

Chapter III

INDIA

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Introduction

India is often cited as an example of a developing country where a stable democracy is in place post the colonial period.³ It is true that India has held on to a democratic process of electing its governments, whereas the freedom for people to elect their governments through a free and fair process in all other postcolonial Asian states has only made cameo appearances. Is the possibility to elect one's government however, the pinnacle of democracy that can guarantee fundamental human rights? Or are there other equally important processes that define the true character of a state? If the latter is true, it is important to consider what these processes are.⁴

Vital to the true realisation of democracy is an open, transparent, and accountable government.⁵ It is only when these three criteria are met, will a state be able to ensure equality, freedom, and dignity—the three foundational human rights guarantees—to its citizens. Only in a state where equality, freedom, and dignity are held as paramount governance principles, can corruption be controlled. Independent and efficient justice institutions play an important role in this process.

Unfortunately, justice institutions in India face a serious crisis. This crisis is rooted in India's unwillingness to provide adequate resources for these institutions to function effectively, and in its failure to reform the criminal justice process. It is this failure that keeps India mired in corruption, which

3 *The Success of India's Democracy*, Atul Kohli; Ed., Princeton University, Cambridge University Press, 2001

4 *Design, Meaning and Choice in Direct Democracy*, Dr. Shauna Reily, Ashgate Publications, 2010, p.11

5 *Id.*, p. 16

is a defining character of all its public institutions. The effective control of corruption is essential to plug the leak in its governance artery that has denied the Indian people the benefits of development, and their fundamental human rights, for the past 67 years.

The AHRC's annual report on India for 2014 attempts to critically assess the functioning of India's criminal justice process, which the AHRC believes mirrors its human rights performance. For this, the report will review whether fair trial is possible in India. The report will then suggest changes that are vital to make India a safe abode for its people, to develop its economy, and to lead a global process of human development.

ICCPR, Article 6

1. *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*
2. *In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.*
3. *When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.*
4. *Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.*
5. *Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.*
6. *Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.*

Right to Life

Article 21 of the Constitution of India guarantees the inherent right to life to all its citizens. To ensure this fundamental right however, it is important that there is a fair process through which any person deprived of her right is able to defend the right, and, it is important that there is an expectation of an open, transparent, and non-arbitrary process. A state can deny a citizen her or his inherent right to life either through direct actions of its agencies (for instance, actions of law enforcement agencies) or as the result of indirect actions (for instance, by the denial of livelihood options). On both these counts, India's performance remains appalling.

India has a high rate of extrajudicial executions,⁶ which has not improved since the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Christof Heyns, visited India and published his report in 2012. Law enforcement agencies are not deterred from using lethal force against persons; in fact, legislation like the Armed Forces (Special Powers) Act, 1958, provides statutory impunity to State agencies for using deadly force.

Extrajudicial executions are also reported from Indian states where repressive legislations are not enforced. Often referred to as “encounter killings”, executions by law enforcement agencies are discounted as “necessary action” while in “hot pursuit”.⁷ This has been government policy in dealing with serious crime, and will remain so, unless accountability is fastened as a non-derogable quotient to every State action. At the moment, this is the code of engagement taught to new recruits in law enforcement agencies. The incumbent Home Minister Rajnath Singh has made it clear on more than one occasion that there will be no change to this practice.⁸

This practice is not recognised in law however, with the Supreme Court of India warning the government that “executive elimination” is not acceptable in India. The practice continues nonetheless and there is virtually no punishment. The National Human Rights Commission of India has, in fact, requested the government to report to the Commission each case of extrajudicial execution. A report is to be furnished whenever such an incident occurs, along with a video

6 *India: Concern expressed about extrajudicial executions* - The Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, New Delhi, 30 March 2012

7 Encounter killings: Middle-class India doesn't care about either blue-collar workers or Muslims, Akar Patel, 12 April 2015, accessible at: <http://scroll.in/article/719338/encounter-killings-middle-class-india-doesnt-care-about-either-blue-collar-workers-or-muslims>

8 AHRC Weekly Roundup Episode 53, Published 14 November 2014

recording of the autopsy proceedings. The Union government and well as the state governments are not following this procedure either.

A large number of law enforcement officers, politicians, bureaucrats, and members of the general public believe that it is all right for the State to kill persons. The only precondition to this is that the person or persons so murdered should be accused of serious crime. Even today, common sense reasoning that, in such cases, the accuser and the executioner is the same is absent in public debate. It is absent even within the lower ranks of the Judiciary. Hence, after each reported case of extrajudicial execution, the State accuses the person murdered with a crime of serious nature and the matter is closed.

