# Systemic Governance Corruption : The Dialectics of Law and Non-violent Social Movements in Contemporary India

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CHAPTER 3

# Systemic Governance Corruption

## *The Dialectics of Law and Non-violent Social Movements in Contemporary India*

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### 3.1. A Side Glance at *Liberty and Corruption*

A while ago, I wrote a monograph entitled *Liberty and Corruption* (Baxi 1989a),[1] which explored 30 judicial decisions examining the charges of corruption in the allocation of essential commodities. This was a portfolio commandeered by the chief minister of Bombay Abdul Rahman Antulay, who through the allocation of essential commodities mainly funded the Pratishthan, a trust run by family and friends, and which included public officials such as Finance Minister Ramrao Adik and High Court Justice Rajaram Bhole. It was dedicated to Indira Gandhi and her mission, who declared herself as 'happy to associate' 'with the Pratibha Pratishthan'. An extraordinary amount of ₹5.2 crore was collected for the Pratishthan and 'Antulay tax' (collection from farmers of a levy of ₹2.50 per tonne of sugarcane as donation) helped along.

[1] Hereafter cited as *L&C*. At 20–26, I classified the principal cases as Antulay I–VII.

It was clearly a situation of using public power, if not entirely for private ends, for partisan political uses. The aspect of using the monies thus collected was the subject matter in this prolix process till it was eclipsed by the wider apex court's enunciation of the right to speedy trial under Articles 14 and 21 of the Constitution.

Many dimensions interested me in this saga, but the emergence of a constitutionalization of the discourse about corruption was indeed remarkable. Combatting corruption was primarily viewed as a party-political matter between the ruling and opposition parties—politics was always at stake, and the pursuit of corruption charges against the powerful was from start to finish regarded as an inter-party and, at times, intra-party affair to handle and settle. It was always considered a political issue, not a legal or constitutional one.

This is how the Antulay matter was also pursued in Parliament and the Bombay legislature. It was mainly an affair of a triumphant return of Mrs Indira Gandhi at the centre and the installation of a Congress chief minister in the leading state of Maharashtra on the one hand, and the opposition parties in hot pursuit on the other. Corruption was condemned all around, but this campaign was particularly seen as a confrontation between a political David and Goliath!

The unusual thing about the Antulay case was that it, contrary to political intention and practice so far, succeeded in converting corruption into a constitutional issue as well. It was the first case in which many steps in this direction were taken: a cease-and-desist order (by which Justice Lentin divested the chief minister of the decision-making power under essential commodities law), a right to clean public administration articulated by Justice Rele (of the Bombay High Court), and a right to speedy trial shaped by the Supreme Court and its powers to do complete justice (under Article 142) were fully enunciated. Systematic governance corruption (SGC, as I call it) became a matter for judicial vigil and will at the highest level, and doctrines of constitutional and administrative law began to be used and further developed as a strategy to combat it.

I was struck by the fact that Antulay himself was a barrister-at-law and was deeply hurt by the charges of corruption. He felt he had done

nothing legally or morally wrong and the law was misused against him by his political opponents since all the donations were made by cheque. The notion that the application of the norms of law or the Constitution to ministers/prime ministers/chief ministers or persons otherwise powerfully placed is an act of injustice remains an inveterate aspect of Indian political culture. Although carceral detention and strict punishment have, of late, been extended to highly placed political and bureaucratic actors, it seems well understood by them that the rule of law may not extend to the crimes of the powerful. In this sense, an entrenched political culture of impunity of the powerful still rules the roost.

I learnt both through the Antulay saga, and later that, investigation and trial, in some cases, continue to define the performative praxes of law as politics by other means. This linkage between corruption and politics interested me as I was writing the book on the eighth anniversary of the Antulay trials and the onset of another crusade against corruption—the Bofors saga—involving accusations of corruption confronting another prime minister, Shri Rajiv Gandhi (see Bhushan 1990; Shourie 1991). Internecine strife within state politics often invited trading of corruption charges (see Baxi 1989a: 41–43; Dhavan 2005; Noorani 1973). I was, thus, able to advance the claim that 'The issue was corruption, but the issue was also politics. So it has been since independence, and will be for a long time to come, unless we institutionalise effective procedures against corruption' (Baxi 1989a: 13). I was, of course, talking about corruption indictments accusing powerful members of the political class; cogs in the wheel and small fries continued to be treated harshly by law as 'corrupt'. Many common Indian citizens face charges and trials for venal acts of bribery and corruption extending over long stretches of time under the much-amended Prevention of Corruption Act.[2]

[2] Average readers of case law or media often express a well-cultivated horror of conviction for petty corruption or for what is now called facilitation money. Long judicial delays make belated punishments scandalizing for the administration of justice and have all kinds of psychological, economic and social impacts on the family of the eventually convicted. Justices and courts who did not choose to err on the side of leniency may derive considerable support from studies/reports that show how the increase in petty corruption may hurt society in many ways. For example, a

The noticeable shift in policy and public discourse to 'combatting' corruption begins to make a good deal of sense since a total eradication of corruption is (and has proved to be) impossible to achieve in any society. Although 'zero tolerance' to corruption has a nice ring of sincerity to it, the distinction among types of corruption matters. Even if all transactions involving 'corruption' are pertinent, as entailing some abuse of power, a choice of strategies of combat remains decisive. We need here to understand how courts (in the language of the theory of law as a means of *ad hoc* judicial handling of conflicts of interests) differentiate between public interest in the administration of due process of law versus public interest in combating SGC.[3]

In this context, the tasks of describing social movements against corruption are not easy. Single-focus movements against public corruption are rare; movements, campaigns and crusades usually include corruption but address multiple issues as well (such as election reform, greater transparency in public dealings—especially public procurement—and governance and institutional change). And that not all forms of action may be comprised under 'movements'; some are specifically targeted (against a public person or an office of integrity) and, at times, we see moral and ritual overtones of just indignation (in moral crusades, often also drawing from religious sources).

