

South Asia Human Right Documentation Centre

22 Northend Complex, Ramakrishna Ashram Marg

New Delhi 110001, India

e-mail: ravinairsahrdc@gmail.com

www.hrdc.net/sahrdc

Landlines 91- 11-23361120 and 91-11-23342717

Mobile number: 91-9810344765

22 September 2016

Submission to the 27th UPR Working Group session on India

Annexure 2

Impunity

As a result of de facto official and sovereign immunity, Indian officials are relatively free to commit human rights abuses, while victims are unable to attain justice.¹Provisions such as section 197 of the Code of Criminal Procedure and the Armed Forces Special Powers Act contribute to an atmosphere of impunity in India, which is damaging to democracy and out of step with international standards. This atmosphere is compounded by judicial delay, costly trials, and lack of proper investigation.

Official Immunity and Prosecution

In Article 34, the Constitution states that Parliament may grant immunity to anyone acting in support of the government, in territories under martial law.²This article has allowed Parliament to enact several provisions that establish de facto official immunity.

Immunity in the Criminal Procedure Code

The Indian Criminal Procedure Code (CrPC) helps produce de facto immunity for police officers, members of the armed forces, and other government officials. Section 197 of the CrPC provides that no court has jurisdiction over an alleged criminal offence committed by a government official or member of the armed forces “while acting or purporting to act within the discharge of his official duty,” without first obtaining authorization from the requisite Central or state government.³

In *Matajob Dobe v. H.C. Bhari*, the Supreme Court upheld Section 197, contending “discretionary power is not necessarily a discriminatory power and that abuse of power is

¹*Id.* at 10.

²The Constitution of India, art. 34, available at: <http://lawmin.nic.in/coi/coiason29july08.pdf>.

³ India Code of Criminal Procedure, 1973, sec. 197, Available at: <http://www.vakilno1.com/bareacts/CrPc/s197.htm>.

not to be easily assumed where the discretion is vested in the government.”⁴ The Court held that there must simply be a “reasonable connection” between an alleged offence and the official duty to require government sanction for prosecution – even abuses of power have been held within this category.⁵The government rarely sanctions prosecutions.

Section 45(1) of the CrPC likewise protects members of the armed forces from arrest for acts committed within official duty, without prior sanction by the Central government.⁶Similarly, section 132 requires sanction from the state or Central government for prosecution for “any act purporting to be done” under sections 129 to 131,⁷ and provides complete immunity for any individual acting in good faith under these provisions.⁸ Sections 129 to 131 allow police officers, with the assistance of the armed forces or “any other male person” to use force to disperse “any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance.”⁹

Moreover, while some provisions in the CrPC provide potential limits on immunity, they are quite narrow. For example, section 176 requires magisterial inquiries if a death, disappearance, or alleged rape of a woman occurs in police custody.¹⁰This section significantly limits the scope of offenses that falls under its purview and does not specify any remedies.¹¹

Immunity in National Security, Counter-Insurgency, and Counter-Terrorism Laws

Various laws aimed at the protection of national security and the fight against terrorism similarly provide de facto official immunity to security forces. For example, the National Security Act of 1980 (NSA) provides the Central and state governments vast discretionary powers of preventative detention. Simultaneously, the Act also grants immunity from civil suit or criminal prosecution to any official acting in good faith in pursuance of the Act.¹²

Similarly, the Armed Forces Special Powers Act (AFSPA)¹³ provides incredibly broad powers to security forces and immunity for related actions.¹⁴The Act grants discretionary

⁴*Matajob Dobey v. H.C. Bhari*, 1956 AIR 44.

⁵*See, e.g., State v. B.L. Verma* (1997) 10 SCC 772.

⁶CrPC, sec. 45(1).

⁷CrPC, sec. 132(1).

⁸ CrPC, sec. 132(2).

⁹CrPC, sec. 129-131.

¹⁰ The Code of Criminal Procedure (Amendment) Act, 2005, amendment of sec. 176, *Available at*: [http://www.mha.nic.in/pdfs/theccp\(amendment\)act,2005.pdf](http://www.mha.nic.in/pdfs/theccp(amendment)act,2005.pdf).

¹¹*See Id.*

¹²*Id.*, at sec. 16.

¹³*See Getting Away with Murder: 50 Years of the Armed Forces (Special Powers) Act*, Human Rights Watch, India, 6, August 2008, *Available at*: <http://www.hrw.org/legacy/background/2008/india0808/india0808web.pdf> (hereinafter “HRW 2008–AFSPA”).

