

STATE REPRESSION IN INDIA: Behind the mask of democracy...

Legitimate power is finite. Its bounds are delineated, simultaneously, in a host of ways. A written (or unwritten) constitution; a body of laws, subordinate to the constitution, dealing with various subjects; Rules and Regulations constituting what is known as subordinate legislation; executive instructions and conventions; and, finally, practices entrenched at all levels of the executive hierarchy which, in a sense, interpret the law and apply it to concrete situations. All these may, broadly, be termed 'Law' and their operation upon a subject population, the 'Rule of Law'. Not included in this scheme of things are the whims of those in power, and the conscious or unconscious violations of law committed by its keepers. To check the unconscious or aberrant violations of 'Law,' there exists a system of courts, which are supposed to entertain complaints and provide redress in accordance with 'Law.'

In this conception, the State is seen as a self-correcting mechanism, the body politic. Much like the human body, which generates its own defences against external and internal depredations, the body politic is, in principle, designed to respond to any disease in itself and apply remedial measures.

State repression is (or, at least, ought to be) alien to this idealised conception of the body politic. It can be likened to the cancer that attacks a healthy cell, perverting its very nature and creating a whole new paradigm of life. It is a breach of the 'Rule of Law,' for the achievement of objects extraneous to the reasons for which the body politic is stated to have been constituted.

Historically, there has never been a State that has not practiced repression. However, till the advent of the modern nation-state and the concept of the 'Rule of Law,' it was people that ruled and repressed. Law was secondary, notwithstanding the efforts of various religious denominations, through recorded history, to establish 'the kingdom of heaven on earth': in other words, rule by 'divine' law. It is only with the rise of the bourgeoisie and their construct, the modern nation-state, that people began to be ruled (and repressed) by 'Law.'

'Breach' can be divided into two broad categories. One, which I shall call 'State Repression,' is constituted by those breaches that are inherent in the very nature of the nation-state or of the 'Law' or the 'Rule of Law.' I shall refer to this kind of breach as 'State Repression.' State Repression, by definition, can (and is) very often carried out in the guise of implementation of the 'Law' or, of the 'Rule of Law.' The second category of 'breach' is that where the State action is in violation of 'Law' or of the 'Rule of Law,' which it is sworn to uphold. I shall call this kind of breach 'State Terrorism.'

A significant part of the rhetoric justifying the creation and evolution of the modern nation-state focuses on its potential – through the ‘Rule of Law’ – to be more just and egalitarian than any other system of organised political power. Unfortunately, however, empirical evidence overwhelms us with proof that so far as repression is concerned, things have not changed very much. States continue to repress their citizens in all manner of ways. The difference being that, today, repression is institutionalised and given the name – ‘Rule of Law.’

Equally mythical is the view that State repression is a problem only of the ‘despotic’ east and that the ‘liberal democracies’ of Europe and North America, founding fathers of the modern world order, are proof that the ‘Rule of Law’ is an effective curb on State Repression. The foundations of the present world order were laid in the mass extermination of entire races of people. Those who survived the genocide were reduced to ciphers within their own lands. Further, from the inception, the European races / nations resorted to legal fictions to justify their conquests, particularly of the Americas, the Caribbean, and Australia and New Zealand. From the ‘law’ that declared the right of the conquerors to all lands that qualified for being declared ‘virgin territory,’ denying the existence of the millions who lived there and thereby, paving the way for the elimination of these groups, to the Doctrine of Lapse, one of the major factors behind the Indian war of 1857 against the British, ‘Law’ and its ‘Rule’ have been tools of conquest and oppression.

Thus, ‘Law’ and the ‘Rule of Law’ have been intrinsic in denying vast population groups both, a corporate as well as a corporeal identity. Its Machiavellian face is also illustrated by the manner in which successive American governments, with the active support of their Congress, coerced the indigenous population groups to enter into ‘treaties’ with them. These ‘treaties,’ however unequal, were ‘Law’ within the European sense of the word. ‘Rule of Law’ demanded that they be honoured. However, the Americans broke virtually all these treaties, justifying each breach in terms of ‘Law’ and declaring it to be a furthering of the ‘Rule of Law’. Ultimately, the US Congress passed the ‘Indian Removal Bill’ into law, making the wholly unjustified eviction of the ‘Indians’ from their lands a direct component of the American ‘Rule of Law.’