This manner of dealing with State-sponsored elimination of persons has led to its exploitation; it is not uncommon for officers to have committed such killings for private vengeance or at the behest of their political masters. In states like Manipur, where extrajudicial execution is reported almost daily, state officers murder persons to steal money or other valuable artefacts. The relatives of extrajudicial killing victims are often forced to fight two simultaneous battles: one to exonerate the deceased person from the false crime alleged against him, and the other to obtain justice against arbitrary State action. Given the reality of justice institutions and processes in India, both battles are destined to either fail or at best, find no closure for around two decades.

The inherent right to life is also indirectly denied to people, such as through state actions denying people their livelihood options. A classic example is that of those who have lost their hut and hearth to the Narmada Valley Project, which spreads across the states of Madhya Pradesh, Maharashtra, Rajasthan, and Gujarat along the length of the Narmada River.

A majority, i.e. 87%, of the catchment area of the project is in Madhya Pradesh, and the largest numbers of people who have lost their land to the project are also from this state. Since 1979, when the Narmada Water Disputes Tribunal first approved construction of 30 major, 135 medium, and 3,000 small dams, including raising the height of the Sardar Sarovar Dam, there are thousands of peasant farmers waiting for adequate rehabilitation and compensation for the land they have lost to the Project.⁹ Many have died subsequently, from acute malnutrition and poverty induced by the submersion of cultivable land.

Such denial of livelihood options is also a negation of the right to life. Unfortunately, in this instance too, the country's justice process has not been able to prevent loss of life.

9 NBA Report, Published October 2010, updated annually.

ICCPR, Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 9

1. *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*
2. *Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*
3. *Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*
4. *Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*
5. *Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*

Right Against Arbitrary Arrest & Torture

Every police station in India engages in arbitrary arrest and torture. One of the foundational principles of crime investigation is to investigate the crime first. The arrest of a suspect is made only when the investigation leads to the accused. In India however, the exact opposite is practiced. This is because crime investigation agencies depend on confession and oral statements to investigate crime, rather than scientific evidence. This has led to the endemic use of torture in India.

Perhaps the least modernised of State institutions in India are its crime investigation apparatuses.¹⁰ Even today, a large number of police officers believe that arresting the accused and questioning the person is the initial step and the best process to investigate crime. This is because developments in criminology have not been adequately introduced to law enforcement agencies.

Misconceived notions like “an accused is the best person who could tell why and how the crime was committed” form substantial parts of police training. Even when an officer is trained to investigate crime scientifically, there are hardly any facilities available for the officer to undertake such scientific crime investigation.

The AHRC has previously reported on the paucity of forensic facilities in India. Forensic facilities in all Indian states are limited to one or two forensic labs, which often also house a fingerprint bureau, an IT division, and a ballistics division. Medico-legal facilities are only available at medical colleges or government hospitals, where often the autopsy examination is undertaken not by a forensic surgeon, but by a helper. The medical doctor who prepares the report often does so at the advice of the helper in the lab. Situations are so grim that in many Indian states even this facility does not exist; often bodies are left to the mercy of the weather and to stray animals like street dogs and to rodents that infest the facilities. It is also common in India for forensic labs to misplace, lose entirely, or contaminate samples received for examination.

There are also not enough forensic pathologists and doctors in the country. Kerala, one of India’s most advanced states, has less than 30 such experts in active government service. Furthermore, samples sent from the hospitals take years to be analysed and reports prepared, stalling investigations. The investigating officer, often under pressure to complete the investigation, is therefore compelled to file the case diary in court with findings that contradict the forensic report.

Due to the absence of scientific facilities or the difficulty in accessing them, investigation officers mostly depend on oral testimonies of witnesses in crime investigation. This, coupled with decades long delays before the trial takes place, result in witness statements in courts often contradicting the charges, resulting in acquittal. This process opens up umpteen opportunities for manipulation.¹¹

10 *The Police in India*, M. B. Chande, p. 533

11 *Delays in the Indian Courts: Why the Judges Don't Take Control*, Robert Moog, *The Justice System Journal*, Vol. 16, No. 1 (1992), p. 19-36

Hence, it is common for the investigating officers to falsify witness testimonies, or arrest the wrong person with the knowledge that he is not the one who has committed the crime. All of this suggests serious problems within the crime investigating apparatus in the country. Unfortunately, addressing this problem has not been the priority of the Union or state governments over the last 67 years.

In this context, where manipulation of records and evidence is rampant, law enforcement agencies also resort to misuse of their authority, either to illegally protect a colleague who is a criminal, or a powerful person, or merely to extort bribes from the person in custody. It is common in Indian police stations for the person in custody or his relatives to bribe the police officer not to torture the person in custody. In fact, police stations in India are not safe places that deliver an essential public service, but are, in fact, dangerous state run institutions where people dread to approach, even in cases of emergencies.

Despite this, cases of torture get reported regularly from India. However, these are often cases of extreme forms of torture, where the person in custody has to be hospitalised due to injuries he has suffered whilst in custody or due to custodial death, which is also common in the country.

