

INDIA

Pseudo Democracy Guarantees Undignified Future

Introduction

Democracy, when viewed broadly, is the possibility of realising guarantees that stem from individual freedom with dignity, equality, and the rule of law.¹ The building blocks of democracy are based on values, such as informed participation, and formal rules on procedures, such as those in elections. Important institutions that a democratic state depends on, to ensure the actualisation of these defining characteristics, are those that comprise law-enforcement.²

The state often enforces its writ upon the citizen through its law enforcement agencies. In an unbridled state, this becomes the enforcement of fear, replacing the rule of law. A direct consequence of this shift in character is that these agencies discourage registration of complaints, and the investigative process transforms into a manipulation and bargaining activity. A complaint and its investigation being the raw materials for arbitrators like the courts to decide a dispute, whether civil or criminal, the immediate casualty in an uncontrolled state is the very notion of justice.

A critical assessment of a democratic state must examine the functioning of its law-enforcement agencies, most importantly, the police. The Asian Human Rights Commission (AHRC), carefully examines how a country's law-enforcement system functions vis-à-vis the normative rule of law guarantees that a state promises to the citizen. In assessing a country's human rights promise and fulfilment, the AHRC uses its assessment of a country's justice institution framework as a kaleidoscope to see the larger human rights landscape.

Being the world's largest democracy with a particularly diverse setting – whether one considers socio-religious, geographical, political, or religious factors – India would appear to pose an enormous challenge in such a critical exercise. However, unlike its diverse citizenry, India's justice institution framework is monolithic. It is unified as a jurisdiction. Variances in law and procedure are negligible, if not absent.

Thus, the assessment of India's human rights performance, based on AHRC's work in India, and based on an analysis of the country's criminal justice institutions, most importantly its law-enforcement agencies, is not an exercise of great difficulty.

¹ *Defining and measuring democracy*; David Bentham ed., Sage Modern Politics Series, Volume 36, p. 6

² *The Functions of Police in Modern Society*, Bittner E., Oelgeschlager, Gunn and Hain, 1980



But, the picture that emerges is not a pretty one.

For instance, despite initial momentum to create a landmark legislation to criminalise torture, and in the process fasten accountability to the police,³ the proposed law and its passing has stagnated. A review on the law by a Parliamentary Select Committee has been kept in the government's legislative cold storage.

Meanwhile, one more year has passed. During this time, a significant number of human rights abuses, most of them involving the police, other law-enforcement agencies, and paramilitary units, have been reported from India. Despite the constitutional promise to uphold the rule of law and the constitution, reflected also in the Voluntary Pledge India made to the United Nations Human Rights Council, the government has made the least effort in addressing human rights abuse committed by Indian law-enforcement agencies.

In sum, 2013 witnessed no significant improvement in India's human rights scenario. There has been no devastating deterioration compared to last year either.

Based on the information the AHRC has collated in 2013, this report categorizes the assessment of India's human rights record for the year under the following: (i) human rights violations committed by the police and security agencies; (ii) resistance to reform; (iii) violence committed against vulnerable groups and human rights defenders.

I. Human Rights Violations by Police & Security Agencies

a. Torture & Custodial Violence

The practice of torture is endemic in India and used without restraint. It is the most commonly used tool for crime investigation. The police and the armed forces, to extract information from suspects, informants, and witnesses, use it with impunity. The practice is rooted within the law enforcement architecture. Officers are expected to use force while on the job, and the judiciary often condones its use.

Torture is not a crime in India. Instead, what exists is a set of non-specific provisions in the Criminal Procedure Code, 1973.⁴ Safeguards provided in the law – to produce a person before the Magistrate within twenty-four hours⁵ or conduct a medical examination of the detainee⁶ – are not followed. And, their violation is not adequately challenged in and by the courts.

³ The Prevention of Torture Act, 2012

⁴ Chapter V, The Code of Criminal Procedure, 1973

⁵ Ibid., Section 57

⁶ Id. Section 54

The prohibition on self-incriminating evidence ⁷ is meaningless, since criminal investigations are often undertaken not to detect a crime but for more statistical purposes. This is the only assumption that may be drawn, from the overwhelming use of torture to extract confession statements, which the investigating agency is aware are inadmissible in trials. Criminal investigation in India often begins and ends with a confession statement.

Use of torture is further promoted in the absence of facility - knowledge and resource - to undertake scientific investigations. Simple but important procedures like fingerprinting and DNA analysis take years to render results, if not decades. Crime investigation agencies are not trained regularly, if at all, to undertake scientific investigation. Most police officers do not know elementary processes like how to preserve a crime scene.

Forensic facilities, including those for exhumation and for conducting an autopsy are inadequate. AHRC's documentation in 2012 has revealed that often unskilled part-time labourers conduct what is known as autopsy examination, across India.⁸ In these circumstances, when officers come under pressure to 'prove' or 'crack' a case, pushed by the political mileage that politicians attempt to draw or defend, officers resort to brute forms of torture to extract a confession.



