to take systematic and comprehensive efforts at all levels of the governmental machinery to ensure that corruption is curbed at every stage of the state's interaction with the citizenry; *third*, to ensure the independence and autonomy of agencies entrusted with the tasks of monitoring and regulating the corruption of politicians and bureaucrats and initiating necessary legal actions against the accused persons. Corruption is a universal phenomenon and the opposition parties, the media, civil society and the citizenry have accused every state and central government that have ever come to power of some form of corruption or other. This has created a quagmire of corruption discourse in India. In this current state of affairs, the task of those struggling for the creation of a corruption-free society in India to

formulate new strategies to eliminate this social evil is an uphill struggle.¹⁶⁶

The development of the right to transparency in governance through the freedom of information is an important milestone for the struggle of resistance against corruption. Freedom of information is expected to provide a transparent system of government so that official decisions relating to development and public policy are not shrouded with secrecy. By checking opportunities for nepotism, favoritism and corruption, the right to freedom of information can instill a sense of accountability in the government. The fundamental right to a corruption-free service is one of the ways in which the principles of transparency and accountability can be elevated to the center of discourse in the governance in India. The right to a corruption-free service has the potential to be recognized as another human right protected and promoted by law, institutions, rules and regulations in India. However, constitutional reform is not a panacea for all the ills that affect the Indian society, and corruption as a systemic problem needs to be addressed in a multifaceted fashion. The formulation of the fundamental right to a corruption free service would be one crucial step towards the empowerment of Indian citizenry and the development of good governance policies.

¹⁶⁶ See Tummala, *supra* note 150.