Chapter II

INDIA

True Democratic Reform Impossible Without Rule of Law

INDIA

True Democratic Reform Impossible Without Rule of Law

INTRODUCTION

The US Department of State, in its 2015 India Human Rights Report, speaks of the worst human rights abuses in the country:

> "The most significant human rights problems involved police and security force abuses, including extrajudicial killings, torture, and rape; corruption remained widespread and contributed to ineffective responses to crimes, including those against women, children, and members of scheduled castes or tribes; and societal violence based on gender, religious affiliation, and caste or tribe.

Other human rights problems included disappearances, hazardous prison conditions, arbitrary arrest and detention, and lengthy pretrial detention. Court backlogs delayed or denied justice, including through lengthy pretrial detention and denial of due process."[38]

This is borne out by the work done by the Asian Human Rights Commission in India in 2015. In fact, the 2015 Human Rights Report refers to the AHRC's work in the area a few times in order to substantiate its findings. Under S.1.c.[39], where the report details cases of torture, it refers to a case of custodial torture of a minor boy in a police station in Katni, Madhya Pradesh[40], for which the AHRC had issued an urgent appeal. The Report also says,

---

38 India 2015 Human Rights Report. US Department of State

39 Page 6 supra

40 http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-069-2015/?searchterm=india%202015

> "A lack of accountability for misconduct at all levels of government persisted, contributed to widespread impunity. Investigations and prosecutions of individual cases took place, but lax enforcement, a shortage of trained police officers, and an overburdened and under resourced court system contributed to infrequent convictions."[41]

It is thus fitting that the Asia Report 2015 is focusing on the different aspects of the criminal justice system in order to demonstrate that a discussion on human rights abuses cannot be disconnected from the failures of the criminal justice system in a country. Re-affirming our focus on the failures of criminal justice institutions, the India chapter of the Asia Report for 2015 will focus on the pillars of the criminal justice system – the police, prosecution, judiciary and the prison system. These aspects will be explored by referring, at every stage, to political developments in India in 2015, and to the substantial information the AHRC has collated from appeals, statements, and articles in 2015.

PART I

THE STATE OF POLICING

The state of Indian policing has remained vexing on many fronts. There have been attempts at various points to reform the police and most efforts have gone in vain. In recent times, the most significant development in police reform has been the 2006 Supreme Court judgment in Prakash Singh v. UOI & Ors[42]. Prior to this, the landmark case of D.K. Basu vs. State of West Bengal (AIR 1997 SC 610) listed 11 guidelines for arrest, attempting therefore to reform one aspect of policing.

In March 2015, the AHRC released a statement[43] on the difficulty of formulating a policing policy for the country. Titled 'Is it for the police to form a policing policy?' the statement asks the question, "… what is it that keeps the Indian policing the way it is?"[44]

---

41 Pp 1-2 supra at note 1

42 (2006) 8 SCC 1 – The Supreme Court of India in a judgment delivered on 22 September 2006 in WP (Civil) 310 of 1996

43 'INDIA: Is it for the police to form a policing policy?' 23 March 2015. Statement by the Asian Human Rights Commission available at http://www.humanrights.asia/news/ahrc-news/AHRC-STM-043-2015/?searchterm=india%202015

44 Supra at note 6

Pinning the responsibility squarely on the police to reform itself is laughable, as it has been shown time and again that the police in India are tools of the ruling class and the elite, ever since 1861, when the British fashioned the Indian Police on the Irish constabulary model. According to Professor Upendra Baxi, writing the Foreword for the publication 'Are Indian Police Law unto Themselves?'[45],

> "Brutal and barbaric policing practices indeed prevail and need reiterated public condemnation. At the same moment, a mindless condemnation of Indian police and security forces is scarcely the way forward. Understanding the reasons for the ways in which some members of the police force routinely conduct themselves is different indeed from justifying some forms of atrocious conduct."

This is echoed in the stance of the AHRC and the way we are addressing the issues of police brutality and torture. The AHRC routinely receives information regarding cases of police atrocities in which torture is used as a tool to elicit a confession or brutalize a member of a vulnerable community. The victims are subject to brutal methods of interrogation, all in the effort to obtain a confession, resulting in the pinning of the crime on innocent people.

Justice D. Anand, in the D.K. Basu case (supra), wrote:

> "Efforts must be made to change the attitude and approach of the police personnel handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable form of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using third degree methods during interrogation."

The framing of the D.K. Basu guidelines was a seminal juncture for Indian jurisprudence and the work of the AHRC demonstrates that usually, none of the 11 guidelines listed out by the Supreme Court of India are followed. In May 2015, the AHRC received information from its partner organization in Kerala, Nervazhi, that a male student, aged 18 years riding his motorbike with two pillion riders was stopped by a policeman who seized his license and asked him to report to the Pavaratty Police Station along with his bike, for payment of fine. When the young boy went to the Police Station, he was tortured and

---

45 Baxi, Upendra. Foreword in 'Are the Indian Police a Law unto themselves? A Rights-based Assessment' by K.S.Subramanian. 28 Feb 2011. Social Watch Perspective Series, Vol.3. National Social Watch Coalition, New Delhi.

detained, prevented from making one telephone call as per his right. The police ultimately allowed him to call his family in order to bail him out. But, before his family could arrive, the police took him to the hospital for treatment. On the way to the hospital, the Sub Inspector allegedly threatened the boy, warning him to not to tell the doctor that he had been tortured. However, at the hospital, the victim informed the doctor about how the police tortured him and thus when the victim was back at the Police Station, the officer slapped and tortured him again for reporting the torture. The next morning, he started coughing and spitting blood and was taken by his family for further treatment.