Even today, the plight of the blacks, the Hispanics, women and other minorities in the USA, is too well known to require comment. Further, the alacrity with which the spate of repressive measures have been passed by the American government and its legislature in the aftermath of the September 11 attack, is proof, if any was needed, that the liberal face of the ‘Rule of Law’ is only a surface veneer.

Similarly, the best of the European, liberal democracies were, till recently, little better than despotic and highly repressive oligarchies. Their record, in the context of their 'colonies' (or former colonies) or with respect to the countries and people of the third world in general, makes them examples of the worst kind of State repression and power. Once again, the facts are too well known to require elaboration.

Even, de hors this magnificent and bloody past, the case for the 'Rule of Law' is very weak. All that seems to have been established in the last several centuries of the 'Rule of Law' is that affluence breeds a 'respect' for the Law. It does not need a very critical eye to discern that this 'respect' is born more out of a desire to preserve the status quo (which is heavily weighted in favour of the ayes) and less out of a considered decision to abide with and to live by the 'Rule of Law.'

In other words, a 'Rule of Law' based upon the affluence of a handful of small and medium sized nations, and contingent upon the abject poverty and misery of the vast majority, is not a credible tool for ensuring universal happiness, justice and peace, even granting all its virtues. Further, it is unlikely to gain credibility till such time as it is seen as the property of the global ruling and middle classes, despite fervent espousal of its virtues as a panacea for the ills of the human race.

To sum up, the issue of State repression has many dimensions. There has never been a satisfactory solution to the problem of handling / controlling political power, albeit the liberal claim that theirs is the best of the possible solutions known to human history. Further, notwithstanding Locke (1), 'Rule of Law' is not a mantra, the chanting of which will magically realise its revolutionary potential for equity, justice and, consequently, universal well being. Lastly, the probability of repression is, at least, as inherent in the concept of the modern nation-state as in any other form of organised political power. The rule of an absolute dictator could be more fair and just, and thereby more legitimate and lawful, than that in a so-called democracy governed by the 'Rule of Law.' For, it is not 'Law' per se but the intention behind it, the makers and keepers of the 'Law,' that is the determining factor. In other words, it is not the form but the content of the 'Rule of Law' that determines whether the exercise of State power is legitimate or not.

The State may repress by making laws that are unjust or unfair or unequal or, the implementation of the laws made may be unjust, unfair, etc., because of an inefficient, corrupt or biased (against one or more section of society or social group) executive / administrative apparatus, or by both these methods. Common sense tells us that, usually, both the foregoing forms of repression obtain.

Clearly, if the test of the legitimacy of a State's authority were its non-repressiveness, most States, including the Indian State, would have to be declared illegitimate.

India is, in many senses, a typical example of a modern nation-state. It contains within itself most of that which commends a State to the universal body politic. It has managed to stay within the definition of 'democratic' – the brief blip that was the Emergency notwithstanding. It has an elaborate, written constitution clearly delineating the three pillars of the modern nation-state and demarcating their respective roles. It guarantees the rights of its citizens in virtually identical terms as the Universal Declaration of Human Rights, including the right to life, the right to freedom of speech, the right to equality and the equal protection of the law, etc. In fact, the Indian constitution incorporates, as a Fundamental Right, the right to directly move the Supreme Court in case the State violates any of the guaranteed, Fundamental Rights.

On paper, India also has a fairly elaborate and developed system of justice. The best and the most liberal strands of Anglo-Saxon jurisprudence have been interwoven into the foundation of the system. There is a clearly defined hierarchy of courts with the Supreme Court at the top. The powers vested in the Supreme Court: to do justice, to protect the Fundamental Rights of people in general and citizens in particular, are truly sweeping. The flanks, so to speak, are amply covered by the High Courts, which have even more sweeping powers in many respects.

At first blush, it seems inevitable that backed by such might, the 'Rule of Law' cannot but prevail. However, for the vast majority of Indians repression is the only truth. Repression is not just a matter of custodial torture and extra-judicial murder. Mis-governance or mal-governance is repression too. While some countries have developed a 'cradle to grave' system of welfare, we in India are confronted with a State apparatus that has perfected a 'cradle to grave' system of repression and oppression.