India does not have a policing policy. No government in the past 67 years has declared one or even attempted to draft one. In fact, having no policy is also a policy. This is because the absence of a policy helps generate an ambiguous situation that people and political parties in power can exploit. Hence, law enforcement agencies in the country operate in an atmosphere of indiscipline. Most officers are only faithful to the politicians in power, ever interested in making money out of illegal gratifications.

The Indian police is hence one of the most corrupt institutions, where vacancies, promotions, and disciplinary actions all occur without adhering to justiciable norms, but according to the whims of politicians or on the basis of money. Each vacancy in the police is susceptible to be filled according to the bribe an officer can pay to someone in power. The prevailing rates range from rupees 600,000 to one million for the rank of a constable and much higher for officer rank posts. Even for more elite officers appointed through the central police service examinations to the Indian Police Service, money and political connections often become enabling criteria for postings, transfers and promotions.

For the average Indian citizen, a police officer is thus seen as a criminal in uniform. The institution the officer represents generates fear and aversion. It is

an institution that Indians have learned to be afraid of and keep silent about. It is the lynchpin in most corruption scams that steals billions from the public exchequer each year. The institution is the protector of the powerful and the persecutor of the weak.

The institution remains unfit to serve the democratic aspirations of the people, but is used to silence voices of dissent. It is an institution that will continue to resort to torture, even if law criminalises the act.

ICCPR, Article 2

1. *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
2. *Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*
3. *Each State Party to the present Covenant undertakes:*
 - (a) *To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
 - (b) *To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
 - (c) *To ensure that the competent authorities shall enforce such remedies when granted.*

Article 14

1. *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

2. *Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law...*

Right to Fair Trial and Adequate Remedies

The first image that comes to anyone's mind speaking about the judicial process in India is the country's crowded courtrooms and the decade long delays. In fact, the average period a case in India will take to complete trial, is anyone's guess. A trial in India could take anywhere between a couple of years to a decade and often more.¹² The situation is such that statements like "at the current rate of disposal of cases, India would take 360 years to clear the existing backlog" is cliché. However, judges and analysts do repeat this, with colourful statistics to support the claim, which are all true.

India is yet to see a Chief Justice who has not lamented about the scandalous delays the Indian court system is plagued with. Likewise, the country is yet to see a judiciary and a government that has taken any meaningful means to address this.

While the government ignores delays in adjudication, the judiciary has devised shoddy methods to address the issue, such as to dismiss cases off the pendency list for minor mistakes, like those made by lawyers and their clients to deposit adequate fees or failing to immediately comply with procedural formalities.

¹² Arrears in Trial Courts, Law Commission of India Report, 2013

Others include pressurising litigants to negotiate with each other to arrive at settlements or in criminal cases, encouraging the accused to plead guilty. In fact, plea-bargaining was introduced in India by way of an amendment to the criminal law, as an attempt to reduce delays. The process is one of the most imperfect methods for dispensing justice; however, the judiciary expressing the urgent need to reduce its caseload overshadowed this fact; and the government in turn merrily exploited this.

India's judiciary is one of the most underfunded State institutions. India has one of the poorest judge to people ratios in the developing world.¹³ The 2014 Union Budget only allocated 0.04% of the national spending for the country's judiciary.¹⁴ This means that judicial vacancies will remain unfilled, there would be no computerisation and other modernisation of court registries, and no new courts will be setup in India. It is in this context, and in the context of a fallen policing institution analysed in the section above, that fair trial in India needs to be understood.

Fair trial, in practice, does not exist in India. This is reflected in the fact that over the years, less number of people approach courts with expectation that their case would be heard and decided promptly.¹⁵ Delay affects both civil as well as criminal trials. In civil cases, litigants resort to out of court processes. In instances where litigants are institutions or individuals who could employ services of private agencies for settlement of claims, like repossession agencies or persons – often criminals – they do so at their terms. In criminal cases, however, delays have a multifaceted impact.

The situation of crime investigation is such that oral statements are used to prove crimes instead of scientific and technical expertise, delays result in witnesses failing to report in courts for trial, or witnesses are unable to recollect events that occurred at least a decade ago. All of this results in a high number of acquittals even in cases that are investigated reasonably well.

The possibility of stalling the trial opens up an enormous opportunity for an accused with resources to escape conviction. This is the singular reason why

13 At the moment the ratio is 13 judges for 1 million people. In December 2014, the Union Government claimed that it would be taking steps to improve this to 30 judges for 1 million people; such steps have not been implemented.

14 Union Budget, 2014

15 Statistical studies and data, like those released by the Supreme Court of India, indicates a near 16% decrease in the number of litigants approaching courts with civil claims in a period spanning 10 years (2004-2014). Whereas no reduction is seen in the number of criminal cases initiated by the State.

persons with criminal records successfully contest and win elections and form governments in India.¹⁶ Organised delay in criminal trial also allows witnesses to be threatened, killed, or otherwise silenced.

