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agenda

ISSUE 26 2013

**More laws =
more rights =
more justice?**

Despite a government
in legislative overdrive,
the gulf between law
and justice is widening
for the poor and
marginalised



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What's law got to do with justice? <i>by Oishik Sircar and Saptarshi Mandal</i>	2
The new avatar of the judiciary <i>by Rakesh Shukla</i>	7
Inequality before the law <i>by Garga Chatterjee</i>	11
Invisibilising mass violence in Gujarat <i>by Anita Abraham</i>	14
Citizen power or media power? <i>by Maya Indira Ganesh and Gayatri Ganesh</i>	18
Accessing justice in times of terror <i>by Mayur Suresh</i>	22
Impunity in the name of war against terror <i>by Manisha Sethi</i>	26
Afzal Guru case: Justice ended up the loser <i>by Saurav Datta</i>	30
Multiplicity of human rights institutions <i>by Swagata Raha</i>	34
How to file a PIL <i>by Shambo Nandy</i>	37
Meeting the law halfway <i>by Abha Singhal Joshi</i>	40
Is this reformatory justice? <i>by Geeta Sajjanshetty</i>	42
Undermining the domestic violence law <i>by Jayna Kothari</i>	45
Maintenance as an entitlement <i>by Pooja Badarinath</i>	47
The supportive role of women's organisations <i>by Rukmini Sen</i>	50
Commissions of compromise <i>by Sonal Makhija</i>	53
Disabled women and sexual violence <i>by Shampa Sengupta and Saptarshi Mandal</i>	56
Policing hijras <i>by Siddharth Narrain</i>	59

Cover: Survivors at the devastated Gulberg Colony in Ahmedabad, 10 years after the Gujarat riots (Reuters)

This volume has been guest-edited by Oishik Sircar and Saptarshi Mandal

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What's law got to do with justice?

There are two perceptions of law and justice: One is of law delivering justice, the other is law as justice. The state, in legislative overdrive, wants us to believe that more laws equals more rights equals more justice. In fact, there are widening fissures between law and justice. Identifying these fissures could help us mend them for better access to and delivery of justice

OISHIK SIRCAR
SAPTARSHI
MANDAL

'ON JANUARY 26, 1950, we are going to enter into a life of contradictions,' B R Ambedkar had prophesied. He said: 'In politics, we will have equality and in social and economic structure, continue to deny the principle of (equality)... How long shall we continue to live this life of contradictions?... We must remove this contradiction at the earliest possible moment else those who suffer from inequality will blow up the structure of democracy...' (1).

Contradictions continue to be the defining feature of Indian democracy today as it sits on a precipice. The constitutional promise of emancipation for all seems to have been frustrated by the scandal of the powerful and elite who have usurped both the mind-space and material-spaces where justice can be imagined and claimed. Forests, hills and rivers are being re-colonised by corporations; as Ambedkar had said, the marginalised still have no mainstream press; there is an upper-caste onslaught against reservations in institutions and jobs; violence against women and the sexually marginalised attract selective middle class outrage; streets are being cleansed by banishing the migrant poor; and the courts, as Justice Dwivedi had observed in 1973, 'have become the arena of legal quibbling for men with long purses' (2).

Despite the lived experience of the law's fraught and very fragile relationship with justice, the poor place faith in the law to deliver them from injustice, and the law holds them captive while they are without rights. This double-binding quality of the law works to maintain the rightsless citizens' continued faith in the state (and now increasingly the market) — even as they are left disappointed by the law's promises of emancipation. Despite the contradiction between the vision of emancipation that the law promises and the reality of violence that the law performs, demands for more laws to protect rights, and claims in courts for redressal of wrongs, remain the most frequent forms of public engagement for the poor and disenfranchised.

Faith in the law emerges from two sources: one is the lived experience of knowing that the law delivers justice; the other is the perception of the law as justice. We are made to understand that there is a linear progressive equation at work here: more laws equals more rights equals more justice. This is an equation

that has informed and been informed by fundamental rights jurisprudence and law reform, the enactment of legislation to guarantee socio-economic rights, and many of the strategies of social movement activism in India.

The state keeps alive this equation by being in a mode of legislative overdrive, projecting new laws and law reform as primary forms of good governance. The United Progressive Alliance (UPA) government has been celebrating its *pro-aam aadmi* commitment by continuously passing laws like the National Rural Employment Guarantee Act, 2005, Right to Information Act, 2005, Protection of Women from Domestic Violence Act, 2005, Right of Children to Free and Compulsory Education Act, 2009, among others — even as it has continued its military onslaught in Kashmir and Manipur by not scrapping the Armed Forces Special Powers Act. Whenever justice is in crisis, the government enacts a law. The secret drafting and passage of the ordinance after the Delhi gang-rape and murder is a case in point.

A court for Indians?

If our faith in the Indian Constitution has remained even contingently intact for over 60 years, is this almost singularly owed to the Supreme Court's efforts (in response to claims by people's movements and social action groups) in expanding the horizons of the right to life under Article 21, as well as rescuing us from the judicial blunder of suspending the right to life made during the Emergency? As the renowned legal scholar Upendra Baxi noted in 1985 in response to the court's judicial activism: 'The Supreme Court of India is at long last becoming... the Supreme Court *for* Indians' (3). Baxi's optimism, however, has waned over time, and he wrote in 2002 about his disenchantment with the court: 'This disenchantment is now more fully voiced when the still rightsless peoples... have to say even to the Supreme Court of India: "Physician heal thyself" ' (4).

Baxi's disenchantment is evident even after a spectacular history of judicial activism and public interest litigation (PIL) in India. The Supreme Court has time and again upheld the constitutionality of draconian laws like the Terrorist And Disruptive Activities (Prevention) Act, 1987, the Prevention of Terrorism Act, 2002, and the Armed Forces Special Powers Act. What, then, has allowed the highest court to maintain its avowed position as the 'Supreme Court for Indians'? Has the

court built on the trail-blazing history of judicial activism from the 1980s, or has it given in to the corporatised demands of liberalisation that started in 1991 to keep pace with the march of global capitalism?

One trend suggests that in deciding PIL cases where the litigant is seeking redress for socio-economic rights violations judges have become 'reluctant to strongly penalise the government even when the state fail(s) to fulfil its statutory obligations. Instead, courts adopt... weak remedies, such as setting up committees and (commissions)' (5). This emphasis on weak remedies marks a peculiar characteristic of legislative democracies like India, where most socio-economic rights are enumerated in the Constitution but are never on a par with civil and political rights. This status makes socio-economic rights non-justiciable and only progressively realisable. Given their constitutionally vulnerable status, socio-economic rights are further at a 'systemic risk in legislative democracies because those who would benefit from them lack political power' (6). In effect, while we might have rights-enhancing judgments from courts that interpret the Constitution expansively, these judgments do not transform structures of injustice.

A plain reading of the Constitution sets up the spectacular potential of its design: its commonsensical distinction between

fundamental rights (FRs) and directive principles of state policy (DPs). As is evident from the language used, there is a clear hierarchy between these two sets of entitlements. FRs like equality (Article 14) and life (Article 21) are worded in a way that imposes a positive limitation on state action, namely that 'the state shall not deny to any person...' or 'no person shall be deprived'. On the other hand, the DPs such as work (Articles 41 to 43), education (Article 45), health (Article 47), and environment (Article 48A) are preceded by aspirational language — 'the state shall promote with special care...'; 'the state shall take steps by suitable legislation...'; 'the state shall... make effective provision for...'; 'the state shall, within the limits of its economic capacity and development...'; or 'the state shall endeavour to secure...'. The distinction between the two, then, is a matter of the intention with which they were inserted into the Constitution in the first place. Regarding the DPs, B R Ambedkar noted during the Constituent Assembly Debates that it was 'the intention of the Assembly that in future both legislature and the executive should not merely pay lip-service to these principles enacted in this part but that they should be made the basis of all executive and legislative action that may be taken thereafter in the matter of governance of the country' (7).

Success rates for the disadvantaged in fundamental rights cases before the Supreme Court have declined sharply since the 1990s, while those for advantaged classes have risen



Yet, the DPs were, from the beginning, imagined as entitlements that would be progressively realised, contingent upon the economic ability of the state. While the state has always put rights enshrined in the DPs on the backburner by hiding behind the fig leaf of economic incapacity, it has continued to pump money to arm the state — to the extent of investing enough monetary resources to orchestrate the Emergency in 1975 and current emergencies spread across India.

As Radha D’Souza notes, during the first phase of the PIL years (1977-1987) the Supreme Court ‘emphasised human rights and facilitated access to justice for marginalised classes and groups’ (8). In the second phase (1988-1998) it started engaging with PIL primarily on issues of governance (9). And during the third phase, which began in 1998, ‘the (Supreme Court’s) responses to economic legislation in the wake of neo-liberal reforms, which include privatisation, liberalisation, withdrawal of the state from critical areas of decision-making, and increased federal intervention in the states among other things... raised concerns about the ramifications of PIL in the era of globalisation’ (10). Since the beginning of this phase, ‘the (Supreme Court) has upheld liberalisation and privatisation but declined to intervene in matters of redistributive justice’ (11). In doing so, the Supreme Court fashioned itself as an organ of neo-liberal governance and according to Balakrishnan Rajagopal started ‘sharing the biases of many of the goals and methods of (neo-liberal) governance itself... (like) market fundamentalism, state fetishism, and the culture-ideology of consumerism’ (12).

This turn has been substantiated through an empirical study by Varun Gauri, which shows that between 1961 and 2008, the Supreme Court’s response to socio-economic rights questions increasingly became pro-middle class and anti-poor. Among other things, success rates for disadvantaged social classes in selected FRs cases before the Supreme Court decreased drastically from 71.4% (1961-1989) to 47.2% (2000-2008). Conversely, the success rates for claimants from advantaged social classes increased from 57.9% (1961-1989) to 73.3% (2000-2008) (13). As the conclusion of this study notes: ‘The data here constitute a prima facie validation of the concern that judicial attitudes are less favourably inclined to the claims of the poor than they used to be, either as the exclusive result of new judicial interpretations or, more likely, in conjunction with changes in the political and legislative climate’ (13).

In another survey of the Supreme Court’s docket, Nick Robinson ‘finds a court overwhelmed by petitions not from poor or ordinary people but from those with money and resources. In fact, these more privileged litigants very often swamp the court using the very mechanisms that were historically justified to make it more accessible to the less fortunate’ (14). In 2007, 40% of the Supreme Court’s regular hearings were on tax, arbitration, and service issues: ‘A disproportionate number of appeals are made up of these cases, which generally involve the more affluent litigants or government lawyers (who do not bear the cost of the appeal themselves)’ (15). Robinson’s findings show that in

the 1970s, around 10% of cases before the Supreme Court were fundamental rights writ petitions, of which 5% were admitted, and, in 2008, the numbers dropped drastically to 2%, of which none were admitted: ‘In 2008, the court received 24,666 letters, postcards, or petitions asking its intervention in cases that might be considered public interest litigation. Of these, just 226 were even placed before judges on admission days, and only a small fraction of these were heard as regular hearing matters. The rest were rejected’ (16).

This drop might have had a lot to do with an articulated stand by successive governments and many political parties that have frowned upon judicial activism allegedly usurping the turf of the executive (17). The present UPA government has even proposed a national litigation policy to claim damages from those who file frivolous PILs. This move comes at a time when it is well-known that it is neither poor communities nor human rights activists who file PILs on their behalf but rather the state that is the most active litigant (18). The troubling concern here is that the PIL has turned into the proverbial Frankenstein that the state is unable to control — which is why the state needs to discredit it forcibly. This is bad news for the rightsless, for whom PIL seemed to be the most powerful means of gaining at least recognition and visibility, if not emancipation and justice.

Who delivers justice?

The PIL in many ways served as an alternative path to justice delivery, particularly for the poor and powerless. The mainstream path is expensive, legalistic and has for long been overwhelmingly crowded. As of 2010, there was a backlog of 31.28 million cases pending in various courts including high courts in the country, which would take 320 years to clear (19). The situation certainly hasn’t improved in 2013. We have seen a range of governmental innovations — from lok adalats to fast-track courts to specialised courts for family and consumer disputes to commissions to out-of-court settlements through arbitration and conciliation and state legal aid services to name a few — as attempts to tide over the enormity of this backlog and enable swifter access to justice. Yet, all of these alternative routes are beset with deep problems, and seem to have made access to justice more complicated, bureaucratic and cumbersome. The problems with alternative routes are not only functional but also structural: absence of adequate funding for many of these systems, inherent biases towards marginalised groups and individuals who approach them seeking remedy, and lack of collective commitment to social justice.

After the December 2012 gang-rape and murder of a 23-year-old physiotherapy student in Delhi, the government quickly set up fast-track courts to try rape cases, as if the speed with which rape cases were disposed of were all that mattered. There was scant mention of how trials would be conducted in these new structures and whether these fast-track courts would be any different from regular courts in their attitude towards the rape victim. While ‘speedy trial’ became the



SMS justice: 24/7 news media turns into a courtroom and fuels the national bloodlust

buzzword bandied about by the state, the very nature of the trials, which victims found humiliating and traumatising, was left untouched by the 'reforms'. The cosmetic nature of the state-initiated alternatives is further illustrated by the example of the family courts. Family courts were set up in several metropolitan cities through the 1990s with the hope that these alternative courts would prioritise 'justice' over 'legality' in marital disputes, so that women, who by and large have a weaker bargaining position in such disputes, do not always end up with unfavourable outcomes. It was hoped that without the involvement of lawyers, litigants and especially women would be enabled to place their concerns before the courts and would have better control over their own cases. This is what anthropologist Srimati Basu observed in a recent article based on her study of a Kolkata family court:

'In the family courts, lip-service is paid to alternate legal methods, but judges and counsellors still work in the ways in which they themselves were disciplined to learn about rights or entitlements. Litigants are subjected to judges' directions and are expected to be best represented through the judge's mediation rather than their own. In fact, it could be argued that this format has vastly increased judges' unilateral powers in exchange for lawyers' and has fewer checks and balances. Those litigants with few educational and financial resources are at a further disadvantage, unable either to perform satisfactorily in court or to hire lawyers for a potentially better outcome' (21).

Similar accounts are provided of other alternative justice mechanisms by a number of pieces in this issue of *Agenda*. The failure of many of these state-generated justice

delivery mechanisms, along with a near collapse of the court system under the burden of backlogs, has led to the amplification of two extra-constitutional systems of justice delivery in modern India: first is the likes of the khap panchayats, which have dared to continue issuing their violent, patriarchal and casteist diktats; and the rise of what can be called 'SMS justice', where it is the 24/7 news media that turns into a courtroom, the accused is publicly on trial (without being able to defend him/herself) and anybody gets to play judge and jury by just sending SMSs to opinion polls. Take an opinion poll that *The Times of India* published in the wake of the Delhi gang-rape and murder. The poll asked the question: 'What's the punishment for a man who takes away a woman's life, while she is still alive?' The copy of the advertisement identifies the assailants as 'shameless maniacs' and 'inhuman criminals'. The options that you can choose to SMS include death sentence, bobbisation and chemical castration. Even before the actual trial had started, polls like these and paranoid TV programmes at primetime fuelled the national bloodlust of angry protestors, a majority of whom were demanding that the accused be sent to the gallows. None of these protestors spoke up in defence of Afzal Guru and his illegal execution.

Are we caught between the deep sea of never-ending legal entanglements and the devil in the form of the state (and corporation and media)?

Where do we look for justice?

The aim of this issue of *Infochange Agenda* on law and

(in)justice is not to disparage or dismiss the law's connection with justice. That would be both an exercise in futility, given the hope that people's struggles rest in the law, as well as politically dishonest, given our contingent belief in the ability of the law to deliver at least a semblance of justice. This issue brings to the fore the enormous and ever-expanding fissures that mark the terrain between law and justice, and the apathy and assaults that make these fissures grow wider with each passing day.

The identification of these fissures will caution both the aggrieved as well as those working with them about how not to be fooled by the law's hollow promises of justice, and it will equip us to mend the fissures for better access to and delivery of justice. This recognition is essential for those who engage the law for the sake of claiming justice, as well as for calling its bluff: a strategic juggling that we continue to do as law and its afflictions give shape and meaning to our lives and ideas of justice. A critical dissection of the law's connections with justice is also a means to identify the limits of legal justice: of what it can and cannot do and how much of our struggles should invest in seeking legal redress. Clearly, there are experiences of injustice that the law cannot address adequately, and calling on the law to respond to such experiences will only leave us disillusioned and disenchanted about the law. Knowing this limit can allow us to search for other repertoires of redress, some of which include community-based support networks, collective actions of solidarity, and, most powerfully, experiences of the quotidian: squabbles, laughs, negotiations, leisure. It is in the everyday and ordinary that many of the contradictions that Ambedkar pointed at get addressed, if not resolved, and that has saved our democracy from being blown up by the sufferers of injustice.

However, recognition of the quotidian should not take our attention away from the violence of the state, and the imperative to hold it constitutionally accountable. This has become increasingly difficult because that state has been conveniently withdrawing from a range of areas to allow private capital to step in. Which is why in our collective struggles against injustice, we need to start looking at the state and the corporation as part of a compact: in which the state clears the space for corporate capital's takeover, using violent laws like the Land Acquisition Act, and then profits from the corporation's exploits over the natural resources of indigenous populations.

Leftist views on resisting private capital, and bringing the state back in, have become inadequate in responding to the deep intimacy between the state and corporations. As the French historian Fernand Braudel sharply observed: 'Capitalism only triumphs when it becomes identified with the state, when it *is* the state' (22). In such a situation corporations have great influence on what the state decides and legislates. Our justice-seeking strategies need to be attentive to this state-corporation compact, and not set up the binary of the state as benevolent and the corporation as evil. They've become two sides of the same proverbial coin,

and we cannot let the state absolve itself of responsibility by saying that private actors like corporations are responsible for harms done. There is adequate brutal evidence of the history of suffering and consequent legal struggles — from Bhopal to Nandigram to Niyamgiri to Kalinganagar to Narmada to Koodankulam and beyond — that should provide us enough caution and inspiration about what role we want the law to play in getting us justice. Indeed, whether we want it to play any role at all.

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The new avatar of the judiciary

Public interest litigation started out as a way to make justice and fundamental rights accessible to the exploited and oppressed. There was a time when the higher judiciary would provide relief from the arbitrary actions of the executive, such as slum demolitions. Now the tables have turned and it is the courts that are ordering slum demolitions!

RAKESH SHUKLA

THE AUCTION OF NATURAL RESOURCES, conservation of tigers, guidelines for media reporting, preservation of the Taj Mahal, corruption, mid-day meals, CNG, location of industry, banks in residential areas... Today the list of issues before the courts appears endless. The origins of public interest litigation (PIL) seem to be overshadowed by the present avatar of PILs. Revisiting the genesis of PIL and subsequent developments in the context of the role of the higher judiciary since Independence, particularly the Supreme Court, can assist us in taking a critical look at the phenomenon.

As far back as the 18th century, Voltaire pointed out the fundamental flaw in the Anglo-Saxon jurisprudence of our legal system: 'The law in its majestic equality forbids the rich as well as the poor from sleeping under bridges and stealing bread.' The judiciary did not recognise the inability, due to poverty, of an overwhelming majority of people to approach the Supreme Court and high courts for violations of the fundamental rights to life, liberty and equality. The principle of locus standi was strictly adhered to and the person whose fundamental rights had been violated was the only one entitled to approach the courts seeking redressal. Lack of implementation of social welfare legislation contributed to the pathetic condition of the exploited and downtrodden sections of our society. Attempts at mobilisation to secure minimum wages and an eight-hour working day, land to the tiller, or even the abolition of bonded and contract labour were repressed. Democratic and peaceful efforts to enforce rights under duly passed laws were met with police action and the institution of criminal cases.

Until the concept of public interest litigation (PIL) was introduced.

Glorious beginnings

On January 8, 1979, a news item appeared in a national daily revealing that hundreds of prisoners had been languishing in jails as 'undertrials' for periods longer than the maximum term for which they could have been sentenced, if convicted. A public-spirited lawyer filed a writ petition in the Supreme Court for violation of prisoners' fundamental rights. In a historic departure from

the principles of Anglo-Saxon jurisprudence and more in tune with the socio-economic realities of our country, the court entertained the petition on behalf of the prisoners. In a series of orders, in what is referred to as the Bihar undertrials case (1), the Supreme Court directed the release of such prisoners and laid down that speedy trial was an essential ingredient of the right to life and liberty guaranteed under Article 21 of the Constitution.

This was followed by the Bhagalpur blindings case where the Supreme Court issued orders for the treatment of prisoners blinded by cycle spokes and acid by the police. The court also ordered an investigation by the CBI in order to punish the guilty (2). A letter petition by the People's Union for Democratic Rights, for payment of minimum wages to workers employed in construction projects for the Asian Games in Delhi, resulted in the Asiad case judgment (3). A series of cases followed — the Bandhua Mukti Morcha case (4) for the release of bonded labour, the Agra Mental Home case on behalf of women incarcerated in the asylum, the Sheila Barse case with regard to the condition of children in institutions, and the M C Mehta cases dealing with environmental pollution. These constitute some of the leading judgments of the era. Prisoners' rights was another issue where a series of cases followed, led by the Sunil Batra case (5). Violence at the hands of police and security forces was an important area of intervention beginning with the award of compensation and direction to prosecute in the case of the disappearance of two people taken into custody by the army in Manipur (6).

Thereafter, the scope of PIL was extended to cover diverse issues like corruption, hawala transactions, fodder scams, petrol pump allotments, and the environment.

Paradigm shift

Although PIL started off as a pro-poor means to effectuate the rights of the exploited, it has been moving in a diametrically opposite direction. There was a time when the courts would provide relief from the harsh, arbitrary action of the executive, reflected in, say, a stay on demolition of slums on grounds of lack of rehabilitation plans or hardship of the monsoons or school examinations. Today, slum demolitions are being directed on orders from the courts. In fact, the tables have turned; today, it is the executive and

legislature that are trying to put relief and rehabilitation schemes in place before demolitions, while the courts are maintaining that demolitions be carried out immediately and people rendered homeless. In fact, the Supreme Court declared that people staying in slums had no right to notification before eviction and that rehabilitating these encroachers on public land was “like giving a reward to a pickpocket” (7).

In fact, a similar trend is reflected in many areas of PIL. Thus, in the case which led to the decision to shift heavy industries out of Delhi (8), the court heard the public interest litigant, owners of the industries, and the government, but denied an opportunity to the workers to be heard. In the name of public interest, people whose life and livelihoods were directly going to be affected by the decision were not even heard by the court!

Protection of environment is another area in PIL where the people-versus-environment paradigm has been constructed. The courts seem to be coming out with a series of orders in the ongoing Godaverman case to evict tribals and other villagers from sanctuaries, national parks and tiger reserves. The right to life and livelihood of thousands of people residing in these areas finds no place in the developing environmental jurisprudence.

Overview of the Supreme Court

An overview of the functioning of the Supreme Court since its inception is instructive in forming an understanding of the transition of PIL from its roots in trying to make justice accessible and fundamental rights real for exploited and oppressed sections and communities, to its present avatar. It also has lessons for us on the role of the institution in terms of the interests of various sections of society.

Land reforms: After Independence, abolition of the zamindari system and implementation of land reforms formed the agenda of the Congress party and the government. Zamindars were symbols of oppression and there was near-total support from the rural population for these measures. Land reform laws were passed in most states by Congress governments in power. The landlords challenged the validity of these Acts in the courts. The court’s approach was one of protection of the rights of property, an aversion to land reforms, and indignation that zamindars were being deprived without adequate compensation. The Bihar Land Reforms Act of 1950 was struck down by the Patna High Court as violative of the right to equality. After the Act was struck down, parliament amended the Constitution in order to protect laws passed for acquisition by the state of any estate, or any rights from being struck down on grounds of violation of fundamental rights (9). Despite the amendments, however, the provisions of land reform legislation were struck down by the Supreme Court in cases like Maharajadhiraj Kameshwar Singh (1952) (10) and Thakur Raghubir Singh (1953) (11). Cases of

compensation after acquisition of land or property were inevitably decided in favour of the owner of the property, as in Bela Banerjee (1954) (12), Dwarkanath Das (1954) (13), Subodh Bose (1954) (14) and Saghir Ahmed (1955) (15).

Economic laissez-faire: Thereafter, the court supported economic laissez-faire and struck down the nationalisation of banks in the R C Cooper case (1970) (16) holding it to be discriminatory and violative of the guarantee of compensation. The Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969 had been passed with the objective of public control over national finance and elimination of concentration of wealth. However, the court ruled in favour of private business and private enterprise. There was a strong demand for the abolition of privy purses granted to erstwhile rulers of princely states. The court, in H H Maharajadhiraja Madhav Rao Jiwaji Rao (1971) (17), held the abolition to be unconstitutional, violative of fundamental rights and contrary to the rule of law. The judgment declared that the government did not have the power to abolish the concept of rulership, privy purses and privileges on grounds that these were incompatible with democracy, equality and social justice.

Civil liberties: In the area of civil liberties, the court soon after its inception had to engage with the issue of preventive detention in the case of communist leader A K Gopalan. The Preventive Detention Act, 1950 had been passed by parliament. Under the provisions of this Act, a person could be detained if the government was satisfied it was necessary that he be prevented from acting prejudicially to the interests of the state or maintenance of public order. There would be no trial but the person could be put in jail for a period of one year.

Gopalan was arrested by the Madras government as there was disturbance in public order in Telengana. He challenged the constitutionality of the Act as well as his detention. The submission was that a person who is detained would lose his other fundamental rights like freedom of movement, freedom of speech and expression, freedom to conduct a business, trade or profession. Under the Constitution, these rights could only be taken away if the legislation satisfied the test of ‘reasonableness’. Therefore, the preventive detention law must satisfy the test of reasonableness. A majority of the judges were of the view that guarantees and restrictions relating to other freedoms should not apply to preventive detention.

Each of the fundamental rights was held to be specific and independent with its own individual limitations. Justice Fazl Ali, representing the minority view, held that principles of elementary justice applied and a person could not be condemned without a hearing by an impartial tribunal. The majority judgment of the court declared that the test of reasonableness was not applicable and upheld the preventive detention law in Gopalan’s case (1950) (18).



In the shameful A D M Jabalpur case (1976) (19), during the 1975-77 Emergency, the Supreme Court upheld a suspension of the fundamental right to life and declared that no habeas corpus petitions could be filed for deprivation of life and liberty. The Terrorist and Disruptive Activities (Prevention) Act (TADA) was upheld by the court in Kartar Singh's case, in 1994 (20), the Armed Forces Special Powers Act in the Naga People's Movement for Human Rights case in 1997 (21), and POTA in People's Union for Civil Liberties in 2004 (22). In fact, it is parliament that allowed TADA and POTA to lapse.

Industrial jurisprudence

Akin to the paradigm shift in PIL today, the trend in industrial law has a similar anti-worker/employee and anti-egalitarian aspect. As in the area of demolitions, the courts earlier provided protection against harsh and arbitrary actions by governments and employers, directing the implementation of social reform legislation and expanding the concept of equality. Equal pay for equal work was laid down as part of the fundamental right to equality, in the Randhir Singh case (23). In a number of cases, the courts, led by the Supreme Court, directed the regularisation of contract workers performing work of a permanent nature. Reinstatement with back wages was the norm in case of harsh punishments imposed by employers.