With this one case, we can see the various aspects of failure within the police system and the failure to follow the D.K. Basu guidelines as well as key provisions of the Code of Criminal Procedure, 1973 (CrPC). Section 50 of the CrPC, mandates that the person arrested must be informed of the grounds of arrest and of his right to bail. Furthermore, Section 50A (1) mandates that the arresting officers have an obligation to inform someone else nominated by the person about the arrest, and the place where the person is being detained. The police officer must inform the arrested person of his rights as soon as he is brought to the police station.

These mandates flow from the constitutional guarantees in Part III of the Indian Constitution, namely Articles 20 (Protection in respect of conviction of offences), 21 (Protection of Life and Personal Liberty), and, most importantly, 22 (Protection against Arrest and Detention in certain cases), which details the fundamental procedural safeguards to be followed.

It is clear that due process has not been followed and there has been an abject miscarriage of justice, a failure to uphold the rule of law. This case is only a small representative of a deep-rooted injustice in Indian society. The nature of police bias, brutality, and torture is widespread, showcasing itself in extrajudicial deaths, colloquially known as "encounter" deaths, custodial deaths, crimes by armed forces in conflict zones, targeting of vulnerable communities like Adivasis and LGBT people, extortion of money and exploiting poor people and their occupations; the list is excruciatingly long.

In June 2015, the Asian Legal Resource Centre (ALRC), AHRC's sister organization submitted a written submission on extrajudicial execution to the 29th Session of the UN Human Rights Council. It submitted that between January and May 2015, the ALRC has reported 25 cases of extrajudicial executions from the states of Andhra Pradesh and Telangana. The state police in both states were not even willing to undertake autopsies and file reports to the National Human Rights Commission in India on the two occasions the Commission directed them to do so. This reiterates ALRC's observations that

human rights violations committed by law enforcement agencies in India are not an aberration against which corrective actions can be taken, but are, on the contrary, what is expected of law enforcement agencies as their duty in India.

Hard legislations like the Armed Forces (Special Powers) Act, 1958 (AFSPA), are statutory legitimisation of archaic law and order enforcement policy. Such laws negate the very principle of fair trial, and the concept of democracy. As long as the police have the refuge of laws such as the AFSPA, utilize poor investigation methods with an over-emphasis on confessions to "crack" crimes, and a need to showcase their power-hungry machismo on the poor and the vulnerable, mired in a system that will protect the criminals within - police torture and atrocities will continue unabated.

Another major obstacle to just policing is corruption and political interference. The rich and the powerful often get away with crimes by bribing policemen and political interference can ensure that the punishment is meagre. In one ironic case from Kerala, an enforcer of the law, Inspector General Jose was caught cheating in an exam in May 2015. The AHRC wrote a statement on this incident, highlighting the erosion of public trust in the police[46] .

To quote from the statement,

> "Police and the politicians have together built an impenetrable fort of impunity that serves their interests; it is strong and tall enough to protect corruption. Inside this fort, concepts like fair trial and the rule of law have no place. In fact, it has been built to negate these very principles."

In May 2015, in another case of corruption, the AHRC received information from its partner organization, Nervazhi, in Kerala, of a rape case that has been dragging on for more than seven years due to corruption. The case concerns a woman, Mary (name changed) who was allegedly gang-raped by her husband's friends in 2007. She struggled to lodge a complaint against the perpetrators with the local police. The police refused to accept her complaint and insulted her at the Police Station, casting aspersions on her character and morality. Unable to get any help or protection from the police, she filed a private complaint with the Judicial First Class Magistrate Court in Thrissur. The Court accepted the complaint and directed the Anthikkad police to register a case against Mary's husband and his friends as alleged in Mary's complaint on 26

46 'India:Where cheating police officers and corrupt politicians rule' May 8,2015, Statement by the Asian Human Rights Commission available on http://www.humanrights.asia/news/ahrc-news/AHRC-STM-072-2015/?searchterm=india%202015

July 2008 under Sections 493, 496, and 471 of the Indian Penal Code. Despite the direction from the court, the police have neither investigated the case nor have they arrested any of the accused. In this case, it is suspected that one of the rapist's brothers, himself a police officer, is influencing the police and preventing the investigation into the crime.

Police in India also routinely exploit loopholes in the law to harass vulnerable people. The Indian police came under fire in 2015 for instances of moral policing. In August 2015, the Malwani police raided hotel rooms and rounded up 13 couples and 35 others[47] in Madh and Aksa near Mumbai.

After the Malwani Police received widespread flak for barging into the private hotel rooms of consenting adults and booking people under S.110 of the Bombay Police Act for "public indecency", the then Mumbai Police Commissioner (now DGP) Rakesh Maria initiated a probe into the incident and the police-officer in charge of the raid was transferred. Mr. Maria also released a circular stating that the Mumbai police must refrain from harassing couples in malls, seaside, hotel rooms, or public places and should not comment or advise on what citizens should wear. It further stated that the police have no right to infringe on the right to privacy of citizens.[48] In November 2015, top cops in Mumbai went one step ahead and ordered that S.110 of the Bombay Police Act, 1951 and S.151 of the CrPC cannot be used anymore in order to arrest people.[49]

Police reforms

In the Prakash Singh (supra)judgment, the Supreme Court established seven directives for police reform. Almost a decade later, it is fitting to examine these directives from the vantage point of AHRC's work and experience with police atrocities. The following table is adopted from the publication 'Seven Steps to Police reform' published by the Commonwealth Human Rights Initiative in September 2010.[50]

---

47 'Moral policing: 61 held in Mumbai for indecent behaviour' Indian Express, Aug 9 2015. Available at http://indianexpress.com/article/cities/mumbai/moral-policing-61-held-in-mumbai-for-indecent-behaviour/

48 Sharma, Somendra.'Mumbai Police Commissioner Rakesh Maria warns force not to engage in moral policing' DNA, Aug 22, 2015

49 'Now, Mumbai Cops Can't Harass Couples Using Sec 110 of Bombay Police Act' NDTV, Nov 25, 201 available at http://www.ndtv.com/mumbai-news/now-mumbai-cops-cant-harass-couples-using-sec-110-of-bombay-police-act-1247395

