1st Peoples' Tribunal

on

Innocent Acquitted

Report of the Jury

Towards a framework *for*
Compensation & Rehabilitation
for victims *of*
wrongful Prosecution/Conviction

INNOCENCE
NETWORK
INDIA

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PART I

The Innocence Network organized its first Peoples' Tribunal on Acquitted Innocents on 2nd October 2016 at Delhi. We were called upon to serve as members of the Jury. On behalf of the public, we heard the testimonies of those who had been charged with terror crimes, and had been acquitted. [See Annexure 1 for full list of those who presented their testimonies] All of those who deposed had spent varying number of years in prison – ranging from three years to 23 years. While some had been acquitted by the lower courts itself, for many the ordeal lasted much longer as their convictions were overturned only by the highest court of the land.

The testimonies were uniformly distressing and did not fail to move anyone who heard those stories of lives destroyed by years of wrongful incarceration. In testimony after testimony, we heard of illegal and wrongful detention, torture in police custody, forced confessions extracted under duress, long incarceration, repeated denial of bail, to be acquitted finally years after their arrest.

One of the most egregious case that the Jury heard was of TADA convict Md. Nisaruddin. Nisar spent 23 years in jail, and his case presents us with all that is wrong with the criminal justice system when it comes to dealing with terror cases. Arrested by Hyderabad police in January 1994 for carrying out multiple train bombings that has taken place across the country in December 1993, Nisar was kept in illegal detention for over a month. The only evidence police produced was the alleged confession — the provisions of Terrorist and Disruptive Activities Act (TADA) were later invoked to make these admissible. But the confessions themselves told an interesting tale, and reveal what is rotten about terror investigations and prosecutions.

While arresting Nisar, the Hyderabad police had made out a confessional cum recovery memo. However, since the so-called confession was made before an inspector rank officer, it was not admissible as evidence even under TADA. Nisar's confessional statement was thereafter recorded before a senior police officer as required by section 15 of TADA. Strikingly, the confession as recorded under s. 15 of TADA, and the inadmissible 'confession' were identical, word for word, comma for comma, full stop for full stop. By a strange chance, Nisar found both the documents in his chargesheet – someone had mistakenly annexed the confessional-recovery memo in his copy. If this wasn't enough, in May 1996, the designated TADA court in Hyderabad ordered discharge of the accused under the provisions of TADA, directed the trial to to conducted under ordinary IPC sections. The state government of Andhra Pradesh appealed against the local court's rejection of TADA charges in the Supreme Court but received no reprieve. In fact the Supreme Court was of the opinion that the exercise of power under Section 20 A (2) of TADA Act by the then Commissioner of Police was in a very casual manner and even

issued notice to the concerned Commissioner to show cause why adverse remarks against him be not made in the judgment. The state of Andhra Pradesh therefore withdrew their appeal in 2001.

But by now, Nisar and other accused including his brother Zaheer were undergoing trial in the TADA court of Ajmer, where again the confessional statement was the principal piece of evidence against him. Nisar produced certified copies of the confessional statement to demonstrate its likeness to the custodial confession, as well as proof that the state of AP had withdrawn their appeal against the TADA court's order to show how confession recorded under TADA should not be used as evidence against him. And yet, disregarding all this, the designated TADA court in Ajmer sentenced him to life imprisonment.

The Supreme Court in 2016 – by which time Nisar had already spent 23 years in jail – observed that the document on the basis of which Nisar was convicted should not have been admissible as evidence.

But the question that Nisar and his brother and co-accused Zaheer ask is, what of the 20 years lost in between, when the document was first rendered inadmissible by the Hyderabad TADA court and the SC's recognition of that inadmissibility.

PART II

Key Observations:

1. The Jury recognizes the special nature of wrongfulness in terror prosecutions because:

I. As the testimonies illustrated, the wrongful prosecution did not result from mere technical errors or genuine human lapses in investigation, but from willful and malicious investigation and prosecution. It does appear that it is routine for police and investigating agencies to round up and arrest Muslim youth in the aftermath of any bomb explosion or attack. The most striking example of this is the manner in which investigation into the Malegaon blast 2006 was carried out. Members of the Muslim community were rounded up, trumped as SIMI activists and shown as key suspects despite the fact that at least one of them was already in police custody at that time, and another key accused was hundreds of kilometres away leading the *shab-e-baraat* prayers in Yavatmal on that very day. The recent developments in the case where the trial against the accused hailing from powerful politically connected groups appears to be collapsing do not augur well. The testimonies lend credence to the charge that the investigating agencies are prejudiced and that they manipulate and fabricate evidence to make unnecessary arrests, only for the reason that the accused belong to a minority community.

ii. The Draconian architecture of anti-terror legislation: The testimonies laid bare the excessive powers granted to the investigating agency under the anti-terror legal

regime. The Jury is constrained to note that these laws have a decided lawless character, and have resulted in the false implication of scores of youth on charges of terrorism.

