

# Anti-Corruption Litigation in the Supreme Court of India

Arghya Sengupta  
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This paper is the second in a series examining the challenges and opportunities facing civil society groups that seek to develop innovative legal approaches to expose and punish grand corruption. The series has been developed from a day of discussions on the worldwide legal fight against high-level corruption organized by the Justice Initiative and Oxford University's Institute for Ethics, Law and Armed Conflict, held in June 2014.

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## Introduction

Corruption by public officials in India—ministers, bureaucrats, other officers of state—is rampant. In Transparency International’s Corruption Perceptions Index of the most corrupt countries, India ranks 94 out of 177.<sup>1</sup> In the largest corruption case of the past two decades, involving corruption in the allocation 2G telecoms licenses in 2008, the government auditing commission estimated that the exchequer lost as much as Rs. 1,76,000 crores (\$29 billion) in revenue.<sup>2</sup> At the end of 2012, there were 7,023 cases pending trial under the Prevention of Corruption Act, the focal legislation for penalizing corruption by public servants.<sup>3</sup>

It is unsurprising that the public perception of corruption has given rise to enormous discontent. A massive anti-corruption protest movement was launched in 2011 with unprecedented public support cutting across regional, caste, and class lines.<sup>4</sup> The Aam Aadmi Party (Common Man’s Party), born out of this protest movement, came to power in the Delhi Legislative Assembly in 2013 in its first electoral contest, an unprecedented political achievement, with the rallying cry of sweeping the corrupt politician from public office.<sup>5</sup>

The Indian Supreme Court became a major site of anti-corruption activism in India in the late 1990s, with anti-corruption NGOs bringing litigation to a strongly counter-majoritarian Court. The Court had begun to entertain public interest litigation (PIL) petitions in the early 1980s, relaxing the strict rules of standing, allowing representative actions as well as actions by concerned citizens for issues of public interest.<sup>6</sup> While it had primarily heard cases related to social causes and human rights issues in its early period,<sup>7</sup> corruption-related complaints began to rise, with weak

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<sup>1</sup> <http://www.transparency.org/country#IND> (accessed 20 May 2014).

<sup>2</sup> Report of the Comptroller and Auditor General of India, *Performance Audit Report on the Issue of Licences and Allocation of 2G Spectrum by the Department of Telecommunications, Ministry of Communications and Information Technology* (Union Govt. [Civil] No. 19 of 2010–11) available at: [http://www.cag.gov.in/sites/default/files/audit\\_report\\_files/Union\\_Performance\\_Civil\\_Allocation\\_2G\\_Spectrum\\_19\\_2010.pdf](http://www.cag.gov.in/sites/default/files/audit_report_files/Union_Performance_Civil_Allocation_2G_Spectrum_19_2010.pdf) (accessed 10 March 2016).

<sup>3</sup> As stated by Shri V. Narayanasamy, Minister of State in the Prime Minister’s Office, in the Rajya Sabha on 6 December 2012. See: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=90084> (accessed 2 May 2014).

<sup>4</sup> For an insightful analysis, see Sumanta Banerjee, ‘Anna Hazare, Civil Society and the State’ Vol. XLVI No. 26 *Economic and Political Weekly* 12 (3 September 2011).

<sup>5</sup> For an analytical assessment of the rise of the Aam Aadmi Party, see Gopal Guru, ‘Two Conceptions of Morality: A Political Reading’ Vol. XLIX No. 17 *Economic and Political Weekly* 112 (26 April 2014).

<sup>6</sup> Ashok H. Desai and S. Muralidhar, ‘Public Interest Litigation: Potential and Problems’ in B. N. Kirpal et al. (eds.) *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (New Delhi, Oxford University Press, 2000) 159.

<sup>7</sup> Upendra Baxi, *Courage, Craft and Contention: The Indian Supreme Court in the Eighties* (Bombay, NM Tripathi, 1985).

elected coalition governments increasing NGOs' reliance on the Court.<sup>8</sup> Often comprising wafer-thin majorities, governments in the 1990s were widely seen as unresponsive and fleeting, incapable of curbing corruption, comprised of officials interested primarily in partaking in the spoils of office. A responsive Court thus presented a viable avenue for impactful activism against grand corruption, defined here as corruption by any person in the service or pay of the government that constitutes a violation of the Prevention of Corruption Act, 1988.