50 Seven Steps to Police Reform. Sep, 2010, Commonwealth Human Rights Initiative (CHRI) available at www.humanrightsinitiative.org

THE SEVEN DIRECTIVES IN A NUTSHELL

Directive One

Constitute a State Security Commission (SSC) to:

(i) Ensure that the state government does not exercise unwarranted influence or pressure onthe police
(ii) Lay down broad policy guideline and
(iii) Evaluate the performance of the state police

Directive Two

Ensure that the DGP is appointed through merit based transparent process and secure aminimum tenure of two years

Directive Three

Ensure that other police officers on operational duties (including Superintendents of Policein-charge of a district and Station House Officers in-charge of a police station) are alsoprovided a minimum tenure of two years

Directive Four

Separate the investigation and law and order functions of the police

Directive Five

Set up a Police Establishment Board (PEB) to decide transfers, postings, promotions and otherservice related matters of police officers of and below the rank of Deputy Superintendent ofPolice and make recommendations on postings and transfers above the rank of DeputySuperintendent of Police

Directive Six

Set up a Police Complaints Authority (PCA) at state level to inquire into public complaintsagainst police officers of and above the rank of Deputy Superintendent of Police in cases ofserious misconduct, including custodial death, grievous hurt, or rape in police custody and atdistrict levels to inquire into public complaints against the police personnel below the rank ofDeputy Superintendent of Police in cases of serious misconduct

Directive Seven

Set up a National Security Commission (NSC) at the union level to prepare a panel forselection and placement of Chiefs of the Central Police Organisations (CPO) with a minimumtenure of two years.

Almost a decade post Prakash Singh, which was in fact, filed by a former DGP of Uttar Pradesh, not much has changed. Efforts continue being made by States to circumvent or dilute the Supreme Court directions and "retain political control over the police", and, according to news reports, since the 2006 SC order, only 17 states have passed new Acts while 12 have issued executive orders.[51] Even the Centre has failed to take much action on these directives and the AHRC and other experts in the field believe that this is no coincidence. The political class and powerful and elite have no interest in allowing these police reforms to see the light of day. It is convenient and desirable to allow the police to continue to run amok, as it clearly serves the needs of a corrupt political class.

Continuing failed efforts at police reform have only deepened the mistrust and fear that the public harbours against the police. The police in India are not a symbol of safety and security – instead, they operate as tools of the patriarchal political elite, powerful, violent, and something to be feared.

Ray of hope: Call for reform from inside the establishment

It is not all dismal though and in July 2015, there was news of a call for police reform from a senior member of the Kerala Police force. Kerala DGP T.P. Senkumar published an open call inviting suggestions on ways to modernize the police institution in Kerala. Realising the need to increase professionalism within the force, he invited ideas from experts in fields as varied as communication, engineering, and language studies. He proposed establishing research & development teams, which can aid police in performing their duties with the help of expertise in various fields, and in order to adopt progressive protocols within the force.

The AHRC believes that this call signals a slow change in the making, a gradual internalization of aspects of criminal justice that the AHRC and other

51 Tiwar, Deeptiman. 'Police overhaul: Case pending'. November 3, 2015, The Indian Express, available at http://indianexpress.com/article/india/india-news-india/police-overhaul-case-pending/

organizations have been talking and writing about and fighting for. This call also means that the AHRC now has a wonderful opportunity to work with the state administration in Kerala to reform the police institution.

AHRC's suggestions for reform

We need a multi-pronged approach in order to truly redesign and reform the India police.

The AHRC suggests:

1) Investment and training in modern and scientific investigation and forensic methods;
2) Investment and training in non-coercive, humane tools of investigation and interrogation;
3) Human rights and gender-sensitivity education and training for police officers;
4) Reform of police recruitment procedures with a focus on rooting out corruption and bribery;
5) A nationwide consultation with police officers in order to understand their complaints and grievances (such as poor salaries, no holidays and so forth);
6) Research & development teams with experts from a cross-section of disciplines to enable the police to do their jobs in a wholesome, progressive manner.

PART II

THE STATE OF PROSECUTION

The state of public prosecution in India is often the one area where there exists a vacuum of information and research. More often than not, high profile cases in India have the luxury of having the best lawyers in the country being appointed as public prosecutors. The 'common man', though is not as lucky.

Public prosecutors are appointed as per the provisions of Sections 24 and 25 of the Code of Criminal Procedure, 1973. Apart from the number of years of legal practice required as minimum experience, there are no other qualifications prescribed for someone to be appointed as a public prosecutor. This results in poor quality and low merit of those who become public prosecutors. Public prosecutors for a High Court are appointed by the Central or State

Governments in consultation with the High Court and for the District, by the State Government, after a list is prepared by the District Magistrate in consultation with the Sessions court.

In reality, in many instances, public prosecutors are de facto political appointees and end up being the tools of the ruling party of the time. In October 2015, the appointment of Mr. Raghuvir Pandya as government pleader at the Vadodara District Court was quashed by the Gujarat High Court while hearing a petition questioning Pandya's appointment alleging that it was a political one and that Pandya had been removed as public prosecutor in the Best Bakery case, via a Supreme Court judgment. Pandya was the public prosecutor in the controversial Best Bakery case of 2002 in which a bakery was burned down and 14 people were burnt alive during the post-Godhra riots. The Supreme Court, while ordering a re-trial of the case, in a judgment passed in April 2004, stated[52]

> 'The public prosecutor appears to have acted more as a defence counsel than one whose duty was to present the truth before the Court.'