In this era of globalisation, however, there is a lot of pressure to change India's labour and industrial laws in favour of employers. Indeed, even before any such changes have been effected, the court has begun changing the face of industrial jurisprudence. The recent trend in the courts and tribunals is of non-interference in administrative action, quasi-judicial decisions and cases where harsh and disproportionate punishment like dismissal of employees for minor infractions (24) has been imposed. Labour legislation, the preamble and directive principles of state policy in the Constitution laying down the move towards a more equitable distribution of material wealth remain, yet the approach of the courts today is of dilution of principles like equal pay for equal work (25) and the abolition of contract labour for permanent work (26).

Constitutional balance of power

The Constituent Assembly Debates make clear that the Supreme Court was never visualised as playing an active role in India's policymaking or governance. At that time, parliament, representing the sovereign will of the people, was considered the final arbiter of the policies and laws that would serve the best interests of society. However, in more than half-a-century of functioning, the court has come a long way and today occupies centrestage in almost all aspects of policy and governance.

The area of public interest litigation has played a major role in the enhancement and expansion of the court’s powers in almost every sphere of life and governance. It has also impacted on the balance between the three wings of the Constitution — legislature, judiciary and executive.

In fact, in the ongoing Godaverman forest case, an application was moved by the amicus curiae seeking intervention with respect to the Scheduled Tribes (Recognition of Forest Rights) Bill, 2005 which was to be tabled in parliament. The apex court, rather than dismiss it outright as not maintainable, thought it fit to keep the application pending before it. Although totally antithetical to the Constitution, we seem to be moving towards a stage where courts consider passing orders restraining the legislature from passing laws, judging them to be unconstitutional even before they are made!

The plummeting credibility of other institutions has led to the court being looked upon as the ultimate resolver of all society’s social ills. Instead of judicial restraint, the court appears happy to usurp this space. The current slew of scams, corruption and bribery cases has resulted in the legitimacy and moral integrity of the political class reaching a new low. A weak and unstable Centre, coalitions with razor-thin majorities and defections have all contributed to an unhealthy tilt in the balance between institutions. Under our Constitution, parliament and state legislatures are independent sovereign entities; the courts do not have the powers to inquire into their proceedings. The totally unconstitutional act of setting a date for the UP assembly session, the Supreme Court fixing the agenda for a composite floor test to determine a majority in the assembly in the Jagdambika Pal case (27), is a striking illustration of this. A government where the judiciary treats the legislature like an inferior court! It seems unlikely that the genie of public interest litigation jurisdiction enabling the higher judiciary to intervene in every sphere regardless of constitutional provisions or validly enacted laws can be circumscribed to fulfil the original limited objective of making fundamental rights real for the marginalised and the poor.

Future

The portents are ominous: declining authority and erosion of the legislature and executive along with an increasingly activist judiciary favouring the haves rather than the have-nots. More than two decades ago, then Law Minister Shiv Shankar remarked (28): “Mahadhipatis like Kehsavananda and zamindars like Golaknath evoked a sympathetic chord nowhere in the whole country except in the Supreme Court of India. And the bank magnates, the representatives of the elitist culture of this country, ably supported by industrialists, the beneficiaries of Independence, got higher compensation by the intervention of the Supreme Court in the Cooper case. Antisocial elements, ie FERA violators, bride-burners and a whole lot of reactionaries have found their haven in the Supreme Court.” Certain other corporate

entities like Vedanta, Sterlite and POSCO could also perhaps be added to this list.

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Endnotes

- 1 Hussainara Khatoon vs Home Secretary, State of Bihar, AIR 1979 SC 1979
- 2 Khatri vs State of Bihar, 1981 (1) SCC 623
- 3 PUDR vs Union of India, AIR 1982 SC 1473
- 4 Bandhua Mukti Morcha vs Union of India, (1984) 3 SCC 161
- 5 Sunil Batra vs Delhi Administration, (1978) 4 SCC 49
- 6 Sebastian Hongary vs Union of India, 1984 (3) SCC 339
- 7 Justice B N Kirpal sitting with M B Shah and D P Mohapatra. J J speaking on behalf of a three-judge bench of the Supreme Court in Almira. Patel vs Union of India, AIR 2000 SC 1256
- 8 M C Mehta vs Union of India, (1996) 4 SCC 750
- 9 Articles 31 A and 31 B — First Constitutional Amendment 1951
- 10 Sections 4 (b) and 23 (f) of the Bihar Land Reforms Act, 1950 were declared unconstitutional and void in the State of Bihar vs Maharajadhiraj Kameshwar Singh, 1952 SCR 889
- 11 Section 112 of the Ajmer Tenancy and Land Records Act, 1950 was declared unreasonable and violative of the right to “acquire, hold and dispose of property” under Article 19 (1) (f) in Thakur Raghubir Singh vs Court of Wards, Ajmer, 1953 SCR 1049. Article 19 (1) (f) was omitted by the Constitution (Forty-fourth Amendment) Act, 1978
- 12 Section 8 of the West Bengal Land Development and Planning Act, 1948 was struck down as unconstitutional and void in State of West Bengal vs Mrs Bela Banerjee, 1954 SCR 558
- 13 Taking possession of Sholapur Spinning Mills when the mill was closed first by an ordinance and then by an Act was declared to be overstepping the limits of legitimate social control legislation in Dwarkadas Shrinivas vs the Sholapur Spinning and Weaving Co Ltd, 1954 SCR 674
- 14 State of West Bengal vs Subhod Gopal Bose, 1954 SCR 587
- 15 With the exclusion of private bus owners from road transport, the UP Road Transport Act was held to be unconstitutional as it amounted to deprivation of property without compensation as well as violative of the fundamental right to carry on a business, trade and profession under Article 19 (1) (g) of the Constitution in Sagir Ahmed vs the State of UP (1955), 1 SCR 707
- 16 Rustom Cavasjee Cooper vs Union of India, (1970) 2 SCC 298
- 17 H H Maharajadhiraja Madhav Rao Jiwaji Rao vs Union of India, (1971) 1 SCC 85
- 18 A K Gopalan vs State of Madras, 1950 SCR 88
- 19 A D M Jabalpur vs S S Shukla, (1976) 2 SCC 521
- 20 Kartar Singh vs State of Punjab, (1994) 3 SCC 569
- 21 Naga People’s Movement for Human Rights vs Union of India, (1998) 2 SCC 109
- 22 People’s Union for Civil Liberties vs Union of India, 2004 (9) SCC 580
- 23 Randhir Singh vs Union of India, (1982) 1 SCC 618
- 24 State of NCT of Delhi vs Sanjeev, (2005) 5 SCC 181; Damoh Panna Sagar Rural Regional Bank vs Munna Lal, (2005) 10 SCC 84
- 25 State of West Bengal vs T K Ghosh (2005) 10 SCC 339; Deb Narayan Shyam vs State of West Bengal, (2005) 2 SCC 286
- 26 SAIL vs National Union Waterfront Workers, (2001) 7 SCC 1
- 27 Jagdambika Pal vs Union of India, AIR 1998 SC 998
- 28 Excerpted from P N Duda vs P Shiv Shanker, (1988) 3 SCC 167, where it was held that the statement does not amount to contempt

Inequality before the law

In a tribal state, and at a police station set up to redress atrocities against scheduled castes and tribes, a glimpse of the indifference, brutality and convenient roadblocks encountered by the marginalised looking for a modicum of justice

GARGA
CHATTERJEE

IN THE PUBLIC IMAGINATION Jharkhand is a 'tribal' state. In reality Jharkhand defies such characterisation with disturbing regularity. I say disturbing because the movement for a Jharkhand state, long after its inception, was really a broad movement to secure rights and dignity for the tribal people of the Chhotanagpur and Jangal-Mahal areas. The subsequent betrayal of that spirit is now out in the open.

I recently saw a full-page advertisement put out by the Jharkhand tourism department with the caption 'Divinity Reigns Here'. Eight of the 13 tourist destinations listed also detailed religious sites. Not a single 'divinity' of local Jharkhand extraction was on that list.

The marginalisation of the tribal people of Jharkhand cannot be starker in a province created in their name and nurtured by the dead bodies of their ancestors. Sometimes the state itself unwittingly lays bare its socio-political priorities even as it maintains a different rhetoric for public consumption. The advertisement in question was one such instance, and it provides an analogy for the tale I am going to tell. There is another part of the tale — one of law. In 'liberalism', there is a certain fiction about equality before the law and state which helps a large number of people sleep well at night. It is this fiction that helps create inward-looking technocratic bubbles among uppity *deshis*. Again, it is this fiction that helps newspapers pull off front-page stories about the protocol in the Rashtrapati's coronation or the details of the Formula 1 circuit in Noida, in a land with the world's largest number of hungry and the world's largest number of internally displaced people. The middle class needs a certain idea of reality and justice to enjoy their morning cup of tea. This tale is also a small snapshot of how fast that illusion can be shattered if we step out of the bubble, even for a minute.

The events in question happened on January 13, 2010, but really they have been going on since 1956-57. I was in Ranchi at the time. The Heavy Engineering Corporation (HEC), a public sector company, had been given huge swathes of land in Dhurwa, in the vicinity of Ranchi. The storyline is sadly familiar. The dispossessed were largely adivasis (indigenous peoples) who were thrown off their ancestral lands without compensation, though not without the promise of compensation. By 2010, HEC was unable to

use most of the land. However, by now, this land was prime real estate. Just the unused land was 3,500 acres. Of this, HEC had 'sold' 158 acres to the Central Industrial Security Forces (CISF) to set up a camp. Setting up a CISF camp was hardly industrial use of the land, the purpose for which the land had been originally acquired. How many times original intent has been set aside to swindle indigenous people in the Indian Union we will never know. But in this case, people cried foul the moment the plan was floated. Since the land was clearly not being used for the original intent for which it had been acquired, they demanded the return of the land to its original owners. Most of them remained uncompensated, nearly 60 years after the acquisition.

Dayamani Barla, an outspoken leader against the exploitation of adivasi resources, was at the forefront of the struggle from the start. After CISF began construction, the protesting adivasis dug in, staging a dharna at the site. (CISF began construction even though the matter was being heard in the high court at Ranchi.) The vigil went on for over six months, with desperately impoverished people often forsaking their daily wage to devote time to the movement. They were part of the Visthapit Morcha, inhabitants of the 36 villages that were uprooted, and had been keeping the resistance alive for generations. They also planted the Sarna flag nearby, a sacred symbol of indigenous religion and identity.

At dawn on January 13, CISF jawans uprooted the Sarna flag. Women at the dharna site who pleaded with them not to uproot the flag were beaten up. News spread and people assembled at the site. CISF jawans brutally beat the assembled people, men and women, including many elderly people. At least 20 people were seriously injured. The intimate and vigorous contact that a *lathi-charge* requires attests to the dehumanisation people suffer at the hands of these 'keepers of the law'. When an ideology makes it possible for an armed 30-year-old to beat and bloody an unarmed 65-year-old woman, it raises serious questions about all levels of the chain of command and the brutalising ideology that keeps this chain well oiled.

Many of the injured were hospitalised in a nearby facility run by HEC itself. People from Murma, Aani, Jaganathpur, Kute

Dayamani Barla leads the agitation of the adivasis in Dhurva



and Labeled villages joined in. Such solidarity does not wait for the theoretical ideas of participatory democracy that are a favourite pastime in Delhi and its surrounds.

My firsthand experience of a day on the other side of the law began when I joined Dayamani Barla as she visited the protest site shortly after noon. We arrived in a rickshaw and shortly after we got down, people assembled around Barla. We met people who were bandaged and bore clear signs of the recent trauma. For about two hours, the assembled people chanted slogans. There were a few *press-wallahs* too. The wounded and the violated poured their hearts out. Notes were taken. An agent of the local Congressman arrived, said that the MLA would have come himself but was 'busy'. The assembled people heard him. They seemed to have heard things like this before. A little distance away, in the makeshift CISF camp, a column of cars arrived. Smart men in khaki emerged and went inside. Salutes were exchanged. Life was going on as usual. At this point, it was suggested that a case be registered with the police. The process was, for me, a real eye-opener.

In liberaldom, I was taught that the process went something like this. I am aggrieved. I go to the police and lodge a complaint. A case is registered. The police pursues the case, investigates it, and books the guilty (if any). After that, the law takes its own course. This is indeed how it works when we pursue domestic help suspected of stealing.



The disused police station for handling cases of atrocities against dalits and adivasis

The next few hours made it plain exactly how and with what systematic indifference and brutality the odds of receiving a modicum of justice are stacked against the marginalised. And how I was not one of them. The first thing was the police station itself. It was not any police station but a special one set up with much fanfare exclusively to deal with atrocities against people from scheduled castes and scheduled tribes. This was the 'tribal' state living up to its promise. The station itself had an abandoned dilapidated look. In front was a board that had the names and cellphone numbers of the officers. The officers were not present. They were not on a mission; they were simply not there. A look at the police station showed why. The male and female lockups meant to temporarily hold those who had prima facie committed atrocities against people from scheduled castes and tribes clearly had not been used in a while. The female lockup was being used as a temporary store for sundry things. The thick film of dust on the male lockup showed that it too hadn't had a visitor in days.

If this was evidence of a lack of atrocities being committed against the marginalised, that idea was soon dispelled. After all, we were there to lodge exactly such a complaint. The policeman on duty wanted to avoid everything; how could

we prove that anyone had been hurt by the *lathi*-charge, he asked. Several injured men and women old enough to be his parents stood right in front of him. He told us to give him medical certificates from the doctors who had treated them. We were at a loss as the staff at the HEC-run hospital had made sure that the treatment happened without any admission records or discharge certificates. After all, it is not easy to see through the ulterior motives of an establishment that is bandaging your wounded arm. Thereafter, the story changed. The lone policeman said that there was no one to take the complaint. Dayamani Barla pointed out that he himself could do it. At this point, he called a higher-up on his cellphone. Then he said to us: "I have been told that this will be investigated thoroughly; there is no need for a written complaint."

The policeman on duty wanted to avoid everything; how could we prove that anyone had been hurt by the *lathi*-charge, he asked. Several injured men and women old enough to be his parents stood right in front of him. He told us to give him medical certificates from the doctors who had treated them. We were at a loss as the staff at the HEC-run hospital had made sure that the treatment happened without any admission records or discharge certificates

The gathered crowd insisted that he take the complaint. It was written up and handed to the policeman. The policeman simply kept it. We asked for a receipt. He said he could not give us one. At this point, I told him I was a journalist and that what he was doing was unfortunate. I also asked him his name. I did not look like an adivasi from the area and I had also spoken a smattering of English. Ironically, being non-*adivasi* or non-marginalised has some serious advantages in this *adivasi* province. For starters, my presence was acknowledged! The policeman agreed to put his name to the complaint copy as a receipt. However, a random name without a stamp and designation means nothing. He knew this, and so did we. He said that the stamp was in a cupboard which was locked, and that he did not have the key. Also, there was not enough ink on the stamp-pad. Barla, being a veteran activist, tried to pull strings to get the complaint received and stamped by calling a known *adivasi* in the police chain of command. The key suddenly materialised; so did a fresh stamp-pad. The receipt was stamped with the seal of the Union of India, four lions and all.

After the ordeal, sitting outside the police station in a tea stall, we noticed that a new multi-storey swanky police quarter was being built. White, clean, impeccable. Later, Superintendent of Police Mohit Bundas told the press: "The matter is simple. Everything was set right immediately." That is what you and I read in the news the next morning. All was quiet on the western front, as we would love to believe.

This was a glimpse into how even the bare minimum that is required to form the basis of legal action is denied to most people. And this is not an error of omission but systemic, procedural and regular commission. It is not dug deep in the system; it *is* the system. The sheer number of well-devised roadblocks in something so apparently basic as lodging a complaint, and how those roadblocks materialise or disappear based on who the complainant is, is something that positive beneficiaries of the Union of India need to understand. They need to understand the cost of their peace of mind, the uninterrupted revelry at the Blue Frog, the banter at Dilli-Haat and the positive confidence of the likes of Ramchandra Guha discussing who is the 'Greatest Indian'.

Justice, it is said, is blind. It does not see who the parties involved are. It simply delivers its judgment based on what it hears — the pure stream of logic and evidence. However, in the Indian Union, the lady of justice has posted at the door an agent who regulates admission. This agent is not blind, but deaf. He looks for those fit enough, safe enough, docile enough to admit. They need to be docile for they are the ones who will not want to examine the nature of the cloth that the lady of justice purportedly blindfolds herself with.

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Invisibilising mass violence in Gujarat

International law mandates the prosecution and punishment of all perpetrators of mass crimes, including heads of state and other leaders. But India has not defined state criminality in mass atrocities in its jurisprudence, making it difficult to address situations such as Gujarat in 2002

ANITA ABRAHAM

The need for a national mass crimes law

With the recent conviction of former Liberian President Charles Taylor by the Special Court for Sierra Leone (SCSL) on all 11 counts of aiding, abetting and planning war crimes and crimes against humanity in Sierra Leone, the jurisprudence of international human rights law and international criminal law, by attaching liability to a former head of state, has expanded in its application and covered the situation of impunity that prevailed during Taylor's regime.

Likewise, the prosecution of people who planned and conspired in the mass violence in Gujarat in 2002 — whether heads of state/leaders or other people actively engaged in the killings, rape and other major crimes — must be carried out in an unbiased court of law. It is necessary to invoke and incorporate into national law, the responsibility of commanders and superiors as well as the irrelevance of official capacity provided by international law, in particular the Rome Statute and the ICTY (International Criminal Tribunal for the former Yugoslavia) and ICTR (International Criminal Tribunal for Rwanda) statutes.

In the Indian context, specific acts and omissions committed by heads of state in the context of genocide and crimes against humanity have not yet been criminalised either through statutes or through judge-made laws. Till date, mass atrocities/crimes or gross human rights violations have not been defined in national legal jurisprudence; nor has it been acknowledged that the Indian state has committed specific types of mass crimes.

International law, through the enactment of the Rome Statute preceded by the Nuremberg Charter and Trials, the Genocide Convention, the Geneva Conventions, ad-hoc tribunals like the ICTY and ICTR, amongst others, has laid down a voluminous legal jurisprudence for the prosecution and punishment of all perpetrators of mass crimes, including heads of state and other ranks of leadership. The Rome Statute, the legal basis for the existence of the International Criminal Court, defines four substantive types of mass crimes — genocide, crimes against humanity, war crimes and crimes of aggression.

It is important for the Indian state to accept that there is a lacuna in the existing laws and state redressal machinery needed to address the situation of mass violence that took place in Gujarat in 2002. Further, there is a need to create legal concepts and jurisprudence for the description and criminalisation of specific forms of state criminality.

Procedure according to the law

Till date, the mass crimes and gross human rights violations that claimed the lives of thousands of people in Gujarat in February and March 2002, and due to which the Muslim community in Gujarat has still not been able to claim their political and legal entitlements, have been referred to as 'communal riots' or 'communal violence'. While the terms 'communal riots' or 'communal violence' suggest that the violence was initiated by a group of people belonging to one religious community upon another group belonging to another religious community, either due to provocation or for self-defence, the violent incidents that took place in Gujarat have nothing in common either with a spontaneous riot or a mob fight.

In many of the cases registered during incidents of mass violence in Gujarat in 2002, the actual facts of the case were different from the facts recorded by the police in the given case (1). In many instances, the perpetrators' modus operandi was to go in large groups/mobs to houses and areas in which Muslim families lived. Hence, in some areas or villages, Muslim families were killed and properties destroyed and in other areas Muslim families were threatened with their lives, and houses, shops and establishments burnt, looted and destroyed. Many families fled to relief camps. Sexual violence of the worst kind was committed against women and young girls. As is a known fact today, the people accused of the crimes lived in the same area/locality as the victims. As a result, the victims were more vulnerable because the aggressors were fully aware of the details of their families, the size of their houses, etc. The mobs would approach a house and kill its occupants; in some cases, if the residents managed to flee for their lives, the house was looted and set on fire. Since many of the perpetrators were known to the victims, in most cases they could be identified by the victims.

Close inspection of the first information reports (hereinafter referred to as FIRs) registered by the police shows that all details of the said offences have been left out. The FIR would be recorded in such a way that, instead of recording every single detail of the offences committed against a person and his/her family, a summary of the destruction of an entire village or locality spanning 3-4 km would be written down in six to 12 sentences. In many cases, it was made to appear as though altercations had broken out between two communities/groups of people leading to violence. The cases would go to trial as cross-cases, in an attempt to justify the violence as 'communal riots'. FIRs that covered offences committed over large areas were referred to as 'omnibus' FIRs, wherein instead of pointing out every offence pertaining to the person or his property, a few general sweeping statements were made in one FIR in order to cover all the aforesaid offences/crimes without naming either the victim or the perpetrators. Statutorily, it is mandated that when the commission of an offence is alleged, for example in a case of alleged murder wherein A kills B at location C, an FIR will be registered at the local police station highlighting all the relevant details varying between time of incident, date of incident, exact location, weapon of offence, possible eyewitnesses, number of victims, offences committed against them, what the victim was doing at the time of the incident (if known), and so

on. In other words, Section 154 of the Code of Criminal Procedure, 1973 (hereinafter referred to as CrPC) is drafted in a manner that envisages that the description of the event will be given in the best possible manner in order to determine the exact way the incident took place. The FIR is considered the fulcrum of an investigation; further and potential investigation turns on the details stated in the FIR. Hence, recording an omnibus FIR with little or no details, sometimes even false details, incorporating a number of cases, is the first step towards ensuring that the scales of justice are tilted in favour of the accused.

The truth of the events of the case was thus completely irrelevant to the investigating agency, and the entire exercise of taking down the victims' complaints was conducted in a manner that shielded and protected the perpetrators. The procedure was manipulated to hide the facts and enable the perpetrators to deny that anything had happened. Arguably, the entire state machinery connived to abstain from providing legal protection to victims of crimes committed against them in 2002.

It is pertinent to mention here that even if the information registered in an FIR is sparse and insufficient, if strong, reliable information is obtained subsequently during the investigation, that information can be placed on record by the investigating agency either through supplementary



Families mourn those who died in the 2002 Gujarat riots

statements or at the time the investigating agency files its chargesheet. These steps, which are mandated by the law, are enough to bring on record a transparent and truthful revelation of facts revealing the manner in which the offence was committed, so that accused persons are ably prosecuted.

In a situation where, in the rest of the state, cases are conducted with a sense of normalcy and by following relevant legal procedures, the absence of redressal mechanisms for victims of incidents that took place in Gujarat appears to have been a result of trying to achieve an invisibilisation of the mass violence that took place against Muslims in Gujarat in 2002. It has only been through persistent efforts by NGOs, the victims and their families, and interventions by the Supreme Court that several prosecutions have been fairly conducted.

Criminal prosecution

Criminal prosecution of people who have committed these crimes, especially those from among the leadership, must be carried out. People who indulge in mass violence in the form of mass killings, mass rape, mass pillage, mass arson, mass destruction of religious places of worship, even as they hide under the cloak of the leadership, must be held accountable in a democracy. It should be the mandate of any government, irrespective of political ideology, to avoid further incidents of mass violence in the name of religion or ethnicity, and render accountability by prosecuting and punishing the ranks of leadership. Kritz, while arguing for accountability, states: ‘In helping societies deal with a legacy of past mass abuses, the process of criminal accountability can serve several functions. Prosecutions can provide victims with a sense of justice and catharsis — a sense that their grievances have been addressed and can hopefully be put to rest, rather than smouldering in anticipation of the next round of conflict. They provide a public forum for the judicial confirmation of facts. They can also establish a new dynamic in society, an understanding that aggressors and those who attempt to abuse the rights of others will henceforth be held accountable. Perhaps most importantly for purposes of long-term reconciliation, this approach makes the statement that specific individuals — not entire ethnic or religious or political groups — committed atrocities for which they need to be held accountable. In so doing, it rejects the dangerous culture of collective guilt and retribution that often produces further cycles of resentment and violence.’ (2)

Levels of culpability

Legal concepts to incriminate the ranks of leadership for the commission of gross human rights violations must be evolved (3). It may also be relevant to create levels of culpability. The Rwandan government, which enacted legislation (4) in 1996 in order to address the genocide that took place in Rwanda, in 1994, created four levels



Zakia Jafri revisits her home in Gulberg Society, Ahmedabad, where her husband Ehsaan Jafri and several others lost their lives in the 2002 riots

of culpability: 1) Leaders and organisers of the genocide, and perpetrators of particularly heinous murders and sexual torture. 2) All others who committed homicides. 3) Perpetrators of grave assaults against persons not resulting in death. 4) Those who committed offences against property (5).

According to Kritz: ‘All those in the first category are subject to full prosecution and punishment. Provision of a series of incentives for people in Categories 2 and 3 — by far the largest categories — to come forward voluntarily and confess... Specifically, those in these two groups who participate in the ‘confession and guilty plea procedure’ which includes a full confession of their crimes, including information on their accomplices or co-conspirators, will benefit from an expedited process and a significantly reduced schedule of penalties... Those Rwandans who confess to their role in the 1994 genocide in exchange for lenient treatment need to do one more thing: they need to formally apologise to their victims... It assumes that, in this way, the process of criminal accountability may be more effective in facilitating national reconciliation. Finally, those in Category 4 will not be subject to any criminal penalties.’

The relevance of the Rwandan justice model to the mass atrocities that took place in Gujarat is substantial. It is pertinent to mention here that in several cases in Gujarat the accused approached the victims/witnesses to reach a ‘compromise’. While some of these cases may involve offences related to property, which may be compounded even legally, many cases in which the accused approached

the victims for a settlement or compromise are those wherein people have been killed in the violence. This is not permitted under the law. Jha states: 'The technical illegality and the impossibility of a legally valid compromise agreement of non-compoundable riot and arson offences is immaterial, given the prevalent culture of compromise which routinely facilitates hostile witnesses on the basis of agreements reached outside the courtrooms.' (6)

Hence, victims have to struggle for basic redressal mechanisms such as getting complaints registered, getting applications for further investigations allowed, participation in criminal proceedings, compensation, etc. In addition, they are forced to consider options for survival based on the terms of the accused who quite often are well-known persons of the village who use threat, including those of social and economic boycott as well as monetary inducement, to reach a 'compromise'. In many cases, while the victims may categorically refuse to 'compromise', some accept a compromise in exchange for promises of no further threats and no social boycotts in order to survive. Says Jha: 'The phenomenon of compromise, whilst illegal, is deeply institutionalised in the criminal justice system where the norms of poor investigation, inordinate delays and low conviction rates have been exacerbated by a communalised society where communal offences have not been diligently investigated or prosecuted.' (7)

While studying the aforesaid situation, it may be fruitful for the purposes of moving towards long-term reconciliation and avoiding future such events from taking place, if the courts in Gujarat effected the process of compromise by following legal procedures. This is especially relevant in view of the fact that even now, after the violence, the two communities are living together. And that the targeted Muslim community must be able to live in their hometowns on a par with the rest of the village. State intervention and judicial intervention is essential to enable this.