Nationwide movements (such as Jai Prakash Narayan's movement and Anna Hazare's movement of India against corruption) are different in scale than local or regional campaigns, and both remain

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Centre for Media Studies' Indian Corruption Study report showed in 2017 that 'In most of the states, the more-often paid bribe amount ranges between ₹100–500. However, an amount of as low as ₹10 and as high as ₹50,000 was also paid by households in a year for availing one or the other public service' and estimated that the size to be ₹6,350 crore in 2017 as against ₹20,500 crore in 2005. The fall is considerable but scientific explanations for it are not yet available. All the same, the amount still remains to refute the expression 'petty corruption'; what appears individually small aggregates almost as a national disaster!

[3] Roscoe Pound (1959), who propounded this theory in the early decades of the last century, was adamant (and rightly so) in insisting that the conflict of interests should avoid the egregious error of contrast between the public, social and individual interests and that judicial decision-makers should place these at the same level to make the conflict sharper. And Julius Stone (1966, Chapters 4–7) elaborated this method as the test of 'inter-translatability'.

different from international combat and conventions against corruption. Participation rates of the elite and masses vary depending on the 'nature' of the movement. And questions of agency-in-structure and leadership, as well as overall impact (both latent and manifest), await discrete impact analysis. What roles legislations and adjudication may play in any war against corruption remain relatively unaddressed. The purpose of this rough checklist is to suggest tasks ahead.

Further, nationwide movements against corruption in high places involve a partnership of learned public professions: the media, investigative journalism, activist lawyering, human rights and social action groups, and academic action research activities. The ways in which non-representational politics gives rise to counter-publics who confront sovereign governance in India have yet to be fully mapped and studied. Notable remain the actor–networks—the rising forms of non-representative sovereignty and what is called in artificial intelligence discourse delegative or liquid democracy.[4]

The *Antulay* cases, and beyond, are a remarkable assertion and articulation of judicial process, power and rhetoric. To be sure, the standing conferred on a social-action petition (Shri Ram Nayak, a prominent Bhartiya Janata Party leader) in a criminal proceeding, and that too in an inaugural social action petition[5]. So is the enunciation of a 'right to clean administration' (for the changes, see Baxi 1989a: 29–42); and cease-and-desist orders (1989a: 53).[6] The juridical discourse liberally construed 'corruption' as an obstinate social fact but did not find the judicial means and tools to hold those in powerful places guilty of the crime. Astonishing indeed was the judicial somersault where the Supreme Court in a larger seven-justice bench overruled its own former decision on finding the accused guilty. Instead, it erected a fundamental right to a speedy trial that was held to be after

[4] Paolo Virno (2004) talked about the collective powers of the multitude against the idea of state sovereignty and global hegemony. See also, for delegative or liquid non-representational politics, Ioannis Caragiannis and Evi Mich (2019), and Christian Blum and Christina Isabel Zuber (2015).

[5] I have maintained, in a minority of one, a distinction between SAL and public interest litigation; see Baxi (1985, 2017).

[6] For the cluster of orders, I rely on ANTULAY II (see Baxi 1989a: 25).

all violated![7] All this diverted the subject of corruption in high offices to a high constitutional affair of the right to speedy trial enunciated in the morally and legally awkward positions under Article 142 powers to do 'complete justice![8] Thus began, what I have named and explained, in some detail, in *L&C* the itinerary of jurisprudence of corruption and corruption of jurisprudence.

I engaged in the book the 'curious inversion' that emphasized less 'the issue of his guilt or innocence and more the issue concerning the forms of liberal democracy and the destiny of Indian law and jurisprudence in direct confrontation with the will to absolute power, in all its manifestations' and addressed more 'the future of conscientious citizen endeavor to extend and enrich the constitutionally valued democratic and republican vision of India'.[9] This was a call that lay in the wind and rampant corruption in high places remained an intra-elite affair till it was momentarily resurrected in what became a middle-class movement of India against Corruption in 2011–2012, which led to the participative drafting between the movement and the government relative to the introduction of the Jan Lokpal bill. We come to look at this movement somewhat summarily later.

Finally, referring to Gunnar Myrdal's notions of a 'hard' state with increased social discipline, I developed a distinction between the folklore of corruption and the facts of corruption, venturing a studied observation that the more widespread is the belief that organs of state and society are corrupt, the less likely the contrary facts of corruption are to emerge or matter.[10] It is the folklore of public corruption that

[7] See Chapter 7 of *L&C* at 127–155. The chapter was titled 'Seven Deadly Sins of Antulay'. At the Bombay Airport, Justice Venkatachalaiah chanced on the proofs of the title of the chapter, he asked me whether I was referring to the seven justices who constituted the Bench! My response was 'My Lord, I would not even dream of it', and he had a hearty laugh!

[8] See, on this, Chapters XII and XIV of *L & C*.

[9] See the last paragraph of the brief Introduction to *L&C*.

[10] The distinctions between 'nepotism' and 'corruption' are often difficult to make, especially when doing favours to one's kith and kin is regarded as a 'natural' thing to do. Some African studies point to a phenomenon of 'ethno-clientism' which does not, and should not, it is argued, amount to corruption. Nepotism is

proves decisive not just for competition for power but also for social and human rights movements. In this context, I maintained that types of corruption do matter and drew attention to the conventional distinction between nepotism and corruption, as distinct from the varieties of discretionary oversights or exercise and outright purchase of public offices (Rose-Ackerman 1978).