Remedies the Supreme Court had awarded in public interest litigation cases brought by NGOs to the Supreme Court surrounding grand corruption can be classified into three types: first, orders of the Court that seek to undertake systemic overhaul of institutions in order to reduce the incidence of corruption; second, judgments that mandate ongoing judicial oversight of the criminal prosecution pertaining to the alleged acts of corruption; and third, traditional remedies of quashing and declarations that executive action that corruption vitiated is illegal and consequently stripped of any legal basis, without any compensatory action being ordered.<sup>9</sup> Parts I, II, and III of this paper describe and analyze these three types of remedies. On this basis Part IV gleans lessons for NGOs, both in India and other jurisdictions, of effective ways in which courts can be used to combat grand corruption.

## Overhauling Anti-Corruption Institutions

The Supreme Court's decision in *Vineet Narain v. Union of India* in 1998 became the foundation of the judicial forum's ability to function as a bulwark against corruption in high places.<sup>10</sup> The seizure of certain diaries had disclosed a close nexus between high-ranking politicians, bureaucrats, and criminal elements in society. Funds were being clandestinely channeled to public officials for several purposes unauthorized by law. The Central Bureau of Investigation (CBI), a specialized investigative body, possessed considerable evidence to this effect<sup>11</sup> but had not investigated. Various anticorruption NGOs and other interested parties filed several public interest litigations calling on the Supreme Court to oversee the CBI's investigation and ensure a fair and expeditious process; an investigative journalist filed the lead petition.<sup>12</sup> The

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<sup>8</sup> For the connections between weak coalition governments and strong courts, see Lavanya Rajamani and Arghya Sengupta, 'The Supreme Court' in Niraja Gopal Jayal and Pratap Bhanu Mehta (eds.), *The Oxford Companion to Politics in India* (New Delhi, Oxford University Press, 2010) 80.

<sup>9</sup> For an explanation of traditional remedies of quashing (certiorari) and declarations, see Durga Das Basu, *Constitutional Remedies and Writs* (3<sup>rd</sup> edn., Kolkata, Kamal Law House, 2009) 22.

<sup>10</sup> (1998) 1 SCC 226, available at: <http://www.indiankanoon.org/doc/1203995> (accessed 31 July 2014).

<sup>11</sup> The Central Bureau of Investigation was set up under the Delhi Special Police Establishment (DSPE) Act, 1946, as a special police force to investigate offenses anywhere in India that may be notified for this purpose by the central government. This is an exception to routine investigations, which are conducted by the different state police forces depending on jurisdiction. For a description of the history and operation of the CBI, see Joginder Singh, *Inside CBI* (New Delhi, Chandrika Publications, 1999).

<sup>12</sup> For more information on the petitioner, see his website: <http://www.vineetnarain.net> (accessed 2 May 2014).

Court grouped these and other cases, accusing the CBI of inaction in all of them in Vineet Narain.

The Court's 1998 decision ordered sweeping institutional reforms at CBI so as to ensure effective investigation of cases involving holders of public office. Three facets of the Court's approach are noteworthy: First, it adopted an innovative procedure, called the writ of continuing mandamus.<sup>13</sup> Through this, it asserted its own power to monitor investigation till a police report pertaining to the investigation is filed in Court for the judicial officer to take cognizance (charge-sheet),<sup>14</sup> and to pass interim orders at regular intervals to continually hold the investigative agencies accountable. Second, it appointed the counsel for the petitioner as an *amicus curiae* ("friend of the Court") and allowed NGOs and all other interested parties to make representations to the court through the brief. Third, it provided an expansive interpretation of Article 32 and Article 142 of the Constitution to effect major structural reform of the state anti-corruption machinery. Declaring the non-investigation of allegations against important persons a violation of Article 14's equality clause,<sup>15</sup> the Court used its powers to enforce fundamental rights (Article 32[2]<sup>16</sup>) and to do complete justice (Article 142)<sup>17</sup> to pass several directions to the executive to restructure the CBI and ensure its accountability. Specifically, it directed the appointment process and working conditions of the director of the CBI so as to afford him maximum insulation