The State Government was directed to appoint another Public Prosecutor in this case. Thus, when the same person who was indicted by the Supreme Court in this case for his bad performance was appointed as Government pleader in the Vadodara District Court, three petitions was filed to quash the appointment. While quashing the appointment, the Gujarat High Court also called for the selection of upright people who are truly 'fit' for the role of a public prosecutor.[53] The Gujarat High Court further stated that there should be no element of political consideration in matters like the appointment of a public prosecutor and the person must be someone of impeccable character and integrity, someone who is competent and able to work independently without reservations, dictates or constraints, and that the only consideration for the Government should be the merit of the person.[54] It will be fitting to quote the comments of the Gujarat High Court on the role of the public prosecution within the criminal justice system.

---

52 Zahira Habibulla H Sheikh and Anr. V. State of Gujarat and Ors.[2004 (4) SCC 158] Judgment delivered on April 12, 2004

53 'Pick honest people as public prosecutors, says high court', Oct 31,2015 , The Times of India available at http://timesofindia.indiatimes.com/city/ahmedabad/Pick-honest-people-as-public-prosecutors-says-high-court/articleshow/49607909.cms

54 Laxman Rupchand Meghwani & Ors. V. The State of Gujarat & Anr. Judgment delivered on Oct 30, 2015

> "The relations between the Public Prosecution service and the judiciary are the very cornerstone of the criminal justice system. Public Prosecutors, who are responsible for conducting prosecutions and may appeal against the Court decisions, are one of Judges' natural counterparts in the trial proceedings and also in the broader context of management of the system of criminal law. The issue in hand has a direct impact on the judiciary. It is said that a man is known by the company he keeps. A Nation is known by the judiciary it has. The worth of a nation is measured by its judiciary, which is seen as the ultimate keeper of a nation's conscience. Ours is such a judiciary. Let no harm be fall upon the judiciary in any manner."

In another instance, Rohini Salian, public prosecutor in the 2008 Malegaon Blasts case alleged that after the NDA came to power, she was given a message by an official in the National Investigation Agency (NIA) that she should 'go slow' in the case as the accused persons were allegedly Hindu extremists.[55]

These two cases show the lack of accountability and the political interference that is common within the public prosecution system in India. In most cases, when a new government comes into power, the public prosecutors appointed by the old government usually resign to make way for the new appointees.

Public prosecutors in India are also notoriously underpaid, thereby resulting in poor quality of candidates; the best advocates often opt for more lucrative options. In January 2013, public prosecutors in Delhi demanded better pay and better working conditions, as there was a severe paucity of public prosecutors due to the poor pay, causing an overburdening of the criminal justice system.[56] In a news report by The Hindu, a prosecutor said the following regarding the sorry state of affairs in Delhi,

> "All the recent talk of strengthening the criminal justice system is forgetting the important role that prosecutors also play alongside judicial and police officers. According to the norm, there has to be one prosecutor for every court, but due to the paucity some prosecutors have to handle cases in two courts. Every day a prosecutor in a magistrate court has anywhere between 50-80 cases, while in a Sessions court we

55 Mehta, Sunanda, 'The meaning very clearly was, don't get us favourable orders: Malegaon SPP Rohini Salian' . Oct 13, 2015, The Indian Express available at http://indianexpress.com/article/india/india-others/the-meaning-very-clearly-was-dont-get-us-favourable-orders/

56 Kattakayam, Jiby. 'Public prosecutors demand a better deal' 17 Jan 2013 available at http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/public-prosecutors-demand-a-better-deal/article4314826.ece

> have to deal with 10 to 30 cases daily. In fact, there needs to be more than one prosecutor assigned to the overburdened courts."

The Delhi High Court, in 2014, passed an order directing the Delhi Government to review the pay scales of public prosecutors while hearing a Public Interest Litigation filed on the matter.[57] The huge backlog and shortage of public prosecutors was recognized as having an adverse effect on the disposal rate in the State. In September 2015, in a welcome move, the Delhi Cabinet finally approved higher pay scales for public prosecutors in Delhi.[58]

Delay in trials and judicial backlog is also a function of poor investigation by the police due to inadequate knowledge of the law and the lack of modern, scientific, investigation methods.[59] The poor quality of the lower judiciary is also a big factor that contributes to judicial backlog. The lack of inadequate supervision of public prosecutors, especially at the district level is also a huge fault of the system as the performance of the prosecutors are not judged adequately in order for 'thrust and impetus to be given to the prosecution agency'.[60] The public prosecutors are also not adequately trained or given opportunities to update their knowledge.

To summarise, the public prosecution system in India is plagued by issues of low pay, no accountability and poor supervision, poor quality of candidates, political interference and corruption, lack of adequate training and avenues for obtaining new knowledge, all of which contribute to poor quality of trials and judicial backlog.

---

57 Singh, Smriti, 'Review Public Prosecutors; pay: HC', 8 Aug 2014 available at http://timesofindia.indiatimes.com/city/delhi/Review-public-prosecutors-pay-HC/articleshow/39842810.cms

58 'Public prosecutors to receive higher pay scales now' 1 Sep 2015, The Tribune India available at http://www.tribuneindia.com/news/delhi/public-prosecutors-to-receive-higher-pay-scales-now/127673.html

59 Sharma, Madan Lal 'The Role and Function of the Prosecution in Criminal Justice' Annual Report for 1997 and Resource Material Series No. 53. Feb, 1998 UNAFEI, Tokyo, Japan.

60 Ibid

Part III

THE STATE OF THE JUDICIARY:

The year 2015 was a watershed year for the Indian Judiciary with two landmark judgments, one in the judicial appointment case and the other in the case on S.66A of the Information Technology Act, 2000.

Collegium system to remain

Appointments to the Supreme Court in India have been the subject of debate for a long time as Judges to the Supreme Court are appointed by a collegium comprising three - five senior judges, headed by the Chief Justice of India. The 99th Constitutional Amendment Act and the simultaneous National Judicial Appointments Act was one concerted attempt to reform this archaic system.

The case Supreme Court Advocates-on-Record -Association and another V. Union of India[61] was heard by a five-judge bench of the Supreme Court of India and a 4:1 judgment struck it down as unconstitutional in November 2015. Activists and lawyers fighting for the National Judicial Appointments Commission (NJAC) to be set up were left disappointed as the Supreme Court declared the Act and the Amendment void, reinstating the controversial collegium system.