## 3.2. Law and Social Movements

The relationship between law and social movements in the context of controlling and combatting corruption can be, and has been, explored variously. It has now been recognized that what is called corruption is a multilevel phenomenon and signifies different patterns of social and statal acceptance and resistance.[11] And undoubtedly while these forms must be studied, a limited solution is given from the outset: one may not eliminate 'corruption' from a state or society, though every generation may seek as a duty of justice to combat and control its more egregious forms. What forms of 'corruption' are to be accepted and tolerated and which are to be combatted and controlled by the civil society and the state is a contested terrain across caste, class and gender lines, and the hegemonic cultures play a crucial role in approaches to this question. It is to societal cultures which our attention must stay focused.

Perhaps most crucial is an exploration of whether, and if so how, law and societal cultures perceive and act against corruption. This is a vast area, but here I may only refer to what I propose to name as the socialization of corruption. It has many facets. First, corruption, in some of its forms, is considered a way of life. Second, it is regarded a prerequisite and even accoutrement of power. Third, it is viewed as a

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often described as a 'subtler' form of corruption and even as the 'worst' form. See, as to African situation, Lewis (1996).

[11] Arvind Verma and Ramesh Shukla (2019) propose, based on both the experience of police organization reforms and empirical research, a programme of also a decentralized doctrine of housekeeping that holds managers responsible for corrupt practices taking place under their supervision. Chapters 6 and 7 are especially important for some wise reflections on mega reforms and ways ahead through escalating in-house procedures of enhanced vigilance procedures.

customary way of conduct. Fourth, it is viewed as a cost of doing business. Fifth, it is also considered as a spiritual matter which enters in the calculus of salvation. Sixth, there are some linkages between corruption and resistance, particularly manifested in the funding of anti-corruption movements. It will take many books reflecting patient studies to achieve a full picture, but some vignettes should here suffice.[12]

The first mode of cultural and social acceptance has been inimitably expressed in the famous Hindi short story *Namak ka Daroga* when an upright father admonishes his son to take up employment that will of course pay *vetan* (salary) but more importantly allow for *uppar ki amdani* (earning from above). He explains the difference between the two: the first is derived from a human source and the second comes from God (heavens); comparing the first to a full moon that wanes after a while to an eternal source of water that always quenches thirst, the father asks the son to take only an appropriate job! We do not concern ourselves with the rest of this poignant story but may note here mainly the aspect of the *socialization of corruption* as an ongoing phenomenon and well tolerated by all, even as a shower of grace and energy from the divine.[13]

[12] Needless to add that his notion of *uppar ki kamai* liberated me to comprehend that combatting corruption requires a more serious social understanding both of forms of domination/injustice and people's power to resist at times and their toleration of 'efficient' corruption. Surely, the latter may even be regarded as an act of popular decriminalization, or de facto amendment of the state law. In considering all this, we ought also to explore international relations, law and organization. As Wouters et al. (2013: 4) point out that the

> surge in international anti-corruption tools, however, occurred surprisingly recently. During the Cold War, parties on both sides of the Iron Curtain were eager to support potential allies, with very little or no concern for the level of corruption within those states…. In addition, some economists in the 1970s claimed that certain types of corruption could actually be beneficial to Society…

and to the fine-tuning of the edge of anti-corruption law and strategy in ways that promoted the developed countries' global edge in international business.

[13] I am reminded of an episode when I received the very first cheque from Delhi University, which had done the honour (and mistake as well) of inviting me to a Chair in Law. I stormed into the office of the Vice-Chancellor Dr Swaroop Singh, who was preoccupied with a major university development. He reluctantly granted me some time and politely asked me what the problem was. I asked him to see who

A second example here, not one of literary representation, emanates from an official source—the K. Santhanam National Committee (first of its kind and unsurprisingly the last) on public corruption. In a quasi-empirical study across India, the Committee found that a custom of speed money for delivery of the services by government agents was well accepted, but people with whom the Committee spoke universally complained that payment of speed money did not make things move expeditiously! The legitimacy of speed money is accepted here and even dignified as a social 'custom'—a practice that carries considerable normative weight. What was held problematic was not speed money but the sheer fact that it did not speed things up! Put another way, while efficient corruption was tolerated, inefficiency in corruption was regarded as a ground of grievance![14]

The third aspect, namely corruption as a cost of doing business, is writ large on domestic corporations as well as multinational enterprises. The mass industrial disasters and degradation, and idea of human rights to health—from Bhopal[15] to Endosulfan[16] and

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had signed the pay cheque; when he saw nothing wrong with it, I pointed out that it was my first paycheque, but it was signed by Assistant Registrar, Pensions. He was quick to reply proudly (but I am sure with a twinkle in his eye) 'Young man, at Delhi University we do not make the mistake of differentiating between salary and pension!' Much later, I read Munshi Prem Chand's short story.

[14] See Baxi (1989a: 1–3, 1989b).

[15] See Baxi (2020) for a brief analysis of the French law, the proposed EU legislation and the Dutch position.