The following practices may be applied in less serious crimes. Sections 320, 265A-L and Section 306-308 of the Code of Criminal Procedure are compounding, plea-bargaining and grant of pardon proceedings provided in national criminal law, respectively. The provisions of Sections 320, 265A-L, 306-308 of the CrPC allows an accused to compound a matter, or plead guilty in order that the matter is settled on terms agreed to and negotiated by the victim. This provides a certain degree of closure for the victim who can even ask for a public apology and compensation where necessary. The entire case gets settled inside the courts. Hence, a plea-bargaining procedure or compounding procedure for less serious crimes such as those involving minor assault on persons or property could be undertaken in the context of the violence that took place in Gujarat.

These steps would be an improvement on the current situation in which the victims agree to a 'compromise', in

a coercive social and political environment. This way, the targeted Muslim community can at least begin the process of healing. For less serious crimes which do not involve offences that have caused death, etc, compounding or plea-bargaining in the context of mass crimes for minor offences that are permitted in Sections 320 and 265A-L of the CrPC should include (a) an apology by the accused persons to the victim; (b) narration of a truthful and accurate account of the facts regarding the commission of offences by the accused persons and; (c) where relevant, a disclosure of accomplices in the manner provided in Sections 306-308 of the CrPC. Plea-bargaining procedures in the context of mass crimes established by the state would assist in reconciliation between the two communities since it would finally allow the victims to be on par, politically, with the accused persons, and would allow the accused to accept and acknowledge their commission and participation in the mass crimes.

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Endnotes

1 The author has studied some of the cases registered in the state of Gujarat during her work with Nyayagrah, the justice programme of Aman Biradari, based in Ahmedabad, Gujarat. The views of the author are her own and do not necessarily reflect those of the organisation

2 Kritz, Neil. 1998. 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights'. *Law and Contemporary Problems*

3 Eichmann was convicted by a court in Israel in 1962 for endless war crimes and crimes against humanity and crimes against the Jewish people. Nino Carlos says: "While the Israeli court recognised that Eichmann did not bear direct responsibility for most of these crimes, it ruled that in the case of such massive crimes 'distance' between the agent and the victims did not diminish responsibility. On the contrary, in general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands." See Nino Carlos. 1996. *Radical Evil on Trial*. New Haven and London, Yale University Press, Introduction (vii-xii)

4 The 'Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed Since October 1, 1990', *Organic Law No 08/96* (August 30, 1996). See also H Morris, Madeline. 1997. 'The Trials of Concurrent Jurisdiction: The Case of Rwanda'. *Duke Journal of Comparative and International Law*, Vol 7: 349

5 *Id*

6 Jha, Prita. 2011. 'Paper on Compromise'. Unpublished paper on file with the author

7 *Id*

Citizen power or media power?

TV news media campaigns such as those for Jessica Lall and Priyadarshini Mattoo appear to be shaping and giving voice to public opinion. But is this democracy in action or a sensationalist, manipulative drama to raise ratings? Is it more about media power than citizen power?

MAYA
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JESSICA LALL, Priyadarshini Mattoo and Nitish Katara were young people allegedly murdered by the rich and powerful sons of politicians. In 2006, the accused in the Jessica Lall case were acquitted by the courts because 99 out of 100 witnesses turned hostile. A strong public outcry against the decision, relayed by electronic news media, rang out against the judiciary which had appeared to buckle (yet again) under the influence that the rich and powerful wield in India. Two electronic news channels — CNN-IBN Live and New Delhi Television (NDTV) — began a concerted campaign to seek ‘Justice for Jessica’. Using text messages, blogs and offline protests, CNN-IBN and NDTV generated a strong public response. Individuals unconnected to any of the families of the victims started their own campaigns on their behalf. It is believed that this was the rebirth of citizen power. From SMS and online campaigns and televised debates to memorials, public vigils and protests, these two channels were intimately involved in shaping and giving voice to public opinion. Shortly after the launch of these campaigns, the case was re-opened with fresh investigations and new witnesses.

On the surface it appears that this was a case of democracy in action: the political participation of citizens empowered by an activist media protecting their interests by bringing the powerful to book. But a closer look reveals how TV news can be a sensationalist, manipulative drama to raise ratings and selectively shape public opinion under the guise of viewer participation. The phenomenon of ‘SMS justice’ is often spoken of as the rebirth of citizen power. This article suggests that such public dialogue and action, believed to be a sign of citizen power, follows a discursive agenda set by the two channels and is about media power instead. The ‘Justice for Jessica’ campaign has been studied because it was the first such media-driven campaign (1). Since 2006, while both channels have had more audience-participation-based programmes we argue that at its core, the news media industry still drives the agenda, selecting causes that would most appeal to its target audience.

The cases

In 1999, Jessica Lall, a 29-year-old model, was shot in the head in a room full of people by Manu Sharma, the son of

Venod Sharma, a serving Member of Parliament. In 2002, Nitish Katara, a 22-year-old student, was allegedly murdered by Vikas Yadav, son of MP D P Yadav, for his alleged affair with Vikas Yadav’s sister. In 1996, Priyadarshini Mattoo, a 22-year-old law student was raped and strangled in her home by Santosh Singh, the son of the former joint commissioner of police. The accused in each case was acquitted by the lower courts. The grounds for acquittal of the alleged murderers appeared flimsy: there was a lack of forensic evidence, and key witnesses turned hostile. That they escaped convictions in the lower courts was not surprising to the jaded public but still upsetting because it was another sign of corruption in the system. It seemed all too coincidental that, yet again, sons of the high and mighty had gotten away.

In the tradition of investigative journalists uncovering corruption, NDTV and CNN-IBN began justice campaigns on their websites, through talk shows and offline ‘vigils for justice’ to protest the verdict in the Jessica Lall case. The campaign quickly encompassed the Mattoo and Katara cases as well. Viewers were encouraged to share their responses online and demand a fair trial to bring justice to the victims and their families. By the channels’ reports the response was positive: NDTV submitted a petition to the President of India pressing for a re-trial in the Lall case when they received 200,000 text messages of support from viewers (NDTV 2006a). The Mattoo and Lall cases were re-opened through appeals in the Delhi High Court, and in October and December 2006 the lower courts’ verdicts were overturned and both defendants found guilty of the murders. The media coverage of public opinion had been so persuasive that the chief justice of the Supreme Court, Y K Sabharwal had instructed judges to “go by the evidence before (them),” rather than pay heed to the media reports (NDTV 2006b).

The campaigns

The role of television in shaping, and being shaped by, a middle class audience is particularly relevant here. The English-speaking audiences accessing NDTV and CNN-IBN are a very small slice of the population, restricted to upper and middle class households (<http://www>).

indiantelevision.com). This population includes college and school students, working professionals, homemakers and retired professionals (IAMAI 2006). Considering that the audiences of these two channels are English-speaking and therefore upper/middle class, their politics are likely to be extremely specific and hardly generalisable in a country as



heterogeneous as India. This is reflected in and reinforced by the justice campaigns as will be described below.

Securing audience appeal

The three victims appeal squarely to a middle class TV-viewing, mobile-phone-toting audience. Jessica Lall was a middle class girl who became a model. Priyadarshini Mattoo was a student of law at Delhi University and lived in a middle class Delhi suburb. Nitish Katara was allegedly murdered because he refused to stop seeing his girlfriend, whose family believed that it wasn't appropriate for someone of her class/caste to associate with Katara.

Interestingly, Jessica was the only one whose photographs were routinely displayed on TV: soft focus, air-brushed and well-lit photographs from her days as a model. Priyadarshini's photograph, if shown, was a grainy black-and-white one; the other is one of the first police photographs of her car where she was attacked. Nitish Katara was rarely shown, but a framed photograph of him was always seen behind his mother Neelam when she appeared in TV interviews talking about her struggle for justice.

All three were also murdered in 'ordinary' contexts: in the course of work, at home or in a familiar, known setting. The everyday-ness of their lives punctured by horrific

Jessica Lall (above) and the 'vigils for justice' spawned by the NDTV and CNN-IBN campaigns



acts of rape and murder drew the audience into a closer subjective identification with the victims and interest in the progression of the news stories. Each of the deceased had a family member who became a well-known face on TV because of coverage of their fight for justice. After the campaigns began, each of these three people — Sabrina (Jessica Lall’s sister), C L Mattoo (Priyadarshini’s father), and Neelam Katara (Nitish’s mother) — became ‘regulars’ on TV news. Audiences were privy to interviews conducted in their homes and in the context of their everyday lives, family photo albums with pictures of the deceased as children and teenagers and descriptions of their personalities, traits, habits. Jasleen, a student who attended a rally in New Delhi in July 2006 to support an appeal in the Mattoo case said: “I am being selfish. I am doing it for myself. If it happened to her, it can happen to anyone in my family” (Roy 2006).

In contrast to their victims, the alleged perpetrators of the crimes were rich sons of politicians, whose evasion of punishment came as no surprise to the TV-viewing public. By selecting the issue of systemic corruption, TV news struck a resonant chord with its largely middle class audience, another source of appeal in this case. Corruption and systemic breakdowns affect the everyday lives of the middle classes. It is often the rich and powerful, who by their social location, enjoy privilege and access to power and never really have to ‘queue up’. Taking a swipe at politicians is thus extremely appealing to the middle classes. The following blog comment captures this sentiment.

In all these cases one thing has been common and that is the culprit has been a son or relative of a powerful leader or a businessman and the deceased has been a common man, who was at a wrong position at the wrong time. It’s mainly because of media and common man, that the Jessica Lall case has been re-opened. (Posted by Vivek Rawat on www.ndtv.com 1/4/2006)

The media shaping public opinion

In contrast to the ‘Justice for Jessica’ campaign, the tragedy of farmer suicides across the country in 2005-2006 or the murder of a dalit family in Khairlanji were not the sites of concerted campaigns by TV news channels or the public. The urban-rural, upper caste-lower caste, Hindu-Muslim divisions frame the everyday social experiences of middle class Indians. Reinforcing the black-and-white binaries that cleave our world — the selection of these urban stories, the representations of the victims as ‘normal’ and unsuspecting, their families as average and middle class, politicians as ‘greedy’ and the common man ‘suffering’ under them — allowed the two channels to marshal their power in constructing a specific representation of social reality. Of all the tragedies that afflict rural Indians every day, none of them (yet) has been the subject of such a concerted TV campaign as ‘Justice for Jessica’. These two channels consciously chose to reflect a very specific social geography because of the greater appeal it would have to their audience.

Those opposed to the media campaigns, like Ram Jethmalani (lawyer for defendant Manu Sharma), say that the media overstepped its role as impartial reporter by prejudicing the viewer, declaring people guilty before they were fairly tried in court. But many viewer posts on the channels’ websites position the media and judiciary as the last bastion of hope for this country.

I believe that the only two systems that can bring about change in the country are judiciary and media. I think both judiciary and media have only taken first baby steps towards a flawless society. I am sure both will learn from each other and lead our society to safety. (Posted by Harish Arora on www.ibnlive.com 20/11/2006)

CNN-IBN editor-in-chief Rajdeep Sardesai defended TV news overstepping its line in shaping public opinion:

“If in the ‘public interest’ — and that must be the defining badge for all journalism — a hidden camera is able to expose the rich and powerful, should they not be held accountable for their actions? Is that not, after all, the ultimate goal of the media? Or are we to see ourselves only as stenographers who simply reproduce banal soundbites? Moreover, who really is in the dock here: the journalist who is attempting to uncover a dark reality or the ‘stung’ individual who has something to hide?” (Sardesai 2006)

By juxtaposing the lofty ideals of journalism with the ordinariness of stenographers, and the idea of the intrepid journalist uncovering ‘dark realities’, Sardesai highlights the power of the media again. On NDTV’s 9 pm news broadcast on the day Manu Sharma was convicted by the Delhi High Court of Jessica Lall’s murder, the extensive news coverage included segments titled: ‘The voice of the common man’, and ‘The people have spoken’. By ‘speaking up for the common man’, the two channels reinforced the hierarchical division between the media and the public while mouthing a rhetoric of inclusiveness, one that was perhaps driven by a need to maintain audiences and the markets they represent. The campaigns, while positioned as an expression of public opinion and demands, in fact reinforced the media’s power to control which issues are highlighted and to what extent they choose to involve and stir up the public.

Twenty-four-hour news programming supported by the Internet allows channels to position themselves as interactive and engaging in a way that draws in viewers-as-citizens, giving them a space to express their opinions on topical issues. With increasing access to technology, citizen-journalism and user-driven content is leading TV news in India into a different phase of its evolution. Being on TV in India today, or having some form of presence in or contact with the ‘media world’ might have the status that owning a TV set had 20 years ago. Elation comes from the simultaneity of people across the country sending in their text messages and watching them scroll across the TV screen on the 9 pm news. Thus, in these rituals of communication,

ordinary people have access to the specialised and rarefied world of 'the media'. But not all are easily swayed; this viewer's biting reaction also reflects the specialised knowledge and access that TV news journalists have, which further emphasises the separation between the two worlds.

Today's journalists in the electronic media think that they can bully their way into anybody's life. First of all they should do their homework. Just because you can speak some good English, have a degree in journalism, have a camera and mic in your hand, you don't become an expert on everything. (Posted by Langda Tyagi on www.ibnlive.com 15/10/2006)

Conclusions

While there are welcome changes in how TV journalism engages its viewers and solicits their voices, there are questions as to who is dictating the agenda — the citizen or the media news industry. As viewers, we are so entrenched in our position that we are susceptible to the unspoken power of the media, allowing ourselves to be herded along the path of engagement set by it. Media power then is that much more subtle when the causes appear noble.

When democracy does fail, the media's role in engaging the citizen needs to be carefully considered. Media power, though abstract and complex, underlies much of the channels' promises of justice and empowerment.

Responding to the criticism in the print media about TV news being selective in issues they give voice to, Ghose (2006b) amends her channel's view saying that citizen power now needs to be available in rural India. However, it is never as simple as capturing a new set of causes in the same programmed format. *Peepli Live*, a Hindi movie released in 2010, takes a scathing look at the machinations of television news in the present moment. Capturing a growing awareness of the farcical nature of the mediation of news, the 'justice campaigns' portrayed in this film focus on rural India and the tragic phenomenon of farmer suicides. The film reiterates the idea that the narrow discursive engagement set by electronic news media has become a mutant force, barely about anything except television itself.

Additionally, the political and economic interests of TV news channels cannot be ignored. In saying that India's 'notoriously opaque society' forces journalists to use a range of methods to create transparency, Sardesai (2006) sounds philosophically naïve as he does not say out loud that journalistic practice itself is embedded within power structures, ideologies, and the consumerist demands of running a TV news channel. In this highly charged media world it is unlikely that the citizen's voice is in command.

Finally, the idea that it is only the media that can 'save' Indian democracy is echoed through viewer responses online

and reflects its special, specific authority. It is as if there is no possibility for any other form of civic action to 'liberate' the country, only the penetrating eye of the camera. If the efficiency of the legislative and executive arms of this democracy is questionable, the alternative strategy of media action as the best way to redress the situation is hardly a wiser choice.

In order to challenge discriminatory and unfair practices endemic in any society there is a need for strong, creative and independent citizen voices. However, the mediations of citizenship by TV news are bound to be co-opted and appropriated as this case study has shown. Citizen power is not impossible. Citizen power needs to be grounded in its integrity and independent, subtle, subversive methods. The debates on the role of TV news journalism in this democracy are far from over. There are wars of competing truths (and ratings) to be fought yet. The magical whirligig that is Indian TV reveals as much as it hides; it enchants as much as it distorts. Like children on a funfair carousel, it is easy to lose sight of who controls the music.

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Endnotes

1 This paper has looked at the events and ideologies of the campaigns, the blogs of two CNN-IBN journalists, news broadcasts and news stories on CNN and NDTV's websites, and 300 viewer responses to the two news channels' websites between February 22 and November 22, 2006. This paper was originally written in January 2007

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Accessing justice in times of terror

Knowing the law is different from experiencing it. Experience tells you that sometimes the problem is not that people have no access to justice, but that 'justice' has too much access to them. These people include tribals accused of waging war against the state, Muslims accused of sedition, and slum-dwellers who have encroached on public lands

MAYUR SURESH

I

IN A MILIEU OF FEAR and uncertainty, on what terms does one speak of justice? Does one look to the law's protection? Or does one flee, bearing a well-founded fear of justice? If the 'justice system' is not merely an arbiter of legal meaning and the referee of social conflicts, but rather deeply implicated in engendering these conflicts, what does this mean for our access to justice?

'Access to justice is recognised as being essential to human development, for ensuring democratic governance, in reducing poverty and for the purpose of conflict prevention,' (1) proclaims a government publication. Sometimes, the problem is not that people have no access to justice, but that 'justice' has too much access to them. Tribals accused of waging war against the state, Muslims accused of sedition, slum-dwellers who have encroached on public lands. The courts, police and their processes often are very much part of the conflict. Occasionally, the problem isn't so much about access to justice as it is about your ability to run away from it.

Driving in Delhi one afternoon, I read on the back of an autorickshaw: '*Jis desh mein log sansad aur nyayalay se darte hain, waise desh mein azadi ya ghulami mein kya farak?*' (In a country where people are scared of parliament and the courts, what is the difference between freedom and slavery?) Perhaps it is a commentary on the present moment, or maybe it speaks from memory, one really can't be sure. But the received wisdom from the back of an autorickshaw tells us that sometimes you cannot tell the difference between freedom and slavery, between law and its violence. Indeed, the expressions, 'the law in force' or the 'law is enforced' recognise at some level that the application of force lies at the centre of the judicial process (2).

I first met Akram, or Akrambhai as I came to call him, in May 2008, on my first day at the Delhi High Court. I had come to Delhi from Bangalore to help a lawyer friend who had just been engaged to challenge the government-imposed ban on an Islamic organisation. The central government had notified the fourth consecutive ban on this organisation under the Unlawful Activities (Prevention) Act, 1967. The

proceedings against the organisation were conducted by a special tribunal comprising a single judge of the Delhi High Court, and took place in the high court complex. During the day's confusion, I was separated from my lawyer friend and walked into the complex with Akrambhai. As we passed through security at Gate No 5, a security guard asked me to deposit my cellphone with the reception. Akrambhai immediately shouted: "Can't you see he is a lawyer? He can take his cellphone in." As he shepherded me through security towards the court building, he explained that there were two entrances into the court building, one for lawyers and one for the general public. I was to go through the lawyers' entry and meet him inside. Once inside, he rapidly shot out directions, telling me to go to the annexe building, first floor, courtroom 35. I nodded blankly. I arrived at the courtroom half-an-hour into the proceedings, lost in the seemingly labyrinthine corridors, and sat down next to Akram in the rows of chairs at the back of the courtroom. These chairs, wooden and without cushions, were meant for the general public, and apparently unworthy of lawyers. He teased me: "Go to the front! Sit with the lawyers! You're supposed to be a lawyer!"

There are many words and phrases that are used to describe the judicial process based on the rule of law. 'Clarity of rules' comes to mind, as do 'transparency', 'natural justice' and 'due process'. One rarely associates the words 'confusion', 'panic', 'frustration' or 'boredom' with courts of law. Yet an experience of the courts can most often be described in these very words. Goodrich writes: 'Assuming that the process of justice, of receiving a hearing, is best understood in terms of that point at which law is created and applied to members of the public (that is, at the point at which it becomes law for them) then the image of legal rationality as a phenomenon of texts and rules has only the most indirect relevances. The day in court is likely to be experienced in terms of confusion, ambiguity, incomprehension, panic and frustration...'

II

Akram was born in India. When he was in high school, he and his parents migrated to the United States where they were naturalised as citizens and settled down in the suburbs

of a big city. Akram never fit in. "They were afraid of my long beard," he says half jokingly. He returned to study in a madrasa in Azamgarh, Uttar Pradesh, where he met Umer, who would become president of the Islamic organisation at the time it was first banned in 2001. Akram joined the organisation in 1985. He rose to become the secretary of one of the organisation's state units and continued till his mandatory retirement at the age of 30. He set up a printing unit in Gujarat where he printed pamphlets, visiting cards and wedding invitations. It was burnt down in the anti-Muslim riots in Gujarat in 2002, after which he moved to Delhi.

Over the years, I came to appreciate Akram's dark sense of humour. He once asked me, almost as if asking me a riddle: "Do you know why Muslims have so many children? The police take away two children as terrorists, two they kill in an encounter; they leave one child to take care of us in our old age."

On a rainy September morning of 2011, I headed to the Delhi High Court to watch the proceedings of an appeal filed by Akram and his brother-in-law Javed, against their conviction by a special court constituted under the Prevention of Terrorism Act (POTA). Their crime? According to the police chargesheet, a 'secret informer' told the Delhi police's anti-terrorism wing, the Special Cell, that Akram and his brother-in-law, who were members of the now-banned organisation, were putting up anti-national posters in a predominantly Muslim area in south Delhi at a busy intersection, in broad daylight. The posters which were described in the chargesheet had an "anti-national" slogan — 'Destroy Nationalism. Establish Khilafat' — in big letters,

An accused in 14 terror cases, Ali spent half of his 36 years in jail, eight of those in Tihar... He pulled out a copy of a letter that he had written to the high court asking that his case be assigned to a fast-track court, as in the six years since its institution no proceedings had been held

with a picture of a closed fist crushing the flags of Russia, the USA and India. At the bottom of the poster were several "Muslim youth raising hands", below which was the name of their organisation. The special POTA court convicted them under Section 124A of the Indian Penal Code (sedition), and Section 20 of the Prevention of Terrorism Act (membership of a terrorist organisation). They were sentenced to seven years for sedition, and five years for membership of a banned organisation.

As if prosecuting someone for terrorist offences for putting up posters wasn't bad enough, the trial itself was a bit suspect. The only witnesses were police witnesses. There were no independent witnesses to corroborate the police's story, when the prosecution itself argued that the two were putting up the posters at a busy intersection during the day. "The police have no reason to lie," the court proclaimed. Akram once hinted that his lawyer deliberately messed up his defence to cut a better deal with the cops in another case.

The evening before arguments on his appeal were set to commence before the high court, I spoke to Akram and we fixed to meet at the courtroom. On my way to the high court, I received calls about a bomb blast at the court. I shrugged off the news, as only the previous week similar news of a car bomb at the court had turned out to be a car that had caught fire. But as I approached the high court I began to hear sirens and saw police cars race towards the court. The police had cordoned off an area around the visitors' entrance to the court complex. From beyond the yellow tape and over the heads of the crowd that had gathered I could see the mangled roof of the visitors' reception at Gate No 5, where Akram and I had entered the court complex three years before.

I tried Akram's cellphone number and received a 'switched off' message. I called him again and again only to be met with the same reply. I wasn't sure what I feared more: that he had been injured, or worse, killed, in the bomb blast or that he would be accused of planting the bomb, arrested and would disappear into the bowels of the state. As Akram himself once told me: "Once you are accused of a terrorist crime there is nothing you cannot do: from making stones cry to being in two places at once. They can accuse you of anything, and it will be true." I telephoned our common friend and asked him if he had heard from Akram. He too had not heard from him and was trying to get through to his cellphone. We sent texts and repeatedly called him. Finally, two hours after the blast, I received a call from Akram. "I am all right," he said. "I am at my lawyer's office." "Were you at the blast site," I asked him, and immediately bit my tongue. I knew Akram did not like talking over the phone as he suspected that his phone was being tapped. After a long pause he repeated: "I am at my lawyer's office. I am all right." "Please let me know if anything happens," I said, anticipating a midnight arrest,

blindfolds and torture — stories of others who had been accused of terror crimes. “Insh’allah, everything will be all right,” he replied and ended the call.

How does one imagine the law, the state, the justice system when it can enter and recede from everyday life with no predictable pattern? When one can be killed in an ‘encounter’, or blindfolded and kidnapped at any moment, one has a more complicated relationship with the rule of law than merely seeking it out in search of justice. The experience of the law involves the ability to ‘stand in an atmosphere whipping back between clarity and opacity, seeing both ways at once’. We have to look at the law differently. In order to have a perspective on the law’s violence, we need to cultivate the ability to move rapidly between the optics of blur and focus (3).

Perhaps the ability to attend to the confusion, panic and frustration of law involves a different way of looking at our justice system. Rather than expecting clarity in the law and its processes, we should expect something else. Reading the law does not involve looking at the text directly. Rather, it involves looking through the text, with the letters slightly blurred.

III

The police come in various avatars. In one incarnation they illegally detain, torture and even kill people. The police abuse human rights with impunity — they stage-manage ‘encounters’, foist false cases and crack down on democratic protests. In another form, we invoke them as protectors, call upon them to protect the weak and underprivileged, and demand that they prosecute offenders. In either case, one can’t imagine the law without its enforcers, its muscle — the police.

There is a strange and complicated relationship between the police and the terrorists. And no, I’m not simply making the point that the state can also unleash terror. Anthropologist Michael Taussig argues that to understand the ‘law of the police’ one must acknowledge two things: firstly, that the police stand outside the law, and secondly that the power of the police is bound to be corrupt as it combines might with right. ‘Thus, no matter how much moral imperative dictates weeding out corruption among the police, intelligence decrees that one approach this with a certain pessimism, understanding the task as endless, if not forlorn in its necessity.’ (4) The question is not so much what differentiates the police from the criminal, but rather the moments at which they unite. Both police and criminal stand outside the law; at times it’s difficult to tell one from the other. And at times, strange relationships emerge between them.

I was sitting in a trial court one day between Shahid (name changed), a person accused of killing a police officer during the course of an ‘encounter’, a police officer, Sub-Inspector

Dharamveer (name changed) who had taken part in that encounter, and a witness against Shahid. We were all waiting for the proceedings to begin.

Shahid (to Dharamveer): I heard about your son. I was very sad to hear that he died.

Me: What? Your son died?

Dharamveer: He had cancer. We came to know eight months ago, and then he passed away one month ago.

Me: I’m so sorry.

Dharamveer (to Shahid): Who told you?

Shahid: Muzzamil and Rizwan.

Dharamveer: *Achcha*, yes. The two Bangladeshis... they are the best of friends. I had arrested them. When I caught the two of them and I was interrogating them, I told Muzzamil that out of the two of them, one of them had to die. You choose. Then Muzzamil told me to kill him since Rizwan was still young. Then I told Rizwan the same thing and Rizwan said, “kill me”. Look at their friendship! Another time, I caught two brothers and interrogated them. I told the younger brother that from the two of them, one of them had to die. He told me to kill him as his older brother had just got married. Then I asked the older brother the same question. Do you know what he told me? He told me: “I’ve just got married, so kill my younger brother”! What kind of world is this? Two brothers and two best friends. The friends say “kill me” and the brothers say “kill the other”!

After a brief lull in the conversation I turned to Shahid.

Me: So what do you do in jail?

Shahid: I’m studying law.

Me: *Achcha*, that’s great.

Shahid: I was anyway getting a practical training in law, so I thought I might as well study it properly (laughs).

Me: Is Humam (another terror-accused) also studying law?

Shahid: No. He’s studying BTS.

Me: BTS?

Shahid: Yes, Bachelor of Tourism Studies. He was saying that for 10 years we can’t go anywhere, so we might as well see the world after we are acquitted and come out of jail (laughs).

Dharamveer: *Haan*, in these sorts of cases your entire youth gets wasted. Are you the only accused in this case? Do you have any other cases against you?

Shahid: *Haan*. I am alone in this case. I was accused in another bomb blast in ***** but they have not filed a chargesheet as yet.

Dharamveer: What about Humam?

Shahid: He's only in that same bomb blast case.

Dharamveer: *Achcha*, anyways in this case there is no strong evidence against you. This case against you will probably be dismissed and you will be acquitted.