Man tortured by paramilitary forces in Assam for obstructing their sexual assault on his wife. (Courtesy: Anjuman Ara Begum)

The casualties in the process are basic norms, like presumption of innocence, prohibition of arbitrary punishment, and ultimately the very concept of justice. In such a contaminated, callous, and demoralised environment, officers use the threat of torture and other forms of physical violence for extortion.

India has also resorted to outsourcing torture. The practice of recruiting, training, arming, and deploying non-state actors named Special Police Officers or village guards is common. This practice started in the state of Jammu and Kashmir, where, after decades, it was concluded that such a practice only worked as catalyst to increase animosity within communities. States like Karnataka, Andhra Pradesh, Jharkhand, Manipur, Tripura, Chhattisgarh, and Madhya Pradesh have started massive recruitment and deployment of these non-state elements, with the ruse of dealing with anti-state activities.

Such deployment of state-sponsored militia negates

⁷ Section 26, The Indian Evidence Act, 1872

⁸ Justice K. Ramaswamy Committee report on autopsy procedures in India, 1999. The government has not acted upon this report. However, the NHRC has issued directions to the state governments to video record autopsy procedures, which only two state governments initially agreed to follow. As of 2013, only seven state governments have agreed to follow the NHRC's directions on video taping autopsy procedures.



the fundamentals of state responsibility. Additionally, antisocial elements exploit the opportunity to maintain feudal power balances at the local level. Despite the practice being declared unconstitutional by the Supreme Court in 2011, it continues.⁹

Judicial interventions, mostly limited to defining the contours of the legality of arrest, detention, and the use of torture, by a broad interpretation of Article 21 of the Constitution, have failed to control torture.¹⁰ Despite the Supreme Court being informed with sufficient details about the breach of its own directives, the Court has refused to act against the violation of its judgments.

In 2012, during the Universal Periodic Review process, Government of India informed the Human Rights Council at Geneva that the Prevention of Torture Bill could be made into a law once the definition of torture is fully reflected in domestic legislation. In 1997, India signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In an effort to facilitate accession to this treaty, the Lower House of the Indian Parliament passed the Prevention of Torture Bill on 6 May 2010. The Parliament's Upper House referred it to the Parliamentary Select Committee for review. Since December 2010, the revised Prevention of Torture Bill with amendments proposed by the Parliamentary Select Committee has been pending before the government.

The UN Special Rapporteur on Torture has requested the Government of India to grant the Rapporteur permission to visit India since 1993. The request is renewed from time to time. However, there has been no positive response even after 20 years.

The widespread impunity for torture, even if it leads to deaths in custody, is reflected in the fact that very few police persons are ever charge-sheeted and convicted for torture. This is not surprising, since there are no independent investigation agencies in India to investigate crimes committed by the law-enforcement agencies. The statistics provided by state agencies like the National Crime Record Bureau (NCRB) is not trustworthy. Neither is its statistical data foolproof, nor is it independently verified. The NCRB's reputation is dubious; it is known to manipulate data to fit government needs.

Neither the civil society, nor the government, has credible data regarding the actual number of torture cases in India each year. Given possibilities for the police to refuse registering a case against police torture, even if a case is referred to the police by a court, the actual intensity of this inhuman and degrading form of treatment of persons by the law-enforcement agencies is anyone's guess. Each and every police station and police outpost in the country, and every detachment of para-military deployed to assist law enforcement in India, resorts to torture. Custodial violence is also rampant in prisons, related to which, once again, no one has quantifiable information.

The sum of it is the alarming scenario that neither the state nor the country's civil society has a clear idea on the actual number of torture victims in the country, despite torture being endemic. The first step for a cure of a disease of such seriousness is diagnosis. This understanding is lacking in India.

⁹ Nandini Sundar and others (petitioner) against State of Chhattisgarh and others (respondents), Writ Petition (Civil) 250 / 2007 decided on 5 July 2011

¹⁰ See further, the D. K. Basu case

b. Extrajudicial Execution

The AHRC has documented cases of extrajudicial execution from India. This includes cases of fake encounters, excessive use of force leading to death, and secret killings. State investigations into allegations of such practices are rare, and involve a very slow process.

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Christof Heyns reported in April 2013 to the Human Rights Council that "[t]he level of extrajudicial executions in this country still raises serious concern. This includes deaths resulting from excessive use of force by security officers, and legislation that is permissive of such use of force and hampers accountability." "Impunity represents a major challenge", he reiterated.¹¹ The Rapporteur made his report, after visiting India in 2012.

According to the National Human Rights Commission (NHRC), the state of Uttar Pradesh recorded the highest number of 'encounter deaths' (138) between 2009–2013, followed by Manipur (62 cases) and Assam (52 cases). However, this does not still reflect the real picture since the NHRC does not accept all complaints that it receives.

The fact is, the NHRC does not meet a credibility and independency test.¹² For instance, when the Supreme Court appointed the NHRC to undertake an investigation into special police officers in Chhattisgarh state, the NHRC reported that the armed militia is a "spontaneously formed tribal resistance movement" which the Court rejected summarily, since the statement did not have an iota of truth.