Consider the matter from the point of view of the Dalits, the Tribals, the abjectly poor, the abysmally helpless and ignorant, the landless, the women, and all those who are or are forced to become marginal to the mainstream. They easily comprise an overwhelming majority. Their lives are an endless saga of misery and oppression without redemption. For most, if not all, the system does not even hold out a possibility of succour or relief. If asked, most of them will say that the State, in one or more of its myriad avatars, has been the handmaiden of oppression and repression in their lives, if not the active agent.

I am sure many will dispute the foregoing formulation, deeming it, at the very least, too extreme. I shall therefore illustrate the point with a few examples.

Consistent with the definition of ‘State Repression’ given above, let us, first look at repressive laws. Given the norms current in international Human Rights jurisprudence, it cannot be disputed that all laws providing for preventive detention are repressive. By this yardstick, repression is intrinsic to the Indian State. Article 22 in the Constitution sanctions preventive detention. In exercise of this authority, independent India has always had several laws providing for preventive detention. Further, it chose to retain on its Statute book, most of the repressive laws enacted by the British, including the provisions contained in Chapter VIII (Sections relating to the power of the police and / or the executive authority of the area to (preventively) detain a person for ‘failing’ to furnish sureties (or, sureties that are ‘acceptable to the authority concerned’)) and Chapter X (Sections relating to the power to use force, including armed force, against the local populace, ‘protection’ from prosecution for officials of the State involved in the use of such force, power to prohibit assembly, etc. – section 144, power to seal premises, etc.) of the Code of Criminal Procedure, the provisions relating to sedition, waging war against the State (a euphemism for any sort of revolt or rebellion or even aggressive opposition to State oppression) and many other local / regional laws of the same kind. In fact, the masters of independent India have put these provisions to new and innovative use to strengthen their stranglehold on repressive power, besides enacting (or reenacting) new laws, such as the Defence of India Act, Maintenance of Internal Security Act (which were repealed by the Janata Party government on account of their gross abuse by Mrs. Gandhi’s government during the emergency), the National Security Act, the Conservation of Foreign Exchange and Prevention of Smuggling Act, etc. Since ‘Law and Order’ is a ‘State’ subject, the State governments have, also, enacted several preventive detention laws.

Similarly judged, laws such as the three Armed Forces (Special Powers) Acts, TADA and, now, POTO are, also, repressive. The Armed Forces (Special Powers) Acts have been used by the Indian State to have, effectively, military rule (or martial law) in the North East, Punjab and Kashmir, while retaining the façade of civilian rule. These laws empower the State to use the regular army and other designated armed formations like the Assam Rifles and the Rashtriya Rifles for control of areas declared ‘disturbed.’ They empower these armed forces to use such force (including to shoot at sight or at will) as may be necessary to ‘control’ the areas, and further, they grant the army immunity from prosecution from acts done by them in exercise of powers under these Acts.

Laws such as TADA, POTO, etc., are repressive and perverse for several reasons. First, they are intrinsically draconian. They define the offence or offences in very loose and broad terms. This gives the police or other agency empowered to enforce the law a wide discretion, which is invariably misused.

Even otherwise, it is one of the axioms of Human Rights (and of criminal) jurisprudence that laws must be clear and definite with as little as possible vagueness or ambiguity. Second, these laws provide for extreme, harsh and disproportionate punishment for the offences covered by them. Third, by making confessions made before police officers admissible as evidence in a court of law, TADA and POTO violate the basic tenets of, both, criminal law jurisprudence and practice. Notwithstanding the ‘safeguards’ provided (in the case of TADA upheld by the Supreme Court), this provision is highly reprehensible, particularly in a country where custodial third degree is routine. Fourth, these Acts pervert the system of justice, setting up dangerous precedents, by shifting the burden of proof. It is a universal norm that a person is innocent until proved guilty. The burden of proving the guilt is of the prosecuting agency. This includes the duty to establish criminal intent or *mens rea*. Laws such as TADA and POTO destroy the intricate balance of justice embodied in this rule by raising a presumption of guilt (or criminal intent) in certain circumstances. Apart from the direct perversion of justice this also tends to subvert the training of the judges who try these cases, by conditioning them to the acceptability of the notion of such a presumption of guilt or, at least, of criminal intent, which is contrary to the ‘normal’ criminal jurisprudence and practice. Fifth, these Acts violate the norm that requires that all criminal trials be conducted in an open court by providing for ‘in camera’ proceedings. Sixth, by permitting the prosecution to keep secret the identity of its witnesses, they virtually negate the vital right to the accused to subject the prosecution witnesses to cross-examination. Last, but not least, these laws repress by negating the power of the court to enlarge an accused on bail, pending trial: an important corollary of the principle that says that a person is innocent till proven guilty. Both TADA and POTO (and several other laws) stipulate that before a judge can grant an accused bail, he must be convinced of the innocence of the said accused! This is an absurdity that the Supreme Court had declared valid in the case of TADA.