¹⁴ Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, *Available at*: <http://www.unhcr.org/refworld/publis her.NATLEGBOD..IND.3ae6b52a14.0.html> (hereinafter “AFSPA J&K”).

power to the Governor of Jammu & Kashmir or the Central Government to declare the whole or part of the state a “disturbed area” that requires military force. AFSPA and the Disturbed Areas Act then grant vast powers to the armed forces in such designated “disturbed areas,” including the power to shoot and kill any person carrying “things capable of being used as weapons” or any person assembling with five or more people in contravention of the law.¹⁵ Even with these powers, the act confers immunity from suit for any related acts unless the government sanctions a case.¹⁶

In *Naga People’s Movement of Human Rights v. Union of India*, which involved the application of AFSPA, the Supreme Court held:

“In order that the people feel assured that there is an effective check against misuse or abuse of powers... it is necessary that a complaint containing an allegation... be thoroughly inquired into and, if it is found that there is substance in the allegation, the victim should be suitably compensated by the state.”¹⁷

Regardless of this holding, the Court otherwise upheld the Act and left in tact the procedure of requiring government sanction.¹⁸

The Unlawful Activities Prevention Act of 1967 (UAPA) similarly provides broad powers and immunity protection to security officers. Specifically, UAPA 2008 uses an expansive and vague definition of terrorism.¹⁹ The amended UAPA then grants broad powers of arrest and search²⁰ and official immunity to anyone purporting to act in pursuance of the Act, unless government sanction is provided.²¹

Immunity in Practice

Several practical considerations also contribute to the system of de facto official immunity. Inefficiencies and abuses within the court system itself add to the difficulty of prosecuting human rights abuses. As the Commonwealth Human Rights Initiative (CHRI) recently noted, “[A]ll across India, courts are slow, expensive and complex. The criminal justice system is mired in huge backlogs... as well as the more serious issues of acknowledged corruption. Victimized people are frequently unable to access the courts.”²²

¹⁵*Id.*, at sec. 4(a).

¹⁶*Id.*, at sec 7.

¹⁷*Id.*

¹⁸*Id.*

¹⁹ UAPA 2008, Sec. 4, substitution for sec 15.

²⁰*Id.*

²¹ Unlawful Activities (Prevention) Act Amendment Ordinance, 2004, sec. 49(a).

²² *Complaints Authority: Police Accountability in Action*, Commonwealth Human Rights Initiative, Better Policing Series – India, 40 (2009), Available at: http://www.humanrightsinitiative.org/publications/police/complaints_authorities_police_accountability_in_action.pdf (Hereinafter “CHRI 2009”).

In addition, potential complainants face severe restrictions in trying to register a First Information Report (FIR) in order to prompt an investigation into abuse.²³ Police officers are reluctant to investigate other police officers and they will often use abusive practices to deter victims from submitting complaints.²⁴ As documented by CHRI, “When a complaint is to be registered against a police officer himself, it will simply not be registered. The complainant will inevitably be subjected to threats, harassment or even physical assault.”²⁵

In 2006, the Supreme Court mandated the establishment of Police Complaints Authorities (PCAs) in every state to hear complaints and conduct independent investigations of alleged police abuses.²⁶ The Court mandated that every PCA have binding authority in making recommendations for administrative and criminal sanctions.²⁷ However, the vast majority of states have either not established the PCAs at all or have established weakened versions.²⁸

Sovereign Immunity and Compensation

In addition to official immunity afforded to government officers, Indian law also provides de facto sovereign immunity to the Central and state governments. De facto sovereign immunity arises from severe limitations on tort liability and compensation awards.

Sovereign Immunity from Tort Liability

While Article 300 of the Constitution allows the Central or State governments to be sued, it also grants Parliament power to enact immunity legislation.²⁹ Parliament has only passed legislation granting sovereign immunity, such as under AFSPA and UAPA,³⁰ and none limiting it. As a result, the Supreme Court has upheld the relatively limited ability to sue under pre-Constitution, British Colonial conceptions of sovereign immunity.³¹

In *State of Rajasthan v. Vidhyawati*, the Court held that plaintiffs could sue the government under theories of vicarious liability for torts committed by government employees within the scope of their employment.³² The Court reasoned that in carrying out its functions as an employer the State should not be treated differently than any other employer.³³

²³See, e.g., CHRI 2009 (Of the 51,767 complaints made against police officers in 2007 according to the National Crime Records Bureau, more than half were simply dismissed).

²⁴CHRI 2009.

²⁵CHRI 2009.

²⁶*Prakash Singh v. Union of India*, (2006) 8 SCC 1, 6.