Widow of Ibeyama, killed in fake encounter, mourns at his last ritual in Manipur. (Courtesy: Anjuman Ara Begum)

The NHRC does not take up cases involving the para-military and military units, with the excuse that it exceeds its mandate. That these forces commit a large number of extrajudicial executions means the NHRC's report only touches the tip of the iceberg. The NHRC also suffers from a lack of investigative capacity. The strength of the NHRC is only twenty police officers of varying ranks, who are supposed to investigate all the complaints that it receives. Due to this, the NHRC asks the respective state government to submit its report on each case NHRC accepts as a complaint, and often dismisses the complaint without hearing, accepting the government report.

¹¹ A/HRC/23/47/Add.1, 26 April 2013

¹² Asian NGO Network on NHRIs - Shadow Report on NHRI, India, *ANNI Report*; 25 May 2011



Extrajudicial execution is widespread in places declared as 'disturbed' in India. The declaration enables the union government to deploy armed forces to 'assist' (read control) the civil administration of the area. Special security laws like the Armed Forces (Special Powers) Act, 1958, provides statutory protection to abuse of power and human rights violations, including use of lethal force, without reasoning and justification.

Additionally, the investigation process for crimes committed by the armed forces is not a civilian exercise. It negates all norms of transparency, rendering the process a whitewashing of the crime committed. This is evident from the virtual absence of conviction of members of the armed forces for crimes they have committed.¹³ Government rarely follows the NHRC's directions: to video record each autopsy in cases of extrajudicial executions and to send a copy to the NHRC.¹⁴

This, however, does not mean that extrajudicial execution is unchallenged. In a petition filed before the Supreme Court, the Court appointed a Judicial Commission to inquire into cases of extrajudicial execution reported from Manipur.¹⁵

In its report, the Commission, headed by Justice N. Santhosh Hegde, has found:

- i) *in all cases the security forces have blatantly violated the law and procedure and have engaged in cold-blooded murder;*
- ii) *the use of disproportionate force against the victims by firing at them even at close range, repeatedly;*
- iii) *the negation of the legal procedures, even by administrative officers like the Executive Magistrates;*
- iv) *the open and uncontrolled possibility for wanton use of authority, including fabrication of or destruction or tampering of the evidence and the crime scene;*
- v) *the abysmal failure of the draconian law, the Armed Forces (Special Powers) Act, 1958 (AFSPA), coupled with the perpetual imposition of emergency under Section 144 of the Criminal Procedure Code, 1973, that has perpetuated loss of faith of the people in their government and institutions and has in fact precipitated only more loss of life and violence in the state.*

c. State of Emergency: 'Disturbed Areas'

Several districts in India are declared 'disturbed' under the Disturbed Areas Act, 1992, and AFSPA, 1958. The Ministry of Home Affairs, answering a question raised in Parliament

¹³ What Pathribal means for India, A. G. Noorani, *The Hindu*, 26 June 2013

¹⁴ NHRC Annual Reports: 2001 through 2012

¹⁵ The Commission of Inquiry, constituted by the Supreme Court of India, in Writ Petition (Criminal) 129 of 2012 [Extra Judicial Execution Victims Families' Association and Another (petitioners) Against Union of India and Others (respondents)] and Writ Petition (Civil) 445 of 2012 [Suresh Singh (petitioner) Against Union of India and Others (respondents)]



on the issue on 5 April 2013 said: (i) the entire states of Assam and Nagaland; (ii) Tirap, Changlang and Longding districts of Arunachal Pradesh; (iii) 20 km-wide belt bordering Assam in the States of Arunachal Pradesh and Meghalaya; (iv) the entire state of Manipur excluding Imphal municipal area; (v) parts of Tripura as notified by the state government; and (vi) districts of Jammu, Kathua, Udhampur, Poonch, Rajouri, Doda, Srinagar, Budgam, Anantnag, Pulwama, Baramulla and Kupwara in the state of Jammu and Kashmir are declared as disturbed area in India.¹⁶

The Home Minister further informed the parliament that the government provided financial assistance in 2011-2012 under its Security Related Expenditure (SRE) to the affected states. The amounts are: Assam (153.04 crore¹⁷), Nagaland (83.11 crore), Manipur (28.88 crore), Tripura (39.25 crore), Arunachal Pradesh (27.82 crore), and Jammu and Kashmir (342.27 crore). The Ministry explained that the reason for continuation of such declaration and financial assistance is to prevent "the terrorist activities intended to overawe the government established by law" and that such "activities [are] prejudicial to the security, sovereignty and territorial integrity of India".¹⁸

The AHRC does not deny that in some areas there are activities undertaken that challenge the integrity of India. However, such activities are also reported from other parts of the country.