Besides these laws, which are directly related to issues of liberty and justice, the Indian State has on its book a host of other laws that are repressive – *per se*, as well as in their operation. Many of these can be categorised as ‘anti poor’ laws. For example, anti begging laws make begging illegal and empower the concerned authority to arrest and detain beggars. Irrespective of the objects, noble or otherwise, the fact of the matter is that for all practical purposes the law operates as a kind of preventive detention. Thousands of people have served up to a year in detention under this law. Since many of these people have no choice but to beg, they go back to begging upon their release. Some of them are rearrested and again sent into detention.

The case of various municipal laws governing the use of space within municipal limits, which render hawking and street vending illegal, is similar. No one can deny the necessity for such regulation. However, neither can any

sensible person deny that hawkers and vendors are an intrinsic part of the cityscape, providing myriad essential services, cheaply and efficiently, to the majority of the millions living in a large city. Nevertheless, whether by accident or by design, these laws hang like a veritable sword of Damocles upon hawkers and vendors, rendering them liable to arbitrary expropriation of property and consequent loss of livelihood, without any notice.

In the case of both, the anti begging laws and the municipal use of space regulations, the nature of the laws gives rise to enormous scope for corruption. Beggars who pay the policeman do not get arrested. Similarly, the hawkers / vendors who regularly pay the *hafta* are left free to ply their trade. By the nature of things, the victims of this racket are completely at the mercy of the extortionists. Thus, the 'rates' that these people are forced to pay are crushing.

Looked at another way, this is the price that the State extracts from its poor for being allowed to live. Only a very hardhearted cynic would deny that the vast majority of beggars beg out of necessity and not out of choice. Most hawkers / vendors, too, would prefer a cushy government job, where one gets one's pay whether or not one works, to the bone crushing fatigue of the lives they are forced to lead. While it may be practically impossible for the State to feed all its citizens, there can be no gainsaying that a State (or a law) that prevents or obstructs a citizen from earning a living, without offering any alternative, and without any reasonable justification, is repressive.

One could multiply the examples endlessly. Take the case of the land acquisition laws. The modern nation-state vests its entire territory in itself. By this thesis, even where a portion of land is 'owned' by a private individual or body corporate, the residuary rights with respect to the same continue to remain in the State, and entitle it to acquire the property, usually for a public purpose. Public purpose, though a justiciable matter, is defined solely by the State. It is one of the ironies of fate that more often than not, it is the land inhabited by the poorest, most marginal of a State's citizens that is needed for 'public purposes' – a dam or a factory, a road or a railway, a mine, a wildlife reserve, a township, a hospital or a park. Already living at the margin of survival, their land is, usually, the only thing that stands between them and extinction. The compensation that the law provides for the acquisition is, almost invariably, no substitute. Coming from a subsistence economy, such people are rarely competent to handle the money paid to them. The alternate land or plot that is part of the compensation package is usually of the worst kind. Besides, for most of these people, it is not their own holding that sustains (had this been adequate they would not have been 'marginal' in the first place), but the 'commons,' whether forest, river or just plain meadow. The loss of these irreplaceable 'commons' pushes the displaced poor into destitution.

I need not spell out the murky details of all the shenanigans that invariably accompany any acquisition to complete the picture of a State having recourse to 'Law' and the 'Rule of Law' to repress its people. Anyone, who wishes a more graphic account of the operation of this law and the repression inherent in it, can refer to Arundhati Roy's pieces in support of the Narmada Bachao Andolan. Polemical they may be, but they paint a true picture.