Bail provisions under UAPA: For a person charged of an offence under UAPA, obtaining bail can be virtually impossible. The bail provisions under UAPA are given in Section 43D(5) of the Act, which makes it mandatory for the Public Prosecutor to be given an opportunity of being heard on the application for such release, and also disallows the bail if the court is of the opinion that "there are reasonable grounds for believing that the accusation against such person is prima facie true". Such a provision in effect places a "complete embargo" on the power of the court to grant bail, with the result that under trials charged in UAPA continue to languish in jail for years before being granted an acquittal.

Admissibility of Confession under State Legislation: The Maharashtra Control of Organised Crime Act, 1999 (MCOCA) makes confessions made before police officers admissible as evidence in court. Section 18 of the Act empowers any police officer, not below the rank of Superintendent of Police, to record the confession of an accused, which then can be used as evidence against the person notwithstanding anything contained in the Indian Evidence Act. This militates against the very fabric of Indian Evidence Act. Abdul Wahid, one of those who presented his case before the Tribunal, remained in prison continuously for nine years without bail. He was charged under MCOCA for planning and executing the 2006 Mumbai serial train bombings. The only piece of 'evidence' against him was his confession, which he retracted as soon as he was sent to judicial custody. And yet, for nine years, he did not get bail. He also detailed the horrific torture in the custody of ATS which he and his co-accused were subjected to, in order to extract the confessions.

An accused under MCOCA can be detained in police custody for up to 90 days (which can be extended up to 180 days) even without any evidence [Section 21(2)], and that it is virtually impossible to obtain bail once charged under MCOCA [Section 21(4)].

iii. Long-drawn Trials: Almost all those who testified in the tribunal had suffered long periods of incarceration in the course of their trials. The nature of charges in terror cases, the public sentiment whipped up by the media, and the legal provisions in anti-terror laws, all work to ensure that a) even if deserving, the accused's applications for discharge are not entertained; and b) bail applications are rejected as a matter of routine. Many of the accused also suffer on account of poor legal representation. Some of those who presented their cases before the Tribunal had been convicted by lower courts. In some cases, their convictions were upheld by high courts and were only overturned by the apex court (eg. Nisaruddin, Akshardham case). This reveals the troubling fact that even courts accept low-grade evidence in terror cases.

iv. Trial by Media: A section of the media plays an irresponsible and sensationalist role in reporting on terror crimes and arrests of suspects in such cases. In almost every testimony presented before the tribunal there were complaints regarding the conduct of media in reporting terrorism investigations or 'busting of modules'. News coverage of such investigations routinely labels suspected detainees as culprits and often becomes the primary source of their stigmatization among the community. Iftikhar Gilani, a journalist himself, narrated how, when the Delhi Police raided his house in 2002, journalists collected outside his home were reporting that Gilani had absconded. All this while, Gilani was inside his home and in fact watching this live on television. All this serves to demonize and condemn the accused even before charges have been filed, and renders the accused's family vulnerable to social boycott and exclusion.

v. The social consequences for those accused of terror crimes are far worse than those wrongfully arrested and charged with other types of crimes. These include stigmatization of accused, isolation even subsequent to acquittals; inability to gain employment as the past always resurfaces; and lastly, the fear of being arraigned for another terror crime. The family members of those accused of terror crimes also face special problems – stigmatization, discrimination at school and college, loss of the earning members of their families etc. They are penalized for no fault of their own. It was heartbreaking to hear the testimony of Wasif Haider who narrated how his daughter was taunted as the daughter of a terrorist while he was in prison undergoing his trial. "Even after seven years of acquittal I am as isolated as I was in jail.", he said. "Social boycott and stigma still continues…I am jobless man. No one is ready to give me job because of my past. I can't start my business because no one wants to deal with a 'terrorist', no matter I was honorably acquitted by the court."

2. Impunity to Investigators: The rampant discourse on 'war on terror' legitimates the arrests of Muslim youth and grants impunity to investigators. In every single testimony, we heard sordid tales of torture, narco analysis, manipulated evidence. The Jury recognizes that this is not a case of 'some bad officers' but points to a widespread institutional crisis, where violence against suspects has become entrenched, where false arrests are condoned, where investigators guilty of framing innocents are not punished – but rather decorated and feted.