[16] The Endosulfan tragedy of Kerala that involved spraying endosulfan (a highly toxic organochlorine pesticide) aerially on its cashew plantations extending over 45,000 hectares in Kasaragod district; that spraying continued from 1978 to 1991 and was terminated with a permanent ban following a munsif ('lower court)' ruling in 2001. Of course, this was done by a state-owned corporation, but the practices of spraying were in vogue by leading agribusiness multinationals. For an acute analysis, see Irshad and Joseph (2015); see also Misra and Joshi (2018). Prasad and Menon (2016) acutely write, as an introduction, the following:

> The battle fought for more than a decade by corporate human rights violation victims in Plachimada, a small village in Kerala in the southern part of India, against Coca Cola's Indian subsidiary to assert their right to water, also seems to have ended without adequate compensation or effective remedy. They mention the stories of Niyamagiri, (home for indigenous community Dongaria Kondh, in the

beyond—are tragically well known at least to the suffering people who also emerge as valiant victims, but what is notable is not their misery and rightlessness but the callous application of colonial private international law that rules by the doctrines of *forum non conveniens* and *lex loci delicti*, fastening all responsibility on the local subsidiary (Baxi 2016b, 2019), and vigorous forms of denialism by multinationals (who otherwise take all the vital decisions from far away). The reasons why complicity is so difficult to show even when the violation of core human rights is palpably and manifestly involved (say, child labour, less than legislatively determined minimum wages, gender-based exclusion from certain jobs or wage discrimination) and the way the doctrine of judicial notice operate are mysterious indeed. In the same way, multinational acts of complicity with the host state's constitutional elites may not be inferred from the course of business conduct. Turning a Nelson's eye to avoidable/preventable suffering is not incurred is in fact the routine way of conversion of a catastrophe into a disaster. All this has been well archived. Noteworthy, too, are the current efforts by the UN Human Rights Council to arrive at a legally binding treaty on business and human rights.[17] At long last, there is some glimmer of hope that national law (and regional as well as domestic law) will take seriously the normalization of the duties of due diligence.

The other aspect of socialization of corruption refers to corruption in the religious and spiritual realms. The tradition of *danam* (charity/donation) is well entrenched. But full-scale studies of the intricate relation between political corruption and faith are very few. It is not the best-kept secret that in India political actors, and even Justices and top lawyers, tend to interact with godmen of all faiths, who often, even if for a long time, enjoy a certain *de facto* immunity from the law; this is true also of all elite actors and most learned professionals.

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state of Orissa in India), and the lack of proper remedy for the affected indigenous community in their tussle against the mining company Vedanta Resources over the land, for protecting their cultural and religious rights. The conclusion is irresistible that 'effective access to remedy for corporate human rights violation still remains an elusive concept in India' (internal footnotes omitted).

[17] See note 14.

Meera Nanda (2009) has studied what she calls the 'god market'.[18] This constitutes a complex but distinct reality that entails faith and belief in vicars of God (saints, sages, tele-evangelist Acharyas, leaders of the sect and Mathas on the one side and followers on the other). As far as I know, Nanda's main thesis has met more with barbs and wild accusations but with no scientific critique.

How far 'corruption' movements constitute acts of resistance to power is also a crucial aspect of movement theory. In Chapter 7 of *Future of Human Rights* (Baxi 2013) I discuss the crisis of nervous rationalities that pervade the investor, provider and consumer of human rights (and allied) services. Most human rights and social movements need to engage the scramble for resources, and they cannot be too choosy or nosy about funding. In a sense that matters, the issue is the protection of human rights of the rightless; it is also a question of resource flow from global multinational philanthropy ultimately based on unfair and exploitative labour practices and consumer fraud, which derives resources by massive and ongoing violation of core human rights. The general argument in favour of corporate philanthropy is that out of evil may still arise some good; the argument against this is that colonial or imperial corporate philanthropy remains immersed in corrupt practices; these maximize unethical profits and massively thrive on human and social suffering. Corporate philanthropy cannot but reproduce endlessly the very same structural conditions that lead to human rightlessness in the first place. Not merely social actors

[18] Nanda points to the growing middle-class 'religiosity' as 'facilitated by the Indian state and corporate interests, often in a close partnership'. Despite the periodic panics about 'Hinduism in danger', and despite the oft-heard complaint that Hindus face reverse discrimination in their own country, Hinduism is doing very well. In fact, the 'Indian state and its functionaries operate on the unstated assumption that Hinduism is not merely one religion among other religions of the Indian people, but rather the national ethos, or the way of life, that all Indians must learn to appreciate, if not actually live by', (p. 72). And she, speaking of 'state temple complex', is able to observe (p. 92) that the 'modern gurus, who are practically CEOs of huge business empires, know that they operate in a highly competitive spiritualism market and try to differentiate their products and services accordingly'.

See also, for a comparative religious studies perspective, Marquette (2010).

must make not-so-pleasant choices between resource grants from the state or market but situated struggles for autonomy and justice must be waged afresh in each generation, as there are not (nor will be) any golden bullets at hand.[19]

## 3.3. Crusades, Campaigns and Movements

The issues of public accountability and social visibility of corrupt acts (that amount to SGC; Baxi 2011), and the roles of investigative journalism, specialist NGOs, social media (Facebook, Twitter and other forms of group sharing), investigative agencies and courts in the processes of visibilization have been under-researched. Undoubtedly, all perform a legitimate role in building up social movements, but the issue in which institutionalization as a process and public institutions play the catalyst role, and in which contexts, is yet to be fully researched. Some campaigns remain just that; others spill over and gather the force of a social movement. Why, how and to what effect are important questions. For example, the ways in which single-issue campaigns acquire a complexion of social movements is well illustrated by the lawyers' campaigns for the independence of the judiciary in India,[20] or by the restoration of justices of Pakistan Supreme Court (Ranganathan 2015; Rodrigues 2020). It is also clear at a pre-empirical level that the television sting operations have been very instrumental in exposing corruption.[21]

SGC campaigns, as noted earlier, remain a matter of political competition for power, and issues they raise eventually reach the courts. This implicates the judicial process and also offers considerable role to other non-constitutional elites or non-representative political actors—the press or digital media investigation or expose (often by

[19] See, especially, Sections 2–5.

[20] The judicial collegium system for appointment and transfer to Justices emerged out of the three rulings of the Supreme Court which are known as the Three Judges Case and the collegium system was reiterated by a 4:1 Supreme Court in the NJAC Case; see, for an analysis, Baxi (2016d).

[21] For example, the leading case of *Vineet Narain v. Union of India* (18 December 1997) (1998) 1 SCC 226.