For instance, the 2002 Gujarat massacre did not contribute, in any form, to nurturing the integrity of the nation. The traumatic effect the massacre caused upon the people in Gujarat, in particular, and India, in general, remains unresolved. Yet one of the key figures responsible for the massacre is projected to be the next Prime Minister of India, and the counterpart in the tragedy, the Congress led government, has ruled India in the aftermath. Similarly, many parts of India, where fundamentalist religious political parties instigate mass violence, are not declared as "disturbed". Hence, the argument that the exercise of declaring regions in India as "disturbed" is based mostly on discriminatory, rather than inclusionary fault lines, does carry some weight.

For instance, the recent declaration of the state of Nagaland as a 'disturbed area' for 2014, under the AFSPA, reinforces nothing but the Union Government's discrimination in policy against the people of Nagaland.¹⁹ Nagaland is under active ceasefire for decades and there is hardly any casualty resulting from armed conflict since the ceasefire came into effect. Earlier, the 'disturbed' 'status' was bestowed on Nagaland for a period from 20 October 2010 to 30 June 2011, ignoring the state assembly's four resolutions against the extension of disturbed area status in the state. Tripura, a state often held as an example of successful counter-insurgency measures remains 'disturbed'. Tripura has had no major armed encounter in recent years.

¹⁶ Lok Sabha Question Number 1195

¹⁷ A crore is a unit in the South Asian numbering system equal to ten million

¹⁸ Loksabha unstarred question no. 6268

¹⁹ On 30 June, 2013, the 'disturbed area' status has been extended to Nagaland for another year through the Gazette of India Notification No. S.O. (E) dated 30-06-2013

Those who often benefit from a state, or a region within the state, being declared as 'disturbed' are the ruling political class in these states. Mr. Okram Ibobi, the Chief Minister of Manipur state, is notorious for being one of the most corrupt politicians in India. This is because the "security assistance" money distributed by the Union Government to the states is free from audit. The status also helps the ruling political forces silence opposition using the military might provided by the Union Government.

d. Culture of Impunity

The existence of both *de-jure* and *de-facto* impunity in India encourages state forces to use excessive force, extrajudicial killings, and other forms of abuse of power. *De-jure* impunity is practiced through several legal instruments that validate impunity for state actions. Section 45, 132, and 197 of the Code of Criminal Procedure, 1973; Section 125, 126 of the Army Act, 1950; Section 45 of Unlawful Activities (Prevention) Act, 1967; and Section 6 of AFSPA, 1958, rules out the jurisdiction of civilian courts to take cognizance of any offence committed by the armed forces 'unless previous sanction thereof' is granted by the government.

The process of procuring 'sanction' for prosecution is almost impossible. The government rejects applications arbitrarily. The concept is itself against the principles of justice, since, at the very least, the process involves asking permission from respondents before they can be sued.

De-facto impunity in India exists because of weak, if not seriously non-functioning, criminal justice mechanisms and enforcement institutions. Police often deny or block access to justice by refusing registration of complaints. The process of investigation and trial remains extremely slow and unscientific. Routine practices of torture by security and enforcement agencies create fear and discourage formal complaint against the agencies, propagating a culture of impunity at all levels.

As per available records no case of sanction for prosecution of members of any of the paramilitary forces deployed in the Maoists affected areas is pending with the Ministry since January, 2011²⁰. The requirement of 'prior sanction' is the second biggest hurdle before a complaint is even investigated. The first is the resistance to register a complaint.

The argument that such prosecution will demoralise the armed forces is a misconstrued one; it is lack of discipline and widespread excesses committed by the armed forces that demoralise a force, and bring indiscipline.²¹ The practice however, continues despite judicial pronouncements declaring that such sanction is required only at the time of framing of charges.²²

²⁰ Lok Sabha unstarred question no 6520, answered on 7.5.2013
<http://164.100.47.132/LssNew/psearch/QResult15.aspx?qref=140616>

²¹ Paul Kennedy, *Military Coalition and Coalition Warfare over the Past Century*, Wilfred Laurier University Press, 1983, p.31

²² Framing of a charge is done by the court, after the investigation is over and the accused summoned to the court, under Section 228 of the Criminal Procedure Code, 1973

e. Access to Justice

Access to justice remains a challenge due to judicial lethargy and other factors. According to NCRB records, as of June 2013, 60,41,559 complaints were registered by police under the Indian Penal Code, 1860, and various special laws.

Today, in India, there is an estimated backlog of 20,000,000 cases in the trial courts, 4,100,000 cases in the High Courts, and 49,000 cases in the Supreme Court. For a modern democracy, India has one of the poorest judge to population ratio – estimated to be 14 judges per a million people. About 16,000,000 new cases are filed before the courts in India each year. Out of this, about 14,500,000 cases are disposed annually. This implies that a judge decides an estimated 1,050 cases every year²³. The quality of such ‘disposals’ is anyone's guess.

A substantial number of cases pending in courts are criminal cases. Given that on average a criminal case could take five to eight years to decide, many under-trial prisoners spend more time in pre-trial detention than the maximum sentence prescribed for the offenses alleged against them.