One of the key features of all testimonies was the systematic torture that the suspects were subjected to by the agencies. As many existing reports have shown, torture is endemic to India's policing culture.[1] In terror investigations, however, it seems to be the very cornerstone. Part of the reason may be the admissibility of confessions as evidence under TADA and POTA previously, and currently under MCOCA. As some testimonies showed, until at least the

[1] See for example, *Torture in India* (Asian Centre for Human Rights, 2011), *India: Torture, Rape and Death in Police Custody* (Amnesty International, 1992), *Torture and Impunity in India: National Project on Preventing Torture in India* (Peoples' Watch, 2008), *Crimes of Habit* (PUDR, 2014).

banning of narcoanalysis and brain mapping by the Supreme Court in *Selvi* case,[2] hospitals became another site of torure.

3. The Jury also observes that India despite being a signatory to ICCPR has not moved to incorporate its Article 14 (6)[3] within the legislative framework.

4. The Jury laments the abject failure of human rights bodies such as NHRC and SHRC to acknowledge and intervene in such cases of wrongful arrests and prosecution.

PART III

The Jurisprudence of Compensation:

In contravention to its international obligations, even having signed the ICCPR, India has failed to create a legislative framework to provide justice for victims of wrongful prosecution or wrongful conviction. Many other countries have converted this commitment into law. In the United Kingdom, provisions of Section 133 of the Criminal Justice Act 1988 (2) provide the legislative framework through which the Home Secretary, under specified conditions, and upon receipt of applications, is obligated to pay compensation for wrongful conviction or incarceration. This section is in conformity with UK's international obligations. Articles 622 to 626 of the French Code de Procédure Pénale give effect to article 14(6) of ICCPR. In Germany too, an Act of Parliament (the Law on Compensation for Criminal Prosecution Proceedings) passed in 1971 specifies that whoever has suffered damage as a result of a criminal conviction which is later quashed or lessened (the "applicant") shall be compensated by the state (Article 1).

In 2004, the Australian Capital Territory incorporated a slightly reworded version of article 14(6) within ACT legislation. Under s 23 of the *Human Rights Act 2004* (ACT), an individual who is wrongfully convicted of a criminal offence may seek compensation. New Zealand has adopted a guided discretionary system of compensation under the Compensation and Ex Gratia Payments for Persons Wrongly Convicted and Imprisoned in Criminal Cases (POL Min (01) 34/5, 12 December 2001). (For detailed discussion on international jurisprudence, see Annexure 2)

In India, lack of a legislative framework should not dissuade the courts from granting compensation in these cases, and indeed in expanding remedies for victims of long periods of wrongful incarceration in terror cases.

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[2] *Selvi & Ors vs State Of Karnataka & Anr* on 5 May, 2010. Accessed here: https://indiankanoon.org/doc/338008/

[3] "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

Two landmark cases that laid the foundations of Constitutional tort may be mentioned here. The Rudal Sah case in 1983 first recognized the liability of the state and marked a clear departure in Indian tort law.[4] The Supreme Court ordered the State of Bihar to pay Rudal Sah, who had been illegally detained for 14 years after his acquittal, compensation of Rs. 35,000. The court also rejected as "stale and sterile" a hypothetical objection that Rudul Sah could, if so advised, recover damages from the state government in a suit. The court held that:

> "The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was controversial in the sense that a civil court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate, in the absence of evidence, the precise amount which could be decreed in his favour."

In the court's view, Article 21 would be denuded of its content "if the power of this court were limited to passing orders for release from illegal detention. One of the telling ways in which the violation of the right can reasonably be prevented and the due compliance of the mandate of article 21 secured, is to mulct its violations in payment of monetary compensation." The court recognized a surviving right "to recover appropriate damages from the state and its erring officials". It said: "We cannot leave the petitioner penniless until the end of his suit, the many appeals and execution proceedings."

While signing the ICCPR, India has expressed a specific reservation, namely, that the Indian legal system does not recognize the right to compensation for victims of unlawful arrest and detention. However, the Supreme Court in the *Nilabati Behera* case has rendered irrelevant that reservation while holding the award of compensation by the high courts and the Supreme Court as "a remedy available in public law; based on strict liability for the contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort".[5]

This was reiterated by the Supreme Court in *D. K. Basu* case where it held compensation to be "the most suitable remedy of redressal…monetary compensation [after] infringement of the indefeasible right to life of the citizen is, therefore, useful, and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim who may have been the breadwinner of the family."[6]

Constitutional tort jurisprudence can be mobilized to address the grievous harms caused to those arrested and incarcerated for extended periods of time on charges of terrorism.