<sup>13</sup> This was an adaptation of the writ of *mandamus* provided for in Article 32 of the Constitution vesting the Supreme Court with the power to enforce fundamental rights by ordering state authorities to take certain mandatory actions which they have failed to perform. By the writ of continuing *mandamus* the Court issued *mandamus* orders over a period of time by keeping the writ petition pending till its orders were complied with and the violation of fundamental rights remedied. For examples of use of continuing *mandamus*, see Durga Das Basu, *Constitutional Remedies and Writs: Law of Writs* (3<sup>rd</sup> edn., Kolkata, Kamal Law House, 2009) 76–79.

<sup>14</sup> The filing of the charge-sheet or police report under Section 173 of the Code of Criminal Procedure, 1973, is the stage of the criminal prosecution where the police report to the Magistrate as to whether, in their opinion, an offense has been committed, and if so, by whom. On the basis of the merits of this report, and after hearing the accused, the Magistrate decides whether formal charges ought to be filed or not.

<sup>15</sup> Article 14 reads:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

In *EP Royappa v. State of Tamil Nadu*, (1973) 4 SCC 3, available at: <http://indiankanoon.org/doc/1327287> (accessed 31 July 2014), the Supreme Court held,

"Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and Constitutional law and is therefore violative of Article 14."

<sup>16</sup> Article 32(2) reads:

"The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."

<sup>17</sup> Article 142(1) reads:

"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 orders 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."

from the government and consequently substantial operational independence. At the same time, the accountability of the CBI was to be vested in the Central Vigilance Commission, the nodal vigilance body of the Government of India. Apprehending that this commission might also come under governmental pressures, it directed that the state convert it into a statutory body with key legal protections to safeguard its own independence.

The government followed these directions, thereby redesigning the architecture governing anti-corruption investigation and prosecution in India. The Central Vigilance Commission became a statutory body with a bipartisan process of appointment of commissioners. Such bipartisan commissioners would in turn constitute the majority of the committee that would select the director of the CBI. These were the key first steps in the Court's overall design of de-politicizing anti-corruption investigation in India.

Recognizing the threat of interference in anticorruption investigations, the Court adapted its procedures to allow for constant monitoring of such investigations as a means to fundamentally transform the nature of the investigative machinery. This marked a radical departure from traditional, one-time remedies in public law.<sup>18</sup> An unstated premise of this innovation was the belief that judicial supervision could substantially remedy any irregularities in corruption-related investigation, hardly a foregone conclusion.

As a means to establish the competence of the judiciary in monitoring investigation and issuing frequent orders to ensure effectiveness and expediency, the Court broadened the office of the *amicus curiae*. Ordinarily a respected senior practitioner who would assist the Court by acting as an interface between the Court and interveners who had knowledge about the progress of investigation and systemic reforms undertaken, the Court began to allow any person interested in intervening the right to argue before the amicus, making the Court's monitoring function truly participatory.<sup>19</sup> The Supreme Court had begun to permit petitioners who had "sufficient interest" and who were not "meddlesome interloper[s] or busybody[ies]" to submit amicus curiae in the early 1980s.<sup>20</sup> Applying the relaxed rule to anti-corruption issues supported the Court's goal of monitoring investigations and ordering systemic reform as a means to elicit independent corroboration of status reports placed before it by the investigating agency and the government.

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<sup>18</sup> For traditional remedies, see Durga Das Basu, *Constitutional Remedies and Writs* (3<sup>rd</sup> edn., Kolkata, Kamal Law House, 2009) 22. It is not as if continuing *mandamus* replaced these remedies. Another remedy in *Vineet Narain* was to strike down the Single Directive by which any CBI investigation had to commence after seeking prior permission from the designated authority (i.e., the executive).