The Supreme Court, in the judgment delivered by Justice A.K. Goel held,

> "22.4. I would conclude that the new scheme damages the basic feature of the Constitution under which primacy in appointment of judges has to be with the judiciary. Under the new scheme such primacy has been given a go-bye. Thus the impugned amendment cannot be sustained."

As per the proposed Art.124-A, the NJAC was stipulated to comprise the Chief Justice of India, two senior-most judges, the union law minister and two eminent persons, who would be jointly appointed by the Prime Minister, the Leader of the Opposition and the CJI. The NJAC via the proposed Art.124-B would have the power to recommend persons for appointment as the CJI, judges to the Supreme Court, Chief Justices and judges of the High Courts. The intention of the NJAC and the proposed constitutional amendments was

---

61 Supreme Court Advocates-on-Record -Association and another V. Union of India. Judgment delivered on Oct 16,, 2015

to increase transparency and transition to a less opaque system of appointments to the higher judiciary in India. The proposed Article 124A must be read in conjunction with the changes proposed in Art.124 (2)

The table below gives the textual changes made in Article 124 (2) of the Constitution. (Adopted from the judgment – pp. 834-835)

Pre- Amendment provisions	**Post-Amendment provisions**
124. Establishment and constitution of Supreme Court. –	124. Establishment and constitution of Supreme Court. –
(1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of notmore than seven other Judges.	(1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.
(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal **after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose** and shall hold office until he attains the age of sixty-five years: **Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:**	(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal **on there commendation of the National Judicial Appointments Commission referred to in article 124A** and shall hold office until he attains the age of sixty-five years:
Provided further that — (a) a Judge may,by writing under his hand addressed to the President, resign his office; (b) a Judge may be removed from his office in the manner provided in clause (4).	**OMMITTED** **Provided that** - (a) a Judge may, by writing under his hand addressed to the President resign his office; (b) a Judge may be removed from his office in the manner provided in clause (4).

Although the collegium system has been reinstated, the Supreme Court bench that decided the case welcomed suggestions on how to improve the system, citing that it is not a perfect system and has scope for improvement and greater transparency. The suggestions came in thick and fast[62] and the AHRC hopes that this is the first step in the path to true reform of a system that is not befitting a democracy. The lack of transparency of the collegium in appointing judges and the risk of political interference results in the appointment of less than meritorious candidates. This is reflected in the quality of justice dispensed by the higher courts and is also suggestive of a deep-rooted tendency of the Judiciary to resist change and prevent external disapprobation. The higher Judiciary must make available the list of candidates under consideration, their qualification, achievements and suitability for the post, and the process by which the collegium selects certain candidates over others. The Supreme Court's reasoning in the present case that the composition of the NJAC will result in undue political interference, while well founded, does not preclude the possibilities of political interference in the present collegium system, as there are no democratic checks and balances.

S. 66A of the IT Act, 2000 struck down as unconstitutional & void

In another major development, the Supreme Court of India, in a landmark judgment, written by Justice R.F. Nariman, in the case Shreya Singhal v. UOI[63], struck down S.66A of the Information Technology Act (IT Act) as being unconstitutional. The SC stated that it was vaguely worded and allowed easy misuse by the Police.

> S. 66 A of the I.T (Amendment) Act, 2008 reads:
>
> "66A. Punishment for sending offensive messages through communication service, etc.
>
> Any person who sends, by means of a computer resource or a communication device,—
>
> (a) any information that is grossly offensive or has menacing character; or

62 Rajagopal, Krishnadas 'Suggestions to improve collegium system pour in'. The Hindu, Nov 3, 2015.

63 Shreya Singal v. UOI, Judgment delivered on March 24, 2015.

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device,

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages,

shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation. — For the purpose of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, images, audio, video and any other electronic record, which may be transmitted with the message."

This is a welcome move by the Supreme Court in a country where poorly drafted laws and sections, which are more often than not relics of the British era, are being used willy-nilly by state administrations to shut down dissent. There have been many instances of people being arrested for innocuous posts and forwards on social media because of alleged "offensive" content being posted. Most of these cases have been booked under the erstwhile S.66A of the IT Act, which was proving to be a tool of vendetta and control by malicious state agents, eager to shut down any form of dissent. The Constitution of India guarantees the fundamental freedom of speech and expression under Art.19(1)(a) and we have been a democracy that has been lauded for its relatively free press. It was thus ludicrous that there existed a provision such as S.66A that allowed for easy manipulation and targeting on those who spoke up against injustice and state action. The Supreme Court in this case held that,

"44. Equally, Section 66A has no proximate connection with incitement to commit an offence. Firstly, the information disseminated over the internet need not be information which 'incites' anybody at all. Written words may be sent that may be purely in the realm of 'discussion' or 'advocacy' of a 'particular point of view'. Further, the mere causing of annoyance, inconvenience, danger etc., or being grossly offensive or having a menacing character are not offences under the Penal Code at all. They may be ingredients of certain offences under the Penal Code

> but are not offences in themselves. For these reasons, Section 66A has nothing to do with 'incitement to an offence'. As Section 66A severely curtails information that may be sent on the internet based on whether it is grossly offensive, annoying, inconvenient, etc. and being unrelated to any of the eight subject matters under Article 19(2) must, therefore, fall foul of Article 19(1)(a), and not being saved under Article 19(2) is declared as unconstitutional."

The Supreme Court also stated S.66A is 'vague and overbroad' and therefore as well, unconstitutional under Art.19(1)(a).It also went on to hold S.118 (d) of the Kerala Police Act unconstitutional, applying the same reasoning as applied to S.66A. S.118 (d) of the Kerala Police Act, which read,

> "118. Penalty for causing grave violation of public order or danger.Any person who,-
>
> (d) Causes annoyance to any person in an indecent manner by statements or verbal or comments or telephone calls or calls of any type or by chasing or sending messages or mails by any means; shall, on conviction be punishable with imprisonment for a term which may extend to three years or with fine not exceeding ten thousand rupees or with both."

