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The Fundamental Threat To The Fundamental Right- The Failure Of The Foot Soldiers Of The State

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Abstract- The protection of the Fundamental Right (right to life and dignity) should be the most basic duty of the state. Bureaucrats and police should be constitutionally mandated to perform this task. The dereliction of this duty should be punished severely but it is also necessary that state officials should be provided relative autonomy from their political masters while performing this duty. India in particular presents the typical example of failure of the police and criminal justice system. Democracies like India should sign and implement the Rome Statute in proper spirit which will further strengthen the Fundamental Right Indian citizen.

Important Terms- Criminal Justice, professionalism, genocide, dereliction.

The author has intentionally used the right not rights in the title of this article. The author is focusing on the most fundamental right which is the right to life, without which no other rights have any meaning for an individual or a community. This article tries to focus on the gravity of the problem which is the failure of the state apparatus to protect the most fundamental right to life of its citizens. This failure is most constant in the developing and underdeveloped countries of the world. This threat is usually faced by individuals, communities, ideological groups and minorities. This article primarily focuses on India but this article can help in understanding the plights of individuals, communities, ideological groups and minorities facing this fundamental threat of, targeted killing of a person, riots, ethnic cleansing and eviction of communities in their respective countries.

Theorizing the problem-

There has been no time since human evolution that people have become so much involved in the political system. Now elections and electoral democracies have become one of the greatest sources of gaining legitimacy for the political elites worldwide. This focus on the election oriented participatory process has reduced democracy to its procedural level. Presently the substantive aspect of democracy is lacking which would have ensured participatory governance, genuine decentralization of powers and effective checks on the dictatorial impulses of majority. Substantive nature of the democracy would demand respect to diversity by the moderation of majority principle. But the fundamental threat to the fundamental right of people emerges when the soldiers of state (who are entrusted to ensure safety of life and property) start to function according

to the unconstitutional wishes of their political masters or follow their own communal inclinations which at times run counter to the morality of the constitution.

Bureaucrats and police are the soldiers of the state which are there to defend the spirit of the constitution while dealing with different issues concerning the governance. In a democratic system like India they are bound to implement the policies and vision of the elected executive while remaining within the domain of the constitutional limits. Threat to the life and safety of dissenting individuals and groups become potent when these officers and constitutional professionals start to give importance to wishes of their political masters or the perceived interests of his /her community. Usually there are constitutional soldiers who are systematically penalized for upholding the constitutional values while those who collude with their political bosses are amply rewarded, this is particularly true in the Indian context.

Presently there is the dire need to reform Indian bureaucracy especially (police) those who are responsible for protecting the life, liberty and property of the individual and community. Police reforms have been one of the issues of Indian politics which has been neglected to the backburner by all the political parties. Presently the governance of the police administration is in the control of the political executive which at times tries to influence its functioning to its own advantage. Issues like promotion, transfer and disciplinary actions are under the purview of political executives which makes this department very susceptible for political interference.

The need to reform the functioning of the police has to be combined with judicial reform which would include the reformulation of the criminal procedure code as well. The protection of the Fundamental right to life or other rights is an essential duty of the judicial system of India and the bureaucratic (police) apparatus is the first and immediate line of defense for these rights. The ultimate protection and adjudication on the matters concerning these issues is the responsibility of the judiciary.

Human Rights and the fate of the Fundamental Right in India-

India became signatory to the *United Nations Convention on the Prevention and Punishment of the Crime of Genocide* by the signature of B.N. Rau, Nov 29, 1949. In this Convention, genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. (a) Killing members of the group. (b) causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. (d) imposing measures intended to prevent births within the group (e) forcibly transferring children of a group to another.¹

After independence there has been a whole series of communal clashes between different communities in different parts of India. 1984 Anti –Sikh riots, Bhagalpur case, Bombay Riots, Gujarat Riots but all these riots and communal clashes have one similar and strange narrative that administrative and police apparatus has been almost out of gear during the peak of such communal carnage. Incidents like Hashimpura Case are examples where state apparatus has acted brazenly against the minorities. There has been a very poor level of investigation and prosecutions in these heinous crimes. Kashmir genocide and forced migration of pandits were not possible with the failure or connivance of the local law and order machinery. Recent killing of BJP supporters after post poll violence in Bengal has to be seen from the same perspective.

¹ United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 1949.