<sup>19</sup> There is now a formalized practice by which the Registry of the Court maintains an *Amicus Curiae* Panel of Senior Advocates, Advocates-on-Record, and other advocates with minimum ten years of experience, revised every two years. For the present panel, see Notice dated 13 February 2014 available at: [http://supremecourtindia.nic.in/notice\\_circular.htm](http://supremecourtindia.nic.in/notice_circular.htm) (accessed 31 May 2014).

<sup>20</sup> *SP Gupta v. Union of India*, (1981) Supp SCC 87. *Per* Bhagwati J., paragraph 18.

As the next section demonstrates, several NGOs have made use of this process as court-monitored investigations have become more numerous given the continuing interference in the functioning of investigating agencies by the government.

## Monitoring Investigations

Experience demonstrates that in the absence of safeguards, agencies such as the CBI can exploit long delays in investigation and trial, to influence police and witnesses and hide or dispose of evidence.<sup>21</sup> For grand corruption cases under the Prevention of Corruption Act, special statutory judges with the power to try these offenses address, in part, the problem of delays.<sup>22</sup> However, the state police or the CBI lead the investigation prior to their referral to a special statutory judge, and delays may be sufficient to be a barrier to justice. The Court in Vineet Narain intended to remedy this problem.

A 1996 case exemplifies the problem of delay. In *State of Bihar v. Ranchi Zila Samta Party*,<sup>23</sup> the Ranchi Zila Samta Party applied to the Court to ensure that investigation into an animal husbandry scam was carried out without interference.<sup>24</sup> Then Chief Minister of Bihar, a prominent public figure, as well as other high-ranking politicians and bureaucrats in the eastern state of Bihar, had allegedly fabricated accounts in order to embezzle large amounts of public funds. The political party alleged that the local police, hitherto charged with investigation, were lax in filing reports against the accused, and that constant interference from their political masters, the state government, had blocked the investigation. The High Court transferred the investigation to the CBI. The question before the Supreme Court was the validity of the High Court's decision and how the investigation ought to be supervised if it was valid.

In its decision, the Court held that conducting investigations in a manner that instills public confidence is a matter of public interest and thus within the domain of judicial intervention through public interest litigation. Further, the state police are answerable to the government under investigation and therefore only an independent agency could ensure such confidence. Thus, it held that ordering the

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<sup>21</sup> The Law Commission of India undertook a close analysis of the impediments to fair investigation and free trial in cases involving "influential persons in public life" in pursuance of a direction of the Supreme Court. See LCI Report No. 239 available at: <http://lawcommissionofindia.nic.in/reports/report239.pdf> (accessed 31 May 2014).

<sup>22</sup> Section 3 of the Prevention of Corruption Act gives both the central government and state governments the power to appoint Special Judges.

<sup>23</sup> AIR 1996 SC 1515, available at: <http://indiankanoon.org/doc/1829856> (accessed 31 July 2014). This was a public interest litigation before the High Court of Patna under Article 226, (Order dated 11.3.96 of the Patna High Court in C.W.J.C. No. 459 of 1996-R) which came to the Supreme Court by way of appeal under Article 136 of the Constitution.

<sup>24</sup> SK Ghosh, *Indian Democracy Derailed: Politics and Politicians* (Calcutta, APH Publishing, 1997) 314-317.



CBI to investigate these matters was valid and that the Chief Justice of the High Court of Patna would monitor the investigation, requiring the CBI to report from time to time. The Chief Justice would himself, or through an appropriate bench, issue directions and ensure fair and expeditious investigation into the allegations.

Court-monitored investigations into grand corruption cases have become an institutional feature of anti-corruption litigation. The case of *Samaj Parivartan Samudaya v. State of Karnataka*, decided in 2012, exemplifies this.<sup>25</sup> In the southern state of Karnataka, several leaders of the political party in power, including the Chief Minister B. S. Yeddyurappa, were implicated in corrupt dealings. The question before the Supreme Court was whether to expand the scope of a CBI investigation already underway into illegal mining in Karnataka and Andhra Pradesh to possible misuse of public office by Yeddyurappa's close relatives. The petitioner was a registered civil society organization that had filed an intervention application in the public interest before the Central Empowered Committee (CEC), the nodal body the Supreme Court had set up to monitor its orders on preventing environmental degradation, in which connection the ban on illegal mining was originally passed.<sup>26</sup> The application made two specific claims: that the actors had made an irregular sale of land to a mining company, and that the company had made a large donation to an education society they had created in recompense. The Court found that these claims were prima facie valid and that the local police were unlikely to make "a fair, unbiased and proper investigation" because they answered to the Chief Minister.<sup>27</sup> The Court accepted the recommendation of the CEC and ordered the CBI to investigate these claims.