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[4] *Rudul Sah v. State of Bihar,* (1983) 4 SCC 141

[5] *Nilabati Behera v. State of Orissa* (1983) 4 SCC 141

[6] *D.K. Basu v. State of West Bengal* (1997) 1 SCC 416

PART IV

Key Recommendations:

On Compensation and Rehabilitation:

The Jury emphasizes that the dignity of those acquitted must be restored. Thus it is imperative that the harms inflicted on them must be redressed within the framework of rights rather than charity. Those who had been wrongly convicted should be entitled to compensation from the state. Those who are responsible for subverting the rule of law – police, prosecutors etc. – must be held accountable.

The Government of India should grant compensation to the exonerees for the loss and harm caused to them and for violating their right to life and liberty and the torture under Article 21 of the Constitution of India. The amount should be calculated on case-to-case basis, weighing in both pecuniary and non-pecuniary factors such as:

- The length of incarceration
- Loss of income
- Loss of opportunities (of education, possibilities of livelihood, skills)
- Amount spent on legal fees
- Loss of family life
- Stigmatization
- Psychological and emotional harm caused to accused and his family

The said amount may be recovered from the officers responsible for the wrongful arrests and prosecution.

On Accountability of Investigating Agencies:

The testimonies make it amply clear that the investigating agencies need greater accountability and transparency. While 'police reforms' is often invoked even within the police establishment, there can be no reform without accountability.

- The first and necessary step towards accountability will be the initiation of departmental enquiry against the officers concerned. The erring officers must be suspended with immediate effect pending enquiry.
- If found that the criminal prosecution against the acquitted persons was malafide and amounts to offences under Section 194, 196 and 211 of the Indian Penal Code, the officers named by the exonerees should be prosecuted by the concerned courts.

Guidelines for Media:

The Jury stands for unfettered freedom of the media and does not endorse censorship in any form. The media however must be cognizant of its power to devastate lives through

sensationalism and partisan reporting. Over the past few years, the courts have also taken a strong exception to news coverage which destroys a person's reputation by creating a widespread perception of guilt, without any verdict in the court of law.[7] In *Siddhartha Vashisht v. State (NCT of Delhi)*[8] the apex court observed:

> There is danger, of serious risk of prejudice if the media exercises an unrestricted and unregulated freedom such that it publishes photographs of the suspect or the accused before the identification parades are constituted or if the media publishes statements which out rightly hold the suspect or the accused guilty even before such an order has been passed by the court.

In September 2012, a constitutional bench of the Supreme Court in *Sahara India and others vs. SEBI and Anr*[9] laid down a constitutional principle that publication of news regarding an ongoing case could be postponed under certain circumstances. In the words of the Supreme Court if publishing news related to a trial would "create a real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial", the court could grant a postponement order, temporarily gagging the media from reporting on it. The Court's directions regarding postponement of publication are largely in line with a similar recommendation of the 200th report of the Law Commission of India.

The Jury therefore recommends that:

- The media should strictly refrain from pronouncing the suspects/ arrestees as guilty.
- The news media should function as objective institutions, and not as mere handmaidens of investigating agencies. It is long established media ethics that reporters provide their readers and audience both sides of the story – not simply the state version.
- All the media houses / publications/ news channels concerned which have published defamatory material against the exonerees ought to widely publish unconditional apology to the exonerees.

On Legislative Reform:

- **A.**
  - India is obligated to convert its commitment to international covenant into law to compensate for miscarriage of justice. It must immediately provide a legislative grounding to compensation for wrongful prosecution and conviction consistent with Article 14 (6) of ICCPR.

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[7] *See R.K. Anand v. Registrar,* AIR 2010 SC 2352.

[8] Accessed at: https://indiankanoon.org/doc/1515299/

[9] Available at http://supremecourtofindia.nic.in/outtoday/media%20coverage%20judgment.pdf

- The Prevention of Torture Bill as amended and proposed by the Rajya Sabha Select Committee be passed by the Parliament forthwith.
- The recommendations of a report by the Tenth Law Commission on custodial crimes (1985) and various NHRC reports with regards to the shifting of the burden of proof in offences relating to custodial violence and torture ought to be accepted and the amendment to section 114 B(1) of the Indian Evidence Act be introduced.
- The requirement of prior sanction for prosecution of police officers as encapsulated in Sections 195 and 197 of the Code of Criminal Procedure should be modified to remove the shield of immunity from erring officers. If the sanction is not forthcoming within three months, it should be deemed to be granted. While grant of sanction should be the norm, any rejection of sanction should be accompanied by adequate reasons, which should be appealable.

B.