Shahid: I have full faith that I will be acquitted.

At this point the court master called the case. When asked to point out the person involved in the killing of the police officer, Sub-Inspector Dharamveer pointed straight at Shahid. Dharamveer then faced a cross-examination by Shahid's lawyer, where his memory of the events was questioned, his presence at the scene of the 'crime' was doubted and he was accused of fabricating evidence against Shahid.

As Dharamveer left the court following his deposition, he stopped in front of Shahid. Shahid bent to touch Dharamveer's feet. Dharamveer stopped him, held Shahid's face and blessed him.

Legal knowledge comes in a variety of forms. I may brandish my law degree while others may claim an activist knowledge of the law. Police officers know how to tweak investigations so that evidence is, or at least appears to be, legally obtained. Some lawyers post signs outside their stalls in court complexes: 'Court marriage, affidavit, stamp paper typing, anti-ragging undertaking can be done here'.

All the terror-accused in Delhi are kept in Jail No 3, Tihar Jail. In the jail, legal knowledge is a shared asset and becomes self-organised; an organic effort. The older convicts and undertrials pass down legal knowledge — which judges convict, which acquit, how to write petitions, which lawyers are good, and which ones will get you convicted.

An accused in 14 terror cases, Ali spent half of his 36 years in jail, eight of those in Tihar. He was acquitted in all but one, and his lawyer is confident that the one conviction will be overturned on appeal. He tells me: "When I went into jail there was no Internet or mobile phones. All of this is a new magic to me. I feel lost in this new world." But he did seem at ease while taking me through his case documents. Delving into a bulky file, he pulled out a copy of a letter that he had written to the high court asking that his case be assigned to a fast-track court, as in the six years since its institution no proceedings had been held. He then showed me the high court's order which, in treating the letter as a writ petition, directed that the sessions court hold day-to-day hearings of the case to dispose of it within six months. "Did you get this done through legal aid," I asked. He

laughed in response. "Then how did you know how to do this?" His reply: "Because one day I was telling *chacha* (an older inmate of Jail No 3) about one of my cases that had not even begun. He said I should write a letter to the high court, and told me it had been done before. He gave me a copy of someone else's letter asking for a speedy trial, and he said: 'Here. Take this. Copy this, add your details and bring it back to me. I'll correct it for you.' I wrote it out and took it back to him. He took out a pen and made corrections. I then made a fair copy of the letter and sent it to the high court. After this happened in my case, news spread and everyone started asking me for copies of my letter. So I made copies of it and gave it to whoever wanted it." Later, he added: "I really wasn't sure if it would work or not. I was just shooting in the dark." Who says that a 'traditional' legal practice is any different?

There has been a tendency to frame issues of access to justice via the tropes of literacy and awareness, where the needs of the people are defined in pedagogic terms. We hold 'rights awareness workshops' with vulnerable communities, teaching them about their rights under the law. In the context of criminal law, we often tell people about the Supreme Court judgment of D K Basu. It says that complainants are entitled to a copy of the FIR that the police are legally bound to register. If arrested, we are entitled to know the reason for our arrest, and that the name and badge number of the police officer arresting us must be clearly visible. We are also told that, once arrested, we must be produced before a magistrate within 24 hours.

Access to justice initiatives do not, perhaps cannot, tell us that the police can never be policed. And they cannot tell us how we are to live, once we are arrested. It cannot tell us how to forge friendships or how to nurture communities while incarcerated in jail. Nor can it tell us of the relationship between these communities and the way we inhabit courtrooms and other legal places. Accessing justice sometimes involves delving into the shared and quotidian knowledge that marks the communities we inhabit, legal awareness not from the top down but from a visceral experience of the law.

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Endnotes

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- 2 Costas Douzinas and Ronnie Warrington. 'A Well Founded Fear of Justice: Law and Ethics in Post-Modernity'. *Law and Critique* Vol II No 2 (1991)
- 3 Michael Taussig. 'Terror as Usual: Walter Benjamin's Theory of History as a State of Siege' in *Social Text* No 23 (Autumn-Winter, 1989)
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Impunity in the name of war against terror

When and how did the purveyors of illegal execution gain the respectable title of ‘encounter specialists’? Terrorism is redefining our criminal justice system. It produces a sense of emergency, calling for the loosening of ethical compunctions, weakening established conventions of legal procedure, and fetishising encounters as legitimate means of disbursing justice

MANISHA SETHI

IT WOULD BE INTERESTING and insightful to map the trajectory of the term ‘encounter’. How and when did it gain such currency? At what point did it seep into our collective consciousness and invade our legal discourse? When did the purveyors of illegal executions gain the respectability and indeed glamour of ‘encounter specialists’?

By the 1990s, opposition to such killings — and torture and illegal detention — had acquired a critical momentum leading to the creation of the NHRC (National Human Rights Commission) first and then to the issue of its guidelines on encounter killings, initially in 1997, revised later in 2003.

The recommendations of the National Human Rights Commission on encounter killings clearly state that ‘when information is received that death was caused in an encounter as a result of firing by the police, prima facie the ingredients of culpable homicide under Section 299 of the IPC are satisfied. That is sufficient to suspect that an offence of culpable homicide has been committed’. The procedure to be followed in case of any death arising out of an encounter with the police was laid out as follows:

- When the police officer in charge of a police station receives information about deaths in an encounter between the police party and others, he shall enter that information in the appropriate register.
- Where the police officers belonging to the same police station are members of the encounter party whose action resulted in deaths, it is desirable that such cases are made over for investigation to some other independent investigating agency, such as the state CBCID.
- Whenever a specific complaint is made against the police alleging commission of a criminal act on their part, which makes out a cognisable case of culpable homicide, an FIR to this effect must be registered under appropriate sections of the IPC. Such a case shall invariably be investigated by the state CBCID.
- A magisterial inquiry must invariably be held in all cases of death which occur in the course of police action. The next of kin of the deceased must invariably be associated with such an inquiry.

- Prompt prosecution and disciplinary action must be initiated against all delinquent officers found guilty in the magisterial inquiry/police investigation.
- The question of granting compensation to the dependants of the deceased would depend upon the facts and circumstances of each case.
- No out-of-turn promotion or instant gallantry awards shall be bestowed on the concerned officers soon after the occurrence. It must be ensured at all costs that such rewards are given/recommended only when the gallantry of the concerned officer is established beyond doubt.

The right to private defence

The fate of the NHRC guidelines was not too different from the fate of the commission itself: meaningless. There is no mechanism to ensure that the guidelines are actually followed or implemented. Being the perpetrators as well as the recorders of crime, the police cleverly circumvent and distort the legal requirements, turning it to their advantage. Instead of registering a crime under Section 302 of the IPC — culpable homicide amounting to murder — against the police officers involved in the encounter killing, what is registered is a case of 307 of the IPC — attempt to murder — against those killed! Indeed, writing to the chief ministers in 2003 about the revised guidelines, the chairperson of the NHRC displayed a surprisingly accommodative attitude towards deaths caused by the police.

‘The police does not have a right to take away the life of a person,’ begins the letter. ‘If, by his act, the policeman kills a person, he commits an offence of culpable homicide or not amounting to murder, unless it is established that such killing was not an offence under the law.’ The chairperson felt it a bounden duty to explain to the chief ministers that ‘under the scheme of criminal law prevailing in India, it would not be an offence if the death is caused in exercise of right of private defence’. He then helpfully adds: ‘Another provision under which the police officer can justify causing the death of a person is Section 46 of the Criminal Procedure Code. This provision authorises the police to use reasonable force, even extending to causing

of death, if found necessary, to arrest the person accused of an offence punishable with death or imprisonment for life.' Thus, it is evident that death caused in an encounter if not justified would amount to an offence of culpable homicide. Further, seeking details of deaths in police operations, the NHRC asks the states to furnish the circumstances leading to death. It gives the police three choices of circumstances: a) self-defence in an encounter; b) in the course of dispersal of unlawful assembly; c) in the course of effecting arrest. (Letter to chief ministers from NHRC Chairperson A S Anand, December 23, 2003. Accessed at <http://nhrc.nic.in/Documents/RevisedGuidelinesDealingInEncounterDeaths.pdf>)

The absence of even the most common circumstances in which encounters take place — such as abductions preceded by illegal detention and unprovoked shooting on unarmed persons (circumstances with which the NHRC must have been familiar, if only through the complaints it receives) — puts in serious doubt the motivation of the NHRC to secure the rights of citizens as opposed to the claimed right to self-defence of the police forces.

However, the right to self-defence is hardly self-evident.

The Supreme Court has ruled time and again that private defence is a right which must be demonstrated. In *State of Madhya Pradesh vs Ramesh*, in 2004, the Supreme Court ruled that 'where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record'. (<http://indiankanoon.org/doc/171461/>)

No doubt, the apex court was ruling about a private citizen's right to self-defence. Would it change significantly if the agent of death and violence was a policeman? The law clearly envisages that a case of culpable homicide — even if purportedly in self-defence — be booked against the police party, thereby granting no special exception to the police when it takes life. Moreover, under Section 105 of the Indian Evidence Act, the mere claiming of exception does not by itself remove the burden of satisfying the court of the existence of circumstances which bring the case within

A girl looks on as police secure the area during the 2008 Batla House encounter in Delhi. Police shot two suspected militants



REUTERS/Adnan Abidi



Protesting the Batla House encounter

any of the General Exceptions in the Indian Penal Code. But our police continue to claim, and are granted, exception as a right.

Dead, hence guilty

Section 46 (3) mandates that nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life. This brings us to the object of the violence, and not its agent. It also presents us with a strange circularity: A is killed; A is alleged to be guilty of crimes attracting death or life sentence; thus A has been killed in good faith; ergo the encounter is genuine. If the genuineness of an encounter killing is to be built on the guilt of the encountered, there is an immediate shift in discourse. The police only need demonstrate an allegation to justify an encounter, shifting the burden of proving their innocence on those killed. And, as everyone knows, dead people don't talk. This is the ultimate convenience of an encounter killing. It effectively silences the victim and erases the possibility of trial for the alleged guilt.

Consider for example the encounter killing of 19-year-old Ishrat Jehan, accused post mortem of being a Lashkar-e-Toiba operative on her way to assassinate the Gujarat chief minister (who incidentally built his Hindu *hriday samrat* reputation on the dead bodies of several purported assassins). When the Tamang report established that the teenager had been killed in cold blood, former Home Secretary G K Pillai continued to defend his affidavit in the Supreme Court wherein he had sworn that the slain girl was a Lashkar operative. Pillai was driven by the need to establish guilt.

Or take the Batla House 'encounter'. No court of law will examine the circumstances that led to the death of Atif Amin and Mohammad Sajid. The Batla House encounter trial currently pending before a court in Delhi seeks to bring to justice the killer of Inspector Sharma. The deaths of Atif and Sajid have become inseparable from their alleged guilt — of

being terrorists of the Indian Mujahideen — and therefore need no resolution.

In fact, terrorism — or at least its spectre — is effectively redefining our criminal justice system. There is a marked shift from law enforcement to securing the nation's sovereignty and integrity, from crime to waging war, from ordinary laws to 'special' ones. The drumbeats of war allow the loosening of ethical compunctions, weakening of established conventions of legal procedures, and fetishisation of encounters as legitimate means of disbursing justice.

It is instructive to follow the message of a former chief justice of the Supreme Court, the very same judge who insisted on subjecting the right to private self-defence to extreme scrutiny. Speaking at a seminar at the Indian Law Institute on the theme of 'Investigation and Prosecution of Offences Relating to Terrorism', Justice Arijit Pasayat, referring to Ajmal Kasab, said: "He is not fit to be called a human. He is an animal. So what is required is animal rights, not human rights." Kasab is a convenient shorthand for appeasement of 'human rights alarmists' — credit must go to *The Economic Times* for coining this term — immediately invoking the apparition of a biryani-chomping, jihad-crazed terrorist undeserving of the refinements of legal procedure.

Morale booster

The very term 'terrorism' produces a sense of urgency and emergency, calling for suspension of ordinary norms. At times, the courts and institutions of democracy see their role as perilously close to that of film stars on the war front: cheering the troops. The Batla House 'encounter' provides an apt illustration of this tendency. The following is an excerpt from the communication received by the NHRC from the office of the deputy secretary (home) informing it of the reasons behind the lieutenant governor's refusal to grant sanction for a magisterial inquiry into the case.

He (Lt Governor) has further observed that in these circumstances, when the police went to apprehend the accused and they were fired upon, there was no option with them but to open fire in self-defence and to arrest the accused. The modules of the Indian Mujahideen have conducted bomb explosions in various parts of the country including Delhi, Uttar Pradesh, Rajasthan, Gujarat, Karnataka, Andhra Pradesh, etc, subjecting police officers, who have worked out this case at the cost of loosing (sic) a gallant colleague and nearly loosing (sic) another would be highly demoralising and would weaken the resolve of the police officers to fight against terrorists. A police officer confronted by armed terrorists should not have to start thinking whether to die of the firing from the militants or if the militant dies to face the magisterial inquiries which are to follow. The Crime Branch is already conducting investigation of the shootout. Two accused persons are yet to be arrested. Crime Branch is expected to file its

chargesheet in the court shortly where after the case will be subjected to due judicial scrutiny.

We return once again to the tautological reasoning of guilt and murder. However, the lieutenant governor deems it fit to not only pronounce his verdict in the Batla House encounter case but clearly settles it in favour of all police officers who must not be allowed to be demoralised by magisterial inquiries which are to follow their 'fight against terrorists'. This reasoning was considered perfectly acceptable by the NHRC — which while issuing the guidelines on encounter killings had already explicitly spelt out the escape route. Little surprise then that the NHRC in disposing of its inquiry and in giving the police a clean chit chose to rely on the account of three senior policemen.

Civil rights activists approached the Supreme Court seeking a judicial probe into the encounter killings on grounds that the NHRC had accepted, in toto, the police version while disregarding conflicting evidence and voices. The Supreme Court chose also to play cheerleader to the policemen saying that an inquiry one year after the encounter would only negatively impact the morale of the police.

A major departure from this morale-boosting adjudication was the landmark judgment of the five-judge bench of the Andhra Pradesh High Court in 2009. Responding to the writ petitions of several civil rights groups, including the Andhra Pradesh Civil Liberties Committee (APCLC), the bench, headed by Justice Goda Raghuram, held that the first information relating to death caused by a police officer — 'acting or purporting to act in discharge of official duties or in self-defence' — ought to be recorded and registered as an FIR. This would have effectively ensured that the deaths of Atif and Sajid did not disappear into a legal black hole; Jamia Nagar *thana* would have been forced to recognise their deaths too. The exceptions claimed by the police — the circumstances of self-defence — would be critically examined by the magistrate. The statements of the senior police officers of the Delhi police, embraced so wholeheartedly by the lieutenant governor and the NHRC, would thus have been treated as mere opinion, not as unassailable truth. Moreover, the bench held that a magisterial inquiry would not be a substitute for the recording of an FIR. The Batla House encounter in this sense was a double travesty, with neither an FIR being filed against the police party nor the magisterial probe being allowed. Earlier, deliberating on the nature of action to be taken in the event of an encounter death, the full bench of the Andhra Pradesh High Court in a majority decision ruled that, 'no crime can be registered under Section 307 of the IPC against a person killed in an encounter'.

The Andhra Pradesh High Court's ruling would have impeded the routines of encounter killings and created a legal precedent which would have eroded the very basis of police impunity. Within days, therefore, the Andhra Pradesh

Police Officers Association rushed to the Supreme Court for a stay. It is difficult to say with certainty whether the Supreme Court would have been inclined to stay the high court order had it not heard the petition just months after the mayhem in Mumbai — obnoxiously and mimetically referred to as '26/11'. The imperative to protect the morale of the police engaged in performing duties 'under hazardous conditions' was underlined by the affidavit submitted by the Police Officers Association in the Supreme Court. Its counsel, Harish Salve, argued that police officers who averted the attack on parliament and the commandos of the National Security Guard engaged in Mumbai would also face criminal charges under the Andhra Pradesh High Court's ruling.

In short, the association's main argument was that fixing culpability of individual officers would prevent the police from countering terrorist or subversive elements — implying that extrajudicial killings be sanctioned and legitimised. The Supreme Court concurred. The chief justice, now the chairperson of the NHRC, told the counsel: "We can't fully endorse the judgment... If we have to accept what you say then all police officers involved in the Mumbai terror attack of November 26, 2008, should face criminal charges." On another occasion, the former CJJ stated that "encounters are unavoidable sometimes... the law and order problem is increasing. Criminals are taking law into their hands, attacking even the police. Police have to take control of the situation". One would think he was reading from the Police Officers Association affidavit submitted to the Supreme Court.

In this impatience with what are perceived as inconveniences and unnecessary of law, all those arguing for rule of law are also condemned as anti-nationals. The Police Officers Association lamented to the Supreme Court in its affidavit that the petitioner, APCLC, 'which directly aids and abets the unlawful activities of the underground CPI (Maoist)' filed frivolous court cases and resorted to agitations to demoralise and portray the police in a poor light. Thus, upholding the morale of the police force is almost elevated to a national duty — one that overrules the commitment to justice and civil rights.

The moot issue is that till such time as the political consensus over impunity in the name of war against terror does not break; till due process of law is not regarded as supreme; till bodies such as the NHRC continue to be ruled by political appointees, part of that same consensus and eager to please their masters in government, the guidelines on encounter killings will exist only to be violated, and civil rights, including the right to life of certain groups of people, expendable at the altar of national security.

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Afzal Guru case: Justice ended up the loser

In the Afzal Guru case the legal community, swayed by misconceived perceptions of patriotism, demonstrated its abject failure to adhere to its core ethics. The judiciary was carried away by bloodlust. And the state, paranoid about ‘terrorism’, was cavalier in its interpretation of effective legal aid to the accused. Did Afzal Guru have any meaningful access to justice?

SAURAV DATTA

NOTHING RANKLES more in the human heart than a brooding sense of injustice. — Justice Brennan, Supreme Court of the United States

It is a strange thing what authority the opinion of mankind generally accords to the intervention of courts. It clings even to the mere appearance of justice long after the substance has evaporated; it lends bodily form to the shadow of the law. — Alexis de Tocqueville

The collective voices of society, polity, the state, media and legal fraternity have all hailed Mohammad Afzal Guru’s execution as a triumph of the ‘rule of law’.

Appalled by this macabre manifestation of jingoism (1), I wish to utilise this space to express my unhappiness over the collective failure of these hallowed institutions that are held up as the fulcra of democracy.

In the following paragraphs, I will scrutinise Afzal’s trial, the conduct of the legal fraternity and especially the lawyers whom the law and judiciary, in their ‘magnanimity’ and lip-service to legal aid, heaped on him despite his protestations, the flawed reasoning, reliance on erroneous precedent, and the sentencing caprice of the Supreme Court of India. I conclude that the act was nothing short of judicially-sanctioned murder, and that justice, instead of being triumphant, ended up being the loser.

The gravamen of my indictment is this: the legal community, swayed by misconceived perceptions of patriotism, demonstrated its abject failure to adhere to its core ethics; the judiciary (from the trial court right up to the Supreme Court of India), carried away by bloodlust, the fantastic paranoia of the Indian state succumbing to the hegemonic concept of ‘terrorism’ and abjectly cavalier in its approach to judicial interpretation of ‘effective legal aid and assistance of counsel’ together were complicit in an insidious conspiracy. What makes the indictment all the more serious is the fact that the conspiracy was successfully executed in the garb of upholding a fair legal process, apparently under the aegis of the Indian Constitution!

‘Patriotic’ lawyers or ethical delinquents?

The parliament attack case was not the first instance where the

legal community sprinted to prove its nationalistic and patriotic credentials, by adopting unanimous, vociferous and zealously enforced ‘resolutions’ prohibiting anyone from defending those accused of committing acts of ‘terrorism’. I put this term in quotes because post-9/11, 26/11, and a spate of similar events, we live in a world where dissent is punished as treason, where taking up cudgels for the cause of justice is deemed an insurrection. Those swearing by civil liberties and believing in cause-justice lawyering are pilloried and vilified, persecuted and even killed (2). As John Ashcroft, George W Bush acolyte and ex-attorney general of the US who was the key legal mind behind the Guantanamo torture programme, said in 2005: “To those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists.”

However, considering that certain bogeys created by the state, its allies and its agents are used as the perfect foil and reason for illegal wars and every kind of defenestration of human rights and civil liberties, it becomes imperative for any lawyer worth his salt to embrace and espouse the ‘jurisprudence of insurrection’ as was done by stalwarts like Roy Black, Thurgood Marshall and K G Kannabiran because both the bar and the bench are equally responsible for carrying the mantle of justice and rule of law. And when both abdicate their responsibilities, as they did in Afzal’s case, both become handmaidens of the gravest injustice.

One of the most eloquent statements on the duties of a lawyer came from Thomas Erskine in his defence of Thomas Paine when he was tried for seditious libel in 1792: ‘I will forever, at all hazards, assert the dignity, independence, and integrity of the English Bar, without which impartial justice... can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court... from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge of the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgment...’

Lord Brougham, a tireless crusader of civil liberties, said in 1937: ‘An advocate, by the sacred duty which he owes to his client, knows in the discharge of that office but one person in the world — the client, and no other... to protect that client at all hazards and costs to all others, and among others to

himself, is the highest and most unquestioned of his duties... Nay, separating even the duties of a patriot from those of an advocate, and casting them if need be to the wind, he must go on reckless of the consequences...'

Nancy Hollander, past president of the National Association of Criminal Defence Lawyers (US), proclaims with pride and devoid of any compunction: 'So let me say it: I am a terrorist lawyer, if that means I am willing to defend those accused of terrorism. I am currently defending two men imprisoned in Guantanamo and I defend others accused of terrorism.'

'Contrary to recent attacks by those who claim to be supporters of American justice, my defence of people accused of serious and sometimes horrific crimes is not an endorsement of those crimes. Rather, it is a testament to the strength of my belief in, and commitment to, the American system of justice.'

'Why? Because in my defence of every client, I am defending the United States Constitution and the laws and treaties to which it is bound, and I am defending the rule of law. If I am a terrorist lawyer, I also am a rule-of-law lawyer, a constitutional lawyer and a treaty lawyer.' (3)

Capital defence cases, legal aid, and the right to effective counsel

One man's terrorist is another man's freedom fighter, goes the saying. This aphorism holds true for Kashmir. For the sake of brevity, I am not going into Afzal's history and background which has been mentioned, discussed, debated, and disputed

ad nauseam in the media and elsewhere before he was thrown into the crosshairs of the police and judiciary. His lament, "I am Afzal for Kashmiris, and I am Afzal for Indians as well, but the two groups have an entirely conflicting perception of my being," (4) makes it clear that his trial was a political one, as many cases of 'terrorism' usually are.

Justice in political trials is more tenuous than in any other trial, for it is not merely criminal procedure or substantive law, but values of democracy and liberty which are affected by the language and logic of the law.

The case of the parliament attack (5) on December 13, 2001, was no ordinary one. The Supreme Court regarded it as waging war against the state because the citadel of Indian democracy had been attacked. It was a case in which Mohammad Afzal, one of the accused and convicted of criminal conspiracy, was sent to the gallows. For, nothing less could have satisfied the 'collective conscience of society', as the Supreme Court was pleased to hold.

Afzal was too indigent to be able to afford a lawyer, and had exercised his fundamental right to demand legal aid from the state and the court. How the court dealt with it has been described later in this article, but before that one needs to understand that, in India, legal aid, despite all its trappings, is considered charity, not a bounden duty. Otherwise, how is it that there is not a single ruling laying down a set of minimum standards of legal assistance for the indigent accused?

Yug Mohit Chaudhry, who champions abolition of the death



penalty, sums up the inextricable link between lack of effective legal aid and cases of mistrial and miscarriage of justice: ‘In the nine years from January 1, 2000, to December 31, 2009, the Supreme Court gave the death sentence in 30 cases. At least 14 of them were defended on legal aid, and many more had legal-aid lawyers in the earlier stages. Twelve of the 14 prisoners wrongly sentenced to death in the Ravji cases, including Ravji himself, who has been executed, were represented on legal aid.

‘In the US, where legal aid is more organised and better remunerated than it is in India, Justice Ruth Ginsburg of the US Supreme Court observed that she had never seen a death case coming in appeal to the Supreme Court where the defendant was well represented at the trial. It is hardly surprising, therefore, that most cases of miscarriage of justice, wrongful conviction and executions have been defended at some stage on legal aid. Prisoners facing the death sentence who are handicapped by poverty are doomed ab initio by a system that pays legal aid lawyers a pittance for their work.’ (6)

Monroe H Freedman in his seminal work, *Understanding Lawyers’ Ethics* (1990), regards the right to counsel as the most important of all rights because it is inextricably linked to the ‘client’s ability to assert all other rights’ (7). Through adversarial advocacy, the lawyer functions to uphold the client’s rights, and protect the client’s autonomy, dignity, and freedom (8).

The right to effective counsel arises because ‘judicial justice with procedural intricacies, legal submissions and critical examination of evidence leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature and judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law’ (9).

In an atmosphere charged with such hate and prejudice as was the aftermath of December 13, 2001, continuing right till the end of the legal proceedings, if a lawyer appearing for any of the accused did not oppose the prosecution’s case tooth-and-nail on every question of fact and law, or conducted his duties in a cavalier manner, it would have been nothing short of forming an insidious allegiance with the prosecution. The accused will never be able to believe in equality before the law when he knows he is inherently disabled from proving the state wrong.

In the present jurisprudential framework, bearing in mind the myriad amoral and coercive tactics adopted by the police and prosecution, an accused needs, and is entitled to, effective legal representation from the very moment he is arrested or detained. This is because the machinations of prosecutorial malice are put to work much before the commencement of proceedings, and these have a crucial bearing on the outcome of the trial. Moreover, in a criminal case, what is blotted at the trial stage cannot be blotted on appeal, because appellate courts deal with questions of law, not fact, unless of course there is a re-trial, Afzal’s pleas for which were steadfastly rejected by the courts. Even a curative petition (filed to remedy

a gross miscarriage of justice) was summarily dismissed.

What if the accused happens to be someone like Afzal who was illegally picked up by the police, tortured in custody, then ‘shown’ as arrested on a later date, and made to narrate a ‘confession’ (10) in the full glare of the television cameras, surrounded by armed policemen? Then, to insist that the right to counsel becomes applicable only from the time ‘proceedings’ start in court would be the surest way to ensure a travesty of justice.

The accused has an inalienable right to be defended by a lawyer of his choice, and such representation and defence must be ‘effective’ — this has been a part of Indian jurisprudence since 1956 (11). It traces its roots to American jurisprudence, where, in *Powell vs Alabama* (12), for the first time, the US Supreme Court allowed the right to counsel to three black teenagers who had been charged with rape and robbery of white women, and had been sentenced to death, because it was considered an ‘essential jurisdictional prerequisite’ to depriving a person of his life or liberty.

In 1945, regarding the standard of a counsel’s assistance, in *Diggs vs Welch*, it was held that assistance of counsel would not be regarded as effective if it reduced the trial to a ‘farce and mockery’ (13). This was obviously too high a threshold to judge the counsel’s incompetence, hence in *McMann vs Richardson* (14) it was clarified that right to counsel means reasonably effective and competent assistance by the lawyer. The brightest beacon remains *Gideon vs Wainwright*, where Justice Hugo Black pronounced that an accused’s right to counsel is one of the fundamental principles of liberty and justice (15).