This is a welcome and far thinking judgment from the Supreme Court, which will go a long way in arresting State attempts at muffling dissent.

Uphaar fire tragedy case: miscarriage of justice by the apex court

On 18 August 2015, the Supreme Court ruled that the Ansal brothers were guilty of criminal negligence and ordered that they pay Rs.30 crore as compensation each, and no more jail time, as they were advanced in age. The judgment was received with shock as it was clear that the Ansal brothers, Sushil and Gopal Ansal, got away easily, having served jail terms of just a little over 5 months and 4 months respectively for a case in which the trial court convicted them for criminal negligence (S.304A of the Indian Penal Code) for offences under S.337 and 338 read with S.36 of the Indian Penal Code, and the High Court and Supreme Court upheld the same. The maximum sentence that could be awarded to them was two years but they were given just one year.

The tragedy took place on 13 June 1997 at the Uphaar Cinema in Green Park Extension, New Delhi. A transformer accident resulted in the building and parking lot catching fire and as the exits were blocked, the patrons of the cinema were trapped, resulting in the deaths of 59 people due to carbon

monoxide poisoning and asphyxiation. More than 100 people were injured. The lack of fire safety precautions and abject negligence of the cinema authorities in this case was slammed by the courts but for a disaster of this scale, it is shameful that the Ansal brothers got off with a mild rap on the knuckles on account of their age.

This case exposes the deep cracks within our justice institutions and the difficulty in ensuring justice for victims of mass disasters. The country's judicial institutions have failed the people time and again and are no more evident in cases such as the Uphaar case and the Bhopal gas leak. Victims and their families have been fighting for decades to ensure that those guilty of criminal negligence and causing the deaths of so many people are held accountable and brought to book. This time the Supreme Court had a fitting opportunity to show that India has a no-tolerance policy for criminal negligence by giving the Ansal brothers the maximum punishment for their crimes. This judgment also sends the message that the rich and powerful can get away with paying money as compensation for their crimes, without having to pay the price of a rigorous jail term.

The average Indian's faith in the judiciary once again stands eroded as is evidenced by this woman's reaction after the court order. Neelam Krishnamoorthy lost her daughter Unnati (17) and son Ujwal (13) in the tragedy and had been leading the legal battle for the victims.[64]

She said to the Indian Express,

> "Eighteen years ago, I lost faith in god and today, I lost faith in the judiciary. I am disappointed and disgusted. Money power augurs so well with the institutions that the death of 59 persons becomes a mere statistic."

The victims and their families received this weak promise of 'justice' a long 18 years after the fire tragedy occurred. Further, this case also showcased the frailty of the highest court in India – the final appeal that was heard by a three-judge bench of Justices Anil Dave, Kurian Joseph, and A.K. Goel allowed Mr. Ram Jethmalani, the counsel for the Ansal brothers to make their submissions but

64 Anand, Utkarsh, 'Uphaar fire: Ansals escape jail, SC rules Rs 60-cr fine adequate'. 20 Aug 2015, Indian Express available at http://indianexpress.com/article/cities/delhi/uphaar-fire-tragedy-no-jail-for-ansal-brothers-asked-to-pay-rs-30-cr-each-to-delhi-govt/

refused to allow the CBI to respond and refute them.[65] The judgment makes a reference to Jethmalani's submissions but does not refer to the submissions of the CBI or the victims[66] before giving the reasons for not imposing the maximum sentence and allowing the brothers to just pay a fine. This is against the principles of natural justice and it is shameful that the Supreme Court of India simply did not hear the other side.Justice delayed is truly, justice denied.

Yakub Memon and the hurried death penalty

Justice Dipak Misra dismissed blasts convict Yakub Memon's plea against the death penalty awarded to him for crimes committed with respect to the 1993 bomb blasts in Bombay. The death penalty was awarded by a TADA (Terrorist and Disruptive Activities Prevention Act) court passed by Justice Kode in July 2007.

President Pranab Mukherjee, exercising his power under Art. 72 of the Constitution of India rejected Memon's mercy petition. A flurry of petitions later, Yakub Memon's lawyers filed a final writ petition seeking 14 days so that the convict could "make peace with God and settle family affairs" before the death sentence could be executed. This petition was heard and dismissed in the wee hours of 30 July 2015 by a Supreme Court bench comprising Justices Dipak Misra, P.C.Pant and Amitava Roy.[67] Hours later, Yakub Memon was executed on the day that was, ironically, his birthday.

This case is a classic example of how the justice system, and in this case the death penalty can be used as a tool of state vendetta and retribution. The AHRC believes that the outcome of this case reiterates the need for the abolition of the death penalty in India. The principle of "collective conscience" and the "rarest of the rare doctrine" that has been evolved to be the basis for the imposition of the death penalty in India can be interpreted variously, depending on who the convict is and who sits on the bench that is deciding. In cases of terrorism, such as this one, the "collective conscience" can be one of revenge and communalism, feelings of hatred built up against a particular community. In a lot of cases, this collective prejudice, channeled through an overwrought media, can pass on to the judges, swaying their judgment. That is

---

65 Sundaram, Venu, 'Uphaar and the Curious Case of the Judges Who Wouldn't Listen'. Aug 28, 2015, The Wire available at http://thewire.in/9075/the-curious-case-of-the-judges-who-wouldnt-listen/

66 Sushil Ansal & Ors. V. State Through CBI, Judgment delivered on Sep 22, 2015

67 Rajagopal, Krishnadas. 'Four hours before execution, Memon woke up SC one last time'. July 30, 2015, The Hindu available at http://www.thehindu.com/news/national/memons-last-ditch-effort-to-stall-hanging-fails/article7480263.ece

why, in the case of the Naroda Patiya killings[68], former Gujarat Minister, Maya Kodnani who was also convicted for a so-called "indirect" role in the March 2002 killings was given 28 years imprisonment, whereas Yakub Memon was given the death penalty.[69]

According to an article written by political commentator, Siddharth Varadarajan in The Wire,

> "In India, sadly, we are not even prepared to recognise the gravity of the crime of communal violence and treat it on par with terrorism, let alone adopt legal remedies to deal with it. It is our national failure to come up with a deterrent to mass violence that allowed the 1984 massacre of Sikhs to take place, followed by Hashimpura, the Babri Masjid, Bombay and then Gujarat. If the government wants to end this chain, it must turn justice from being a product of faith – in which minority victims don't count – into an article of faith for India and its state institutions."