- The Jury further recommends the repeal of Section 18 of MCOCA, explicitly calling for an end to the admissibility of confessions as evidence.
- All those currently undergoing trial under the repealed and lapsed TADA and POTA should with retrospective effect be tried only under ordinary law.
- Special provisions regarding bail and extended pretrial detention in UAPA and MCOCA should be repealed.

Recommendations for other Institutions:

- The NHRC and SHRC must establish a dedicated cell in the commission to especially look into the cases relating to acquitted persons and their grievances.
- The NCRB must start collecting and compiling the data with regard to the acquitted persons.
- Wrongful prosecution must become major or indicator of the performance of legal system in this country.

For the Society at Large:

- The positive campaign highlighting the plight of acquitted persons must be launched at the community level to spread awareness in this area.
- A public function to welcome the acquitted when they are released from prison to give them a sense of being accepted back in society.
- Creation of a fund to help in the education of the children of those exonerated and skill development of the exonerees.

Conclusion:

It was deeply saddening to hear the testimonies about destroyed lives. That this was a result of callous and malafide action on the part of those whose duty it is to uphold law was even more frustrating. While wrongful arrests imply that the actual perpetrators of the terror attacks are free to continue their operations and increase insecurity for society as a whole, continuous targeting of a community will also fuel a sense of injustice. If allowed to fester, this may itself become a source of insecurity. Justice must not only be done, but also seen to be done.

Mere acquittals after years of incarceration are not enough. As the apex court observed, it is the duty of the state to apply the "healing balm". There must be some recompense for the years lost and lives devastated. As we have shown, this is not a fantastical demand, but grounded in sound public law, which the courts have themselves elaborated over the years. We would also like to reiterate that alongside compensation that the state must offer in recognition of its liability and victim's rights, those guilty of falsely framing innocents in terror cases must suffer penal consequences. We also hope that the communities will respond in earnestness too with programmes of rehabilitation and support.

ANNEXURE 1

Introduction of the Acquitted Innocents

First Deposition: Shoeb Jagirdar

Mecca Masjid Blast case

Shoeb Jagirdar is a resident from Jalna, Maharashtra. He was first accused in the Mecca Masjid blast case. After his bail was furnished in this case he was charged in the Gokul Chat blast case. The charges against him in the Mecca Masjid blast case was of smuggling RDX and of fake passport acquisition. In the Gokul Chat case he was charged against Sec 107 of the IPC. He was acquitted after spending 7 years as an undertrial.

Second Deposition: Mohammad Aamir Khan

Mohammad Aamir Khan is a residence of Delhi. All the blast between the years of 1996-97 that took place in Delhi was charged against him. They were a total of 19 cases against him under charges of sec 121, 122 302 and 307 IPC and sec 3 and 4 of Explosive Act. He spent 14 years in the prison.

Third Deposition: Dr. Yunus

Jaipur SIMI case

Dr Yunus and 10 others were arrested for the Jaipur SIMI case. They were accused of taking forward the activities of the banned organization SIMI. Dr Yunus was brutally tortured in prison where he spent a total of 3years. The battery of charges against Dr Yunus had to do with speech and association- talking against national unity , integrity and secularism , of involving Muslim youth in anti- national activities, taking forward the activities of the banned organization SIMI and sympathizing with those carrying on similar activities, and not violence. He was found innocent on all counts.

Fourth Deposition: Abdul Azeem

Aurangabad Arm Haul Case

Abdul Azeem is a resident of Beed, Maharashtra. He was alleged to be the driver of the terrorists of the Aurangabad Arms Haul case. He was acquitted after spending 10 years and 3 months in prison. The charges against him included Sections 10(a), 13, 16, 18, 20, 23, 38, 39 of the Unlawful Activities (Prevention) Act, and Sections 3(2), 3(1)(ii) & 3(4) of the Maharashtra Control of Organized Crime Act, 1999.

Fifth Deposition: Maulana Salees

SIMI case

He spent about 2.5 years in jail and still some of the charges continue to be against him. He was alleged to be a SIMI member at the age of fifty. Later 4 more charges were put against him. He was also held responsible for the Kanpur blast case. However, he was found innocent on all counts.

Sixth Deposition: Wasif Haider

He was accused of waging war against the nation (sedition), rioting, of attempt to murder under Indian Penal Code (IPC) and some other sections of national security act (NSA). He was also accused of being a Hizbul Mujahideen operative. Nothing though could be proved in the court, and he was honorably acquitted. The prosecution appealed against Wasif's acquittal in the High Court, but its appeal was dismissed by the court at the primary stage itself.