'sting' media highlighting), the social action litigation (SAL) elite, the occasional *suo motu* investigation by courts[22] and the investigating agencies themselves.[23] These produce a judicial and juristic discourse

[22] The Supreme Court of India has invented this device of Special Investigation Teams and though its full history must be written, this judicial invention has contributed a great deal to the current confrontation with corruption; see further the moving concern articulated by Justice B. Sudarshan Reddy in *Ram Jethmalani v. UOI* (2011) 8 SCC 1.

[23] We all know the incident of *CBI v. CBI! 2017–2018*, a prolonged public tussle between the then Director Alok Verma and Special Director Rajiv Asthana, which was settled by the Union of India by transferring them both (along with some other officials) and appointing Nageswara Rao to take over as interim chief of the CBI. It must be noted that the CBI was brought into existence by the Santhanam Committee's recommendation by the special resolution of the Home Ministry and was further placed under the jurisdiction of the CVC. Its main duties included the following: superintendence over the functioning of the Delhi Special Police Establishment (DSPE) with respect to investigation under the Prevention of Corruption Act, 1988 or an offence under the CRPC for certain categories of public servants and to give directions to the DSPE for the purpose of discharging this responsibility; review the progress of investigations conducted by the DSPE into offences alleged to have been committed under the PC Act; undertake an enquiry or cause an enquiry or investigation to be made into any transaction in which a public servant working in any organization, to which the executive control of the Government of India extends, is suspected or alleged to have acted for an improper purpose or in a corrupt manner; tender independent and impartial advice to disciplinary and other authorities in disciplinary cases, involving vigilance angle at different stages, that is, investigation, enquiry, appeal, review, etc.; exercise a general check and supervision over vigilance and anti-corruption work in ministries or departments of the Government of India and other organizations to which the executive power of the Union extends.

In the *Vineet Narain Case* (note 21), the Supreme Court of India had ordered the following:

(a) The CVC should be given statutory status and be entrusted with the responsibility to supervise the work of the CBI ensuring its efficiency and impartiality; (b) its head should be selected by a team consisting of the prime minister, home minister and leader of the opposition in the Parliament from a panel of eminent people and the CBI director be appointed for a minimum tenure of two years by a committee headed by the CVC including the union home secretary and the secretary personnel; (c) a report on the activities of the CBI should be submitted in three months; (d) a nodal agency should be set up for dealing with the emerging political–criminal–bureaucratic nexus; (e) a directorate of prosecution

and have some election campaigning impact but very little in terms of legality, autonomy and efficiency of investigations and prosecutions. The campaigns against SGC assume that some judicial and juridical talk and action in high-profile cases will have a toning up or trickle-down effect—a matter which warrants an empirical analysis. Yet it may not be an overstatement to say that the normative juridical discourse has not been rather significant in combatting corruption in high-profile situations.

Still, it may be helpful to talk about C1 as charges of corruption on high political actors and C2 as daily (routine) acts of corruption. It will be truer to say that social and human rights movements in India seem more focused on C1, perhaps to the total neglect of C2. Both are, of course, law-violation acts and also often result in unconstitutional deprivations of Article 21 rights to life and liberty.[24] C1 is, however, a bigger catch for news and views, as well as for social and human rights movements, because of the alleged crimes of the powerful in which corruption as bribery and abuse of power for personal gain coalesce.

To vary the metaphor it is considered really proper (kosher) for politics because of the potential for a change of the players *in* the game; in contrast, it is the 'metapolitics which aims at change *of* the game itself'.[25] C1 is then viewed as a legitimate practice of liberal competitive politics. Put another way, it is (as I described it in *L&C*) a big 'political shikar' (a sport of big hunting) in which combatting corruption must occur and recur primarily a way of circulation of elites.[26]

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should be set up. Of these, directions C–E have lain fallow and so have been the recommendations made by the L. P. Singh Committee in 1978 and a Parliamentary Standing Committee in 2008, which recommended the 'enactment of comprehensive central legislation to remedy the issue of autonomy'.

[24] In fact, it is eminently justified to maintain that an international human rights principle, standard and a norm exist providing for immunity from public corruption, which also binds India under Article 51 of the Constitution. See C. Raj Kumar (2003–2004).

[25] Ulrich Beck (1997, Chapter 3) first made the distinction between 'sub-politics' and 'meta-politics'.

[26] I deploy here Vilfredo Pareto's (1902) concept of 'circulation of elites' rather broadly as he initially did to indicate the broad division between elites and masses

This is an important distinction—a register on which social movements from Jai Prakash Narayan's Total Revolution to Anna Hazare's India against Corruption inscribe themselves. These are reformist movements in the sense aiming at legislative, rather than social, reform. There are many concerns about the 'nature' of these 'movements'. There is no doubt that they had considerable social resonance, but this feature does not always convert all anti-corruption campaigns into a mass social movement. Indeed, what may distinguish a 'campaign' from a 'movement' is a vexed question (Eder 1985). Second, even when some movements warrant the description of their being mass movements, these must be distinguished between juristic movements and social ones: the former primarily pursue reforms in/of the law. It seems to be believed that law and governance reforms will, sooner or later, bring in desired social change, but we know how the law in books differs from the law in action. However, in complete plain words, there is a huge distance between legal change by way of law reforms and their realization and effect on social (actually lived) life.[27]

These movements are too complex to be summarily analysed here. Jai Prakash Narayan asked for a complete reform of governance in which combatting corruption was an integral part; in contrast, a law relating to a system of Lokpal was the only agendum for Anna Hazare. While both were new social movements,[28] and both sought a discrete platform of social transformation, the Total Revolution

(non-elites) and as inter-elite conflict and cooperation. Pareto composed in 1916 his classic 3,000-page explorations in social theory in his 3,000-pages *Trattato di sociologia generale* (*Treatise on General Sociology*). He contested Gaetano Mosca's term 'ruling class', and he had lifelong feud with Mosca on the origination of the concept of a ruling minority (elites). Pareto included both political and bureaucratic actors and formations within this category. For a more nuanced and historical explanation and critique, see Higley and Pakulski (2020[2012]), Welty (2016), Best and Higley (2018) and Drochon (2017).