In *Samaj Parivartan Samudaya*, the Court held that the basis for judicial intervention was to "ensure that the rule of law prevails over the abuse of process of law."<sup>28</sup> In this connection it sought to address two types of abuse—the state authorities' actual abuse of power in allowing illegal mining contrary to the previous order of the Court, and the likely abuse that would ensue from the lack of fair investigation given the complicity of public officials. Only investigation by the CBI under the continuous watch of the Court would clearly reveal the extent of abuse and ensure that those guilty of corruption were called to account, irrespective of their stature.

A more recent case firmly entrenched judicial authority over the investigation process in cases where government interference would otherwise hinder it as a matter of law.<sup>29</sup> In 2014, *Manohar Lal Sharma v. Principal Secretary and others*<sup>30</sup> required the

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<sup>25</sup> (2012) 7 SCC 407, available at: <http://indiankanoon.org/doc/37541448/> (accessed 31 July 2014).

<sup>26</sup> *State of Andhra Pradesh v. Obulapuram Mining Co. (P) Ltd.*, (2011) 12 SCC 491.

<sup>27</sup> (2012) 7 SCC 407, available at: <http://indiankanoon.org/doc/37541448/> (accessed 31 July 2014), paragraph 60.

<sup>28</sup> (2012) 7 SCC 407, available at: <http://indiankanoon.org/doc/37541448/> (accessed 31 July 2014), paragraph 66.

<sup>29</sup> Section 6-A, DSPE Act was struck down in *Subramanian Swamy v. Central Bureau of Investigation*, W/P (Civil) No. 38 of 1997 and W/P (Civil) No. 21 of 2004 available at: <http://supremecourtfindia.nic.in/outright/41503.pdf> (accessed 31 July 2014).

<sup>30</sup> (2014) 2 SCC 532, available at: <http://supremecourtfindia.nic.in/outright/wr120.pdf> (accessed 31 July 2014).



Supreme Court to monitor investigation in cases pertaining to alleged irregularities in allocation of coal blocks by the Government of India through a public interest litigation brought before it by the petitioner, an advocate of the Court. In its decision, the Court clarified the broad range of circumstances that would “compel” it to intervene in an investigation in the “public interest,” to include an investigation of corruption hindered by any circumstances, including the investigating authority’s deficiency of “enthusiasm” due to “pressures” and the government’s reluctance to comply with an investigation.<sup>31</sup> To demonstrate these grounds, public interest petitioners have to provide evidence, presumably circumstantial, of the investigating agency or the government hindering investigation.

Manohar Lal Sharma put the question before the Court as to whether, in court-monitored investigations, the CBI would require the prior approval of the central government before instituting a preliminary enquiry, as the Prevention of Corruption Act had mandated in all cases registered under it.<sup>32</sup> The purpose of such approval is to protect honest public servants from being subject to frivolous or motivated investigation. The Court deemed its monitoring an automatic safeguard against such harassment and deemed prior approval of the government unnecessary. Further, it concluded that allowing the central government to statutorily withhold sanction for an investigation would defeat the entire rationale for a court-monitored investigation.

Unfortunately, ongoing reform by the Supreme Court has not made court-monitored investigations as successful as the judges likely hoped in the 1990s. The judges expressed as much in 2014, almost two decades after the Court’s decision in Vineet Narain termed the CBI the executive government’s “caged parrot.”<sup>33</sup> Judicial monitoring has functioned as the salve the investigative mechanism needs on an ongoing basis to ensure impartiality and fairness of the process. Yet India’s levels of corruption have changed little, according to Transparency International.