Seventh Depositions: Nisar and Zaheer Ahmed

1996 Railway Blast case

Nisar Ahmed was acquitted after 23 long years of jail. He along with his brother Mohammad Zaheer- who spent 14 years in prison- was convicted for the railway blast cases in 1996. The charges against them were of under various sections of TADA, IPC, Explosive Substances Act, Arms Act and Railways Act for planting bombs in five trains.

Eighth Deposition: Wahid sheikh

7/11 Train Blast case

Wahid Sheikh was charged for 7/11 train blast case. The charged included 3 (1) (2) (3) (4) (5) of MCOC Act 1999 r/w Sacs 10, 13, 16, 17, 18, 19, 20, and 40 of UAPA 1967 r/w Sacs. 302, 307, 326, 325, 324, 427, 436, 121-A, 122, 123, 124-A, 201, 212, 120-B. Wahid Sheikh was acquitted of all charges after spending more than 10 years in prison. A government school teacher before his arrest, he has fought an uphill battle to get his job back. However, he is yet to receive his salary as well as his arrears for the last 10 years which he spent incarcerated as an undertrial.

Ninth Deposition: Iftikhar Gilani

Official Secrets Act

He was charged for violating the Official Secrets Act. He was accused of possessing classified documents that violated the provisions of the statute. The evidences against him included the possession of a public document released in 1995 by Pakistan's Foreign Ministry that includes information about alleged human rights abuses committed by Indian troops in Kashmir. The charge was found fake and the evidence planted. He spent about 7 months in the jail without any bail.

ANNEXURE 2

What is wrongful prosecution?

Article 14(6) of the International Covenant on Civil and Political Rights (ICCPR) deals with the issue of wrongful conviction:

"When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

168 state parties, including India, have ratified the ICCPR. But not all countries have converted their commitment into law. And even where legislation for dealing with wrongful convictions exists, the actual practice may be uneven, sporadic and non transparent.

Part of the problem is lack of clarity (sometimes deliberately so) as to what precisely constitutes wrongful convictions and miscarriage of justice. Is it contingent upon the discovery of a new fact, which had not been brought to the notice of the judiciary which resulted in conviction, and consequently miscarriage of justice? What if the facts were known and disregarded by the judiciary? Does the possibility of judicial abdication or prejudiced investigations enter into this understanding of wrongful conviction? How do we account for laws that have allowed for slackening of rules of evidence, and short-circuited due process?

Who is competent to receive reparations from the state? All those acquitted or only those pronounced innocent by the courts while either quashing their convictions or acquitting them?

In this context, it may be important to recall the Bingham Test of Wrongful Convictions:

The English judge Lord Bingham in his speech in *Mullen* stated:

"The expression 'wrongful convictions' is not a legal term of art and it has no settled meaning. Plainly the expression includes the conviction of those who are innocent of the crime of which they have been convicted. But in ordinary parlance the expression would, I think, be extended to those who, whether guilty or not, should clearly not have been convicted at their trials. It is impossible and unnecessary to identify the manifold reasons why a defendant may be convicted when he should not have been. It may be because the evidence against him was fabricated or perjured. It may be because flawed expert evidence was relied on to secure conviction. It may be because

evidence helpful to the defence was concealed or withheld. It may be because the jury was the subject of malicious interference. It may be because of judicial unfairness or misdirection. In cases of this kind, it may, or more often may not, be possible to say that a defendant is innocent, but it is possible to say that he has been wrongly convicted. The common factor in such cases is that something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted."

R (Mullen) v Secretary of State for the Home Department [2005] 1 AC 1

This expansive definition of wrongful conviction weighs in in favour of those acquitted, some of whom may not be in a position to demonstrate their innocence. The Bingham test was a significant contribution to English case law and influenced the most recent judgment of the Supreme Court of United Kingdom (referred to below). Nonetheless, there are no set practices determining who shall avail compensation and how is it to be calculated.

New Zealand:

The Law Commission of New Zealand in its 1998 Report No 49 on "Compensating the Wrongly Convicted" advised at para 127: "A requirement to prove innocence is, however, necessary to prevent the 'guilty' claimant, acquitted on a technicality, from profiting from the crime. It recognizes that it is a person's innocence which provides the justification for compensation in the first place." New Zealand has adopted a guided discretionary system of compensation under the Compensation and Ex Gratia Payments for Persons Wrongly Convicted and Imprisoned in Criminal Cases (POL Min (01) 34/5, 12 December 2001). Compensation is still ex gratia payments, so there is no actual right to compensation. However, discretion as to whether, and how much, compensation should be paid is structured by guidelines. These guidelines set out criteria for determining pecuniary and non-pecuniary loss and set a starting point of NZ$100,000 of pecuniary loss for each year served in jail. They also specifically state that, as a matter of policy, compensation should be akin to that payable for the tort of false imprisonment.