However, these are not the limits of 'State Repression.' Repression by the breach of 'Law' and the 'Rule of Law,' or 'State Terrorism,' is as endemic as repression by means of the 'Law' or by recourse to the 'Rule of Law.'

The power and reach of the modern nation-state makes its ability to repress and to terrorise, limitless. I gave some examples of this limitlessness from its early history. Its subsequent history is, essentially, no different except that today, perhaps out of compulsions generated by the rhetoric of its superiority, all States are deeply conscious of the necessity of maintaining the façade of legality. This, as much as the enormity of the repression and terror, has given rise to a massive, global discourse about 'Law' and the 'Rule of Law.' Another difference is that with the end of the colonial era, most States are constrained to repress only within their territorial limits. Trans-national repression has become indirect, conducted through the local quislings who are often even more brutal than their European predecessors.

India, being a typical nation-state, is familiar with most, if not all, possible forms of atrocity upon its citizens. Custodial torture and rape are intrinsic to policing in India. The Indian police have been called the largest gang of organised criminals by the head of the only Police Commission ever constituted after independence. Extra-judicial murders, fake encounters, disappearances, etc., continue to remain part of standard police modus operandi in the discharge of their duties. The police, and in fact, all the para-military formations of the State like the CRPF, the BSF, the CISF, the RR and various PACs, are feared all over the country for the ferocity of their conduct, rather than respected for strength of their law enforcing resolve. The reputation of the Indian Army, often called the last bastion of discipline and honour in a rapidly degenerating polity, is equally tarnished in the North East and Kashmir. Bihar has, of course, over the years become eponymous for barbaric State repression. Who can forget the ghastly blinding of alleged criminals by the police of Bhagalpur?

The ruthless manner in which the Indian State crushed the Telengana movement, the Naxalbari revolt, the Naga rebellion, the Punjab insurgency and the revolt of the people of Kashmir, is an elegy to its fundamentally lawless nature. In each case the movement was political. As part of a conscious policy, the State refused to deal with them at that plane, thereby deliberately pushing the movements to resort to violent methods. They were

then declared law and order problems, and the armed might of the State was unleashed to crush them.

The modus operandi has been perfected through practice, and is today one of the most sophisticated to be found anywhere in the world. Having first pushed the movement into militancy by its intransigence, the State employs subversion, dissimulation and disinformation to discredit the movement. It uses its control over the media to unleash a propaganda war, which convinces the rest of the nation that the ‘militants’ are a threat to the ‘fabric of the nation.’ Thereafter, it unleashes its dogs of war, the police and the massive paramilitary and military formations, to crush the militancy and the militants, without mercy. There are detailed published reports on how the Indian State has dealt with each of the movements or struggles named above. I am sure the interested reader would be able to access some of these reports.

False encounters became infamous during, first, the Naxal movement in Bengal and Bihar. Since then, almost every police force in the country has been charged with having used this technique to eliminate ‘undesirables.’ Into this catch-all category, were included rank criminals like Sundar daku, who was killed by the Delhi police in the early ’70s, as well as young, left-leaning, political activists, many of whom left their privileged middle class lives to join the Naxalite movement, fired by the idealism of a brave new world. Hundreds, if not thousands, of people have since been slaughtered in Punjab and Kashmir by showing them as having been killed in an ‘encounter.’ Another technique, used since long, but perfected in Punjab in the late ’80s and early ’90s, and subsequently, also in Kashmir, has been to make an ‘undesirable’ *disappear* altogether.

Perhaps the most famous of the ‘disappeared,’ is Jaswant Singh Khalra, a journalist, political activist, human rights worker, and a respected citizen of Amritsar district in Punjab, who was abducted by a team of the Punjab Police, under orders from their SSP (Senior Superintendent of Police) Mr. Ajit Singh Sandhu, from outside his home in Amritsar city. Jaswant Singh Khalra was guilty of having refused to heed the warnings, given to him by Ajit Singh Sandhu, to desist from persisting in attempting to trace the whereabouts of several thousand people who had disappeared from the custody of the police. In fact, shortly before his disappearance, Sandhu is stated to have specifically threatened Jaswant Singh Khalra that he, too, would join the ranks of the ‘disappeared’ if he did not desist in his enquiries and efforts on behalf of the other disappeared. The CBI, in an inquiry ordered by the Supreme Court after Khalra disappeared, confirmed that the Punjab Police had, indeed, abducted him, probably on Sandhu’s orders. In subsequent developments, a witness, Kuldip Singh, who was working as a Special Police Officer (SPO) under Sandhu’s command, confirmed that Jaswant Singh Khalra had been killed and his dismembered body dumped in one of the many canals flowing through the