The problem of judicial backlog and delay

Judicial backlog and delay has been a consistent issue in India. Every year, we receive staggering statistics of how many years it would take for the courts to clear up the current backlog. The problem is overwhelming and disheartening, as there are thousands of cases that have been dragging on for more than a decade. Reports claim that there are upwards of 3 crore cases pending in India[70] and according to Bloomberg Businessweek calculations,

> "If the nation's judges attacked their backlog nonstop—with no breaks for eating or sleeping—and closed 100 cases every hour, it would take more than 35 years to catch up".[71]

The oft-heard solution for this problem is to increase the number of judges and increase the number of courts. The AHRC believes that this solution is

---

68 'MLA gets 28 yrs for Naroda massacre,Bajrangi to spend rest of his life in jail'. Sep 1, 2012. Indian Express available at http://indianexpress.com/article/news-archive/web/mla-gets-28-yrs-for-naroda-massacre-bajrangi-to-spend-rest-of-his-life-in-jail-2/

69 Varadarajan, Siddharth, 'Yakub Memon, Maya Kodnani and the 'Chain of Action and Reaction", Aug 2, 2015, The Wire available at http://thewire.in/7693/why-india-needs-justice-as-an-article-of-faith-and-not-a-product-of-it/

70 Lasster, Tom, 'India's stagnant courts resist reform'. Jan 9, 2015, Bloomberg Businessweek available at http://www.bloomberg.com/news/articles/2015-01-08/indias-courts-resist-reform-backlog-at-314-million-cases

71 Ibid.

only addressing the tip of the iceberg and even if the judge to citizen ratio was tackled satisfactorily, this will not solve the problem of backlog successfully.

A big part of the reason for judicial backlog is the clogging of the Judiciary with false and frivolous cases. The police in many states target hapless innocents, pinning on them crimes they did not commit or throwing them in jail and committing the case to trial when it is completely unnecessary.

The role of the Executive in clearing up the backlog has been stressed umpteen times and that it is not doing enough to fill up vacant posts has been established. The corruption that accompanies the process is also a huge stumbling block. In June 2015, the Law Minister V. Sadananda Gowda wrote a letter to the Delhi High Court Chief Justice G. Rohini raising the issue of complaints received by his Ministry regarding nepotism and favouritism in the Delhi Judicial Services Examination, 2014. It was alleged that the children of sitting Delhi HC judges were declared successful in the exam and of the 659 candidates that appeared for the exam, only 15 were declared successful in the results announced on 1 May 2015.[72] The exam was conducted in order to fill up 85 vacant posts.

But the Executive is responsible not just for filling up vacant posts. The Executive must take the responsibility for training police officers in modern and scientific investigation techniques so as to prevent the police from torturing and committing atrocities on vulnerable people and communities and filing cases unnecessarily, thereby clogging up an already overburdened system. It is also necessary that rogue police officials involved in torture and other atrocities are investigated and penalized for their actions and a strong message of zero-tolerance sent out.

The Judiciary is also plagued with issues of poor infrastructure and the insufficient uptake of technology within the court management system. Modernising Indian courts and slowly converting to an electronic system will also go a long way in reducing the time taken on each case.

Finally, outdated laws and unnecessary procedural requirements and loopholes result in the wastage of time, contributing to the backlog and pendency of cases. For example, traffic fines and other petty, routine matters waste the time

72 Anand, Utkarsh. 'Check complaints of judges' children clearing judicial exam: Sadananda Gowda asks Chief Justice'. June 26, 2015, The Indian Express available at http://indianexpress.com/article/india/india-others/check-complaints-of-judges-children-clearing-judicial-exam-sadananda-gowda-to-chief-justice/

of the lower courts as these fines need to be paid in Court. Justice Ajit Prakash Shah, chairperson of the 20th Law Commission in India, in its 2014 report to the Law Ministry on setting up new courts in the country, recommended that "Special morning and evening Courts be set up for dealing with Traffic/ Police Challan cases which constitute 38.7% of the institutions and 37.4% of all pending cases in the last three years before the Subordinate Judicial Services."[73]

In conclusion, there were some ups and downs with respect to the performance of India's Judiciary in 2015. The issue of backlog, delay, and pendency preoccupied debates surrounding the Judiciary and the AHRC hopes that the debates are steered towards the nature of criminal justice and the state of justice institutions in the country.

PART IV

THE STATE OF THE PRISON SYSTEM

As per the data provided by the National Crime Records Bureau (NCRB) which is attached to the Ministry of Home Affairs (MHA), there were a total number of 4,18,536 jail inmates in India as of 31.12.2014.[74] The report "Prison Statistics India 2014" was released in September 2015 and contains critical information regarding the abysmal state of India's prison system and is a commentary on the near collapse of the criminal justice system in India.

As per the Report, of the total number of inmates, 1,31,517 or 31.4% are convicts, and 2,82,879 or 67.6% of the total inmates were undertrial prisoners. The occupancy rate of prisons in India in 2014 was a whopping 117.4%. Dadra & Nagar Haveli reported the highest overcrowding in prisons (331.7%) followed by Chhattisgarh (258.9%) and Delhi (221.6%).