National Human Rights Commission (NHRC) came into existence in 1993 and the Supreme Court proved receptive to NHRC's pleas to intervene in Gujarat cases. After the collapse of the trial in the Best Bakery case in 2003 the NHRC first approached the Supreme Court.²

Rome Statute and Lacuna in Indian Legal System-

India has neither signed nor ratified the **Rome Statute** on the international criminal court (ICC). The Rome Statute established four core international crimes; genocide, crimes against humanity, war crimes, and crime of aggression. Those crimes "shall not be subject to any statute of limitations." Under the Rome Statute, the ICC can only investigate and prosecute the four core international crimes in situations where states are "unable" or "unwilling" to do so themselves; the jurisdiction of the court is complementary to jurisdictions of the domestic courts. The court has jurisdiction over crimes only if they are committed in the territory of a state party or if they are committed by a national of a state party; an exception to this rule is that the ICC may also have jurisdiction over crimes if its jurisdiction is authorized by the United Nations.³

The presently this insensitivity of Indian criminal law towards the crimes of genocide or mass killings has been pointed by the Delhi High Court. Neither '**crimes against humanity**' nor '**genocide**' is part of the domestic law on crime now this loophole needs to be addressed urgently, the Delhi High Court said on Monday. While calling for strengthening of the legal system to ensure that perpetrators of mass crimes are made answerable, Bench of Justices S.Muralidhar and Vinod Goel convicted and sentenced Sajjan Kumar. The Bench said the riots 'answer the description' of crimes against humanity as in the aftermath of Indira Gandhi's assassination, there was the mass killing of Sikhs in Delhi and the rest of the country "engineered by the political actors with the assistance of the law enforcement agencies." It is said that criminals responsible for the mass crimes enjoyed political patronage and managed to evade prosecution and punishment. The mass killings in Punjab, Delhi and elsewhere during the country's Partition remain a collective painful memory as are the killings of innocent Sikhs in November 1984. There has been a familiar pattern of mass killings in Mumbai in 1993, in Gujarat in 2002, in Kandhamal (Odisha) in 2008, in Muzaffarnagar in UP in 2013 to name a few. Common to these mass crimes was the targeting of minorities and the attacks spearheaded by the dominant political actors being facilitated by the law enforcement agencies,' the Bench said.⁴

Example of India's largest state-

Moradabad in 2011 when they nearly beat an SSP to death over the discretion of the Quran. The good residents of Mathura went one step further and actually killed an Additional SP in 2016. The mobilization of cow vigilantes is the obvious culprit. And in this context of this particular crime it makes perfect sense to question the culture of impunity that has grown around the cow vigilantes, from the days of the first lynching of Mohammad Akhlaq in Dadri. Five accused have been arrested, a few clear links with right-wing outfits. However, to blame this cop killing culture of UP on the right-wing alone would be to confuse the symptoms for the disease. This incident is at the intersection of two sub-cultures, first the culture of impunity of lynch mob, and the second a culture of servility of an emasculated and politicized police.⁵

² Manoj mitta, Finally, Justice Tribune 18 dec, 2018.

³ [HTTPS://www.un.org/law/icc/index.html](https://www.un.org/law/icc/index.html)

⁴ Press Trust of India, 18 dec, 2018.

⁵ Abhinav Kumar, The death of an SHO, THE INDIAN EXPRESS, Dec 6, 2018.

The fundamental link between crime and punishment, that is the foundation of the rule of law, has been broken in UP for a while now. Trials take decades. Conviction rates are abysmal. Witnesses turn hostile as a matter of routine with no adverse consequences. Forensic facilities are negligible. Prisons are overcrowded and more often than not, they serve as safe havens for well-connected gangsters to run their empires from. The most important factor is there simply are not enough policemen to police India's largest state. By the UN standards, at current population levels UP needs around a million police personnel. At present it has around 3, 00,000. Those who are there are not just overburdened and under-resourced, but their professional spine has been broken by casteism, corruption and frequent transfers.⁶ Recently Yogi government chose the way out by ensuring encounters of the hardcore criminals and creating a fear of police in the minds of goons which at times seems very effective but this strategy has its own negatives like right to fair trial and human rights.