Australia:

In 2004, the Australian Capital Territory incorporated a slightly reworded version of article 14(6) within ACT legislation. Under s 23 of the *Human Rights Act 2004* (ACT), an individual who is wrongfully convicted of a criminal offence may seek compensation. The individual must have:

- been convicted of a criminal offence by a final decision of a court
- suffered punishment because of the conviction
- had the conviction reversed (or been pardoned) on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.

Section 23(2) provides that the individual will have a right to be compensated 'according to law'.

It appears that the convicted person does not need to have been imprisoned – a lesser sanction, such as a fine or even the recording of a conviction alone, may amount to punishment on the wording of the section. However, s 23(3) provides that the right to compensation is contingent upon the conviction being reversed or the person being pardoned as a result of a new fact showing conclusively that there has been a miscarriage of justice.

France and Germany:

However, the cases of France and Germany illustrate that proof of conclusive innocence has not been universally adopted as the test of entitlement to compensation.

Articles 622 to 626 of the French Code de Procédure Pénale give effect to article 14(6) of ICCPR. In France a conviction will be reviewed where a "new element" gives rise to serious doubts about guilt and that the reviewing court can then either quash the conviction on the ground that the new element proves that the defendant is not guilty or direct a retrial. Compensation will be recoverable in the former event or, if there is a retrial, if this results in an acquittal.

In Germany too – where an Act of Parliament (the Law on Compensation for Criminal Prosecution Proceedings) passed in 1971 specifies that whoever has suffered damage as a result of a criminal conviction which is later quashed or lessened (the "applicant") shall be compensated by the state (Article 1) – there is no requirement that the applicant show innocence. The state also compensates a person who has suffered damage as a result of a remand order or certain other types of detention, provided he or she is acquitted or the prosecution is suspended or abandoned (Article 2)

United Kingdom:

In the United Kingdom, provisions of Section 133 of the Criminal Justice Act 1988 (2) provide the legislative framework through which the Home Secretary, under specified conditions, and upon receipt of applications, is obligated to pay compensation for wrongful conviction or incarceration. This section is in conformity with UK's international obligations.

This was seen as an advance over the existing scheme, which granted the Home Secretary the discretion to award ex-gratia payment to those it deemed to have been suffered negligence at the hands of police or public authority, or wrongfully convicted. In both schemes, however, critics have pointed out, the Home Office was guided by the principle that compensation was simply for "the hardship caused by the conviction", ignoring the many ways in which miscarriage of justice hurts, not only the applicant/ acquitted but also the circle of people in association, namely his family. Moreover, the grant of compensation required strictly that the claimant be completely innocent and not acquitted on grounds of legal technicalities or evidence falling short of "beyond reasonable doubt".

(See "Fixing the Price for Spoiled Lives: Compensation for Wrongful Conviction" by Nick Taylor, *Criminal Justice Review 1999-2001*, Centre for Criminal Justice Studies, University of Leeds.)

By 2006, the earlier scheme was superseded by the new statutory framework.

'Conclusively Innocent' vs 'Not Guilty beyond Reasonable Doubt': The UK Supreme Court rules

In a landmark ruling, the UK Supreme Court widened the definition of miscarriage of justice and the notion of innocence.

A majority judgment ruled that the requirement of conclusive innocence was too narrow, and held that even those who cannot prove their innocence beyond reasonable doubt were entitled to compensation. To quote Justice Baroness Hale:

"Innocence as such is not a concept known to our criminal justice system. We distinguish between the guilty and the not guilty. A person is only guilty if the state can prove his guilt beyond reasonable doubt… if it can be conclusively shown that the state was not entitled to punish a person, it seems to me that he should be entitled to compensation for having been punished. He does not have to prove his innocence at his trial and it seems wrong in principle that he should be required to prove his innocence now."

R (on the application of Adams) (FC) v Secretary of State for Justice [2011] UKSC 18.

Members of the Jury

Justice A.P. Shah, *Chairman*

Justice (Retd.) Ajit Prakash Shah was the Chief Justice of Delhi High Court from May 2008 till his retirement in February 2010. He was the Chairman of the 20th Law Commission of India. Justice Shah did his graduation from Sholapur and attended Government Law College, Mumbai for his law degree. After a short span of practice at the Sholapur District Court, he shifted to the Bombay High Court in 1977 and joined the chambers of the then-leading Advocate Shri S.C. Pratap. He gained experience in civil, constitutional, service and labor matters. Justice Shah was appointed Additional Judge of Bombay High Court on 18 December 1992 and became a permanent Judge of Bombay High Court on 8 April 1994. He assumed charge as the Chief Justice of Madras High Court on 12 November 2005 and was transferred as the Chief Justice of Delhi High Court on 7 May 2008.Since June 2011, Justice Shah has been the Chairperson of Broadcasting Content Complaints Council (BCCC), the self-regulatory body for non-news general entertainment channels (GECs) set up by the Indian Broadcasting Foundation (IBF).