area. Much later, Sandhu committed suicide, allegedly because he could not face the several prosecutions launched against him, particularly in the case of Jaswant Singh Khalra and the case of Kuljit Singh Dhat, a relative of Bhagat Singh, the famous *shaheed* of the Indian freedom struggle. Despite all the evidence, however, the case against the other police officers involved in the crime against Khalra continues to languish.

The case of the thousands of disappeared people in whose cause Jaswant Singh Khalra was martyred, also continues to languish. More than five years after the matter was referred to the National Human Rights Commission (NHRC) for an adjudication upon all the issues that arise or may be raised in the case, the matter is still mired in preliminaries and procedural niceties. The main culprits for this state of affairs are, of course, the Governments of India and of the State of Punjab. However, the NHRC is not wholly free of blame in the matter.

This brings me to the last aspect of the issue, the role of the judiciary. Apart from 'democracy,' the mainstay of the nation-state's claim to be better lies in the proposition that it provides for a greater degree of justice to a larger number of people than any other system. Justice has been variously defined. However, whatever the definition (or whoever the definer) it is patent that without elements of truth, equality, fairness, consistency and the right to be heard, justice is either a farce or a tragedy or both. These elements are essential at both the conceptual and the real planes. Thus, however complete and refined the theory by which justice is constituted, if its delivery systems are deficient in any respect, it will result in both, a tragedy and a farce.

In the ideal scheme of things, the judiciary is the ultimate protector of the 'Rule of Law.' It is the *Brahma Astra* in the armoury of the body politic to protect itself from dis-ease and derangement. A State with a vigilant and effective judiciary must be a State where the 'Rule of Law' prevails. Notwithstanding my efforts to show that the 'Rule of Law' is anything but synonymous with the absence of State Repression, there can be no gainsaying that the presence of the 'Rule of Law' is preferable to its absence.

By the criterion just stated, the Indian judiciary is a failure. The very fact that the Indian State and its minions continue to operate with such impunity, as illustrated above, is proof of its failure.

This is not to wholly negate the efforts of the judiciary, to deal with fundamental problems affecting the polity and the people. The votaries of the Indian judiciary will assert that it, particularly the higher judiciary – the Supreme Court and the High Courts – have rendered yeoman services to the cause of the Indian people; upholding their democratic aspirations and protecting their democratic / liberal / humanistic ethos. In short, doing their

utmost to uphold the 'Rule of Law.' They will cite numerous instances to buttress their argument.

Since the cases they cite are real, in a sense, these votaries of the Indian 'justice' may be said to be justified in their assertion. However, viewed in the sweep of the history of independent India, this conclusion is not as clear as it seems. Such a conclusion would not be justified even if one confined oneself to examining how good a protector the judiciary has been of the civil rights and liberties of the Indian people.

To conclude, besides the fact that 'Law' and the 'Rule of Law' are inherently problematic, the power to enforce the 'Law' carries within itself the power to violate the 'Law.' Since the modern State is an all-in-all with regard to the 'Law,' it has a special potential for mischief with respect to the 'Law.' As stated earlier, humanity has always been in search of a satisfactory solution to the 'problem' of political power. In olden times, people were known to vote with their feet whenever the ruler became too tyrannical to bear. However, in the modern context, with hard and impermeable borders and rigorous asylum regimes becoming the order of the day, it is only a miniscule minority that can avail of this remedy. Thus today, as never before, the power of a nation-state over its denizens is absolute. Recent trends in Human Rights law and International law have tended to counter the absolute nature of this power by defining a duty (and, increasingly, a right) upon the community of nations to protest against a State's violation of the human rights (or, in other words, violation of the 'Rule of Law') of its citizens. This trend, however, is too weak at present to prevent such violations.

Notes:

(1) "Where law ends, tyranny begins."