[27] Geoffrey Sawer (1965), now a little-read Australian sociologist of law, made a notable distinction between the two.

[28] See Upendra Baxi (2013) for the distinction between Old Social Movements versus New Social Movements at pp. 235–237.

aimed more on reforming political and public life in India; in contrast, the India against corruption engaged primarily the design issues of the system of Lokpal—where consensus building on an appropriate structure for combatting corruption had to overcome fractured understandings.[29]

All the same, whatever may be said about the final Bill and later the Act, a remarkable chapter in the history of legisprudence in India needs to be noted: for the first time in Indian history, the government constituted a Joint Drafting Committee (JDC) on 8 April 2011, consisting of five nominees of Shri Anna Hazare, including himself, and senior Cabinet ministers represented the government to prepare a draft of the Lokpal Bill whereupon Shri Hazare ended his fast on 9 April 2011, which was later to resume often. The JDC met nine times during April–June 2011 and circulated 40 Basic Principles and the Statement of Objects and Reasons team, which formed the basis of discussions in subsequent meetings. Out of 40 Basic Principles, 26 were agreed on, 7 required some editorial changes and 6 required further discussion. These concerned (a) whether one single Act be provided for both the Lokpal in the centre and the Lokayukta in the state; (b) should the prime minister be brought within the purview of the Lokpal? (c) Should judges of the Supreme Court/high court be brought within the purview of the Lokpal? (d) Should the conduct of the Members of Parliament inside the Parliament (speaking and voting in the House) be brought within the purview of the Lokpal? (e) Whether Articles 311 and 320 (3)(c) of the Constitution, notwithstanding members of a civil service of the union or an all-India service or a civil service of a state or a person holding a civil post under the union or state be subject to enquiry and disciplinary action, including dismissal/removal by the Lokpal/Lokayukta, as the case may be; and (f) the definition of the Lokpal, and whether it should

[29] See the identical statement issued by the Union Finance Minister Shri Pranab Mukherjee, NDTV (27 August 2011) at https://www.ndtv.com/india-news/with-this-speech-pranab-launched-lokpal-debate-465688 (accessed on 2 October 2020). See, also, for a prescient analysis of the Lokpal movement and the law, Verma and Shukla (2019: 6).

itself exercise quasi-judicial powers also or delegate these powers to its subordinate officers.

The All-Party Meeting emphasized the primacy of Parliament by resolving that 'the supremacy of the Constitution of India has to be maintained. Institutions of democracy cannot be undermined, and the checks and balances visualized in the Constitution cannot be adversely affected' and laws 'have to be made by the Parliamentarians who are elected representatives of the country. Few nominated members of the Drafting Committee cannot have precedence over elected members of … Parliament'. Shri Pranab Mukherjee, in a statement read at both the Houses of Parliament, said:

> I believe that the Government has amply demonstrated that it is sensitive to the common man's concern about corruption. It has also requested Shri Anna Hazare Ji to give up his fast by assuring him that all issues raised by him will be duly discussed by the Standing Committee when finalizing the Lokpal Bill. We want to end agitation. We have taken oath to abide by the Constitution. So whatever we do has to be within the Constitution. *We are at crossroads. It is a rare occasion that proceedings of this House is attracting the attention of entire nation and outside world*. I would request the Members to have a dispassionate and objective discussion to find out the *solution of the problem without compromising Parliamentary Democracy*.[30]

I have quoted the narrative extensively for many reasons, a salient reason being that we have altogether neglected to study a great experiment in legisprudence in combatting SGC. Even if there was a valued concern with the autonomy of Parliament, justifications were also found for setting up a fully functional JDC comprising senior ministers of the union and representatives of India Against Corruption. The role of expert lawyers in the JDC and Parliament is, indeed, crucial for the political and representative elite. A beleaguered prime minister

[30] Available at https://www.ndtv.com/india-news/with-this-speech-pranab-launched-lokpal-debate-465688 (accessed on 2 October 2020), emphasis added.

(Dr Manmohan Singh) tried and succeeded in accommodating the demands of the integrity of Parliament's sacred duties and civil society insistence on a Lokpal law now, backed with practices of fast unto death by Anna Hazare. The issue related to corruption was also about the integrity of democratic governance as well as non-violent normative demosprudential insurgency.

## 3.4. The State Agencies for Combatting Corruption

The landscape of state agencies concerned with corruption is getting crowded, though the Central Vigilance Commission (CVC) and the Central Bureau of Investigation (CBI) remain the principal agencies for the investigation and prosecution. The full story of anti-corruption law and strategies in India is yet to be written, but it must be noted that the CBI and CVC were brought into existence in 1963 and 1964, respectively, by executive orders and the CVC obtained statutory powers by the Act of 2003. The CBI, originally suggested by the Santhanam Committee, was initially established by a special resolution of the Home Ministry, and it was further placed under the jurisdiction of the CVC, which describes itself as the 'apex integrity institution of India'.[31]

The CBI was assigned many functions, primarily of investigation under the Prevention of Corruption Act, 1988, or an offence under the Criminal Procedure Code for certain categories of public servants. The CVC was entrusted with a large number

[31] See Central Vigilance Commission (2019, Para 1:1). This shall be hereafter cited as the Report. The device of administrative promulgated rules often serves as a default legislation. One more example of this is the area of state procurement, which is now regulated effectively by the General Financial Rules (GFR), developed by the Ministry of Finance, which establish the principles for general financial management and procedures for government procurement. All government purchases have to strictly adhere to the principles outlined in the GFR. The Manual on Policies and Procedures for Purchase of Goods contains guidelines for the purchase of goods.

of superintendence functions.[32] In the *Vineet Narain Case*,[33] the Supreme Court of India had directed that the CVC should be given statutory status and be entrusted with the responsibility to supervise the work of the CBI ensuring its efficiency and impartiality. The Act now provides for some special arrangements to select its head by a committee comprising the prime minister, home minister and leader of the opposition in the Parliament; the CBI director has a term of minimum tenure of two years.