In 2002, the Supreme Court of India, when it decided *All India Judges' Association and others (petitioners) against Union of Indian and others (respondents)*, directed the government to an increase in judge strength from the then prevailing 10.5 judges for a million people to 50 judges for every million people. However, eleven years since, this proposal is yet to be fully implemented due to lack of infrastructure, including the number of judges and the facilities for judges to function.

The state governments have also refused to cooperate, having failed to provide adequate financial resources to implement the Court's directives. Additionally, for improving justice delivery it is just not the number of judges, court buildings, and other infrastructure that needs to be increased. For example, appointment of public prosecutors is a matter completely under the prerogative of the state. Often appointments of prosecutors are delayed for unacceptable periods.

II. Resistance to Reform

This year the Government of India resisted several reformatory directives pronounced by the Supreme Court. The government has proposed amendments in the Right to Information Act, 2005, to exclude political parties from its jurisdiction; created an ordinance for the continuation of criminal parliamentarians in the office; and also cleared the passing of the Judicial Appointment Commission Bill, 2013, circumscribing judicial independence.

²³ Statistical data provided by the Supreme Court of India

a. Electoral Reform & Transparency

The modern concept of 'open government' and the democratic culture of open society forbids secrecy and its manifestations in public affairs as secrecy negates government's responsibility to accountability and violates people's right to know. Official Secrets Act, 1923, and a culture of secrecy has been a part of the governance system in India even after independence, despite the citizen's 'right to know' being embodied in Article 19 (1) (a) of the constitution.

The Supreme Court, in several of its interpretations, has reaffirmed that "the concept of an open government is the direct emanation from the right to know" which is implicit in the right of free speech and expression guaranteed under Article 19 (1) (a). Therefore, disclosure of information concerning the functioning of the government must be the rule and secrecy an exception.²⁴ The Court has also affirmed that "the people of this country have a right to know every public act, everything, that is done in a public way, by their public functionaries. To cover with veil of secrecy the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired."²⁵

The freedom to be informed is guaranteed under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which India has ratified. General Comment No. 10: Freedom of expression (Art. 19) issued on 29 June 1983 defines the scope of Article 19 of the ICCPR as: "protection of the right to freedom of expression... includes not only freedom to 'impart information and ideas of all kinds', but also freedom to 'seek' and 'receive' them 'regardless of frontiers' and in whatever medium, 'either orally, in writing or in print, in the form of art, or through any other media of his [or her] choice.'"²⁶

The right to information movement in India is exemplary and iconic of people's participation in governance. The growth of this movement resulted in a law that came into force on 12 October 2005 as 'Right to Information' Act, 2005 (RTI Act). It has been termed a second independence movement in India. The RTI Act is a watershed event in the country and is emulated across the world, since this statute empowers every citizen to seek and obtain information, most importantly, information concerning the rationale behind government decisions and their implementation. The law has brought to the forefront a citizen's right to be informed, and, if sensibly used, has the potential to fasten transparency and accountability in governance.

Promoting the public opinion prevailing in India towards greater transparency in governance, the Central Information Commission (CIC), in a ruling in June 2013, brought six national political parties (the Indian National Congress, the Bharatiya Janata Party, the Communist Party of India, the Communist Party of India (Marxist), the Nationalist Congress Party, and the Bahujan Samaj Party) under the remit of Section 2 of RTI Act, by defining them as public authorities.

²⁴ S. P. Gupta vs. Union of India, AIR 1982 SC, 149

²⁵ *id.*

²⁶ General Comment 10, issued on 29 June 1983

The verdict raised hope for ensuring transparency in the country's political institutions and for making the opaque political space transparent in the country. However, on 12 August 2013, the Ministry of Personnel, Public Grievances, and Pension, on behalf of the Government of India, introduced a Bill in the lower house of the Indian Parliament, seeking an amendment to remove political parties from the scope of the RTI Act.

Political representation in India is an inclusive process and every adult is eligible for political representation based on adult franchise. However, this representation of people in governance is not devoid of accountability and responsibility. In India, legal assurance of transparency in political institutions is limited to Section 29 (B) and 29 (C) of the Representation of the People Act, 1951.

Section 29 (B) allows political parties to accept any amount as contributions, unless such contributions are from foreign sources or a government company, in which case it is prohibited. Section 29 (C) of the Act stipulates that a political party, in each financial year, is to prepare a report of contributions in excess of Rs. 20,000, failing which it will curtail the political party from claiming any income tax relief under the Income Tax Act, 1961, as amended by the Finance Acts promulgated every year. As observed, political parties in India exploit this dexterity, accepting large unaccounted sums.

The RTI Act could fill the gap of this limitation and usher in a more transparent and accountable political system. The imagination of RTI as a barrier for smooth internal functioning of political parties and its probable misuse by rival political parties cannot be accepted as a valid argument to nullify the ruling of the CIC. In fact, the amendment must be made to bring all political parties under the RTI scanner, not just six of them.

The accountability of a political party arises from the role it plays in ensuring 'open government', ranging from forming political opinion, policy making, to direct society, and recruiting representatives for government positions, who, in turn, become decision makers to ensure social, economic and political justice for the people. Hence, given this responsibility, political parties cannot exclude themselves from the duty of being transparent and accountable to the people they represent.