These statistics tell a sorry tale. There have been various efforts at reforming India's prison system and the latest data shows the urgent need for continuing efforts at improving it. Although AHRC does not work directly in the area of prison reforms in India, it is necessary to highlight this aspect of criminal justice reform as it is entwined with the police, prosecution, and Judiciary and many issues of the other three areas of judicial reform directly affect the prison system.

---

73 Press release ' Law Commission of India Submits its Report on Setting Up New Courts in the Country' July 7, 2014 available athttp://pib.nic.in/newsite/PrintRelease.aspx?relid=106132

74 'Snapshots – 2014', Prison Statistics India 2014. Sep, 2015, National Crime Records Bureau, Ministry of Home Affairs available at http://ncrb.gov.in/index.htm

The Indian government, however, most likely in the aftermath of the ban of and controversy surrounding Leslee Udwin's documentary, 'India's Daughter'[75] released a circular dated 24 July 2015 titled "Guidelines for allowing visit inside jails by individuals/ NGOs/ Company/ Press for the purposes of undertaking research, making documentary or interviewing the inmates, etc". These guidelines make it extremely difficult and near impossible for organisations and individuals to conduct research, write articles, take photographs or make documentaries in an independent manner on the realities of the prison system.

The guidelines require permission to be obtained before a prison visit. This permission must be sought in the form of an application to be submitted to the Jail Superintendent (JS) or Home Department of the State/UT Government 30 days before the date of the visit and for foreigners, 60 days. Thereafter, this application has to be forwarded by the Superintendent to the Home/Prison Department of the state and if the application is directly submitted to the Home/Prison department, then a report is sought from the Jail Superintendent before permission is granted. If permission is granted, the Jail Superintendent may allow the visitor into the prison once an undertaking is given, along with a security deposit of Rs.1 Lakh by way of a Demand draft or a local Banker's cheque. Permission can be granted only if the State/UT government feels that the research is for the purposes of 'creating positive social impact' or if it is related to prison reform or if the State/UT government itself invites the visitors.

These ludicrous guidelines do not end there. The Jail Superintendent or the next seniormost officer must accompany the visitor and be present at all times, in order to "immediately intervene" in case a "certain video clip or an interview being conducted is not desirable". Finally, after the visit is complete, the visitors have to hand over all the equipment used to the JS for a period of three days in order to allow the JS to peruse it and delete anything that the JS finds "objectionable". The final version of the documentary/film/research paper/ article/books must be submitted to the concerned State Govt./ Head of Prison Dept. for a "No Objection Certificate" before it can be released.

These guidelines unequivocally restrain the fundamental right to freedom of speech and expression under Art. 19 of the Constitution of India and in the backdrop of the ban on the documentary "India's Daughter", it is clear that the incumbent government at the Centre is taking every effort to prevent the exposition of India in a "bad light". The rigid guidelines and the draconian

75 Yadav, Yatish, 'Deception, Lies Behind Making of India's Daughter' Mar 9,2015, The New Indian Express available at http://www.newindianexpress.com/nation/Deception-Lies-Behind-Making-of-India%E2%80%99s-Daughter/2015/03/09/article2704869.ece

tight-fistedness showcased by the MHA circular will make it very difficult for the truth to leave the prisons, leaving the sordid reality to be painted over by the prison authorities. Honest reform efforts and attempts at gaining access to prisons in order to improve the conditions of inmates in a country with such a high rate of overcrowding and undertrials, where allegations of physical and sexual abuse are commonplace, will be stonewalled, the dark truths whitewashed for public consumption.

It is well known that inhuman prison conditions can further harden criminals, thereby precluding the possibility of reforming them. According to Reny George, a former murder convict who served his sentence and now runs a home in Bangalore for the children of prisoners,[76]

> "Institutions from various sectors should seriously look at their reforms and rehabilitation. If you lock up people and condemn them as criminals for life, they will behave like criminals."

This attitude of the government will thus prevent honest efforts at a reformative approach to criminal justice as opposed to a retributive one. Without access to prisoners and an insight into their psychology, it will be impossible to realistically implement efforts in reformation and rehabilitation of prisoners so that they can re-enter society. The AHRC believes that the Indian government must recall this circular and allow organisations and individuals to release material that might not be palatable but nevertheless can create a "positive social impact".

Conclusion

The year 2015 has been a year of hits and misses. The country is enveloped in an environment of increased government control and muffling of dissent.

The year 2015 was a year of "bans" from increased censorship of films and the ban on the hard-hitting documentary 'India's daughter' to the ban on beef in some states and, in Mumbai, an attempted temporary ban on meat altogether during a Jain festival (a ban the Supreme Court later disallowed). The government also tried to ban pornography on the Internet and then hastily backtracked in the face of widespread protests, converting the ban to include only child pornography. India's favourite easy-cook food, 'Maggi Noodles' was

76 Kumar, G. Pramod, 'Inside Indian jails: Reformed ex-convict has some answers' Mar 13, 2013, Firstpost available at http://www.firstpost.com/breaking-views/inside-indian-jails-reformed-ex-convict-has-some-answers-659093.html

banned amidst allegations that it contained lead over permissible limits. The Karnataka government banned parties that had foreign invitees. Nitish Kumar, Chief Minister of Bihar, promised to ban liquor following his victory in the Assembly Elections. The Ministry of Home Affairs did not outright ban prison visits, but the draconian guidelines may well operate as a de facto ban.

This does not bode well for the world's largest 'democracy', a country that is supposed to be governed by its Constitution. The political climate is extremely detrimental to criminal justice reform as the police and prosecution can and do very easily convert to malevolent agents of a draconian state.

The AHRC, while continuing its efforts at the radical rethinking and fundamental redesigning of justice institutions, hopes that the year 2016 will bring it with a climate of freedom and increased political will for criminal justice reforms.