Saeed Akhtar Mirza:

Mr. Akhtar Mirza is a noted filmmaker and has been working as a producer/director/ scriptwriter since 1976. He is well known for his work on many national and international acclaimed films, documentaries and television serials like *Arvind Desai ki Ajeeb Dastaan* (1978), *Albert Pinto Ko Gussa Kyoon Aata hai?* (1979), *Mohan Joshi Haazir Ho* (1983), *Salim Langde Pe Mat Ro* (1989), *Primary Education and the Child in India* (1993), *Unheard Voices of India* (2002-03) and many more.

Prof. (Dr.) G.S. Bajpai:

Dr. Bajpai is presently serving as the professor of Criminology and Criminal Justice and Registrar of National Law University, Delhi. He is also the Chairperson at the Centre for Criminology & Victimology. Before joining National Law University, Delhi, he served as Professor & Chairperson at the Centre for Criminal Justice Administration, National Law Institute University, Bhopal (2007-2011). He also held positions at the Indian Institute of Public Administration, (1989) Bureau of Police Research & Development, (1989- 1995) Punjab Police Academy, Punjab and Department of Criminology & Forensic Science, University of Sagar, MP.

Neena Vyas:

Neena Vyas is a noted senior journalist and columnist and has been one of the early women to be associated with journalism. She started her career as a reporter with the *United News of India* in 1965. She worked with *The Statesman* in Delhi from 1973 to 1990 and after that she was with *The Hindu* from 1990 to 2011. Her main area of work had been mainly issues related to domestic

violence and minorities. While working with *The Statesman*, she has covered many communal riots in Aligarh and Meerut including Ayodhya agitation. Since 2011, she has been working as a freelance journalist.

Nandini Sundar:

Nandini Sunder is a professor of Sociology at the Delhi School of Economics, Delhi University. Her publications include *Subalterns and Sovereigns: an Anthropological History of Bastar*, and (co-authored) *Branching Out: Joint Forest Management in India* (2001). Her edited volumes include *Civil Wars in South Asia: State, Sovereignty, Development*, *Legal Grounds: Natural Resources, Identity and the Law in Jharkhand and Anthropology in the East: The founders of Indian Sociology and Anthropology*. Her most recent book is *The Burning Forest: India's War in Bastar*. In 2010, she was awarded the Infosys Prize for Social Sciences-Social Anthropology. She was the recipient of the 2016 Ester Boserup Prize for Research on Development awarded by the Copenhagen Centre for Development Research (CCDR). Her research interests relate to citizenship, war and counterinsurgency in South Asia, indigenous identity and politics in India, the sociology of law, and inequality.

Abdul Shaban:

Abdul Shaban is presently the Deputy Director, Tata Institute of Social Sciences and also a member of Maharashtra Chief Minister's Study Group on Muslims under Chairmanship of Mahmoodur Rahman (IAS). He has Masters degree in Geography from Jawaharlal Nehru University (JNU) and M.Phil and Ph.D from IIT, Mumbai. Dr. Shaban has been Visiting Professor at the Department of Geography, University of Paris, France, and at University of Masaryk (Brno) and Palacky University, Olomouc, Czech Republic. He has also been Fellow at the Department of Geography and Environment, LSE, London. He was Commonwealth Academic Staff Fellow at *Cities Programme*, London School of Economics and Political Science (LSE), London during 2011-12.

Vinod Sharma:

Vinod Sharma is a journalist of over thirty years standing. He is currently the Political Editor of *Hindustan Times*, a leading multi-edition English language newspaper headquartered in New Delhi. He began his journalistic career with the *United News of India* in 1978 and had a stint with *The Week*, an English magazine of the Kerala-based *Malayala Manorama* Group, before joining *Hindustan Times* in 1988-89. He has since served the newspaper in various capacities: as its Chief of Political Bureau, Diplomatic Correspondent and resident representative in Islamabad (Pakistan) from 91-94.

Monica Sakhrani

Monica Sakhrani is an independent lawyer and academic. An ex-chairperson of the Centre for Dalit and Tribal Studies, Tata institute of Social Sciences, she has worked extensively on the issues of state and domestic violence, terror laws, and impunity. She has done M.S.W. in Mumbai and Master of Laws from Nottingham, UK.