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<sup>31</sup> Per Lokur J., (2014) 2 SCC 532, available at: <http://supremecourtindia.nic.in/outtoday/wr120.pdf> (accessed 31 July 2014), paragraph 61.

<sup>32</sup> Section 6A (1), of the DSPE Act under which the CBI is constituted reads:

“The Delhi Special Police Establishment shall not conduct any enquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 (49 of 1988), except with the previous approval of the Central Government where such allegation relates to:

“(a) the employees of the Central Government of the Level of Joint Secretary and above; and

(b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government Companies, Societies and local Authorities owned or controlled by that Government.”

<sup>33</sup> Per RM Lodha J., (as he then was) in relation to the coal blocks allocation scandal. BS Reporter, ‘CBI a caged parrot speaking in its masters’ voice, observes SC’ *Business Standard* (New Delhi, 2 June 2014) available at: [http://www.business-standard.com/article/current-affairs/cbi-a-caged-parrot-speaking-in-its-masters-voice-observes-sc-113050900032\\_1.html](http://www.business-standard.com/article/current-affairs/cbi-a-caged-parrot-speaking-in-its-masters-voice-observes-sc-113050900032_1.html) (accessed 2 May 2014).

A key challenge for a court in monitoring an investigation is to ensure that its interim orders do not affect the right of the accused to a fair trial. Though in law, monitoring of an investigation extends only up to the filing of the charge-sheet before the magistrate who will conduct the trial,<sup>34</sup> in practice there is a risk that any interim court orders passed in the course of monitoring the investigation may influence the subsequent trial. In 2014, for instance, former Minister of Telecommunications A. Rajah, who had been arrested in connection with the 2G spectrum scandal, alleged that the continuous monitoring of the investigation had prejudiced his right to fair trial.<sup>35</sup> The Court must take such objections seriously and mould its interim orders so that they have relevance to the investigation alone. Conversely, if the evidence collected after the best efforts of the investigating agency suggests the lack of a triable case against the accused, the monitoring court should not be hesitant to close the investigation. So far no instance of this having happened has come to the knowledge of the author; the Court's lack of diligence in this matter threatens to render the entire system unconstitutional.<sup>36</sup>

## Supplementing Court Monitoring with Traditional Remedies

The Supreme Court has supplemented the use of the novel remedy of continuing mandamus to monitor investigation and overhaul anti-corruption institutions with the traditional public law remedy of quashing a decision alleged to be illegal owing to corruption or misfeasance. A prime example is the case relating to the irregularities in the 2G spectrum scandal. In 2012, the Centre for Public Interest Litigation, an NGO, approached the Supreme Court of India to determine the legality of the Ministry's use of the first-come-first-served method of allocation.<sup>37</sup>

While respecting the principle that the Court would not ordinarily pronounce judgment on fiscal policies of the state by substituting its judgments for expert opinions, the Court in its decision in *Centre for Public Interest Litigation v. Union of India* underlined that it was always open to testing the legality of such opinions. On this basis, it found that the first-come-first-served policy of allocation favored those who have access to privileged information and therefore falls foul of the equality clause of the Constitution. Further, it found the minister had shown a clear intention to favor certain parties in the implement of the policy. The Court therefore issued a

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<sup>34</sup> The Supreme Court has also clearly said so: *Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 1 at paragraph 102, available at: <http://indiankanoon.org/doc/70191862> (accessed 31 July 2014).

<sup>35</sup> Ayesha Arvind and Mansi Tewari, 'A Raja targets SC for "unfair" trial' *Business Today* (6 May 2014) available at: <http://businesstoday.intoday.in/story/a-rajah-targets-sc-for-unfair-trial/1/205921.html> (accessed 30 May 2014).

<sup>36</sup> A thorough case record search and interviews with counsels involved in several cases where the Supreme Court has monitored investigation have revealed no such instance.