²⁷*Prakash Singh v. Union of India*, (2006) 8 SCC 1, 6.

²⁸See, CHRI 2009, at 26.

²⁹The Constitution of India, art. 300(1).

³⁰Although immunity in these Acts was discussed with respect to official immunity above, the same provisions of the acts also provide immunity to the Central and state governments themselves as well as the officials of those governments. See, e.g., AFSPA J&K, sec. 7; UAPA 2004, sec. 49(a).

³¹See, e.g., *Kasturi Lal v. State of UP*, AIR 1965 SC 1039.

³²*State of Rajasthan v. Vihiyawati*, 1962 AIR 933, 1008.

³³*Id.*, at 1007.

Despite this renunciation of absolute immunity the Court distinguished between activities carried out by the government that are inherent sovereign powers and those that are, “assigned to (a public servant) not by virtue of the delegation of any sovereign power.”³⁴ In *Kasturi Lal v. State of Uttar Pradesh*, the Court focused on this distinction to provide sovereign immunity for those acts that can only be done in the exercise of government authorized power.³⁵ Acts that any private individual could undertake can bring vicarious liability to the State, but acts that can only be done because of government authority do not subject the State to liability.³⁶

This distinction has greatly limited the ability to sue the government for human rights abuses and has created a degree of confusion and arbitrariness in the granting of vicarious liability.³⁷ For example, courts have categorized dispersal of a mob as a sovereign power,³⁸ but moving detainees to prevent riots as non-sovereign.³⁹

In *Nagendra Rao v. State of AP*, the Supreme Court attempted to clarify when sovereign immunity should apply.⁴⁰ The Court highlighted the following as functions of sovereign immunity: “defence of the country, raising armed forces and maintaining [them], making peace or war, foreign affairs, power to acquire and retain territory,” as well as “administration of justice, maintenance of law and order and repression of crime.”⁴¹

Thus, while individuals can sue the government for vicarious liability in limited and sometimes arbitrary circumstances, these circumstances generally would not include the human rights violations.

Sovereign Immunity and Fundamental Human Rights Cases

The Supreme Court has held that sovereign immunity does not apply to compensation in public law cases involving fundamental rights.⁴² Nevertheless, the ability to receive compensation in fundamental rights cases has been limited.⁴³

In *Nilabati Behera v. State of Orissa*, the Supreme Court found that pursuant to this power, courts can issue awards of compensation for fundamental rights violations committed by government officials and that public law violations are distinct from

³⁴*Kasturi Lal v. State of UP*, AIR 1965 SC 1039/*Id.*

³⁵*Id.*

³⁶*Id.*

³⁷*Liability of the State in Tort*, National Commission to Review the Working of the Constitution, 8 Jan. 2001, Available at: <http://lawmin.nic.in/ncrwc/finalreport/v2b1-13.htm>.

³⁸*State of Orissa v. Padmalochani*, AIR 1975 Orissa 41, found in *Liability of the State in Tort*.

³⁹*State of Punjab Vs. Lal Chand Sabharwal*, AIR 1975 P&H 294. *Liability of the State in Tort*.

⁴⁰*N. Nagendra Rao v. State of AP*, 1994 AIR 2663.

⁴¹*Id.*

⁴²*Nilabati Behera v. State of Orissa*, 1993 AIR 1960.

⁴³See SAHRDC Report 2001, *supra* note 1, at 17.

private law damages.⁴⁴ Distinguishing public law cases, the Court held that sovereign immunity could not apply with respect to a “constitutional remedy.”⁴⁵

However, subsequent cases have greatly limited the ability of individuals to receive compensation. In *Rudul Sah v. State of Bihar*, the Court considered an award of compensation in such cases as only an “interim measure” noting that the petitioner could institute a civil law suit to “recover appropriate damages” (emphasis added).⁴⁶ In addition, the Court implied that courts should only make such limited awards in fundamental rights cases when no factual controversy exists as to the violation.⁴⁷

The Court further limited the scope of compensation in *M.C. Mehta v. Union of India*.⁴⁸ The Court made clear that awards remain discretionary and that the Court will not always issue them for violations of fundamental rights.⁴⁹ The Court declared that in order to award compensation:

“The infringement of the fundamental right must be gross and patent... and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons, or it should appear unjust or unduly harsh or oppressive on account of theft poverty or disability or socially or economically, disadvantaged position...”⁵⁰

In addition to this excessively high standard there is also arbitrariness in the amounts awarded. For instance, the Court awarded Rs. 35,000 for a person unlawfully detained for fourteen years in *Rudul Sah v. State of Bihar*,⁵¹ without explanation the Court awarded Rs. 50,000 for the detention of an MLA for a few days in *Bhim Singh, MLA v. State of J & K*,⁵² and awarded Rs. 100,000 each to the wives to two disappeared persons in *Sebastian M. Hongray v. Union of India*.⁵³ Decisions awarding compensation are thinly reasoned and thus, difficult to examine for precedent.⁵⁴

The awards themselves do not serve as a substantial or adequate remedy because the Court views civil lawsuits as the appropriate mechanism to receive compensation despite

⁴⁴ *Behera v. State of Orissa*, 1993 AIR 1960.