Why the Strickland Test fails

Strickland vs Washington (16) is what the Supreme Court of India decided to apply to Afzal’s case. It was gravely erroneous on two counts: one, as shown above, there already were existing precedents in Indian law, hence the adherence to *Strickland* was whimsical, and dispensable. Moreover, as proved below, *Strickland* was a study in prejudice.

In *Strickland*, a two-pronged test was laid down:

- The accused must show deficient performance on the part of counsel.
- This deficient performance prejudiced the defence so seriously as to deprive him of a fair trial, a trial whose results are reliable.

The court went on to stress that the evaluation of such assistance by counsel must be very ‘deferential’ and a strong presumption would be drawn that such assistance was reasonable and effective.

It does not require any explanation that adherence to such pre-judicial standards, which are so loaded against the accused, would more often than not result in ‘punishment

by procedure' (17), and for these very reasons the 'Strickland standard' has been subjected to trenchant criticism (18). The sole mitigating factors in Strickland were some of counsel's basic duties. These included, but were not limited to: duty to advocate the case, and duty to consult with the accused on important decisions. As I shall demonstrate in the subsequent paragraphs, even redeeming aspects of the Strickland Test were overlooked by the Supreme Court.

Conduct of Afzal's lawyers at his trial, and the Supreme Court's injustice

Afzal had provided the special court with a list of four lawyers, and wanted to be represented by any one among them. Strangely, the trial court recorded that all four had refused, but no reasons were provided. There is nothing on record to even verify whether these four lawyers were approached at all, and what, if any, had been their grounds for refusal. Both the high court and the Supreme Court glossed over this strongly suspicious situation in the most blasé manner.

On May 17, 2002, the day the trial began, Seema Gulati, a person whom he had never met before, was assigned to Afzal. Gulati easily conceded that the prosecution had prima facie evidence to frame charges, and not only that, admitted without demanding any formal proof all the crucial documents and recovered items which later on were used as the basis for Afzal's conviction. If this 'performance' does not belie credulity, there's more.

On July 2, 2002, Gulati, without giving any reasons, withdrew her *vakalatnaama* in favour of Afzal and decided to appear for S A R Geelani, another accused in the same case. She assigned the case to her junior Niraj Bansal who made clear his unwillingness to represent Afzal. But the court, for 'reasons' which can at best befuddle, appointed Bansal amicus curiae (friend of the court), because he had experience in handling TADA cases! (Afzal was being tried under POTA, and charged with 'waging war against the state' u/s 121 of the Indian Penal Code. Both are far more draconian than TADA.) When there is dire need for a lawyer to withstand the prosecution's onslaught, the court cherry-picked a 'friend'!

Afzal's repeated pleas that he had no confidence in Bansal's performance and requests for another lawyer went unheeded. He had no option but to cross-examine most of the witnesses himself because most of Bansal's questions were perfunctory, at best. So we had an accused, who had no training in the law, staring at death, forced to do the best he could and fight a Titanic battle because he had been deprived of a basic right by none other than the court!

In one of the most astounding displays of institutional self-referentialism, the Supreme Court went on to perpetrate a greater violation. It found nothing wrong with Gulati's conduct and instead held that she had 'exercised her discretion reasonably'. When the law mandates holding someone to an inviolable standard of 'duty', can anyone even conceive of the exercise of 'discretion'?

As for the complaints regarding Bansal's lackadaisical approach, the court was content to follow the 'deferential' path of Strickland, receive an annexure (which contained the list of questions he had asked during cross-examination) from the prosecution, and without even bothering to examine those, condemned Afzal by ruling that he had received a 'fair' trial.

In the high court, when Afzal protested again against Bansal's now-proven incompetence and unwillingness, a human rights lawyer offered to represent him, and he accepted. However, this 'benefactor' started his argument by asking the court not to hang Afzal but to order his death by lethal injection (19)!

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Endnotes

- 1 The Parliament attack case was the first litigation I was part of. I was a student intern in the chambers of Kamini Jaiswal, who was briefing Ram Jethmalani. I got to see and understand the case from the closest of quarters, and maybe that exacerbates my indignation at this egregious miscarriage of justice
- 2 Like Shahid Azmi (<http://kafila.org/2012/11/24/remembering-shahid-azmi-can-the-love-of-justice-be-assassinated-arvind-narrain-saumya-uma/>) or Jitendra Sharma, whom the NIA (National Investigation Agency) is hounding because he was defending people accused of naxalism (yet another of those terms thrust into the vocabulary of terror by a tyrannical state). <http://daily.bhaskar.com/article/MP-BHO-nia-targeting-lawyer-who-represents-terror-accused-4164462-NOR.html>
- 3 'A Terrorist Lawyer, and Proud of It', *NYT*, March 24, 2010. Available at http://www.nytimes.com/2010/03/24/opinion/24iht-edhollander.html?_r=0&pagewanted=print
- 4 'Mulakat Afzal', *Caravan*, February 9, 2013. Available at <http://caravanmagazine.in/reportage/mulakat-afzal>
- 5 State (NCT of Delhi) vs Navjot Sandhu @ Afsan Guru (2005, Supreme Court of India)
- 6 'Legal Aid', *Frontline*. Available at <http://www.flonnet.com/fl2917/stories/20120907291702800.htm>
- 7 p 13
- 8 *Id*, pp 15-17
- 9 Madhav Hayawadanrao Hoskot vs State of Maharashtra, AIR 1978, SC 1548, para 3
- 10 This confession was discarded by the Supreme Court, but by then the damage had been done. The prosecution had a free hand in concocting 'evidence' — something that was never challenged by his lawyer in the trial court!
- 11 Hansraj and Ors vs State AIR, 1956, all 641; affirmed in State of Madhya Pradesh vs Shobharam and Others, AIR 1966, SC 1910
- 12 287 US 45 (1932)
- 13 Diggs vs Welch, 148 F 2d 667, 670 (D C Cir 1945)
- 14 397 US 759 (1970)
- 15 372 US 335, 341 (1963)
- 16 466 US 668 (1984)
- 17 Per Gideon, *supra*
- 18 See, for instance, Victoria Nourse, *Gideon's Muted Trumpet*, 58 *Md L Rev* 1417 (1999), where a very cogent claim is staked for debunking Strickland and reviving Gideon
- 19 'A Collaborator in Kashmir', psp 172-182 in Amitava Kumar, *Evidence of Suspicion — A Writer's Report on the War on Terror*, Picador (2010) at 178

Multiplicity of human rights institutions

The proliferation of HRIs to inquire into human rights, women and child rights, minority rights and SC/ST rights has not translated into better protection of human rights as the state machinery remains largely indifferent to them. Is it time to look at the possibility of a merged institution?

SWAGATA RAHA

Establishment of HRIs in India

India has seven national human rights institutions (HRIs) known as commissions, with varying structures, powers and mandates that have been established with a view to promoting and protecting human rights, women's rights, children's rights, rights of minorities, and the rights of persons belonging to scheduled castes and scheduled tribes. Except for the National Commission for Scheduled Castes (NCSC) and the National Commission for Scheduled Tribes (NCST), which have been provided for under the Constitution, all other human rights institutions at the national level have been established through legislation.

The functions of these commissions include evaluation of existing safeguards for human rights protection and making recommendations for strengthening them, inquiry into complaints of human rights violations, inspection of custodial institutions, creation of awareness about rights, promotion of harmony between domestic laws and international conventions, and research and analysis on human rights issues. They have all been empowered with certain powers of a civil court while looking into the violation of rights. After the completion of inquiry, they can recommend that the government or public authorities initiate proceedings against those responsible for the violation, pay compensation, or take further steps to remedy the violation. Although their recommendations have no binding value, these commissions are seen as alternative forums that have the potential to offer speedy, accessible, and inexpensive relief.

The Protection of Human Rights Act, 1993 (PHR Act) and the CPCR Act, 2005 also provide a framework for the establishment of commissions at the state level and have vested the state governments with the discretion to constitute the commissions. Owing to lethargy on the part of the states, only 20 have set up the State Human Rights Commission (SHRC) and 14 have constituted the State Commission for Protection of Child Rights (CPCR). Some commissions were established only because the high courts had directed the state government to do so (1). However, some of these institutions exist only on paper and some do not function because of poor infrastructure, lack of staff,

and the reluctance of the government in appointing a chairperson and members (2).

How independent are HRIs in India?

According to the Principles relating to the Status of National Institutions, 1993 (Paris Principles), a set of internationally accepted minimum standards that states must aim to comply with while establishing a national human rights institution, HRIs must be functionally and financially independent. They must not be controlled by the government and must have adequate funding that allows them to have their own staff and premises. The Paris Principles and other international guidelines and best practices on human rights institutions lay unequivocal emphasis on the independence of these institutions (3). The term 'independence' has to be understood in its fullest sense as signifying foundational, functional and operational, and financial independence. Foundational independence depends on the manner in which the institution has been brought into existence, its composition, and the process followed to appoint members. The appointment process should be fair, transparent, and bereft of political influence. Operational autonomy stems from the authority to appoint staff and take administrative decisions. Financial independence is very critical as dependence on the government for funds can stymie the effectiveness of an oversight authority.

In order to discharge its mandate effectively, a human rights institution must be absolutely independent of governmental and political control or interference. It must distance itself from the government whose policies and actions it is expected to scrutinise and inquire into. Further, it must strive to ensure that it is not perceived as a government department or an NGO. The former is likely to compromise its credibility, and the latter might earn it the label of being 'pro-NGO'.

Commissions in India enjoy varying degrees of independence. For instance, the National Human Rights Commission (NHRC) is headed by a former chief justice of the Supreme Court, while the chairperson of the National Commission for Women (NCW) has nearly always been a

political appointee. The executive exclusively determines the appointment of chairperson and members of all the commissions except the NHRC where appointments are based on the recommendations of a high-powered selection committee comprising representatives of parliament and the executive. The extent of political control over some commissions is more than others. For instance, a change in government at the Centre in 2005 led to the dismissal of members appointed by the previous government (4). All the commissions except the CPCR have been empowered to frame their own regulations. Further, the National Commission for the Protection of Rights of Children (NCPCR) has to seek the approval of the government before incurring expenditure under certain heads (5) and must abide by the directions of the central government on “questions of policy relating to national purposes” (6). The NHRC can appoint technical staff and the NCPCR can constitute a panel of consultants. However, all commissions are dependent on the government for their establishment, infrastructure, staff, and grants. Though an appropriation is made by parliament, the funds are routed through a ministry. The mandate of the NHRC is limited to inquiring into complaints of violation of human rights or abetment or negligence in the prevention of such violations by public servants. The NCW and NCPCR, on the other hand, can look into complaints relating to deprivation of women’s rights and child rights, respectively, irrespective of whether the complaints relate to public servants or private entities. Because of its composition and powers, the NHRC is perceived as being more independent than others.

Do we need multiple human rights institutions?

Most commissions have earned the reputation of being post-retirement hubs for bureaucrats and a parking lot for members of political parties with no background in or understanding of human rights. This is borne out by facts which indicate that the present chairperson of the NCSC (7) is also a Member of Parliament while the chairpersons of the NCST (8), NCW (9), and the Orissa SCPCR are former MP, MLA, and minister, respectively. The chairperson of the National Commission for Minorities is a retired member of the Indian Administrative Service (10). Although the PHR Act requires that persons with knowledge of or experience in human rights be appointed members, retired bureaucrats have predominantly occupied the position of member. Political appointees and bureaucrats often lack the necessary qualifications and do not inspire confidence in the independence of the commission.

The non-binding nature of recommendations made by the commissions often evokes the sentiment that these commissions do not serve any purpose. Some commissions have openly raised the issue of governmental indifference and refusal to act on recommendations (11). At the state level, commissions fail to take off or fulfil their mandate because of the government’s tardiness in providing them space, staff, finances, and infrastructure. Civil society has

In order to discharge its mandate effectively, a human rights institution must be absolutely independent of governmental and political control or interference. It must distance itself from the government whose policies and actions it is expected to scrutinise and inquire into

also expressed its disappointment over their inefficacy and has tagged them ‘toothless’.

The commissions in India have emerged in response to international and domestic pressures, and barring the NHRC, which has a general mandate, they have been vested with a special mandate. They are premised on the belief that they can protect and promote the rights of a special group more effectively than a single institution with a broad mandate. However, such an approach raises several questions. Does it not ‘undermine the principle of the indivisibility of rights’? (12) Is it efficacious to have multiple institutions with a different composition, mandate, and powers? Will the existence of institutions devoted to issues of a particular group lead to better protection and promotion of their rights? Will they help avoid the risk of prioritising the interests of one group over others? On the other hand, the presence of these institutions has also led to duplication of efforts and simultaneous inquiries, and it is debatable whether they serve as one among many options for a victim of a human rights violation.

In an article on the issue of one versus multiple human rights institutions, Richard Carver reviewed the international legal framework and observed that there is no clear principle or guideline on this matter and that the decision must be driven by the ‘pragmatism and effectiveness’ (13) of the options. Based on these considerations, he states that a single institution is preferable as: ‘...generally the model of a single national human rights institution is likely to lead to greater effectiveness, provided that it is designed with inbuilt guarantees that the interests of particular vulnerable groups will not be neglected and will receive an appropriate level of priority. A single institution offers several clear

advantages. It will work within a coherent legal framework with consistent powers in relation to all vulnerable groups. It will maximise institutional resources, avoiding duplication and sharing best practice. It will be more accessible to vulnerable groups and better able to address cases of multiple discrimination. It will exercise greater authority in relation to governmental and other bodies and will offer a clear, comprehensible public profile on human rights issues.’ (14)

He acknowledges that a single institution may be looked upon as being cost-effective by government, but terms this ‘irrelevant’ as it ‘is hard to see the validity in human rights terms of an argument that says that money should be spent wastefully, simply in order that the human rights budget not be cut’ (15). Carver cites the examples of the United Kingdom, Croatia, Sweden, and Australia where multiple institutions were merged to form one single human rights institution.

In India, the composition, mandate, functions, and powers of human rights institutions vary. Carver also makes an important point about the need for equal protection of rights of victims of human rights violations, a service that can be provided consistently only by a single institution (16). This right stands diluted owing to the difference in powers and mandate of multiple institutions. Should a victim not be equally protected no matter which commission he/she may appear before? As commissions are prohibited from looking into complaints before another commission, an ignorant victim should not have to suffer for not approaching the ‘appropriate’ body in the first instance.

The downside of multiple institutions with different powers and mandates is that it leads to inconsistencies in the handling of issues affecting different groups (17). The difference in stature of the chairperson and members in each of the commissions often determines their relationship with government departments and the seriousness with which their recommendations are regarded. On the other hand, it is also cumbersome for officials to deal with and respond to different commissions instead of a single institution. The commissions often cite inadequacy of infrastructure, staff, resources, and funds as critical factors that hinder their effectiveness. Whether or not we need multiple institutions with varying powers and structures at the national and state level to protect and promote the rights of various groups requires close examination.

Conclusion

The proliferation of HRIs at the national and state level has not necessarily translated into better protection of human rights as the state machinery remains largely indifferent towards them. The presence of multiple institutions has also led to parallel inquiries and turf wars which have resulted in loss of considerable time and resources, and secondary

victimisation of victims of violations. The merits and demerits of a merged institution vis-à-vis existing institutions need to be looked at.

Nevertheless, there is a definite need for greater cooperation and coordination between HRIs at the national and state level so that considered and effective responses are framed to address issues of overlapping concern. The Protection of Human Rights Act, 1993 (PHR Act) is the only legislation which provides a platform for coordination between some of these institutions at the national level. According to Section 3(3) of the PHR Act, the chairpersons of the NCW, NCM, NCSC, and NCST are deemed to be members of the NHRC for the purpose of discharge of all functions other than inquiry into complaints. The chairperson or member of the NCPCR attends the meetings of the full commission as a special invitee. However, these meetings are usually held only once a year.

At an Inter-Commission Dialogue on Child Rights in India, organised by the Centre for Child and the Law, representatives of six national commissions and chairpersons of various state commissions agreed that commissions must collaborate on policy issues and make joint recommendations to the government as collective action would likely elicit better results (18). They also agreed on the need to develop an integrated complaints registration mechanism that would aid detection of complaints filed before multiple authorities. Pending law reform, a coordinated approach is probably the only way in which HRIs can posit themselves as strong, effective and independent monitors of human rights.

Note: The author has relied on research undertaken at the Centre for Child and the Law, NLSIU, on a project titled ‘Justice to Children through Independent Human Rights Institutions’ and a report she co-authored titled ‘A Review of the Working of the Karnataka State Human Rights Commission and the Karnataka State Commission for Women’, Daksh & Accountability Initiative, April 2011, at http://www.accountabilityindia.in/sites/default/files/daksh_kshrc_kscw_apr_2011.pdf

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Endnotes

1 In *People’s Union for Civil Liberties vs Union of India*, 1999 (4) Bom CR 608, the Bombay High Court directed the state of Maharashtra to establish a State Human Rights Commission. Similar directions were issued by the high courts of Allahabad (*People’s Union for Civil Liberties vs State of Uttar Pradesh*, AIR 2000 All 103) and Karnataka (*Shri P Hanumanthappa vs the Home Secretary, the State of Karnataka*, decided on 05.12.2006). In the states of Jharkhand, Uttar Pradesh, Manipur and Punjab and Haryana, the respective high courts had directed the state governments to establish SCPCRs

2 The position of chairperson in seven SHRCs is lying vacant while not all six members have been appointed in 12 SCPCRs. While all states have established a State Commission for Women (SCW), this does not necessarily imply that they are active or functional. In Karnataka, for instance, a chairperson was appointed after a gap of three-and-a-half years. SCWs in Arunachal Pradesh, Andhra

Pradesh, Chhattisgarh, Maharashtra, Karnataka, Rajasthan, Manipur, Meghalaya and Mizoram are functioning without members. Thirteen state governments have enacted legislation that provide for the establishment of a State Minorities Commission and the states of Manipur and Uttarakhand have constituted non-statutory commissions, that is institutions that have not been created under a statute

3 International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights Institutions*, Switzerland: ICHRP, 2005; Commonwealth Secretariat, *National Human Rights Institutions Best Practice*, London: Commonwealth Secretariat, 2001, at http://www.asiapacificforum.net/members/international-standards/downloads/best-practice-for-nhris/nhri_best_practice.pdf; National Human Rights Institutions — Amnesty International's Recommendations on Effective Protection and Promotion of Human Rights, 2001, at <http://www.amnesty.org/en/library/asset/IO40/007/2001/en/3c676e38-d8e3-11dd-ad8c-f3d4445c118e/ior400072001en.html>

4 Anon, 'Expulsion of NCW Members Degrading and Unconstitutional', *Deccan Herald*, May 29, 2005, <http://archive.deccanherald.com/Deccanherald/may292005/national1841462005528.asp>; Anon, 'UPA Axe Falls on Three NCW Members', *The New Indian Express*, May 21, 2005, <http://www.hvk.org/articles/0505/62.html>

5 Rule 24 (3) of the National Commission for Protection of Child Rights Rules, 2006 states: "The chairperson shall obtain prior approval of the central government in matters of creation of posts, revision of pay scales, procurement of vehicles, re-appropriation of funds from one head to another, permitting any officer of the commission to participate in seminars, conferences, or training programmes abroad and such other matters determined by the central government, by order."

6 Section 33, Commissions for Protection of Child Rights Act, 2005

7 Profile, P L Punia, <http://ncsc.nic.in/writereaddata/sublinkimages/156.pdf>

8 <http://www.ncst.nic.in/writereaddata/linkimages/Biodata-Rameshwar%20Oraon-CP2880148912.pdf>

9 <http://ncw.nic.in/frmCurrentCommission.aspx>

10 <http://ncm.nic.in/WajahatHabibullah.html>

11 Sugata Srinivasaraju, 'Drill Them All Into Line', *Outlook*, May 24, 2010, <http://www.outlookindia.com/article.aspx?265435>

12 Richard Carver, 'One NHRI or Many? How Many Institutions Does It Take To Protect Human Rights? — Lessons from the European Experience', *Journal of Human Rights Practice* Vol 3, Number 1, 2011, pp 1-24 at p 11

13 Richard Carver, 'One NHRI or Many? How Many Institutions Does It Take To Protect Human Rights? — Lessons from the European Experience', *Journal of Human Rights Practice* Vol 3, Number 1, 2011, pp 1-24 at p 21

14 Richard Carver, 'One NHRI or Many? How Many Institutions Does It Take To Protect Human Rights? — Lessons from the European Experience', *Journal of Human Rights Practice* Vol 3, Number 1, 2011, pp 1-24 at pp 2-3

15 Richard Carver, 'One NHRI or Many? How Many Institutions Does It Take To Protect Human Rights? — Lessons from the European Experience', *Journal of Human Rights Practice* Vol 3, Number 1, 2011, pp 1-24 at p 14

16 Richard Carver, 'One NHRI or Many? How Many Institutions Does It Take To Protect Human Rights? — Lessons from the European Experience', *Journal of Human Rights Practice* Vol 3, Number 1, 2011, pp 1-24 at pp 13-14

17 Richard Carver, 'One NHRI or Many? How Many Institutions Does It Take To Protect Human Rights? — Lessons from the European Experience', *Journal of Human Rights Practice* Vol 3, Number 1, 2011, pp 1-24 at p 2

18 Centre for Child and the Law, *Inter-Commission Dialogue on Child Rights in India — A Report*, <http://www.nls.ac.in/ccl/justicetochildren/ReportCommissionDialogue.pdf>, Centre for Child and the Law, Proposed Plan of Action for a Coordinated Response of Human Rights Institutions to Child Rights, Suggested Plan of Action Emerging out of the Inter-Commission Dialogue on Child Rights, organised by Centre for Child and the Law, National Law School of India University in partnership with UNICEF-India Country Office, on February 22, 2012, New Delhi, p 22, at <http://www.nls.ac.in/ccl/cclsuggested/ICD%20annexures/AnnexureB-ICDpalnofaction.pdf>

How to file a PIL

PILs have become a powerful tool of empowerment and access to justice for the common man

SHAMBO NANDY

RECENTLY, the Supreme Court, in a public interest litigation (PIL) filed before it by an NGO, ruled that the Centre and states should provide basic infrastructure including drinking water and washroom facilities in all schools within six months. That very same day, in another case, the Supreme Court also ruled that the government should desist from altering the existing pricing system for essential medicines, a step which could allegedly lead to a steep hike in their prices.

Cases like these, wherein the interests of a large section of the populace are at stake, are routinely heard and disposed of by the Supreme Court and in most of the cases the petitioners get a favourable order. This is reflected in the fact that filing a PIL is now bread-and-butter for many lawyers, with several PILs being filed in various Indian high courts and the Supreme Court every day. And so, PILs have become not only an important and powerful tool of empowerment and access to justice for the common man over the years, it has also become a dominant grievance redressal mechanism for many unheard voices in the country.

But to say that PILs have largely helped the country's *aam admi* better represent themselves and their cause before the courts of law is probably an understatement of the influential role the courts have begun to play in India's political system. Our school civics lessons have taught us that the three branches of government are the executive, legislature and judiciary, each independent of the other. For some time though, the courts have been going beyond their domain, donning the mantle of the executive by ruling on policy matters which traditionally are within the realm of the executive and legislature. As a result of this 'enthusiasm', courts have ruled on a wide range of issues. From entertaining corruption-related petitions to environmental cases to prison reforms, meting out justice to undertrials or the functioning of tribunals, the courts have dealt with it all. In fact, instead of merely being adjudicatory forums, courts have now become all-powerful and sit in judgment over the way the other two branches function.

The primary advantage of filing a PIL is that one does not have to show an interest in a particular case. In legal terms, one does not need to exhibit a *locus standi* in the case or

the fact that one has suffered or is likely to suffer legal injury. Thus, a person is able to approach the courts on behalf of others even though he is not the aggrieved person in the traditional sense of the term. One of the hallmarks of a PIL is the tendency of the courts to do away with stringent customs and rules which prohibit them from meting out justice. In the interests of the greater good, formal filing procedures are dispensed with in matters that are of urgent common interest. This is especially true of cases where poor and helpless people are involved who have almost no knowledge of the country's formal adjudication process.

The first of such cases where a PIL was used to grant justice was in the Sunil Batra vs Delhi Administration case wherein Justice Krishna Iyer used a letter written by a prisoner to start a case. However, what really started the formal PIL mechanism in India was the Hussainara Khatoon vs Home Secretary, State of Bihar case. In this case, Kapila Hingorani, an advocate practising before the Supreme Court, brought before it through a habeas corpus petition (meaning 'to produce the body') based on a newspaper report, the case of 19 undertrials who were languishing in a jail in Bihar. The first-named petitioner was Hussainara Khatoon, a young woman who had fled with her family from Bangladesh some time in 1975. She was lodged in jail under protective custody despite an order by the central government to release all Bangladeshis arrested under the Foreigners Act.

Habeas corpus petitions are usually not filed by the aggrieved persons themselves but by their relatives. What made this case different was that Kapila Hingorani was in no way related to the petitioners, nor had she secured their permission before filing the case. On being admitted by the court for hearing, the case established four distinct principles of PIL in India: (a) a petition need not be filed by the person whose own legal rights are at issue and can be brought before the court by any public-spirited citizen, (b) a petitioner need not have personal knowledge of the case details but can support it by materials such as newspaper articles, (c) both legal principles and substantial relief can be used in the preliminary stage of litigation, and (d) the scope of litigation can expand rapidly beyond what was stated in the original petition if the progress of the case exposes greater injustice.

Although these principles were propounded in the Hussainara Khatoon case, they have travelled more widely and have since been used extensively to deliver justice to the helpless and needy. Thus, in most landmark PIL cases we see that the courts have waived the locus standi requirement. It has also actively involved itself in the investigation of facts and has quickly issued remedial relief in the form of interim orders.

Since PILs have become a part of the mainstream adjudicatory process of our country, it is important that we understand how a PIL is filed in court, the essential contents of a PIL, and the way it is to be presented in court.

(Although courts often waive formal filing requirements, with the increasing number of PILs being filed every day the courts now use their discretionary powers to consider such letters.) Such an understanding will help us evaluate whether the situation merits filing a PIL in the first place, the chances of it being admitted in court, and the likely outcome from the court.

The basic thing that one needs to keep in mind while considering whether or not to file a PIL is the amount of public interest involved in the matter. It must be demonstrated that the concerns of a class, section or group of people are involved as opposed to that of an individual. It must also be shown that there is a constitutional or legal dimension to that interest or concern. It should have the potential to defend the rights of a large number of people and redress wrongs done to them. For the existence of a PIL, one needs to show that there has been an act or omission by the state or its authorities that has affected a substantial number of people. A PIL is least likely to be admitted if it alleges that a governmental authority is selectively targeting individuals who indulged in tax evasion when the petitioner himself has also committed the wrong. On the other hand, if a PIL is brought forward that a state authority is not offering minimum wages for work done, then it is most likely to be admitted if brought forward by any person.