Cases get stalled for lack of judges, prosecutors, or simply because the witness or evidence is not yet available in court. Cases also get stalled due to lawyers exploiting the system. Besides, trial courts in India are overworked. By the time the regular roll call is over, which is mandatory under the law, a trial judge is left with hardly any time to conduct a trial.¹⁷

One of the foundational principles in criminal trials is that the judge presiding over the court when the evidence is adduced must be the one who decides the case. The same principle applies to prosecutors. Unfortunately, this does not occur in India. Often several judges handle cases; judges retire, get promoted, or get transferred during the trial and between the trial and judgment. Prosecutors also change during this period. Judges and prosecutors have a maximum period of three years in a station. This means, in a criminal trial that last 10 years, at least three judges and prosecutors would have handled the case file, opening huge possibilities for miscarriage of justice.

Delays also affect the accused in various ways. Worst affected are those in pre-trial custody who cannot afford to post bail. This has led to the situation where India's pre-trial detention centres and prisons are 75% full of under-trial detainees. Many of these under-trial detainees have already completed long periods in custody, sometimes twice the maximum possible sentence they would have been awarded had they confessed to the crime at the first instance they were produced in the court.¹⁸ Men make up 96% of all prison inmates. Nearly 2,000 children of women inmates live behind bars, 80% of those women being undertrials.

Police officers understand that the trial in the case they have spent time investigating, will get delayed; they understand that due to delay the accused will be acquitted; and therefore they end up believing that the only punishment the accused would ever get, would be from him. Therefore, police custody

16 54% of the elected representatives in the Indian parliament have criminal records, with trials pending.

17 GOVERNMENT OF INDIA LAW COMMISSION OF INDIA, *Expedition Investigation and Trial of Criminal Cases Against, Influential Public Personalities Report No.239*, Submitted to the Supreme Court of India in W P (C) NO. 341/2004, *Virender Kumar Obri vs. Union of India & Others*. The irony is the Law Commission submitted this report 10 years after the case was instituted.

18 "Two-thirds of prison inmates in India are undertrials", *The Hindu*, October 30, 2014

is treated as opportunity to deliver the punishment. Thus, even sincere police officers, concerned that the accused – who the officer is convinced has committed the crime – would escape punishment, imparts punishment in the form of torture to the accused. Some suspects are killed in custody due to this. Many are permanently maimed from the injuries inflicted. These are acts of gruesome torture and crimes, which nonetheless sometimes receive considerable support from the public as well as the media.

In other instances, spontaneous mobs resort to street justice. Lynching in India is becoming more common. One popular film has been made where women fed-up of the fallen criminal justice system resort to instant street justice where they “deal” with the suspect on their terms, once the person is apprehended.

In sum, India suffers serious defects in its justice dispensation processes. This implies that the possibility of adequate remedies in instances of human rights violations also suffer equally in the country.

Conclusion:

Without immediate corrective actions, India’s justice institution framework is destined for a complete collapse. Even the notional trust that many in the country have about the justice process in India will soon erode should conditions remain the same. The impending collapse and its fallout will not differentiate gender, age, or race. Given India’s context of social imbalances, it could be the women, children, and the poor who might face the maximum brunt of such a complete collapse. This will certainly affect India as a nation, its security as a state, and therefore its neighbours as well.

Given that India today has a far-right-wing government in power is something that could play the role of catalyst to this impending catastrophe. It is in this context that it becomes the responsibility of every Indian, including its well-placed civil society and the media, to work with the country’s government to place primacy upon correcting the serious defects affecting India’s justice processes.

If this is delayed, the space available today for the country’s civil society to work independently will shrink further. The country’s government could become more authoritarian, and India could soon plummet to a bottomless abyss into which most of its neighbours have fallen.

To end this unacceptable status quo, the following must be undertaken immediately:

- Indian civil society and media must consciously develop the habit of critically examining the justice institutions, from the following perspective: without adequately functioning justice institutions no human rights can be guaranteed;
- Abrasions like misuse of power by the police, particularly the practice of torture, must be spoken about widely and acted against;
- Victims of human rights abuses, willing to speak about their plight with justice or the absolute denial of it, must be protected and encouraged to speak loud and strong;
- The country's media should end their self-censorship, and must speak independently about state abuses, irrespective of the government in power;
- The Union as well as state governments must be pressured to place primacy on justice institution reforms, which is currently not even last on a priority list of any of the governments;
- Cases of human rights abuses reported from India must be widely reported, and meticulously followed so that the current practice of international institutions like the UN, which glaze over India's justice institutions, attributing them to be the best in the region, will end;
- People's initiatives in India that speak about injustices must be encouraged to expand and form a formidable voice that Indian politicians can no more ignore.