⁴⁵ *Id.* (“The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy”).

⁴⁶ *Rudul Sah v. State of Bihar*, 1983 AIR 1086.

⁴⁷ *Id.*

⁴⁸ *M.C. Mehta v. Union of India*, 1987 AIR 1086.

⁴⁹ *Id.* (“we must make it clear that it is not in every case where there is a breach of a fundamental right committed by the violator that compensation would be awarded by the Court in a petition under Article 32.”).

⁵⁰ *Id.*

⁵¹ *Rudul Sah v. State of Bihar*, 1983 AIR 1086.

⁵² *Bhim Singh, MLA v. State of J & K and others*, 1986 AIR 494, Available at: <http://bprd.nic.in/writereaddata/mainlinkfile/File707.pdf>.

⁵³ *Sebastian M. Hongray v. Union of India*, 1984 AIR 1026.

⁵⁴ See, e.g. Sebastian M. Hongray v. Union of India, Eliminating Sovereign and Official Immunity In Fundamental Human Rights Cases – SAHRDC’s submission to the National Commission for the Review of the Working of the Constitution. January 2001, pg 26

the fact that, the Central and State governments enjoy sovereign immunity from civil lawsuit for abuses committed during actions inherent in sovereign power.

Effects of Impunity

In *S.P. Gupta v. Union of India*, the Court stated that “there can be no doubt that the risk of legal action... will induce the State... to act with greater responsibility and care, thereby improving the administration of justice.”⁵⁵

In practice, a lack of legal deterrence has continued to allow police and armed forces to commit widespread abuses. Advocates continue to document the systematic violation of fundamental rights through practices such as illegal arrests and detention, torture, extrajudicial killings, extortion, disappearances, crimes against women and failure to register complaints and investigate crimes.⁵⁶

The Human Rights Watch noted with respect to AFSPA, that impunity sends a “negative signal to victims about state indifference to and complicity in their suffering.”⁵⁷ With impunity, “the viability of democracy is seriously jeopardized.”⁵⁸

International Standards

The current state of immunity in India is grossly out of step with international standards. As recognized in the International Covenant on Civil and Political Rights (ICCPR), to which India acceded in 1979,⁵⁹ State Parties must provide “an effective remedy” to those who suffer human rights abuses by government officials.⁶⁰

Similarly, the Rome Statute of the International Criminal Court, the Statute for the International Criminal Tribunal for Rwanda, and the Statute for the International Criminal Tribunal for the former Yugoslavia, and the Statute for the Special Court of Sierra Leone all have nearly equivalent provisions to ensure that officials, regardless of their position in the government face criminal responsibility and punishment.⁶¹

⁵⁵*S.P. Gupta v. Union of India*, 1982 AIR 149.

⁵⁶See, e.g., *Broken System*, Human Rights Watch, *supra* note 3, at 111; CHRI 2009.

⁵⁷HRW 2008 –AFSPA, *supra* note 19, at 17.

⁵⁸SAHRDC Report 2001, *supra* note 1, at 9.

⁵⁹“Ratification of International Human Rights Treaties – India,” University of Minnesota Human Rights Library, Available at: <http://www1.umn.edu/humanrts/research/ratification-india.html>.

⁶⁰*International Covenant on Civil and Political Rights* (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 23 1976 (“Each State Party to the present Covenant undertakes: To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, *notwithstanding that the violation has been committed by persons acting in an official capacity*” (emphasis added)).