<sup>37</sup> *Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 1 at paragraph 102, available at: <http://indiankanoon.org/doc/70191862/> (accessed 31 July 2014). This was apart from the criminal investigation monitored by the Court which led to the arrest of the incumbent Minister of Telecommunications, and subsequent criminal trial in a Special CBI Court.

severe indictment, declaring the policy unconstitutional, cancelling all licenses the Ministry had issued, and mandating a fresh allocation process, by auction<sup>38</sup>

Unlike monitoring investigations and reforming anti-corruption institutions, an order to cancel licenses is firmly within judicial legitimacy and competence, being a standard remedy in administrative law. However, the order stripped the licenses of third parties who had been allotted spectrum, even in the absence of any accusation that they had adopted corrupt means to obtain them. This caused these businesses significant economic loss and led to considerable criticism of the judgment for breaching the law-policy divide.<sup>39</sup> Critics argued, with some merit, that allowing post-facto judgments to undo the effects of a policy that has already been implemented creates uncertainty that could be harmful to economic growth. However, the state must balance costs to innocent third parties against the benefits of setting a firm precedent against self-serving policies and their corrupt implementation. The order has served a severe precedent for all public officials and private parties open to engaging in corrupt practices to secure favors. Not only would criminal investigations ensue for the acts, but also the benefits of such acts would not accrue as envisaged.

A more complex question about the Court's use of traditional remedies to address corruption arose in 1996. *Common Cause v. Union of India*<sup>40</sup> centered on fifteen petrol pump allotments from a minister's discretionary quota alleged to have been given to friends, relations, and important persons following no criteria whatsoever. Quashing the said allotments, the Court held that discretionary allotment of government largesse must follow a rational, non-discriminatory policy. It also asked the minister to show cause to prevent criminal proceedings for criminal breach of trust and civil proceedings for damages against him. After hearing his reply, the Court ordered him to pay Rs. 50 lakh (Rs. 5 million) as exemplary damages for misfeasance involving public largesse.<sup>41</sup> However, in review three years later, the Court recalled the damages on the grounds that the public interest petitioner had no standing to be awarded damages. Although it had ordered the minister to pay damages in his personal capacity, not from state funds,<sup>42</sup> it noted that the state could not pay damages to itself.<sup>43</sup>

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<sup>38</sup> *Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 1 at paragraph 102, available at: <http://indiankanoon.org/doc/70191862/> (accessed 31 July 2014), at paragraph 102.

<sup>39</sup> Timothy Endicott, 'Arbitrariness' 27 *Canadian Journal of Law and Jurisprudence* 49 (2014); Agencies, '2G judgement went beyond limits of judicial review: Govt' *The Indian Express* (2 March 2012) available at: <http://indianexpress.com/article/news-archive/politics/2g-judgement-went-beyond-limits-of-judicial-review-govt> (accessed 21 May 2014).

<sup>40</sup> (1996) 6 SCC 530, available at : <http://indiankanoon.org/doc/1155600> (accessed 31 July 2014).

<sup>41</sup> (1996) 6 SCC 593.

<sup>42</sup> Para 16, (1996) 2 SCC 593.

<sup>43</sup> (1999) 6 SCC 667.

The reasoning of the Court in recalling its damages order is questionable. Apart from the fact that the objection that the state could not pay damages to itself suggests the Court was ignorant of its own intent, the doctrine of standing relevant to the case, which is very liberal, relates to the petitioner having sufficient interest to adjudicate the matter. It should automatically follow that the Court has the power to grant the remedy necessary to overturn the illegality brought to judicial notice. In fact, exemplary damages were to be paid to the government exchequer, not the petitioner.

Regardless of errors such as the Court made in *Common Cause*, quashing and declarations have been overall effective means for the Court to deter future acts of corruption. By combining new remedies with these traditional approaches, the Court has become the epicenter of anti-corruption activism by NGOs in India. Yet as the Court navigates the distance between an apolitical dispute resolution forum and a political actor, actively intervening and overseeing systemic solutions, it is constantly negotiating its own role in upholding the rule of law and promoting good governance in the public interest vis-à-vis the other branches of government. As one sign of this negotiation, the Court has refused to award damages for misfeasance even though Indian constitutional law provides for such damages,<sup>44</sup> while making frequent use of mandamus. Arguably this contradiction suggests the Court is checking itself to not overreach in its endeavor to secure the rule of law. It is performing a careful balancing act, pushing the envelope far enough to secure compliance but not so far as to turn the executive into an adversary. The Court provides key lessons for effective anti-corruption litigation by NGOs, discussed in the concluding section.