Experiences in India show that political parties are often engaged in strategic alliance with extremist groups, funding communal campaigns, money laundering schemes, establishing new political parties using unfair means, corruption, horse trading, and legitimate and illegitimate business. Hence, declaring political parties as 'public authorities' under the RTI Act would bring transparency to political organizations and create legitimacy for their work, making them more pro-people.

The AHRC believes the proposed amendment to the RTI Act 2005 will negate its aims and objectives and will violate Article 14 of the Constitution, which guarantees equality before the law, and Article 19 (1) (a), which guarantees freedom of speech and expression. In a parliamentary democracy, the norm for 'open government' assumes high value, in principle and practice. Hence, AHRC supports the CIC ruling and opposes the proposed amendment to the RTI Act.

b. Political Reform



To make political participation free from criminals, on 10 July 2013 the Supreme Court of India upheld a Patna High Court decision, that a person who doesn't qualify as an elector under the Representation of the People Act, 1951 (RPA, 1951) is also not qualified to contest the election of either houses of the Parliament or the Legislative Assembly of a state.²⁷ Politicians of the country disliked the implications of the order : many legislators could lose their elected status.

An analysis by the Association for Democratic Reforms (ADR) and National Election Watch has revealed that about 30% of the members of Lok Sabha (Lower House) have pending criminal cases against them, while 14% of these members are embroiled in serious criminal cases. The figures further show that 1,460 out of 4,807 sitting MPs and MLAs have criminal cases against them.

To counter the Supreme Court's order, the members of Parliament, in a rare occasion of solidarity and unanimity, passed the RPA Amendment Bill on 27 August, 2013, with the intention of retaining criminal legislators in the house. The proposed amendment was supposed to bring a change to sub-clause 5 of section 62 of the RPA. The clause states that no person shall vote in any election if they are confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or are in the lawful custody of the police, with the exception of preventive detention.

Furthermore, in September, 2013, the cabinet approved an Ordinance to negate the Supreme Court order, at a time when the Government's petition to review the Supreme Court order was sub *judice*.

This shameless legal chess to protect criminals and potential criminals created intense debate in the country. Public opinion has always been stacked in favour of criminal-free legislatures. Embarrassed, members of the ruling party were forced to respond to unanimous public opinion. As a result, the Ordinance was withdrawn by the Cabinet in early October. The resistance against political reform has been temporarily quelled.

III. Violence Against Vulnerable Groups & Human Rights Defenders:

a. Impact on Children

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions, after visiting India in 2012, expressed concern about negation of child rights in armed conflicts, in his report to the UN.²⁸ Others, including government-sponsored commissions that studied the effects of militarisation and the adverse impact of AFSPA in the armed conflict affected

²⁷ Chief Election Commissioner vs. Jan Chaukidar and others, Civil Appeal Nos. 3040-3041 of 2004

²⁸ supra note 11

region in northeast India, have shared the same concern.²⁹ Particularly worrying is the status of children caught in the armed conflict, having been denied adequate schooling, and having to live in an environment of violence, fear, and resentment that can cause deep psychological trauma, passed on over generations.

The Government of India has denied the existence of armed conflict in the country, in its report to the UN Child Rights Committee. This is enumerated in the state party report where the government elaborates on its commitment on the implementation of Article 38 of the Child Rights Convention.³⁰



Child in a relief camp following ethnic violence in Assam. (Courtesy: Anjuman Ara Begum)

Extrajudicial execution committed by security forces after an arbitrary detention of the victim, often a male member in the family, has resulted in what are known as the 'gun widows' of India. For instance, it is estimated that every year since 2008 approximately 300 women are widowed due to extrajudicial executions of their husbands in the state of Manipur alone.

The widows lack financial independence; most of them had depended on their husband's income to run the family and meet the needs of their children. This forces widowed mothers to let their children work, to fetch an income, rather than be at school. Child labour also poses additional threat to children like sexual exploitation and trafficking.

Disadvantaged communities do not register births in their family and schooling is often a delayed decision. School enrolment certificates are often used as birth certificates in India. Hence, in rural areas, such certificates do not represent the accurate age of the person. Such certificates are considered valid for recruitment, for instance in the army, which means that employment of children in the regular army cannot be ruled out in India.

The state also promotes recruitment of surrendered militants into the army. Between 2005 and 2012, the government claims, 7,893 militants have surrendered. Often militant groups abduct children from schools or force children to join ranks. So it is possible that a proportion of surrendered children are recruited to the Indian Reserve Battalion.