The CVC reports that it received 33,645 complaints (including complaints brought forward from 2017) during 2018. The Commission received a considerable number of complaints against public servants working in the state governments and other organizations outside the jurisdiction of the Commission or of an administrative nature. It does not merely deal with complaints; rather, it implements a 'multi-pronged strategy to combatting corruption' and proudly records 'a concept of "Integrity Pledge" which "encompasses preventive, punitive and participative vigilance measures."' It has enlisted 'support and commitment of the citizens and organizations for upholding the highest standards of ethical conduct, honesty and integrity'. In 2018, it administered this pledge approximately to '70.5 lakh citizens and

[32] The following functions are listed by the Act and the CVC website. The CVC is to

- exercise superintendence over the functioning of the DSPE with respect to and to give directions to the DSPE for the purpose of discharging this responsibility;
- review the progress of investigations conducted by the DSPE into offences alleged to have been committed under the PC Act;
- undertake an enquiry or cause an enquiry or investigation to be made into any transaction in which a public servant working in any organization, to which the executive control of the Government of India extends is suspected or alleged to have acted for an improper purpose or in a corrupt manner;
- tender independent and impartial advice to disciplinary and other authorities in disciplinary cases involving a vigilance angle at different stages, that is, investigation, enquiry, appeal, review, etc.;
- exercise a general check and supervision over vigilance and anti-corruption work in ministries or departments of the Government of India and other organizations to which the executive power of the Union extends;
- chair the Committee for selection of Director (CBI), Director (Enforcement Directorate) and officers of the level of SP and above in the DSPE.

[33] Note 21.

around 94,118 organizations'.[34] Out of 17,431 cases against all categories of officers, while the major penalty was imposed in 5,595 cases, minor penalty was awarded in 11,746 cases.[35] It has now an impressive jurisdiction on complaints by and against whistle-blowers.[36]

The CVC is quite concerned with delays in investigation and trial. The 2018 report finds that '898 cases were pending for investigation for more than one year as on 31.12.2018' and '9,255 Court cases were pending in various Courts'. In more than 3 years but less than 5 years, 54 cases were pending at the investigation stage and 19 cases were pending for more than 5 years. But we get a different picture when we look at judicial delays: more than 5 years and up to 10 years were 1,847 cases, more than 10 years and up to 20 years were 1,465 cases and more than 20 years were 175 cases; 289 cases have been pending in appeals and revisions (including the apex court). The requirement of prior sanction by the relevant officers entails considerable delays as demonstrated by 2018 and earlier reports of the CVC.

Here, I will not visit some more specialist legal regimes such as the Money Laundering Act, the Drugs and Narcotics Bureau, the Special Branch for Economic Offences and even the National Intelligence Agency, which also develop anti-corruption strategies and often overlap with the roles of the CBI and CVC in their respective spheres.[37] Socio-economic offences are generally described as actions

[34] Report, at Para 8:14.

[35] Ibid., at 3:17. Pending further research, all that can be said now is that this trend towards the award of minor punishments tilts CVC towards the educational rather than punitive approach.

[36] The Public Interest Disclosure and Protection of Informers (PIDPI) Resolution, 2004, popularly known as whistle-blowers resolution. What makes this resolution interesting that the CVC may 'enquire or cause enquiry or investigation into the complaints against group "A" or equivalent level of officers is not applicable' under this 'Resolution': see the Report at 1:13.

[37] A rough index of economic crimes in India is provided by *Crime in India*, 2019, which reported that

> a total of 5,156,172 cognizable crimes comprising 32,25,701 Indian Penal Code (IPC) crimes and 19,30,471 Special & Local Laws (SLL) crimes were registered in 2019. It shows an increase of 1.6% in registration of cases over 2018 (50,74,635 cases). Crime rate registered per lakh population has increased marginally from 383.5 in 2018 to 385.5 in 2019'.

'calculated and executed in order to obstruct or prevent the economic development of the country and also its economic health' and extend to conduct which relates to the evasion of taxes, corruption, breach of contract and delivery of goods incommensurate with promised specifications, all activities related to black marketing and hoarding, activities involving adulteration of foods and drugs, misappropriation and stealing of public property and funds, and activities relating to trafficking of licences, permits, etc.[38] And India's low ranking in the world corruption index[39] still remains a grave cause of anxiety; we may also note that Parliament has not been inactive in redressing the overall legislative design.

Yet there are some structural limitations since law and order are state subjects, and the constitutional validity challenge of the CBI upheld by the Guwahati High Court a decade ago is now before the Supreme Court.[40] Federalism is declared an integral part of the basic structure and essential feature of the Constitution and cannot be

[38] One may also mention that the Central Economic Intelligence Bureau is headed by a Director-General, who also carries the designation of Special Secretary to the Government of India.

[39] I refer here only to Transparency International World Corruption Perception Ranking for 1999, which ranks India as 80th among 180 countries. According to its website:

> the 2018 Report … index, which ranks 180 countries and territories by their perceived levels of public sector corruption according to experts and businesspeople, uses a scale of 0 to 100, where 0 is highly corrupt and 100 is very clean. More than two-thirds of countries score below 50 on this year's CPI, with an average score of just 43.