As stated earlier, PILs act as a grievance redressal mechanism by ensuring that there is good governance in the country. The courts usually direct that the government take appropriate measures in cases where the interests of a large section of the public are at stake. For example, the Calcutta High Court is currently hearing a PIL and passing orders relating to the misuse of red beacons on top of cars. Recently there have also been several anti-corruption-related PILs wherein the court was asked to direct the government to start an appropriate investigation against relevant officials. PILs are filed as writs under Article 32 of the Constitution in the Supreme Court of India, and under Article 226 in the various high courts of the country. Most of these writs are in the nature of mandamus (meaning 'to direct') and the court uses its powers to direct the government to carry out measures in the interest of the public.

Apart from the element of sufficient public interest, it helps if a credible person is filing the PIL. It is easier to establish then that the PIL has been brought forward in good faith and with no motive apart from the best interests of the public. This varies from case to case, but is easy to figure out. For example, if one wants to file a PIL regarding arsenic contamination in the groundwater of a particular village, it would help if the village sarpanch is the person filing the petition. Or an environmentalist working in the field. Petitions challenging the constitutionality of legislation are best done through someone from the bar or someone from academia. For example, in the case of D C Wadhwa vs State of Bihar

(AIR 1987 SC 579), a professor of political science who had done substantial research and was deeply interested in ensuring proper implementation of constitutional provisions, challenged the practice followed by the state of Bihar in repromulgating a number of ordinances without getting approval from the legislature. The court held that the petitioner as a member of the public had 'sufficient interest' to maintain a petition under Article 32.

Another important aspect of filing a PIL is that one should properly implead the parties to the petition. If we take the previous example of arsenic contamination in groundwater then one should ideally make the central water resources ministry, the state water resources ministry, the central environment ministry, the state environment ministry and the state pollution control board the respondents. The thumb-rule in such cases is that one should implead as many parties as possible to the petition if they are in any way connected to the issue at hand. This is essential because all such parties have to be given an opportunity to be heard. Parties can be impleaded later in the case too, but that would mean further delays in disposing of the case as the court won't pass any orders against any party without giving it enough time to hear its side of the story.

The main part of the PIL usually starts by introducing the petitioner and his reasons for filing the petition. Earlier cases where the courts have entertained similar petitions should be mentioned and are helpful in getting the PIL admitted. Thereafter, one should present all the facts in the petition. The history of the case should be mentioned. For example, if one is challenging the constitutionality of a legislation, the petitioner should state the way the law came into existence, reasons for parliament enacting such legislation, details about the legislation, and so on. If there was a prior law in that field which the current statute replaced it should be mentioned along with some of its features. All this helps present a holistic picture of the scenario in which the court will be hearing the main issues of the case. Further, one should state the current facts and the situation on the ground. Here, the petition should be very well researched and, if possible, backed by field data.

The next part is where one states the grounds for filing the PIL. This is the most important part, as this is where one states the legal and constitutional basis on which the PIL has been filed and relief asked for. One needs to state and substantiate clearly the reasons why one thinks rights have been violated. For example, in the *Visakha vs State of Rajasthan* case (the case in which the Supreme Court issued guidelines relating to sexual harassment of women in the workplace), it was alleged that the police and doctors violated the complainant's rights under Articles 14, 19 and 21 of the Constitution of India. In cases where the constitutionality of a statute or a regulation is challenged, more often than not a violation of Article 14 (right to equality) is alleged. If a government regulation or activity or

statute violates the directions given in a previous judgment of the Supreme Court or high court, that too forms independent grounds.

At the end comes the prayer portion of the petition where one lists the possible remedies one wants from the court. Usually there are two sorts of remedies — one temporary and immediate, the other permanent. For example, in cases where statutes are challenged it is often prayed for that bodies created under it should stop functioning immediately until the case has been disposed of, otherwise there will be further miscarriage of justice.

PILs are often filed by poor and aggrieved people who approach the courts as a last resort, and so there are no court fees levied on any PIL. Since this provision has often been misused by people who file numerous PILs for publicity's sake, courts of late have begun to impose costs on such petitioners to dissuade people from filing frivolous PILs and wasting the precious time of the court. Apart from this, the petitioner needs to pay the fees of the lawyer representing him in the case, from time to time. This amount is variable and depends on the quality of lawyer one hires. In many cases, however, lawyers waive their fees and argue the case as a pro bono matter.

If one is fully aware of the facts of the case and more or less aware of relevant portions of the law, one can also argue one's own case in court. However, with the courts becoming increasingly wary of the large number of PILs being filed, a petitioner usually seeks out the services of an advocate to argue the case. In fact, senior counsel is often drafted to get a PIL admitted; thereafter, some other counsel argues the case.

One also needs to be aware of delays that could take place in the proceedings of a PIL. Often, government authorities take a long time replying and may submit their replies many months after the time limit fixed by the court. Court staff too often do not list matters properly on the days they should. Such cases should be immediately brought to the notice of the judges who heard the case or, in their absence, the chief justice of that court.

Though PILs constitute an excellent mechanism to force the government to work, rather to work in the most appropriate manner possible, there have been many instances of frivolous PILs being filed. Such petitions have earned PILs a bad name and have resulted in the Supreme Court and high courts issuing guidelines on the nature of cases that will be accepted as PILs. As citizens of this country, we must thwart the efforts of a few self-centred individuals or else this effective mechanism for grievance redressal will slip from our hands.

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Meeting the law halfway

Most people dismiss the law as tangled, futile, expensive and biased. But legal literacy trainings can help citizens negotiate the legal system and restore their faith in justice

ABHA SINGHAL
JOSHI

YOU CAN AVOID IT, break it, invoke it, challenge it, repeal it, amend it, stretch it, and call it an ass. Yet, its spectre shadows you wherever you go. Like a friendly ghost helping you out in unseen ways, or even a scary tormentor waiting to boo you around unseen corners. The 'Law'.

Working in legal literacy and legal training has been about giving form and shape to this ephemeral presence, to learn that the only way of exorcising the law from your life is to turn around, grab its long arm as it reaches for your collar, and shake it warmly.

There is great resistance among all classes of people to the idea of meeting the law halfway — to not duck it but make a friend and ally of it. For the law, in the form and shape known to most people, is something to be dreaded, avoided and shaken off by dubious and illegal means — bribery, or settling scores through violent methods. The idea of 'law' as relating to 'justice' is alarmingly weak in the common mind. To many the law represents a tangled web, a connection possibly born of the unfortunate and complete identification of 'the law' with the legal profession!

Interacting with hundreds of people over a range of different laws and legal problems and situations throws up interesting patterns of socio-legal thinking, including people's needs and aspirations which are or need to be reflected in the law, and about gaps in implementation because of a lack of knowledge and understanding on the part of the beneficiary as well as the duty-bearer. It also throws up the shame and sham of the kind of 'democratic governance' that not only denies the value of the law underpinning all social and political activity, but also actively resists the following of law as 'impractical'.

How people respond to neutral, just, stand-alone propositions set down in the law, or support the notion that the idea of justice has universal appeal which cuts across classes and even frontiers has very little to do with an academic or intellectual analysis of the form or the provisions themselves.

The job of the structures of justice-delivery — informal or formal — is to facilitate and bring to fruition this inherent belief in justice. What they actually do is the opposite — resulting in people confounding the notion of justice with the engrafted structures of justice and labelling it 'useless, unfair, expensive

and biased'. The refrain '*Nyaya jaisi koi cheez hi nahin hai,*' (There is no such thing as justice) from every corner of society is something everyone should be worrying about.

Over two decades ago we encountered an old widow in Chhattisgarh whose sons were depriving her of the basic necessities even though there was a fair amount of family land. On learning of the provision in the Hindu Succession Act that allowed her a share in her late husband's property, she sat her sons down and told them calmly that either they support her properly or they should hand over her share with which she could manage her life. They resisted initially saying, "*Auraton ka koi hissa nahin hota,*" (Women don't have any share in property). But the woman checked with the patwari who confirmed the right and — surprise! — the sons turned into ideal offspring. And so a gentle but anxious and neglected mother was able to reclaim her life. In Bihar, a woman explained how she was constantly being bothered by the local policeman who kept calling her and others to the police station on pretext of questioning them. She was told about Section 160 of the CrPC, which puts a complete embargo on summoning women to the police station for any kind of questioning. The woman noted down the provision carefully and when we went back for a review session some months later, she reported with glee the dialogue between her and the policeman. "*Chalo thane bulaya hai,*" (You have been summoned to the police station). "*Aurat ko thane nahin bulaa sakte,*" (Women cannot be asked to come to the police station). "*Achcha? Kaun kehta hai?*" (Is it? Who says so?) "*Kanoon ki dhara kehti hai — nahin pata?*" (The law. You don't know that?) "*Achcha, tujhe kaise pata?*" (How do you know this?) "*Pata hai, tujhe nahin malum to sikha deti hun, aur tere thanedar ko bhi,*" (I know it. If you don't, I could teach you, and the other police officers too). A mutually abusive exchange then took place, and the policeman retreated with threats of "*Dekh lenge tujhe aur tere kanoon ko!*" (I'll show you, and your law!)

As our own experiences have been incrementally gleaned from similar experiences across the country, we now temper our sharing of legal information with caveats of expecting some amount of aggression, threat, delay and refusal. We also point out how each of these can be dealt with.

The results of this tutoring have been good. People have

reported high levels of verbal aggression in the initial stages of interaction, of having the law flung in their faces whether in personal relationships or with state agencies. This gradually turns into threats of unspecified 'serious' consequences, and then to a stiff-backed retreat. There are many who are cowed down by the legal *danda*. Violent husbands, on seeing legal pamphlets on the living room table, first resort to threats of more violence. But that is followed by abstinence from violence.

The law, when explained to people in the language of justice, will find resonance with all but the extremely obdurate. A young tribal man in Andhra Pradesh's East Godavari district sat through a legal training workshop sullenly and came out with an outburst on the second day. Roughly translated from the Telugu, he said: "I don't think the law is any good. It only scares people — it is used to extract money from innocent people. The police have been troubling me for days and are asking me to pay Rs 20,000 to my neighbour whose few trees got burnt when I burnt the stubs of my crop. It wasn't my fault that the wind blew in that direction and his trees got burnt." Besides explaining to him that unless it was a deliberate case of causing mischief by fire, the police had no business to be involved in the case, least of all to be negotiating the damages to be paid to the neighbour, a panchayat was simulated in the workshop and he was made to argue out his case with another trainee acting as his neighbour. After an excellent round of both trainees presenting their cases with passion and reason, the roles were reversed. He was told to be the neighbour whose trees had been burnt, and to ask for compensation. After initial confusion and resistance, he started arguing against himself and for his neighbour with equal passion and reason! Deep into the argument, he suddenly turned around with a weak smile... Got it! At the next workshop, a smiling face met us. He had settled the matter with his neighbour by mutually calculating the loss and promising to pay him in instalments. Moreover, both of them told the police to stay out of it.

The stories are many and varied. They may sound like small and negligible successes. They may even suggest a certain naive romanticism to those who want 'larger', 'systemic' or 'policy' changes so that people get justice from 'the system'. Yet, there is a power to them that suggests that a massive push towards enabling people to negotiate in this manner will bring about a change in negotiating justice and correcting the perversity of crassly exploitative, corrupt and even criminal behaviour on the part of individuals and state. It is often said that there is no point telling people who are in weak and vulnerable situations about the law. Yet, it appears that these are precisely the people who need the law and who will negotiate with the law simply because they have no money or power.

Which brings us to the downside of the quest for justice through law, since the law no longer operates from the fundamentals of human relationships but in a man-made system gone badly awry. Were we to follow these upbeat stories through, we would find that many of the pacts do

not last long, taking us to the next step in the search for justice — litigation. For those seeking a remedy for a wrong done, this is a harsh experience that both attracts and repels people. This is what builds the case for reforms in the judicial system — to make it worthy of the belief in it that makes the poor trudge miles for their dates in court; that makes people mortgage and sell bits of their jewellery and land. The philosophy behind this strange faith seems to be the same as that of the villagers of Assam who, when asked why they worshipped the Brahmaputra when year after year it destroyed everything they had, said it was because the river also gave them life!

Despite its drawbacks in terms of delays, expenses, even outright cheating, people feel a comfort in the neutrality of the law courts. Men and women, and surprisingly women vehemently, have said that they prefer the law courts to community mediation. This trust and hope possibly comes from seeing the law courts as the most objective in environments that are unacceptably subjective. The courts are the resort for all those who would cock a snook at the *jat* panchayats, the qazis and the khaps. Thus it is that you find dozens of reported cases from the high courts, of Muslim women challenging the oral *talaq*, denial of maintenance, denial of custody of their children. Likewise, many people who have been unjustly or inhumanly treated have approached the courts and fought it out. A random look at the nature and numbers of relief sought by people through the courts concludes the argument in favour of a structured system of justice. The fact that it is also a system that is abused and misused only underlines that it needs cleaning out and rejuvenating. Its demise would mean a slide into anarchy and distress.

Over the years, state agencies have touted 'justice at the doorstep', but what is on offer is cheap, fake versions of mediation and adjudication by tackily-put-together 'lok adalats', in which the desperation of struggling and tired litigants is converted into numbers that satisfy the budgets for 'justice'. This curious concoction is a 'shortcut' version of justice with all the rigmarole of 'regular' justice — lawyers, files, bribes, unfair orders. Again, it will be a doughty litigant who will once in a while challenge this hegemony of the legal 'system' and drag it back to what it was meant to be — an instrument of justice, not a 'marketplace' for justice.

For every debate on law and justice which rages in outraged righteousness and spreads itself over reams of precious paper, there is a simple fellow back in the boondocks making a simple statement to an earnest law researcher eager to know the worst from the horse's mouth: "*Nahin, judge achche hain, sab achche hain. Jab kismet aur kanoon mein hi aisa likha hai to bechaare judge kya karenge?*" (No, the judge is good, everyone is good. If destiny and law don't favour us, what can the judge do?")

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Is this reformatory justice?

The Juvenile Justice Act requires a child-friendly approach in investigating and adjudicating cases of children in conflict with the law. The idea is to give these children access to reformatory and restorative justice. This article reveals what juvenile offenders and their families really come up against

GEETA
SAJJANSHETTY

ACCORDING TO *Crime in India, 2011*, there has been an increase of 10.5% in the juvenile crime rate for offences under the Indian Penal Code, and an increase of 10.9% in offences under special and local laws. This basically implies that the number of children within the purview of the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act) has substantially increased (1). Also, according to *Crime in India, 2011*: “Out of the total juveniles involved in various crimes, 6,122 were illiterate and 12,803 had an education up to primary level, and these two categories have accounted for 55.8% of the total juveniles arrested during the year 2011... A large chunk of the juveniles (56.7%) belonged to poor families whose annual income was up to Rs 25,000.” Most children and their families who come before juvenile justice boards (JJBs) across the country are poor, vulnerable and unaware of their rights under the juvenile justice system.

This article looks at issues surrounding access to justice, quality of child rights lawyering, and the right to free legal aid. My experiences have revealed several problems, including the incompetence of lawyers providing free legal services, a lack of clarity about legal aid and how to procure such services, lack of sensitive and trained staff at observation homes, absence of a defined constructive routine for children at observation homes, lack of sensitised members on the juvenile justice board, and non-filling of vacant positions.

Structural and procedural gaps within the juvenile justice system

The Juvenile Justice Act was enacted with the objective of ‘providing proper care, protection and treatment by catering to their developmental needs, and by adopting a child-friendly approach in adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation...’ (2). It deals with children in conflict with the law and children in need of care and protection. The competent authority to deal with children in conflict with the law is the juvenile justice board (JJB) and for children in need of care and protection it is the child welfare committee (CWC). Proceedings before the juvenile justice board are required to be held in a child-friendly manner and in a language that the child understands. The child is given a chance to be heard and participate in the proceedings.

The juvenile justice board comprises two social work

members and one judicial magistrate first class. Of the two social work members, one has to be a woman. The social work members should have been actively involved in issues like education, health or welfare activities pertaining to children for at least seven years, and the magistrate must have special knowledge or training in child psychology. The board has powers conferred on it under the Criminal Procedure Code available to a magistrate.

The usual practice is that the chief judicial magistrate is appointed as chairperson of the juvenile justice board. It is difficult to find a magistrate who is well-versed in child psychology; as a result, this eligibility clause remains mostly on paper. Most magistrates who are appointed to the juvenile justice board have no knowledge of child psychology; training is provided to them after their appointment. This impacts the board’s functioning. The tenure of juvenile justice board members is three years.

Pendency and its impact on hearings

The principle of a child-friendly approach contained in the preamble to the Juvenile Justice Act is hardly ever implemented. Due to the heavy case load and increasing backlogs, the juvenile justice board in Bangalore is unable to spare enough time to hear every individual case. So, multiple matters are heard in parallel. For instance, while the magistrate records the evidence in a case, one social work member explains the plea and the other hears the bail application. The process of hearing is thus disorganised and chaotic, turning the goal of promoting child participation into a distant dream. A child who is part of the system finds it difficult to understand or navigate through the procedures and processes.

What compounds the problem is the fact that there are no full-time magistrates at the juvenile justice board in Bangalore and other parts of Karnataka. The magistrate attends to criminal cases five days a week in the regular courts and devotes only a day or half-a-day for juvenile justice board hearings depending on the case load. Delays in filing chargesheets and initiating trials also contribute to high pendency in the juvenile justice boards.

Delayed social investigation reports and the impact on bail

Investigation of the background of children in conflict with the

law is an essential component of the justice process before the juvenile justice board. The child's social investigation report/probationary report (PO report) is considered before bail is granted. The rationale behind this is to become aware of the child's socio-economic background. The PO report is a detailed report which should include the educational qualifications of the parents and siblings, physical or mental disability of any member of the family or the child concerned, whether any member of the family is an alcoholic or addicted to any other substance, economic background in terms of monthly income of the family, kind of neighbourhood, etc.

The social investigation report should help the board arrive at a decision with respect to bail. However, the probation officer charged with conducting the social investigation is responsible for the PO reports of hundreds of adult offenders in regular courts as well as children placed in children's homes. As a result, the reports are sketchy and provide little insight into the background of children in conflict with the law. Often, bail is delayed because the report is not available on time. It is the duty of the lawyer to coordinate with the officer and get the report filed in time. It is critical to have dedicated officers responsible for the preparation of social investigation reports for children in conflict with the law.

Child rights lawyering and the right to legal aid

If the right to access to justice is to be fully realised, the state must provide the right to free, effective and competent legal aid. Article 39A of the Constitution of India says: 'The state shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities

for securing justice are not denied to any citizen by reason of economic or other disabilities.'

Legal aid is not limited to representing the client before a court; it also entails helping clients understand the process of justice and make an informed decision about the course of action to be taken. Lawyers also have a duty to assist the board in adjudicating the matter. The lawyer needs to understand that the child and his family may require psycho-social intervention; it is necessary that the lawyer coordinates with other professionals such as counsellors, probationary officers and NGOs for the required services. For instance, a child in conflict with the law may be ousted from school because of an ongoing case. In such circumstances, the lawyer needs to ensure that the child does not face any injustice or suffer social ostracism because of the case, and that the child is re-admitted to school once the case is over. The ultimate objective is that the child should lead a normal life.

There are systemic issues that plague free legal aid to juveniles in conflict with the law. To start with, the procedure of availing of free legal aid — details about lawyers and their contact numbers — is not made available to family members when they come to rescue the child. There is often a nexus between the police and private lawyers and on apprehension of a juvenile, families are often directed to a private lawyer by the police.

The quality of representation before the justice juvenile board also warrants scrutiny. Most lawyers appearing before the board are interested only in getting the child out on bail, which is also the family's demand. They betray a shallow understanding of juvenile justice, as little consideration is given to whether it is in the interests of the child to be



released on bail. The board has to consider whether the child should be let out on bail or whether bail would expose the child to moral, physical or psychological danger. These matters are usually handled in a routine manner and once bail is granted and the child goes home, the lawyer disappears.

After getting bail, the juvenile needs to appear before court only after the police files a chargesheet. And since the chargesheet is rarely filed on time, there is a long gap between hearings. The hunt for a new lawyer commences at the start of the next hearing. This is a problem many families face irrespective of whether the lawyer is a free legal aid lawyer or a private one.

Things need to be explained to the child and his/her family at every stage of the process. The most crucial stage in these proceedings is the recording of the plea. The child must be thoroughly counselled, and emotional, social and psychological support extended at this stage. However, cases are often routinely dealt with and the child is told to plead 'not guilty', with a view to defending the child. There may be cases where the child has committed an offence and a guilty plea may have therapeutic/healing effects on the child. At times, board members ask the child in conflict with the law to plead guilty so that the case can be closed immediately. This happens especially in old cases; the interests of the child are completely negated and become secondary.

The measly remuneration offered to lawyers on the legal aid panel may explain the lack of interest in providing services to children in conflict with the law. In Karnataka, a legal aid lawyer is paid Rs 250 per sitting, which is too little for any lawyer to sustain his services. Enhanced remuneration could potentially improve the quality of legal services. At the same time, the need to monitor and evaluate the provision of legal aid is important. For its part, the juvenile justice board should try and ensure that lawyers who are assigned cases handle the matter until it is over and not just concern themselves with getting the child out on bail. The state has to ensure that free legal aid lawyers are effective, competent, child-rights oriented, and sensitive. Completion of legal education in itself does not prepare law graduates for handling child cases; child rights lawyering is a specialised area requiring an understanding of the case not just from a legal context but from the psycho-social perspective as well. Therefore, in-depth training could help build a cadre of lawyers who promote child rights jurisprudence in India.

The right to legal aid for children in conflict with the law who have been denied bail and are living in observation homes cannot be ignored. Training for staff at observation homes is non-negotiable. The stark reality is that most staff are not trained to handle children in conflict with the law. Out of sheer frustration with the system, in January 2012, three children in conflict with the law and housed at an observation home at Bangalore allegedly attempted suicide (3). Staff members often hurl abuse at the children and are incapable of handling children from different backgrounds and children in difficult circumstances. The rehabilitative

aspect of these spaces stands severely compromised due to these shortcomings. Staff at such homes must ensure a lively atmosphere for all children.

The right of children in observation homes to education should be respected. Although the Right of Children to Free and Compulsory Education Act, 2009 mandates that all children from the ages of 6 to 14 must attend school, this right finds no place in the juvenile justice system as these children represent a floating population. The government has made no effort to ensure that children in conflict with the law who do not get out on bail are given the benefit of an education.

Some children suffer emotional trauma because of the guilt of having committed the offence, or because they are away from their families, or because of the abuse that they may suffer. Such children desperately need the services of a counsellor. There is, however, no facility for full-time counsellors. In places like Gulbarga and Bidar, there is no counsellor at all.

With the aim of reforming children, the JJB can give disposition orders according to Section 15 of the Juvenile Justice Act; the case can be closed with advice and an admonition; a child in conflict with the law can be asked to do community service; a fine may be imposed if the child is above 14 years of age and is working or has parents who can pay the fine; the juvenile can be directed to participate in group counselling or similar activities. The juvenile justice board can pass an order directing that the child be placed in a special home for a period of three years; this is the highest penalty/punishment that the board can order even for the most serious offence. The special home should provide vocational training and set a daily routine so that the child receives special attention. This training should help him resume life on a fresh note. However, orders such as group counselling and community service are used very rarely as a means of reformation of juveniles.

Conclusion

Improving and providing uninhibited access to effective, competent and free legal aid lawyers, capacity-building and sensitisation of staff in observation homes, probationary officers, members of the juvenile justice board, and allocation of full-time magistrates may help implement the law in spirit. Children in conflict with the law should have access not merely to justice but to reformative and restorative justice.

Note: This article draws most of its observations from the Juvenile Justice Board (Urban and Rural), Bangalore

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Endnotes

1 *Crime in India, 2011*

2 Preamble of the Juvenile Justice (Care and Protection) Rules, 2007

3 <http://www.thehindu.com/news/states/karnataka/article2868193.ece>

Undermining the domestic violence law

The Protection of Women from Domestic Violence Act, 2005 aims to provide women quick decisions on protection, residence, maintenance and child custody. This is an account of how the best intentions of the law are thwarted in the process of implementation

JAYNA KOTHARI

WITH THE ENACTMENT of the Protection of Women from Domestic Violence Act, 2005 (PWDVA) it was imagined that justice for women would be quick and relief-oriented. However, five and more years after the law's passage, many of these notions are being reconsidered. A number of innovative solutions introduced in the law, such as having the jurisdictional magistrate's court as the forum for domestic violence complaints, specific provisions for ex-parte and interim orders, special provisions for breach of interim orders, and others, have not worked out very well in practice.

What has been the experience of women using the PWDVA in the last few years? Did they get the relief they needed quickly? Were the courts accessible? Was the enforcement of interim and final orders easy? As a lawyer who has taken up several cases under the PWDVA, I shall try and answer some of these questions based on my experiences in Karnataka.

Effective implementation of the PWDVA can take place only if the judiciary understands the core objective of the law, which is to provide immediate relief to women in emergency situations where they face domestic violence.

Access to courts

The women's movement wanted women facing domestic violence to have easy access to courts everywhere to file complaints under the Act. It was decided that magistrate's courts, which are situated at the local level, were the ideal forum; civil or family courts are only available at the district level, would not provide speedy justice, and would further ghettoise women. Studies on family courts in India and abroad showed that specialised courts offered no greater advantage to women; nor did they offer quick disposal of domestic violence cases (1). Magistrate's courts were also chosen because criminal proceedings are usually much quicker than civil proceedings. Thus, Section 27 of the PWDVA provides the forum for filing complaints at the jurisdictional magistrate of the first class or the metropolitan magistrate's courts (2).

A unique combination was thus arrived at — the PWDVA, a civil law, provided for the speedy disposal of cases and easy access to justice for women in the magistrate's courts,

which are criminal courts. The courts recognised this fact. In *Manish Tandon and Ors vs State and Anr* (3), the Delhi High Court held that: 'It will be apposite to take note of the fact that though it is a piece of civil law, evidently in the interests of expedition and to cut down procedural delays, the forum provided for enforcement of rights under the Protection of Women from Domestic Violence Act is that of the magistrate courts constituted under the provisions of the CrPC.'

This objective of the PWDVA, however, is being thwarted by several states in unique ways. In Bangalore, all cases under the PWDVA are assigned only to the traffic courts or to the metropolitan magistrate (traffic court). At present there are only around four to five metropolitan magistrates in the traffic courts. This assignment of domestic violence cases was done under the CrPC, which gives powers to the chief magistrate to assign cases for the better administration of the court. Thanks to this order, in Bangalore, all cases under the PWDVA are in effect assigned to a handful of magistrate's courts, undoing all the promises of Section 27, of facilitating access to the courts. The courts are clogged as a result; some of them take up domestic violence cases only two days a week. This makes obtaining emergency interim orders extremely difficult and nullifies the purpose of the PWDVA and speedy relief for women. The mandate of disposal of cases within 60 days is a long way from being achieved, with the magistrates' caseload increasing every day (4).

In the rest of Karnataka too, domestic violence cases are handled by the traffic courts. The registrar general of the Karnataka High Court has reportedly issued a circular to all magistrates to fix one day a week/fortnight/month for the hearing of cases under the PWDVA (5). Such measures, though prompted by procedural reasons, strike at the core of the PWDVA.

Interim orders

The PWDVA, under Section 23, specifically provides for ex-parte and interim orders for protection, residence, monetary relief, child custody, etc, to be granted to women facing domestic violence. Section 23 (1) refers to interim orders generally and Section 23 (2) provides specifically for ex-parte orders.