Justice K.T Thomas Committee-

The committee stated that "Proper functioning of the police forces is crucial for the rule of law to prevail in any society. It is also a critical requisite for ensuring the Fundamental Rights of the people enshrined and guaranteed under our Constitution. The indifference of the State Governments to the issue of police reforms and non-compliance of the Directives of the Supreme Court in this regard, despite the tenacious efforts made by the Committee within the boundaries of its limited mandate, has to be viewed in this perspective."⁷ Lack of political will and financial resources are the biggest impediments in the path of police reforms.

Justice J.S.Verma committee-

Constituted in 2013 also recommended the implementation of the directives issued in **Prakash Singh Vs Union of India case**. In the committee's perspective, ensuring full compliance with the judgment across all of India is of utmost priority to national welfare; including the welfare of women and children and towards the weaker sections of the community. Proper policing can ensure a safer community which is accessible to all for enjoyment; especially women and children without fear of sexual harassment or violence. The court noted that all the following Commissions and Committees; National Police Commission, National Human Rights Commission, Law Commission, **Ribeiro Committee**, **Padmanabhaiah Committee** and **Malimath Committee** had broadly come to the conclusion of urgent need for police reforms with agreement on the key areas of focus which are (a) State Security Commission at State level; (b) transparent procedure for the appointment of Police Chief and the desirability of giving him a minimum fixed tenure; (c) separation of the investigation from the law and order, (d) a new Police Act which should reflect the democratic aspirations of the people.⁸

The Justice Malimath Committee submitted a report in which the Committee felt that the existing system "weighed in favor of the accused and did not adequately focus on justice to the victims of crime." The panel was in favor of borrowing features from the inquisitorial system of investigation practiced in countries such as Germany and France, where a judicial magistrate supervises the investigation. The committee recommended that courts be bestowed with powers to summon any person –whether or not listed as a witness –for examination, if it felt necessary.

The Committee suggested that a Schedule to the Code be brought out in all regional languages so that the accused knows his/ her rights. The committee also felt that the present method of proof beyond reasonable doubt '*as the basis to convict an accused in criminal cases*' needs to be changed. This according to committee

⁶ Ibid.

⁷ K. Deepalakshmi, 17 January 2018, thehindu.com

⁸ Report of the Committee on Amendments to Criminal Law, 23 Jan 2013, P 312-339.

gives very “unreasonable burden” on the prosecution and hence suggested that a fact be considered as proven “if the court is convinced that it is true” after evaluating the matters before it”

The committee suggested hiving off the investigation wing from Law and Order. It also recommended setting up a National Security Commission and State Security Commissions. To improve the quality of investigations, it suggested a slew of measures, including the appointment of an Addl. SP in each district to maintain crime data, organization of specialized squads to deal with organized crime, and a team of officers to probe inter-state or transnational crimes, and setting up of a **Police Established Board** to deal with posting, transfers, and so on.⁹

It suggested that a new post of **Director of Prosecution** be created in every state to facilitate effective coordination between the investigating and prosecuting officers under the guidance of the Advocate General. The report submitted in 2003 pointed out the judge –population ratio in India is 10.5 per million populations as against 50 judges per million populations in many parts of the world. The ratio is 19.66 per million people as of 2017. The committee argued for a strong witness protection mechanism –it said the judge should be ready to step in if the witness is harassed during cross-examination.¹⁰

Need of the Hour-

Judges should be provided a more active role in the criminal justice system, especially the power to punish the perpetrators and the errant police officers. Dereliction of the constitutionally assigned duty should be treated a crime against constitutional values and humanity in general. The Indian police act was passed in 1861 by the colonial government in the wake of the rebellion of 1857 to crush the dissent of the Indians. That law is still the most prominent law governing the Indian police administration. There is a need to create a new police act which functions according to the democratic principles. Police should be organized on the professional principles which can help to insulate them from political influence. Police is the essential component of the criminal justice system and without improving the criminal procedure the task of protecting the Fundamental Right of people cannot be fulfilled.

There is the need to make all the countries and their officials constitutionally bound to protect the Fundamental Right (right to live with dignity) of their citizens. Democratic countries like India and the US should not shy away from signing the *Rome Statute* and become a member of the *International Criminal Court* to further strengthen the human rights of their own citizens and other residents. Totalitarian and dictatorial countries should also accept the Rome Statute to ensure the Fundamental Right of citizens of their own countries because ideological or political differences cannot become an excuse to commit crimes against humanity.

⁹ K. Deepalakshmi ,17 January 2018, thehindu.com.

¹⁰ Ibid.