⁶¹Rome Statute of the International Criminal Court, art. 27, available at:

<http://www.un.org/children/conflict/keydocuments/english/romestatuteofthe7.html>; Statute of the

International Criminal Tribunal for Rwanda, art. 6(2), available at:

<http://www.ictj.org/ENGLISH/basicdocs/statute.html>; Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(2), available at: <http://www1.umn.edu/humanrts/icty/statute.html>; Statute for the

With respect to compensation, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power mandates that victims of government abuse should receive compensation from the government.⁶² Similarly, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment finds that victims of torture are entitled to “fair and adequate compensation.”⁶³

International Criticism

The Human Rights Committee has criticised India for an atmosphere of impunity that deprives people of effective remedies.⁶⁴ Similarly, the Working Group on Enforced or Involuntary Disappearances noted the problems created by immunity provisions of the Armed Forces Special Powers Act⁶⁵, which are in violation of the government’s obligations under articles 2(1)⁶⁶, 13(5)⁶⁷ and 14⁶⁸ of the Declaration on the Protection of All Persons from Enforced Disappearance.

The United Nations Special Rapporteur on Torture has also criticized India, noting that torture victims have encountered difficulties in filing complaints because local police were instructed not to file a First Information Report without higher authority.⁶⁹

Special Court of Sierra Leone, art. 6., available at: <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&>.

⁶² *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, G.A. Res. 40/34, para. 11 (29 Nov. 1985) (found in SAHRDC Report 2001, *supra* note 1, at 17).

⁶³ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, (annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force 26 June 1987 (found in SAHRDC Report 2001, *supra* note 1, at 17).

⁶⁴ Human Rights Committee: India, CCPR/C/79/Add.81 (4 Aug. 1997) (Concluding Observations), para. 21.

⁶⁵ *Civil and Political Rights, including Questions of Disappearances and Summary Executions*, Report of the Working Group on Enforced or Involuntary Disappearances, E/CN.4/2000/64, para. 53, 21 Dec. 1999, Available at:

[http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/4c250eb0e6d15c988025688f004314cd/\\$FILE/G9916472.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/4c250eb0e6d15c988025688f004314cd/$FILE/G9916472.pdf); *Civil and Political Rights, including Questions of Disappearances and Summary Executions*, Report of the Working Group on Enforced or Involuntary Disappearances, E/CN.4/1999/62, paras. 151 & 153, 28 Dec. 1998, Available at:

<http://daccessdds.un.org/doc/UNDOC/GEN/G98/053/10/IMG/G9805310.pdf?OpenElement>.

⁶⁶ Declaration on the Protection of All Persons from Enforced Disappearance, A/RES/47/133, 18 Dec. 1992, art. 2(1), Available at:

[http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/A.RES.47.133.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/A.RES.47.133.En?Opendocument) (“No State shall practice, permit or tolerate enforced disappearances”).

⁶⁷ *Id.* at art. 13(5) (“Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished”).

⁶⁸ *Id.* at art. 14 (“Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall ... be brought before the competent civil authorities of that State for the purpose of prosecution and trial.”).

⁶⁹ UN Commission on Human Rights, Report of the Special Rapporteur on Torture and cruel, inhuman or degrading treatment or punishment, U.N. Doc. E/CN.4/1994/31 (1994) (Prepared by Nigel Rodley)

In its 2008 country report on Human Rights practices in India, the U.S. Department of State criticized impunity, noting the immunity granted to security forces under AFSPA, corruption in the police forces, and the ineffective investigation and prosecution of communal violence.⁷⁰ Amnesty International's 2009 report also commented that "impunity remain[s] widespread."⁷¹

These criticisms point towards the necessity of creating effective systems of prosecution and compensation.

The Government's Response

The Indian government response to criticisms regarding impunity, and the lack of action on the part of the national human rights commission, represent the weakening of the rule of law. The government does not contest the international legal obligations in the area of immunity, but instead argues that in practice, all cases are investigated and wrongdoers prosecuted whenever a prima facie case of human rights violation is established.

Unfortunately, an overwhelming amount of evidence of both individual and mass cases of human rights abuse flies in the face of this denial.

Conclusion

The current state of the law in India continues to allow impunity for even the most serious human rights violations. The relative silence of the Constitution, various legal provisions granting official and sovereign immunity, Supreme Court judgments' endorsing such provisions, and multiple practical impediments to justice all combine to allow police officers, armed forces, and other officials to commit human rights abuses without fear of sanction, and leave victims and their families without adequate redress.

India must amend or repeal the current laws so that government sanction is never required for prosecution and individuals can receive adequate compensation. These changes are necessary for India to comply with international law and most importantly to provide adequate redress for victims of abuse.

⁷⁰India, Country Reports on Human Rights Practices – 2008, Released by the Bureau of Democracy, Human Rights, and Labor, 25 Feb. 2009, Available at: <http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119134.htm>.

⁷¹India, Amnesty International Report 2009: State of the World's Human Rights, Available at: <http://thereport.amnesty.org/en/regions/asia-pacific/india>.