Usually, protection orders restraining the abuser from committing any further acts of domestic violence are easily obtained from the courts as they are negative orders. Positive orders such as residence orders, maintenance and custody orders are more difficult to obtain and usually take a long time as notices must be issued to the respondents, after which they are required to file their reply, then arguments are heard on the applications and finally orders are passed.

In Karnataka, especially in Bangalore, magistrates were liberal in granting ex-parte maintenance orders as well when prima facie evidence of domestic violence was found. Even when ex-parte orders for maintenance were not granted, after a notice was issued and in cases where the salary certificate of the respondent was available and produced, magistrates would grant maintenance orders fairly quickly, and were reasonably generous in awarding maintenance.

Thanks to a 2009 judgment by the Karnataka High Court, however, the procedure of even granting interim orders has been brought to a standstill. Justice Jawad Rahim in *Krishna Murthy Nookula vs Y Savitha* (6) held that before granting any interim relief the magistrate had to conduct an inquiry as prescribed under the Code of Criminal Procedure for summons cases, and pass orders only after taking evidence in the matter. He only excluded orders granted ex-parte, and held that all other interim relief orders could be passed only after taking evidence, which could take months, even a year or two. Holding that even interim relief will be available after collecting evidence undermines Section 23 of the PWDVA which provides for the claiming of immediate interim relief.

Following this high court decision, most magistrates across the state are granting ex-parte orders only where required, leaving maintenance and residence orders to be decided after evidence has been taken. The judgment has not been challenged and, unfortunately, unless it is overturned by the Supreme Court it will continue to subvert the PWDVA and deny women quick interim orders as envisioned under the Act.

Maintenance

While the PWDVA has specifically provided for monetary relief in Section 20, with maintenance based on the status of the parties, this is not being seriously followed by the higher courts in Karnataka. It is strange but true that the best orders for monetary relief are often granted by the lowest courts, that is, the magistrate's courts and as the respondents appeal to higher courts, the monetary relief amount gets reduced further and further. The general experience in Karnataka has been that the sessions courts and the high court usually reduce the maintenance amount granted.

In conclusion, one could say that the working of the PWDVA leaves a lot to be desired. The ideals it was inspired by

are very different from the reality in which the courts and judiciary implement the law. The Karnataka High Court's judgment, for example, in *Krishna Murthy Nookula vs Y Savitha*, makes it clear that even members of the higher judiciary have not understood the provisions of the PWDVA, and have been treating it as a criminal law when in fact it is a civil law providing civil remedies to women.

Unless the courts clearly understand the PWDVA as a law that works positively for women and children facing domestic violence it will not be effectively implemented. Unfortunately, while some magistrates are made to undergo training, no training on the PWDVA is provided to sessions court judges and judges of the high court. And so we find that good orders passed by magistrates are often reversed by the sessions and high courts.

Allegations are still being made that women are misusing the PWDVA, when in fact interim relief takes months to obtain, if at all, cases drag on, sometimes for years, though the timeframe suggested for disposal is two months, and even a breach of orders is not taken seriously. In such an environment, is it even reasonable to say that women are misusing the law? In fact, women who file complaints often end up feeling harassed and violated twice over in their daily tribulations with the court system.

Only when the PWDVA is understood as a law which aims to protect women from violence, recognise their right to live within the home without abuse, and protect their rights to equality and life with dignity guaranteed under Articles 14, 15 and 21 of the Constitution, will it be truly effective. Until that happens, the courts and the legal system will find a myriad ways to delay justice and effective access to the law for women.

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Endnotes

1 Garoupa, Nuno M, Jorgensen, Natalia and Vazquez, Pablo, 'Assessing the Argument for Specialised Courts: Evidence from Family Courts in Spain' (April 2010) *International Journal of Law, Policy and the Family*, Vol 24, Issue 1, pp 54-66, 2010

2 Section 27 (1). The court of judicial magistrate of the first class or the metropolitan magistrate, as the case may be, within the local limits of which:
(a) the person aggrieved permanently or temporarily resides or carries on business or is employed; or
(b) the respondent resides or carries on business or is employed; or
(c) the cause of action has arisen, shall be the competent court to grant a protection order and other orders under this Act and to try offences under this Act

3 Criminal M C No 1784/2009 available at <http://www.indiankanoon.org/doc/1420423/>

4 'Staying Alive', 5th Monitoring and Evaluation Report 2012

5 *Ibid*, at page 36

6 Criminal Revision Petition No 815/2009 available at <http://judgmenthck.kar.nic.in/judgments/bitstream/123456789/500665/2/CRLRP815-09-09-12-2009.pdf>

Maintenance as an entitlement

The right to 'maintenance' acknowledges the woman's non-economic contribution to the family. In patriarchal India, however, this right ends up being linked to the real or perceived 'sexual purity' of a woman. Also, it is usually available only to middle class and elite women. How can this civil right be made meaningful for all women?

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THE TERM 'RIGHT TO MAINTENANCE' is a loaded term and, needless to say, a loaded right! Flavia Agnes explains this very appropriately as: 'It is a need-based approach which reduces the wife to a subordinate position and does not recognise her as an equal partner in marriage.' However, marriage and the way it has been conceived in India is an inherently patriarchal and unequal institution; against this background it is a necessary right. It is also one of the very few positive rights available for women. At a time when the women's movement has been focusing on reforms in criminal law and laws that impose greater penalties and more stringent punishments, maintenance is one of the few rights which provide civil remedies.

But maintenance is also a right which necessarily tags along a stigma — of being a favour bestowed upon a woman rather than an entitlement. Maintenance also comes with the baggage of being a right that is and will be useful to the elite and the middle class. For instance: in situations where the woman is the sole earner or where both parties earn equally (read, daily wages), the right to maintenance becomes effectively redundant. This article explores the different contradictions within this right, and attempts to resolve them and understand what the ideal right to maintenance should look like.

The general debate around maintenance in the past decade has been regarding 'who is legally entitled to claim maintenance' and expanding the scope of maintenance to extend beyond the myopic definition of a wife. The Delhi High Court recently, in *Narinder Pal Kaur Chawla vs M S Chawla (1)* went a step further in doing this very same thing. In this case, the couple had lived like a married couple for 14 years and the man had concealed the fact that he was already married. They had two children from this relationship. The view taken by the court was that on account of the nature of the relationship, the woman should not be deprived of her right to maintenance under the personal law applicable to Hindus. The court further expressed that denial of maintenance under such circumstances would amount to putting a premium on or rewarding the man for defrauding the woman by concealing his first marriage. It was further recorded that for the purpose of granting maintenance under personal



law, a woman placed in the position of a second wife can be treated as a legally wedded wife and is entitled to maintenance.

Before embarking on the meaning and implications of the right to maintenance it is essential to examine the provisions providing maintenance, and some of the issues surrounding those provisions. I am going to refer to three major legislations that deal with the right to maintenance, not all the legislations.

Criminal Procedure Code, 1973 (CrPC)

Section 125 of the CrPC provides for maintenance of a legally wedded wife, legitimate and illegitimate minor child/children, legitimate or illegitimate child/children who cannot maintain himself/herself because of an infirmity in body or mind, and parents; the exception is a married daughter who has attained majority. The law provides that if any person (read, man) who has sufficient means (read, income disclosed to the court) neglects or refuses to maintain any one of the abovementioned categories of persons, a magistrate can order a monthly allowance to be paid to such persons. For the purpose of this piece I will be referring only to the legally wedded wife, not discussing other issues arising from it.

The section further provides an exception when maintenance need not be paid to the woman. According to the law, a wife will not be ‘entitled’ to receive maintenance if she is ‘living in adultery’ or she refuses to live with her husband without providing sufficient reasons, or if they are living separately by mutual consent.

Three major issues arise out of this provision:

- It is only a legally wedded wife who can claim maintenance. And proof of marriage is almost non-existent in non-urban, non-educated sections of society. Also, there are so many different varieties of customary marriage that one can never come to a clear unambiguous conclusion as to who is a ‘real wife’ (2). The prevailing debate on the much-discussed proposed Compulsory Registration of Marriages Act is centred precisely on this point (3).
- Secondly, in many instances of bigamous marriage, the second wife is not entitled to maintenance because it is only the first marriage that is the legal marriage in the strictest sense (4). This applies even to cases where the second wife is not aware of the first marriage and the man has married her fraudulently. This means that the woman pays the price for the man’s fraud, and he is actually rewarded for defrauding the woman!
- Thirdly, cases of maintenance are always accompanied by accusations of adultery by the woman. Since an exception is provided in the law, almost all cases have respondents (husbands) accusing their wives of adultery; a baseless yet traumatic experience for the woman.

The idea is that a woman who does not perform her ‘conjugal obligations’ (sic) faithfully by being an ‘adulteress’ is not entitled to any maintenance. One cannot escape noticing the transactional nature of maintenance, which being monitored by the court only adds to the dilemma surrounding maintenance.

The Hindu Marriage Act, 1955 (HMA)

Section 24 of the HMA provides for maintenance and expenses of proceedings for cases where either the husband or the wife does not have sufficient income for their own support and the expenses of the proceedings. Either party can apply to the court, and the court can order the respondent to pay the petitioner (the person who has filed the claim) the expenses of the proceedings and a monthly income during the proceedings, keeping in mind the petitioner’s needs and respondent’s means.

Section 25 of the HMA deals with permanent alimony and maintenance which can be ordered to either husband or wife. While passing a divorce decree, the court, after an application in this regard, can order either the husband or the wife to pay maintenance. The said maintenance can be either a gross amount or a periodic sum. Needless to say,

such an order can be altered with a change in circumstances and/or if the husband or wife has had sexual intercourse (5) outside of wedlock. Sub-section 3 which deals with this aspect maintains that the order can be changed if the woman is not ‘chaste’ and the man has ‘sexual intercourse outside the marriage’, the section implying that a woman’s sexuality is somehow much more ‘protected’. The word ‘chaste’ and ‘chastity’ implies a sense of purity which is automatically expected from a woman. One can argue that the result of such behaviour is the same; however, the language, especially on purity for the woman, belies any such claim of equal treatment regarding sexual intercourse outside of marriage in the law.

The Protection of Women from Domestic Violence Act, 2005 (PWDVA)

The PWDVA is the most recent and probably the most secular addition to laws on maintenance. As the name suggests, the law provides protection to women who have been subjected to violence in their homes. The law provides civil remedies for women who have been subjected to domestic violence, maintenance being one of them. Since violence has been defined broadly, many cases can be covered under the PWDVA as well. Section 20 of the PWDVA provides a woman who has been subjected to violence with monetary relief which includes loss of earnings, medical expenses, loss caused by the destruction, damage or removal of any property from the control of the person, and maintenance for the woman and her children. The most significant contribution of this law to jurisprudence of maintenance is broadening the scope of maintenance itself, that is, persons living together but not married can also claim maintenance. Hence, all bigamous marriages and other cases where there is no proof of marriage can claim maintenance under the PWDVA. However, it will not be wrong to say that the specific provision relating to maintenance under the PWDVA is the direct descendant of Section 125 of the CrPC. This can be seen through the fact that enforcement of maintenance under the PWDVA is the same as under Section 125 of the CrPC. Hence, it has not only inherited the procedures but also the baggage from that section. And it has also clearly worded maintenance as just that — ‘maintenance’. The language in this section is significant because language defines perspectives on any issue.

Maintenance as a transaction

In all the legal provisions referred to above, maintenance is linked to the real or perceived ‘sexual purity’ of the woman. It is a reward earned for maintaining this purity and essentially conditioning behaviour in regard to her sexuality. Hence, if a woman behaves in a manner that is more often than not ‘beyond reproach’, only then will her value within a marriage be acknowledged. Every provision ensures that maintenance is doled out without taking into consideration

the financial or non-financial inputs a woman makes within a marriage but only the apparent 'respectable behaviour' of the woman.

When the laws imbibe different meanings for the same behaviour, as for example 'woman is not chaste' being equal to a 'man having sexual intercourse', it is reinforcing an already cultural and patriarchal norm on women's sexual behaviour being of higher value than a man's. This discrimination percolates into different judicial decision-making where a woman is judged by a set of different parameters from a man. In matrimonial litigation it is invariably the people who are judged; very rarely are cases seen on the merits of the facts and adjudicated in a cut-and-dry manner as would be expected in civil matters. In such cases, the law itself seems to condone an unequal process of assessing who is more worthy of 'favour' by the judge doling out these favours and entitlements. Consequently, it very rarely becomes a discussion about the 'right' but more a discussion on the 'obligations' which were not fulfilled and, in this case, the obligation of a woman not seen or perceived to be an 'adulteress' or 'un-chaste'. As a result, she is also held responsible for others' un-chaste behaviour!

Claims for maintenance by women

A study of matrimonial litigation and also cases filed under the PWDVA shows that, almost always, a claim for maintenance is the most commonly sought after remedy in the courts. A study on family court litigation in West Bengal conducted by Flavia Agnes (6) has shown that the bulk of family court cases revolve around maintenance under Section 125 of the CrPC. The study also showed that the provision was generally used by poor, destitute women, most of them illiterate (7). Similarly, analysis of court orders under the PWDVA showed that maintenance was the most commonly sought after order under the Act. This has been the trend for five consecutive years (8). Due to a lack of such studies with respect to other legal provisions providing for maintenance, one cannot make the same claim. However, we can safely make the statement that within matrimonial litigation, maintenance has been a highly contested and very valued provision.

Maintenance does become contentious when we look at cases of women who are the sole earners in their household, or daily wage labour. For example a typical scenario where both husband and wife earn Rs 100 per day and have one child. The wife is physically and mentally abused. The typical solution suggested in such a case is always file for maintenance and also a protection order and possibly divorce depending on the circumstances of the woman and the societal structures. In such a case, the court procedures are long and the woman spends a lot of time coming and going to court without any support. Eventually, she ends up losing more money than she would ever gain. This is

without even going into the problem of enforcement of the order, if made. At this point, do we say women do not need maintenance at all? We need to think about custody of the children with their mother; a single income is not sufficient to make ends meet.

Conclusion

There is no doubt that 'maintenance' as a concept is an extremely invaluable provision. The idea behind maintenance is to respect the woman's non-economic contribution to the family. It stresses the fact that women have a right to monetary compensation in a marriage, not necessarily of being 'maintained'. It is also essential for a woman's sustenance and living. However, for the right of maintenance to be available to all women including those in extremely poor circumstances, the existing provision should be amended to bring in the state's liability in such circumstances — that is, welfare and social security mechanisms. Since criminal law in this regard has not been the most effective in providing rights to women, there has to be an alternative through which a woman's contribution to the family and economy is recognised. We need to question how the right of maintenance can move beyond an entitlement for the middle class elite woman and find a more effective and meaningful 'right' for *all* women.

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Endnotes

1 Cri Rev Pet No 238/2004 decided on March 19, 2012

2 For details please refer 'Rights in Intimate Relationships', Partners for Law in Development, New Delhi, 2010

3 The Compulsory Registration of Marriages Act is hailed as ending the ambiguities in such bigamous marriages because non-registration would result in levy of a fine. It is also hailed as a way to prevent child marriages as all marriages should be compulsorily registered. However, the opposite argument that such compulsory registration will further marginalise the few women who are either unaware or do not have access; further there is no mechanism to track whether every marriage is registered and in cases of maintenance and other matrimonial rights, denial of a wife's right becomes easier

4 Section 5, Hindu Marriage Act, 1955

5 Section 24 (3), Hindu Marriage Act, 1955

6 Agnes, Flavia. 'A Study of the Family Courts, West Bengal' for the West Bengal Women's Commission, September 2004, pg 26

7 Agnes, Flavia. 'A Study of the Family Courts, West Bengal' for the West Bengal Women's Commission, September 2004, pg 27

8 Please refer: 'Staying Alive; The First, Second, Third, Fourth and Fifth Monitoring and Evaluation of the Protection of Women from Domestic Violence Act, 2005', Lawyers Collective Women's Rights Initiative, New Delhi

The supportive role of women's organisations

In most situations, in spite of legal provisions being in place, women cannot access the courts by themselves. They need the help of support groups. Women's organisations become that support, helping the victim become a survivor

RUKMINI SEN

ACCESS TO JUSTICE is a phrase specifically used with reference to the judiciary and the manner in which a proactive judiciary has increased access to the justice system for vulnerable communities. This paper will talk about how women's organisations have been liaising with the courts and women who come to them for help.

Access to justice is not a one-time phenomenon of going to the courts; it is continuous and lengthy. It is attempted access to the justice delivery system: the access itself entails various hurdles and women's organisations become an agent of support and comfort to women who want to attain justice through the courts. In the process, the organisation makes a survivor out of the victim.

This article comes from my engagement with an activist women's group in Kolkata between 2001 and 2009. It elaborates on the various practices and debates that the organisation has been engaged in while handling various 'cases'.

Nari Nirjatan Pratirodh Mancha (Forum Against Oppression of Women, hereinafter NNPM) is an autonomous women's organisation that's been in existence since the early-1980s in Kolkata. It was and remains a non-funded, voluntary organisation running mostly through donations from members and friends. It originated at a time when activist women's groups and individual women activists were common, but NGOs for women were not. With members from radical left political parties and independent women's libraries and study circles (*patha chakra*), the group, from the start, took an oppositional stand against the left-ruled West Bengal government. The main strategies employed were campaigns, demonstrations, leafleting and pamphleteering, street corner activities, and handling what they called 'cases'. The idea was to challenge and pressurise the government into ensuring justice to all its citizens. It was primarily in following up cases that the organisation came into direct contact with the dispensers of justice — the police and the courts.

Certain steps were followed when a woman came to NNPM to present her 'case'. But first let me explain the word 'case'. Members of NNPM would often casually refer to 'so-and-so's case', or 'this *didi's* case'. Then when NGOs became

a common platform for women's issues to be discussed, they had to write out 'case studies' or 'case diaries' as well as success stories from the wide range of cases they handled. There is a case study method in social science research where the researcher takes a representative case (a village, a piece of literature, a hospital) to carry out an in-depth cultural and historical study, and also make certain generalisations out of it within the main argument. Students in law schools are expected to study law through the case law approach, where important judicial decisions become cases for them to analyse and interpret. The common element among all these cases is that it is about a singular person/event. However, there may be connections between cases. A case that may start out at a women's organisation may eventually become the case that a law student reads in her/his classroom, because it went to court and justice was either delivered or denied. Thus, the word 'case' has a connection with access to justice, both for the organisation as well as for legal pedagogy. It is the case which seeks justice, and it can become a part of the legal curriculum if justice is provided or denied.

A woman coming to NNPM with her problems is usually dealt with in the following way:

- She is first asked whether she is comfortable talking to the group or to a single/couple of individuals from the group.
- While listening to her story, the NNPM member takes down notes (this is what becomes a 'case diary'). Listening is a very important component since the woman is usually hesitant, undecided about what to say and what not to. So it is about both listening as well as trying to gather more information (which might be seemingly irrelevant) from the woman, in a supportive environment, never once being intimidating towards the woman.
- The next most important part is to ask the woman narrating her life story, usually a story of violence and discrimination, why she has come to NNPM and what it is she wants both individually and from the organisation. Over the years I have found this the most crucial question because often women are confused about what they really want — some want the organisation to only talk to the husband (in most cases, the

perpetrator of the violence); some want the organisation to accompany them to the police station because their individual efforts at going to the police station to lodge a complaint have failed; some want information about lawyers; some want to fight their case in court; some may even want the organisation to provide them economic help. When a woman wants to go to court, there is always a word of caution that she must be mentally strong and prepared for a difficult long-drawn-out struggle. Not dissuading her, but laying bare the realities of the courts and inevitable delays in accessing justice. Many women ask for economic support, sometimes jobs or a shelter at which to stay. We acknowledge our helplessness in such situations and also the limitations of a strictly legal understanding of access to justice.

When we take the woman to the police station, the attitude of the sub-inspector is usually one of cooperation rather than indifference. One has to understand the interplay of class, caste and gender in this attitude and the importance of the collective against a single, marginalised woman trying to access justice.

If the woman does go to court finally, members of the organisation, by turn, try and be present on the case dates. One has to remember that all NNPM members have their own employment (formal or informal) and it has always been an area of deliberation as to which member shall accompany the 'case' to the court, and on what date.

On some occasions, the 'case' did not remain a single,

individual case. NNPM tried to mobilise other women's organisations to generate a larger campaign around the one case, making a paradigm shift of what Peter Berger would call 'personal trouble' to a 'public issue'. Of course the 'merit' of the case is an important criterion in making this leap and making the case a matter of collective concern beyond NNPM.

There are certain benefits of having and running cases within an organisational framework. A lot of human interaction happens between various sets of stakeholders — the woman who has come to the organisation with members of the organisation, at times with members of the woman's family and family members and friends of NNPM members (I would discuss, keeping confidentiality and anonymity, cases with my friends, or use examples in my classroom teaching, so they became 'live' persons in my everyday life) and finally interaction between state agencies (police, lawyers, doctors) that have the power to deliver justice within the constitutional framework.

The woman and her troubles would become part of our daily lives — we would be concerned if she did not visit the NNPM office on Friday (the one day of the week when members would meet). The 'human' in us gets shaken when we are faced with stories of suffering. The justice system, however, does not have much space for 'emotional' suffering; it is concerned with 'rational' evidence, truth and witnesses. There is a sense of trust and faith that is developed as a result of all these interactions. For the



woman in search of justice, the organisation and its members become her friends and a place that she wants to come to; at times, a sense of dependence is created.

It is only through handling and working with these cases that members of NNPM are made aware of the functionings of the police and the courts. That there is a wide gap between what is written in law and how the law is enforced is witnessed as the case proceeds. In court, one also gets to understand the various provisions of the Criminal Procedure Code and how maintenance laws work. Experience is gathered about the kind of questions that the defence counsel can ask; sometimes the woman fighting for justice is counselled along these lines. In such cases, the lawyers fighting for the woman will either be from the Legal Services Authority or empanelled lawyers of other NGOs working on women's rights. There are various occasions on which the woman who has come as a 'case' to the organisation ends up becoming a member of the organisation, subsequently fighting for other similarly placed women.

The search for justice necessarily transforms a woman from a victim into a survivor; she survives the police station (where she is often stereotyped as a 'bad woman' because she has complained against her significant other[s]), she survives the trial (which is also a fight of the weak and vulnerable against the more powerful patriarchy — husband, defence counsel, judge), she survives the everyday negotiation with her family and community (her defiance makes her 'deviant'), she survives her friends in the organisation who support her, and she survives in order to live life different from what she is used to. She also survives knowing that she is not alone and her situation is not unique; there are many other women trying to access justice just like her.

Although these are the positives, there are several limitations to an organisation being largely dependent on 'cases'. In an activist group, where members have other regular jobs, the resources factor is often a reason for the discontinuation of cases. A lot of time and energy is required to follow up cases, and sustained effort is mandatory in order to see results. On many occasions, case follow-up can be stressful, draining and also depressing because it is long and does not yield immediate results. Emotional stress is common with members involved in cases; to see the everyday harassment of the powerless within the court premises can be daunting.

There used to be a well-intentioned tendency for everyone to take up the role of counsellor when a woman came to the organisation for help. As a result, counselling was popular in the initial years of NNPM's handling of cases. But this need to help, to reach out, to support, to tell the woman what to do is often very different from professional counselling, and there are specific methods to handle it. At NNPM, we debated the need for a professional counsellor in the 2000s, because by that time the counselling profession had been well established and there were younger members who thought it necessary to get specialised help rather

than a friendly *didi* (sister) who would lend a sensitive ear to the person's traumatic situation. There were debates within the organisation that at a time when there were few women's groups the judiciary or the legal system had not become proactive as a result of sustained campaigns by women's movements; the need for organisations like NNPM to deal with cases was relevant. But with more and more funded NGOs emerging, with a dedicated workforce to deal with cases, NNPM debated whether it should become a referral centre and channelise its energies into other campaigns and research-related activities. Moreover, a case-specific understanding could develop where members do not perceive feminist politics beyond cases. There is therefore lack of holistic comprehension of substantive issues concerning the women's movement and people's movements in general. The much-needed link between the 'personal' and the 'political' may not best be established through the case method. Teaching of the law through this method could have similar limitations in that the pedagogy becomes limited to understanding one case, without analysing the context in which the case originated, the politics and the philosophy of the case, how judgment was reached, who the key players in the judgment were, etc.

Saheli, a group based in New Delhi with similar origins to NNPM, has comparable views on case work. "Some of us in Saheli felt that the very nature of case work is inherently curative, rather than preventive. Unless it is accompanied by active efforts to organise for social and structural change, case work can only provide symptomatic relief to a few individual women. Yet case work, by becoming a primary activity of Saheli, consumed the energies of volunteers so completely that campaigns on issues emerging from the case work did not receive enough attention." (<https://sites.google.com/site/saheliorgsite/other-activities/the-casework-debate-in-saheli>, last visited on July 2, 2012)

Women's groups and activists in India have since the early-1980s fought and campaigned vigorously for legal rights — from dowry-related torture, to cruelty within marriage, to domestic violence within marriage or in the parental home, to the demand to broaden the definition of rape and sexual harassment. It's been a long journey. The legal rights that have been acquired need to be exercised by ordinary citizens. It is unfortunate that, in most situations, in spite of legal provisions being in place, women cannot access the courts by themselves, they need the help of support groups. Women's organisations become that support. Indeed, today it is legally legitimised: the Protection of Women from Domestic Violence Act has a section on service-providers (NGOs that will take in women and get them justice). Although not all women supported by women's groups manage to get justice, these groups often are the first step towards access to justice for many women in India who are tentative about going to court.

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Commissions of compromise

Women's commissions were set up at central and state levels to monitor violations against women, recommend policies and legislation and take up cases related to collective justice. But in Karnataka at least, the commission seems to be handling marital and other private disputes

SONAL MAKHIJA

Introduction

The law has always assumed a central role in women's empowerment in India. The 1970s and '80s in particular saw the women's movement focussing on legal reform to improve the status of women. This period also saw an effort by the judiciary and legislature to make justice 'accessible' to the poor. Accessibility to the courts featured in academic and public policy debates on the law. The informalisation of formal adjudicative institutions, such as relaxation of the rule of locus standi and 'epistolary tradition' in the Supreme Court and the high courts was a step in that direction.

The debate on setting up women's commissions at the national and state levels took place around the same time. It was first voiced in 'Report of the Committee on the Status of Women in India'. The commissions would monitor violations against women, evaluate existing policies and bring women's concerns into policy decisions. They would recommend new laws or law reforms to state legislature or parliament, intervene in cases of violation or discrimination against women, and file cases in court.

To increase women's access to justice, the commissions also had the power to receive complaints. In investigating a matter under the National Commission for Women Act, 1990, the commissions were empowered with all the powers of a civil court in trying a suit, especially with respect to summoning anyone before them, receiving evidence and requisitioning any public records, and examining witnesses and documents. The focus was on providing 'justice' within the realm of a formal state-controlled justice mechanism.

Subsequent to the setting up of these commissions, however, there has been little assessment of the functioning or evolution of these autonomous watchdogs. Are these bodies meeting their objective of protecting and promoting the rights of women? How have they performed?

These were some of the questions considered in the study 'A Review of the Working of the Karnataka State Human Rights Commissions (KSHRC) and the Karnataka State Commission for Women (KSCW)' (1). For the purpose of this article, I will discuss the existing complaints unit and its

'justice mechanism' in light of the study on the Karnataka State Commission for Women (KSCW). I will not examine the nature of political appointments of chairpersons, or its autonomy or transparency that has been discussed in the report in detail.