The presence of the army in educational institutions and its premises is one of the causes of dropouts of female students. The school dropout rate in Tripura, particularly amongst tribal children, is alarmingly high, especially after primary schooling. The dropouts are obvious recruitment targets of insurgent groups. In all the eight states in the northeast region, the dropout rate of children of age group 6-11 from school is 45.91% for boys and 44.87% for girls. This is well above the national average, which is 31.81% for boys and

²⁹ See for instance, Justice Jeevan Reddy Committee, 6 June 2006

³⁰ CRC/C/93/Add.5, p. 323

25.42% for girls. For the age group 6-14, the dropout rate is even higher, with the rate of boys leaving school at 60.08% and girls at 59.32%, in comparison to the 50.84% national average.

b. Sexual Violence Against Women

In India, sexual violence is rampant due to prevalence of gender based discrimination and inequality. A misogynistic society and repressive practices permits violence against women, tolerated in the name of culture. Compounding this is a failed criminal justice apparatus that forces women to refrain from complaining.

The Indian police lacks capacity, a colonial legacy. According to the latest statistics, India only maintains 129 police officers per 100,000 people, compared to the global average of approximately 350 officers. And, only 5 percent of India's police officers are women.³¹

In 2013, the Government of India has made several amendments to existing laws, in its attempt to address the outrage related to sexual violence. The gang rape and subsequent death of a medical student in December 2012 ushered these legislative changes. In the frenzy, and improper reasoning, death penalty for certain cases of sexual assault was introduced as a result.



Campaign against sexual assault in Delhi in early January 2013. (Courtesy: Purnima Gupta)

However, the fundamental problem has not been addressed: the need for change in the existing state of policing in India, for which the government policy is: no policy. Police doesn't have advanced facilities and equipment to undertake scientific criminal investigation. It is not a priority for the government or the police.

Sexual offences like rape and sodomy are some of the most complex and cruel crimes that a person could commit upon another. Contrast this with the sophistication of the country's police to investigate these crimes. More than 90 percent of police constables and low-ranking police officers do not receive any training in criminal investigation, other than that which they received before joining the force at cadet school. In a male dominated Indian society, one cannot expect a police officer who abuses the female counterparts at home to be sympathetic to a victim of sexual abuse.

In regions declared 'disturbed', such as in Jammu and Kashmir, north-eastern states, and Chhattisgarh, where special security legislations like Public Safety Act and AFSPA are in

³¹ <http://asiafoundation.org/in-asia/2013/03/06/new-sexual-assault-laws-in-india-only-the-beginning/>

force, sexual offences committed against women and children often go unreported due to the prevailing culture of fear. Sexual assault committed during 'operations' by armed forces deployed in these areas occur often in the cover of darkness and at the victims' home. Due to lack of possibilities to complain, neither the government nor the civil society has adequate records that would even approximate such sexual violence. Without information, reforms are impossible.



Campaign against sexual assault in Delhi in early January 2013. (Courtesy: Purnima)

Several incidents of such violence have been reported by the AHRC. For instance, the AHRC, upon receipt of information from the North East Support Centre and Helpline, reported the case of a 17-year-old girl belonging to a scheduled caste in January 2013. The girl was abducted, drugged, and raped in Manipur.

After AHRC's intervention the police registered a case. But, no action followed. Furthermore, the police avoided registering a case against the accused under the strong provisions of the Scheduled Caste and the Scheduled Tribe (Prevention of Atrocities) Act, 1989.

Deep-rooted corruption in the bureaucracy, particularly within the law enforcement agencies, in which jobs and positions are sold for bribes, has promoted impunity. Women and children being the most vulnerable in the socio-political landscape of

India, mere legislative amendments cannot improve their condition, unless reforms are made to the criminal justice framework. Unfortunately, this is not a priority for the government or for a large section of the civil society in India.

c. Threat to Rights Defenders

Threats to the life and person of human rights defenders in India are not news. The AHRC has reported numerous such cases from India during the year. Human rights defenders are harassed, being summoned and monitored by state police commandoes without legal sanction. Fabrication of charges against human rights defenders is a common practice in India. The landmark judgment in *D.K. Basu vs. Government of West Bengal* in 1996 directs that there can be no summoning of innocent people without a warrant or a letter of summons. Yet, the practice continues.

There are no legislative or institutional frameworks providing effective protection to human rights defenders in India. Should the country's justice system function properly, there would be no need for additional measures to provide protection to human rights defenders. However, in the absence of such a safety net, the frontline defenders of human rights are subjected to abuse of legal process.



For instance, the Criminal Procedure Code, 1973, mandates that a person can be arrested only when the investigating agency has reasonable suspicion that the person has committed an offense. Upon arrest, the state agency cannot resort to torture, and has to inform the detainee and a person of the detainee's choice about the reason for arrest; the place where the person would be detained; and the court in which the person will be produced within 24 hours as mandated in the Code. However, in India, where none of these procedural safeguards are observed, where law is abused to harass individuals, human rights defenders fall easy prey to law-enforcement agencies.

In addition, the country has liberally legislated and adopted security legislations from the colonial past. The National Security Act, 1980, is an example. These laws exempt procedural safeguards of arrest and detention and leave initial adjudications that have devastating effects upon individual freedoms, such as the right to bail.