## Conclusion: Lessons for NGOs in India in Combating Grand Corruption through Litigation

Litigation concerning grand corruption before the Supreme Court of India has been the beneficiary of an extant trend in Indian jurisprudence and an emerging trope in Indian politics. From the 1980s the Supreme Court had relaxed rules of locus standi, as a result of which NGOs, concerned citizens, and even lawyers, as long as they were public-spirited, pointing out public wrongs could bring such matters to the attention of the Court. The migration of public interest causes from social justice and human rights issues in the 1980s to concerns of the middle class in the 1990s and 2000s brought corruption cases before the Court more often and with considerable visibility. At the same time, public disaffection with grand corruption was soaring, making it a high-octane political issue. Thus, decisions of the Supreme Court that sought to hold public figures accountable for allegedly corrupt acts had an immediate resonance amongst the people. The image of the Court as a populist institution, creatively shaping remedies in order to curb the menace of corruption which

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<sup>44</sup> *Shiv Sagar Tiwari v. Union of India*, (1996) 6 SCC 558. It has also been awarded in other public interest litigations: *MC Mehta v. Kamal Nath*, (2002) 3 SCC 653.

recalcitrant governments had failed to tackle, only bolstered public support for such judicial activism.

It is thus unsurprising that these litigations were largely successful in enforcing political accountability for public figures. The Karnataka Chief Minister B. S. Yeddyurappa, who was implicated in the mining scandal in the state, was forced to resign from office and later from his political party; A. Raja, the Minister of Telecommunications in the Government of India, resigned in the wake of allegations of impropriety in the 2G spectrum scandal and strong words from the Supreme Court. However, as far as legal accountability for such acts is concerned, evidence of the Court's success is mixed. The application of principles of administrative law has meant that decisions taken pursuant to illegalities have been quashed. At the same time, while continuous monitoring of investigation has ensured strict interim accountability (i.e., regular orders monitoring investigation, leading to arrests and filing of police reports), the conversion of such orders into trials and, further, convictions pursuant to trials is low. Data from the Association of Democratic Reforms, a civil society organisation, shows that out of 543 Members of Parliament in the 2009 Lok Sabha (Lower House of Parliament), 162 had criminal cases against them. Only three of these cases had resulted in conviction; the rest remained pending. Further, only two MPs had cases registered under the Prevention of Corruption Act, 1988, and in only one of these cases had there been a conviction.<sup>45</sup> Two prima facie inferences can be drawn from this: first, despite the wide prevalence of grand corruption, actual registration of cases against holders of public office was low; second, cases against holders of public office, whether under the Prevention of Corruption Act, or otherwise, were subject to delays and rarely ended in conviction.

The mixed record of legal accountability suggests the need for a qualitative study as to when it pays for an NGO to litigate grand corruption issues in India. It is undeniable that a responsive Supreme Court that has relaxed rules of standing and ordered wide remedies makes litigation an attractive prospect, and that the very fact of such litigation holds public figures accountable for their actions. But NGOs need to consider closely the success conditions for such litigation to convert into a trial and for systemic reform. Specifically, a comparative study across three subject areas where continuing mandamus is used widely by the Supreme Court of India—environmental protection, human rights protection and anti-corruption monitoring of investigation—needs to be undertaken. Such a study would reveal NGOs' ability to hold the state and public figures accountable on an ongoing basis through litigation and ascertain the usefulness of other NGOs participating in the follow-up process. Such study would help to make the focus of litigation by NGOs in corruption issues more targeted, thereby building on extant successes in holding public figures accountable.

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<sup>45</sup> Association for Democratic Reforms, PDF of National-Level Analysis, Lok Sabha 2009, available at: <http://adrindia.org/sites/default/files/o.9%20ofinal%20report%20-%20lok%20sabha%202009.pdf> (accessed 30 May 2014).

The challenge to anti-corruption activists around the world is to use the case of India to determine the optimal mode of using courts to fight the world's fight against grand corruption.

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