The Karnataka State Commission for Women (KSCW)

In 2010, when my colleague Swagata Raha and I studied the Karnataka State Commission for Women (KSCW), the purpose was to evaluate the functioning of the commission within the powers assigned to it under the Karnataka State Commission for Women Act, 1995, and in light of the international principles on human rights institutions. The commission was constituted with the objective of protecting and promoting the rights of women. Did it fulfil that function? Frequent violations against Christian women on the west coast of Karnataka in 2008 (2), and the 2009 Mangalore pub attack on women pub-goers by right-wing parties (3) suggested otherwise. Since its establishment in 1995, the KSCW had done little to check violations against women in the state. Not only that, it had failed to exercise its powers to make policy changes and suggest law reforms/schemes benefiting women.

It did however have a functioning complaints cell which received and heard cases twice a week. Yet, it had achieved little since its existence. In fact, from 2007 to April 2011, the KSCW did not have a chairperson. In the absence of a chairperson, the secretary presided over the cases and was in charge of the commission's day-to-day functioning. The Karnataka State Commission for Women Act, 1995 does not empower the secretary to discharge functions which are meant to be performed by the chairperson or other members of the commission. Of course, for most women complainants whom I interviewed as part of our fieldwork, the absence of a chairperson was of little concern provided the secretary heard their cases and they obtained relief.

Private justice and the culture of compromise

The bulk of cases received by the KSCW were essentially concerning marital disputes, domestic violence, dowry harassment, custody issues and restitution of conjugal

In its daily functioning, the commission was content running a complaints unit and setting up kiosks outside family courts to assist women. But the complaints cell functioned with the primary purpose of resolving disputes. Does this guarantee ‘justice’? Much of its interventions at the time of the study were driven by a culture of compromise or taking the ‘saving the family’ approach

rights. The receiving, hearing and disposing of cases made up the majority of work discharged by the KSCW. The criterion for accepting cases is that the case must involve an issue related to women’s rights. In one of my field visits, I found case workers intervening in a neighbourhood squabble between two women. In another case, a woman filed a complaint against her former landlord who refused to return her deposit after she vacated the flat. In yet another case, a woman working in a hospital filed a case alleging discrimination against hospital authorities. Cases pertaining to domestic violence were directed to protection officers or police stations in the given jurisdiction, as per the Protection of Women against Domestic Violence Act (PWDVA), 2005. Predictably, most cases relating to marital disputes were ‘compromised’, suggested the secretary in an interview. The objective was to resolve the matter and ‘save the marriage’. “The primary aim of counselling is to reconcile the parties and to avoid breaking the marriage. If this is not possible, then other steps are taken,” explained one of the case workers. The case workers essentially gathered all the facts of the case from the petitioner, and the relief sought; they then prepared the case file.

In its daily functioning, the commission was content running a complaints unit and setting up kiosks outside family courts to assist women. But the complaints cell functioned with the primary purpose of resolving disputes. Does this guarantee ‘justice’? Much of its interventions at the time of the study were driven by a culture of compromise or taking the ‘saving

the family’ approach. For women with little access to formal courts, ‘compromise’ suggested by KSCW staff, especially in cases of violence, is coercive as opposed to the granting of ‘justice’. Pratiksha Baxi, in her paper ‘Access to Justice and Rule-of-(Good) Law: The Cunning of Judicial Reform in India’, comments on the nature of compromise and the inequality of negotiation where women are discouraged from taking an adversarial position (4). The commission, much like courts adjudicating on family law, encouraged compromise.

Was the objective of women’s commissions to transform into yet another adjudicative body redressing private disputes? How does this stand against the objective of commissions providing relief to a wider population of women?

The overriding objective of the constitution of commissions was to improve the overall status of women in the state. Its powers — to examine and review laws, investigate the status of women, take suo motu action, recommend and suggest schemes for women, disseminate information relating to the rights of women, and take up cases relating to violation of constitutional rights of women in the state — stress on impacting the lives of a large body of women in the state. This includes inspecting conditions of women in prisons and funding litigation affecting women at large. The purpose is to improve women’s social and economic lives in the state.

In the case of the KSCW, it rarely exercised its powers to advise the state on law enactments, or demand that the state take action against large-scale violence against minority women in Karnataka. Both cases — of violence against Christian women and the 2009 Mangalore pub attack — are illustrations of the KSCW’s inaction.

Instead, with the KSCW, the emphasis is on ‘private justice’ as opposed to ‘collective justice’. While one of the objectives of the women’s commissions is to assist women in receiving justice in matrimonial disputes in family courts, the primary objective of the women’s commissions is to facilitate the overall development of women in the state, as opposed to merely focusing on resolving personal conflicts or disputes. The assistance provided to women in matrimonial matters too is to facilitate a change in women’s conditions or the repeal of discriminatory laws which have a larger impact on family or personal laws.

Possibly one of the biggest achievements of the KSCW has been a compensation scheme available to women acid attack victims. Much of this was because of civil society intervention and a petition filed by the Campaign and Struggle Against Acid Attacks on Women (CSAAAW) and Human Rights Law Network (HRLN) in the Bangalore High Court. It was on directions from the Bangalore High Court that victims of acid attacks were provided compensation, loans and employment under the

Suraksha Scheme issued by the KSCW.

Courting informality

International principles mandate that human rights institutions be accessible. Accessibility to commissions includes not merely economic accessibility but also physical and procedural. Most times, the KSCW functions as a rudimentary court with all the intimidating formality of adjudicative bodies — a written complaints procedure, issuance of notice to parties to attend the hearing, and a hierarchical seating arrangement that constructs a safe distance between the dispenser of ‘justice’ and its claimants. The counselling and hearing of cases take place in a large room. The chairperson typically seats herself in a position of authority accompanied by two counsellors and a typist. The petitioner(s) and respondent(s) are seated on the other side. The KSCW has adopted all the rituals of formal adjudicative bodies which encourage fear, intimidation and are often procedurally complex and incomprehensible to a layperson. The KSCW’s complaints unit is beset with all the same problems that surround formal court systems — delays, inadequate staff and procedural and bureaucratic formality. Almost all women applicants interviewed had their first date of hearing after more than six months of filing their complaint. On the date of hearing, they spent long hours waiting for their turn.

More so, KSCW personnel, with the exception of a couple of counsellors/case workers, were often deputed from another government department. For instance, at the time of our reviewing of the KSCW, one of the case workers was a first division assistant deputed from the revenue department. She had no knowledge or inclination towards women’s rights. Besides, she applied the same bureaucratic procedures and practices that intimidate women and impede their access to the commission.

This possibly is why the KSCW often functions like a mailbox with long bureaucratic procedures, scarce information about the law or the rights of women and an indifferent attitude towards women applicants. Many women complainants were redirected to a protection officer or a police station in the given jurisdiction or the Legal Service Authority (LSA). These cases were depicted in the annual reports as cases resolved, much like the cases that have been compromised. Similarly, much like the statistics on cases filed and cases resolved that are maintained by the Supreme Court on its official website, the annual reports of the KSCW provided similar statistical evidence of success in dispensing ‘justice’ based on the number of cases filed and cases resolved annually. Resolving cases is considered ‘administering justice’.

Conclusion

Professor Marc Galanter and Jayanth Krishnan write in their

paper ‘Bread for the Poor: Access to Justice and the Rights of the Needy in India’ (5) that the elite in India have access to efficient ‘formal’ courts, as opposed to being compelled to seek justice in an alternative, inefficient dispute adjudicative body. Not that efficiency and speed assure justice. But for women who approached the KSCW, delays and inefficiency meant not just greater disability in accessing justice; it also operated as a barrier.

Decentralisation of the justice system and the setting up of informal justice systems or mechanisms was done with the purpose of increasing access to justice. This emphasis on access to justice often neglects the nature and kind of justice that is delivered. Moreover, since the establishment of commissions at the state and national level, there has been little evaluation of these institutions. Do these bodies and their mandate need some restructuring and rethinking? The founding legislations under which the human rights institutions were constituted have not been reviewed or amended since their enactment. In an interview with Justice Santosh Hegde in 2010, former ombudsman of Karnataka Lokayukta, he remarked that “every enactment after a certain decade needs to be amended based on changes in human behaviour”. (6) The commissions were set up to promote and protect human rights by ensuring implementation of international and domestic human rights norms, encouraging accountability and proposing legislative reform. What the KSCW, in particular, has been reduced to is an alternative dispute-resolution body available to those who can access it, as opposed to a human rights watchdog — just another platform to reduce court arrears.

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Endnotes

- 1 The report ‘A Review of the Working of the Karnataka State Human Rights Commissions (KSHRC) and the Karnataka State Commission for Women (KSCW)’, 2011, was conceptualised and authored by Swagata Raha and Sonal Makhija under the aegis of Daksh, a non-profit organisation based in Bangalore
- 2 The year 2008 witnessed a wave of attacks by Hindu fundamentalist political parties against Christians in the west coast of Karnataka. This included isolated attacks on Christian women. Although widely reported in the media, the state and human rights institutions failed to intervene
- 3 In 2009, young women were assaulted in a pub in Mangalore by a Hindu right wing political party. The attack was allegedly carried out in order to protect the Indian culture and values. In this instance, it is the National Commission for Women that conducted an inquiry after the KSCW failed to intervene. For further details, please refer to: Anon, ‘Hindu Brigade Attacks Women in Pub’, *IBN*, January 25, 2009 (online). <http://ibnlive.in.com/news/hindutva-moral-brigade-attacks-women-in-mangalore-pub/83648-3.html>
- 4 Baxi, P. 2007. ‘Access to Justice and Rule-of-(Good) Law: The Cunning of Judicial Reform in India’, Working Paper, commissioned by Institute of Human Development on behalf of the UN Commission on the Legal Empowerment of the Poor, New Delhi
- 5 Galanter, Marc and Jayanth K Krishnan. 2004. ‘Bread for the Poor: Access to Justice and the Rights of the Needy in India’. *Hastings Law Journal*. Vol 55, No 4, 789-833
- 6 Interview with Justice Santosh Hegde, Lokayukta, on 22.09.10 (on file with Daksh)

Disabled women and sexual violence

What difficulties do disabled women face in accessing the legal system and navigating the trial process? And what are the consequences for them of making sexual assault gender-neutral for the perpetrator and the victim?

SHAMPA
SENGUPTA
SAPTARSHI
MANDAL

FOR THE FIRST TIME in the history of sexual violence law reform in India, issues pertaining to disabled women are being flagged as important items on the reform agenda. Sexual violence against disabled women is rampant, both within the supposedly safe zone of the ‘home’ — be it familial or custodial — and without. A small number of cases manage to get reported and legal actions are initiated. But most of these cases that reach the courts end in acquittal. Some of the reasons behind the low rate of conviction are common to all rape cases: faulty investigation by the police, biased conclusions reached based on medical examination of the victim and the accused, general attitude of distrust towards the victim and so on. But there are also factors that are specific to the cases of disabled women, such as not recording the testimony of the victim during the trial or recording the testimony without following the procedure laid down in law, which weaken the prosecution case at the appellate stage and result in acquittal.

The Justice Verma Committee, constituted by the central government to look into sexual assault law reform after the Delhi gang-rape and murder last December, gave many of us working on these issues an opportunity to place some of these concerns before the government. The committee responded positively and a large number of its recommendations addressed difficulties faced by disabled women in accessing the legal system and navigating through the trial process. Among other things, the committee recommended that the assistance of interpreters or special educators be taken at the time of recording of the complaint by the police and also during the trial, that the process of identification of the accused be videographed and that disabled women be exempted from recounting their testimony once again at the time of cross-examination in cases of sexual assault. The recommendations also addressed issues of sexual abuse within institutions for the disabled and suggested oversight mechanisms for both state and privately run institutions. The recommendations of the committee were welcomed by women’s groups and disability groups, including the ones that we are associated with.

However, when the government hurriedly introduced the Criminal Law Amendment Ordinance just three weeks before the upcoming session of parliament, we were faced

with a dilemma. The ordinance, which was promulgated purportedly to give effect to the recommendations of the Verma Committee, incorporated a majority of the disability-specific ones. But longstanding demands made by women’s movements such as recognising marital rape, rape by security forces, compensation for rape victims, rejection of the death penalty as a punishment and such others, which were recommended this time around as well, were left out of the ordinance. As activist and researcher respectively, we were familiar with the travails of disabled women within the legal system in rape cases. Hence we were acutely aware of the relevance of the disability-specific clauses in the ordinance and were happy to have been part of the process which had led to those changes. But we were also politically aligned with the women’s movement and thus found it difficult to endorse the ordinance, which had left out issues which were fundamental to reconceptualising sexual offences in a manner that protected the rights of victims of sexual violence.

Leading from the personal/political dilemmas regarding our position on the ordinance, we wondered if the disability-specific recommendations were so readily accepted by the state because disability was seen as a ‘safe’, sympathy-inducing issue that posed no threat to the established orders. Demanding that marital rape be recognised as an offence on the other hand, definitely threatened the gendered/sexualised ordering of heterosexual marriage and family. Was this the reason, we wondered, why the two movements rarely spoke to each other in the course of the sexual assault debates, although they raised similar questions pertaining to the body and violence, power and vulnerability? We also wondered whether the predominantly service-providing nature of the disability sector was in any way responsible for it being viewed as a ‘safe’ issue. If, for the state, disability was a ‘safe’ issue and gender a ‘disruptive’ one, then what did it mean for movement politics — the business of building alliances and solidarities across sectors while engaging with the state? And at a much smaller level, what did it mean for our own work where we try to think through both these axes of power and vulnerability?

While we still do not have clear answers to any of these

questions, we want to flag some cautionary notes on sexual violence against disabled women and the legal response to the same. Protecting the rights of the disabled against sexual assault requires us to think beyond provisions for interpreters and special educators, and engage with the domain of power and sexuality as well. In the context of sexual assault law reform, one issue that has created sharp divides between the state and women's rights groups, women's rights groups and queer and child rights groups, and amongst women's rights groups as well, is the proposition of making sexual offences gender-neutral. In the year 2000, the 172nd Report of the Law Commission mooted the idea of substituting the words 'man' and 'woman' in Sections 375 and 376 of the Indian Penal Code with the word 'person' so as to bring instances of same-sex sexual assault and sexual assault on male children by adults within the scope of the law. The idea was rejected by a wide section of the women's movement which argued that sexual offences took place within a framework of gendered power relations and the legal system which tried these offences was heavily biased against women. These realities, it was argued, could not be wished away just by changing words in the law. Similarly, a number of lesbian women's groups expressed concerns that in the absence of any affirmative legal recognition of same-sex relationships, a gender-neutral rape provision could be used by disapproving families to lodge false complaints against same-sex lovers.

In the last 12 years, several developments have taken place: decriminalisation of adult same-sex sexual acts by the Delhi High Court in 2009, greater public awareness and discussion about child sexual abuse, and much more documented evidence of sexual violence against gay, transgender and transsexual persons. With the result that by the time the government introduced the Criminal Law Amendment Bill in June 2012, there was agreement on certain things among the groups involved in these debates. Thus most groups agreed that victims of sexual assault must be defined in a gender-neutral manner so as to provide protection to men and transgendered persons, in addition to women. But the perpetrator should be kept as male alone, as, making the perpetrator gender-neutral would weigh heavily against women. Thus the 2012 Bill, which proposed gender-neutrality with respect to both the victim and the perpetrator, was opposed by women's groups as well as some queer groups.

Cut to 2013, the Verma Committee recommended that in the definition of rape, the perpetrator should be gender-specific (man), while the victim should be gender-neutral (person). However, despite strong opposition, the ordinance stuck to gender-neutrality with respect to both the victim and the perpetrator, and till the time a new Criminal Law Amendment Bill is introduced and passed to replace the ordinance, it remains the operative law.

Surprisingly, disability groups have not been part of

these debates, though making sexual offences gender-neutral clearly has consequences for disabled women. A stereotypical view of disabled women, particularly those with intellectual or psycho-social disability, is that they are unable to control their sexual urges (1). Such a view, historically propagated by the medical establishment, is prevalent among the police, doctors and judges. In the course of handling cases of sexual assault on disabled women, we have often heard the authorities sympathising with the accused based on the belief that 'such women' are prone to making sexual advances on men, and later charge them with sexual assault. In 2001, in a case where a speech- and hearing-impaired girl was raped by two

A stereotypical view of disabled women, particularly those with intellectual or psycho-social disability, is that they are unable to control their sexual urges. Such a view, historically propagated by the medical establishment, is prevalent among the police, doctors and judges. In the course of handling cases of sexual assault on disabled women, we have often heard the authorities sympathising with the accused based on the belief that 'such women' are prone to making sexual advances on men, and later charge them with sexual assault

In *Meeraj Alam vs State of Bihar*, the Patna High Court kept on repeating throughout the judgment that 'the victim girl was a grown-up lady who was unmarried because of such infirmity and that her younger sister was already married, having children from before'. How were the marital statuses of the victims of any relevance here, unless the judges were trying to implicitly suggest that the women in these cases were sexually mature and yet were not 'getting any' because they were disabled and hence one should be suspicious of their motives?

policemen inside a prison van in Kolkata, the officer-in-charge had said to one of us that activists should not follow up such cases. When asked why, he said it was common knowledge that disabled girls were 'sex starved' and it was the girl who had in fact attacked the policemen. More recently, in the course of inquiring about a case of sexual assault on a female inmate by a male staffer at a Kolkata mental health institution in April 2012, the superintendent of the institution told one of us that he himself was scared of going inside the female ward for fear of being 'molested'. He even asked us if there was any law to punish such women who first molest/tempt and then complain against hapless men.

In such a scenario where such attitudes are presented as medical 'truths' and where authorities put the blame on

the victims and their lack of sexual discipline, what might be the implications of a gender-neutral rape law, where even women can be made assaulters and men their targets? Court judgments reveal how disabled women's accounts of sexual assault are treated with suspicion by judges. For instance, in an Orissa High Court case the prosecutrix was deaf and mute and had not revealed to anyone that she had been raped; it was discovered only when she became pregnant. The court, while granting bail to the accused observed that a case of consent on the part of the woman could not be ruled out since (a) the woman was about 30 years old and still unmarried and (b) she could have at least communicated it to her mother knowing that her mother would naturally be anxious about her marriage (2). Again in *Meeraj Alam vs State of Bihar*, the Patna High Court kept on repeating throughout the judgment that 'the victim girl was a grown-up lady who was unmarried because of such infirmity and that her younger sister was already married, having children from before' (3). How were the marital statuses of the victims of any relevance here, unless the judges were trying to implicitly suggest that the women in these cases were sexually mature and yet were not 'getting any' because they were disabled and hence one should be suspicious of their motives? Earlier a standard defence by an accused in a rape case used to be that the woman (disabled or not) had consented to the sexual intercourse, which then would be proved with reference to her dress, conduct, sexual history, etc. Now, if the perpetrator is made gender-neutral, whenever a disabled woman complains of sexual assault, the alleged assaulter might file a counter-complaint that it was he who was raped by the woman. And we have good reason to believe that given the widely held view regarding disabled women's hypersexuality, such counter-allegations by men will be believed and sympathised with, by investigators and adjudicators.

Thus gender-neutral definition of the perpetrator in sexual offences, as is currently the case, is not in the interests of disabled women. The government is preparing to introduce a Criminal Law Amendment Bill, 2013 soon to replace the ordinance. From media accounts, it seems the government is undecided about the formulation of the offence in the final Bill. But whatever it is, it is about time disability groups appreciated the implications of it, took a stand on the issue and made it known to the state.

Note: This article was written prior to the enactment of the Criminal Law Amendment Act, 2013, which ultimately retained the pre-existing formulation of rape where both the victim and the perpetrator were defined in gender-specific terms

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Endnotes

- 1 An equally prevalent stereotypical view is that disabled women are asexual
- 2 Deepak Mahapatra vs State of Orissa, 107 (2009) CLT 93
- 3 2008 CriLJ 4384

Policing hijras

In the wake of several positive developments for transgender communities in Karnataka came 36A, a startling amendment to the state Police Act aimed at controlling the 'objectionable activities' of 'eunuchs'. The new rule relegates hijras to second-class citizens, vulnerable to police harassment and surveillance

SIDDHARTH
NARRAIN

IN APRIL 2011, the Karnataka government legislated an amendment to the state Police Act, introducing Section 36A. The section is aimed at controlling the 'objectionable activities' of eunuchs. Under it, the police must record the names of 'eunuchs' in their jurisdiction suspected of kidnapping boys, committing 'unnatural offences' or any such crimes in a register.

There are multiple problems with this law, starting with the term 'eunuch' (*napumsaka*, in Kannada). 'Eunuch' is a term used by the British to refer to castrated males. The movement for transgender rights in India has attempted to relegate this word to the past. Identity-based politics have introduced terms like 'hijra', 'aravani', and 'mangalamukhi' that have been reclaimed and sometimes created afresh by transgender communities in the country. The reason the term 'eunuch' features in this law is the direct link between Section 36A and provisions in the Hyderabad Eunuchs Act, which, in turn, is based on the Criminal Tribes Act Amendment of 1871. The British, in 1871, included 'eunuchs' among other tribes, castes and social groups considered criminal at birth. Nehru, whose government repealed this law in 1952, referred to it as "a blot on the law book of free India".

Understandably, members of the hijra community are outraged by the enactment of Section 36A, which, they feel, will exacerbate the harassment and violence they face at the hands of the police. While there is no evidence yet of the police invoking the amended law, the section will enable them to invoke these provisions. The very presence of the law in the statute books relegates hijras to second-class citizens, vulnerable to police harassment and surveillance. In Karnataka, LGBT-rights-based (lesbian, gay, bisexual, transgender) groups have for many years fought police harassment of hijras through protests and public action, and through the courtroom. Hijras remain the target of a number of laws, with charges ranging from public nuisance and theft to sex work and begging. Many cases that have been contested in court have resulted in acquittals, although the police officers who file the charges are rarely rebuked, punished or demoted for their actions.

A lot of problem lies with the discretion a policeman has

in targeting street-based work done by hijras — sex work and begging. This is further complicated by public attitudes towards hijras. In Bangalore there has been intense public and media debate on the 'harassment' faced by the public from hijras, especially at traffic junctions. The hijra community has responded saying that an entire community cannot be targeted because of a few stray incidents. They have put the onus on society, saying that without job opportunities and attempts at allowing hijras to participate in the mainstream, society should not point fingers at them.

It is against this backdrop that K R Chamayya, former law secretary and former vice-chairman of the Karnataka Administrative Tribunal recommended that Section 36A be introduced in the Police Act. The law was passed without debate in April 2011, ironically as part of an omnibus provision that repealed hundreds of archaic laws that had remained in the statute books. Of the few laws that the government decided to retain, one was this 'monstrous' section.

What puzzled LGBT activists and those working with the issue of transgender rights in Karnataka is that this section came in the wake of a number of positive developments for transgender communities in the state. The Karnataka government, through the Department of Women and Child Development, in 2010, issued a government order securing benefits for the transgender community which is now included in the 2A category of the Backward Class Commission. The government order also referred to providing housing facilities and opportunities for transgenders to avail of government loans. The order covered a wide range of 'gender minorities' including hijras, kothis (1), jogappas (2), female-to-male and male-to-female transsexuals (3), and mangalamukhis.

Following a petition filed by the Karnataka Sexual Minorities Forum, the Backward Classes Commission headed by Chairperson C S Dwarkanath, organised a public hearing on sexual minorities issues in its premises — a first for any body of its stature in India. The commission heard around 20 members of sexual minorities present a case for their community to be included in the list of backward classes in Karnataka. In July, the commission in its recommendation

While advocacy and community groups are demanding that Section 36A be repealed, one option is for activists to take the issue to court. However, any courtroom challenge has to go hand-in-hand with advocacy efforts, especially with the media and with public intellectuals and the larger human rights community. Public attitudes towards the hijra community have always been at best ambivalent, and at worst hostile

to the state government suggested that sexual minorities, sex workers and children of people living with HIV/AIDS be included in Category 2A of the backward classes list to ensure up to 15% reservation for these communities. Further, the government has allocated money for the transgender community in this year's budget.

Political leaders from the three main parties — the BJP, Congress and Janata Dal (S) — spoke out publicly in favour of these measures. The Karnataka Legal Services Authority in 2011 organised a programme on 'Transgenders and the Law' which was attended by a number of high court and trial court judges. Interestingly, the chief guest and head of the National Legal Services Authority (NALSA), Justice Altamas Kabir, explained that he had suggested that a Bill related to adoption rights for religious minorities be amended to include adoption rights for transgender persons too.

Amidst this wave of positive legal and policy changes, the enactment of Section 36A has come as a rude shock, overshadowing other individual gains made by transgender persons. Both the state government and the Karnataka High Court recently appointed transgender persons as employees in the Class D category, and prominent members of the ruling BJP party have publicly espoused the rights of transgender persons in the state.

With reports of increasing police harassment and a climate of fear amongst the hijra community, the repeal of Section 36A has become a common demand for a range of organisations working with the issue. Legal experts

have pointed out that the section's use of the language 'unnatural offences' flies in the face of the Delhi High Court's decision in the Naz Foundation case which held that consensual sex between adults in private, whatever form it takes, is no longer criminal.

While advocacy and community groups are demanding that Section 36A be repealed, one option is for activists to take the issue to court. However, any courtroom challenge has to go hand-in-hand with advocacy efforts, especially with the media and with public intellectuals and the larger human rights community. Public attitudes towards the hijra community have always been at best ambivalent, and at worst hostile. On the positive side, hijras can claim indigenous roots and do not have to fight the tag of being a 'western import'. Their street-based work and gender non-conformity gives them a presence that is disproportionate to their small numbers.

There have been two public events on this issue, one in July 2011 and the other in August 2012, demanding the repeal of Section 36A. Both the events were attended by a large number of hijras, many of whom were vocal about the demand to scrap this law. One of the discussions at the events was how a numerically small community can advocate for rights and be taken seriously. With the media divided on this issue, and limited public support, the way ahead is tricky. A possibility suggested was alternative political formations or strategic voting, which of course depends on the community getting voter ID cards, which is a slow process because of the lack of identity documents.

While on the face of it the BJP government may seem sympathetic to these demands, it has not yet taken concrete measures to repeal the law. In Karnataka, more than a decade of positive intervention on this issue by NGOs is now making way for intervention efforts by the state. Section 36A threatens to derail these gains by re-inscribing discrimination and transphobia. It is crucial that there be a sustained effort to oppose this law through efforts that will bring together community members, NGOs and the larger umbrella of human rights organisations.

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Endnotes

1 'Kothi' refers to effeminate men, usually working class, who assume a receptive role during sexual intercourse

2 'Jogappas' are found in north Karnataka and Andhra Pradesh and are traditionally devotees of the Goddess Yellamma. They are sometimes compared to devadasis

3 A transsexual person is one who has undergone or is in the process of undergoing physical or hormonal alterations by surgery or therapy in order to assume new physical gender characteristics. In India many transsexuals, especially in the female-to-male transsexual (FTM) community, faced with the exorbitant cost of surgery, do not undergo surgery but dress as men and identify as transsexuals



*Bombay riots 1992-93: Mass atrocities
have not, to date, been defined in
national jurisprudence*

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