For instance, the Chhattisgarh Special Public Security Act, 2005, authorises a District Magistrate³² to decide, whether a person should be released on bail, once charged with an offense punishable under this law. Such laws also give a very low threshold for defining a crime. For instance, under the Chhattisgarh special law, media personnel can be charged for reporting an incident that the state considers unlawful activity. What is unlawful is for the executive officer of the state to decide. By the time an act by the state under such a law is successfully challenged, say by way of a writ application to the High Court, the person detained could be in custody for months, and the damage done.

Conclusion

The debates that followed the Delhi gang rape for once brought some attention to the requirement for comprehensive reform to the criminal justice architecture in the country. The incident exposed every conceivable dimension of the Indian state's inability to ensure safety with dignity and equality to each one of its citizens.

However, the government's attempts, post incident, have been limited to the window-dressing act of legislative amendment, prescribing severe punishment for sexual offences, to pacify the ill-informed section of civil society, politicians, and a large section of the country's media.

There was a group of civil society actors, which includes the AHRC, that demanded a thorough review of India's criminal justice policy. The basic premise of criminal justice reforms is that it is the certainty of punishment, not the severity of it which prevents crime. It also implies, that at the moment, the country's criminal justice architecture, which depends on use of brute force and confessions, is thoroughly incapable of serving a democracy and the cause of justice. It further means that only in a society that does not advocate and operate along the contours of an eye for an eye, concepts like individual freedom, equality, and security with dignity has achievable meaning.

³² An executive officer of the state, not a judicial magistrate



Given the prevailing circumstances in India, and the manner in which the country's criminal justice machinery functions, one need not hesitate to conclude: the country's criminal justice process has debilitating problems, which require correction.

Any adjudication of guilt of a person begins with a complaint. Crimes registered for all offences, at the instance of a private citizen or of the state, are complaints. The fundamental, thus, is that the complaint registering entity should entertain complaints, be able to record them professionally, and be equipped to deal with them immediately.

How does the single largest complaint receiving entity in India, fare in light of this fundamental? Police, the very mention, does not infuse confidence in Indians. On the contrary, it generates fear and repulsion. Police stations are notorious for their secretive, fear-generating environments. None would wish to get involved a police station, as complainant, witness or accused.

To approach this agency, people scramble for extraneous support, often in the Indian context, by approaching a local politician. Before approaching the police, ordinary people ask around what amount of bribes are to be paid to the police – the station house officer, a constable, the driver of the police vehicle, the Sub Inspector of Police, the Circle Inspector, or the Superintendent of Police.

People make these inquiries irrespective of what the person would want to do at the police station. Despite all this, there is no guarantee that the police will do what they are expected to do, according to the law or otherwise. Any person approaching the police runs the risk of being humiliated, tortured, raped, shouted at, and implicated in fabricated charges. Instances where people have lost lives at the hands of the police they have approached to seeking from are not rare.

If women in India feel they are not safe in the company of the police, perhaps it is time that they ask what is the government's plan to change this. Mere increase in the number of women police officers is not a solution, since it is based on the wrong presumption that women may better protect women and women in distress talk better to women. It is incorrect to make such an assumption, particularly in India, since what is wrong is with the institution, not just in its gender balance or in the nature of crime.

The statement that women facing domestic abuse seldom approach the police to make a complaint since they are afraid of being raped in police stations is not a joke. This fear is real. The civil rights movement in India should question the government: what action has the government done to change this frightening fact?

If criminal investigation in India has serious problems that need to be addressed, the legal minds in the country also suffer from severe dysfunction. The most recent example is the protest by the Delhi Bar, when the accused in a rape case reported from Delhi in December 2012 were brought to trial. Those lawyers who argued with and tried to physically manhandle the lawyers who were willing to appear on behalf of the accused, demonstrated their disagreement with the rule of law and due process. Such lawyers have no place in the profession and the Bar Council of India should consider disqualifying them from the profession. Where standards of the profession are maintained, such conduct would not be taken lightly. In India, standards, across the criminal justice system, are the exception.



The Government of India has made its criminal justice apparatus rot, keeping it thus as pliable as possible. This benefits only criminals in the ruling class. Having no policy of reforming the criminal justice system is India's policy.

This must change.

The criminal justice institutions of the country need reform to enable them to:

- (i) *encourage and accept complaints;*
- (ii) *equip and expand the capacity of these institutions to investigate and prosecute complaints;*
- (iii) *revitalise the judicial system, so that adjudications conclude within reasonable times spans, and so that the concept of justice is preserved, rather than decayed in court corridors;*
- (iv) *fasten accountability – augmented, if required, by legislative processes like criminalising torture;*
- (v) *allow the government to think and behave in manners that fit a democratic state, and not an authoritarian regime.*

This can only occur if the country realises what was achieved on 15 August 1947 was not a change of guard at New Delhi, but the fundamental right of every Indian to live in a democratic country, which respects, by guarantee and action, individual freedom and safety with dignity. It is only then that the preamble of the Indian Constitution would, in letter and spirit, reflect what the corpus of its text guarantees. Until then, every Indian, now and in the future, will live an undignified life in a pseudo democracy.