'It reveals that the continued failure of most countries to significantly control corruption is contributing to a crisis in democracy around the world. While there are exceptions, the data shows … most countries are failing to make serious inroads against corruption'. But, at the end of the day, the Report talks about 'perception', which, while important, is still an aspect of folklore and not the reality of SGC, which has to be constructed by recourse to high data and archives of SGC.

[40] Justice Iqbal Ahmed Ansari and Justice Indira Shah of Guwahati High Court held (in early November 2018:

> While we decline to hold and declare that the DSPE Act, 1946, is not a valid piece of legislation, we do hold that the CBI is neither an organ nor a part of the DSPE and the CBI cannot be treated as a 'police force' constituted under the DSPE Act, 1946;

amended by law unless the Supreme Court approves. This means that the responsibility for translating federal laws and policies finally lies with the states, not all of which are known for aggressive enforcement. The CBI, at the best of times, is an investigative agency and can play little or no role in prevention strategies and, even then, it is often suspect of political directions and patronage, which marks an end to all discourse of professional integrity and autonomy.[41] CVC's regulatory reach is as constrained as CBI's investigatory and prosecutorial reach by remorseless political intrusion. Thus, intrusion interrupts and, in specific situations denies professional competence and institutional autonomy to the CBI and the CVC.

The laudable objectives of several measures such as the Right to Information Act, 2005, Lokpal and Lokayuktas Act, 2013, Black Money Act, 2015, and the ratification of the United Nations Convention against Corruption (UNCAC), 2005, need full appreciation. But successive governments have continued to justify and preserve (what I called in *L&C*) the epistemological and ontological immunity even to conduct any enquiry or investigation into any POCA offence against the rank of Joint Secretary and above.[42] This flies in the face of the Court's invalidation earlier on the ground of violation of equality under Article 14,[43] and the resounding

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and Justice Ansari beings the judgment by recalling Thomas Jefferson, the principal author of the Declaration of Independence (1776) and the third President of the USA (1801–1809) as saying: 'When the people fear the government, there is tyranny. When the government fears the people, there is liberty'; see Baxi (2019).

[41] As Verma and Sharma (2019) illuminatingly demonstrate in their work (Chapter 4).

[42] And even in corporations, established by or under any Central Act, government companies, societies and local authorities owned or controlled by central government. Also, see Shantonu Sen (2014); Mr Sen is a former CBI Joint Director; Sourya Majumder and Paranjoy Guha Thakurta (2018).

[43] *Dr Subramanian Swamy v. Director, Central Bureau of Investigation*. Indian Kanoon (http://indiankanoon.org/doc/183165917/, accessed on 15 July 2021). The Supreme Court asked: 'Can there be sound differentiation between corrupt public servants based on their status? 'And answered:

> Surely not, because irrespective of their status or position, corrupt public servants are corrupters of public power. The corrupt public servants, whether high or low, are

declaration that the office 'of public power cannot be the workshop of personal gain', the 'probity in public life is of great importance' and that corruption 'is an enemy of nation and tracking down corrupt public servant, howsoever high … and punishing such person is a necessary mandate of the POCA, 1988'.[44]

## 3.5. Conclusion

Despite their limited reach and political interference, which earned the Supreme Court sobriquet that CBI was a 'caged parrot speaking in the master's voice',[45] it remains paradoxically true that the CBI evokes more degree of public confidence as is manifest in the demand

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birds of the same feather and must be confronted with the process of investigation and inquiry equally. Based on the position or status in service, no distinction can be made between public servants against whom there are allegations amounting to an offence under POCA, 1988 (at para 58).

Further, it said (in para 60):

The essence of police investigation is skillful inquiry and collection of material and evidence in a manner by which the potential culpable individuals are not forewarned. The previous approval from the Government is necessarily required under Section 6-A would result in indirectly putting to notice the officers to be investigated before the commencement of investigation. Moreover, if the CBI is not even allowed to verify complaints by preliminary enquiry, how can the case move forward? A preliminary enquiry is intended to ascertain whether a prima facie case for investigation is made out or not. If CBI is prevented from holding a preliminary enquiry, at the very threshold, a fetter is put to enable the CBI to gather relevant material. As a matter of fact, the CBI is not able to collect the material even to move the Government for the purpose of obtaining previous approval from the Central Government.

[44] Ibid at paragraphs 70–71.

[45] The Bench comprising Justices G. M. Lodha, Madan Lokur and Kurian Joseph made this remark (per Justice Lodha) in open court on 7 May 2013. He further observed that 'It's a sordid saga that there are many masters and one parrot,' the bench said after going through the nine-page affidavit of CBI Director Ranjit Sinha, which said that Law Minister Ashwani Kumar had made certain 'significant changes' in the agency's draft probe report on Coalgate, while the top law officers and government officials, including those from the PMO, had suggested amendments. Sinha had stated that at least four changes were made: two by the Law Minister and two by joint secretaries of PMO and Coal ministry Shatrughna Singh and A. K. Bhalla, respectively. The remark in the open court hearing has reverberated ever since both as chastising political interference and as demonstrating the agency's political subordination.

for the 'CBI enquiry'. Its processualism is often debated in the media and its competence is put in question by experts, but the public has a good deal of confidence compared with the doings of state police and political actors.

Despite the rhetoric of combatting SGC, the narratives of governance structures and practices continue to overcome the social facts of corruption. The folklore reigns and governance rules, while corrupt acts of abuse of power continue to flourish. Let us hope that India will still, sooner rather than later, be determined to disprove the resilience of the French saying: *plus ça change, plus c'est la même chose* (the more it changes the more it remains the same).

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