Dealing with issues of impunity

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The Rajya Sabha shows the way in the manner in which it handled the Prevention of Torture Bill, 2010.

BANGALORE - 26/06/2009 : Students along with SICHREM members taking part it the Candle light vigil to observe the UN International Day in Support of Victims of Torture, at M G statue, in Bangalore on June 26, 2009. Photo K Murali Kumar.

We like to berate our parliamentarians. It is true that some of them are indeed opportunist, corrupt and lazy. But it is also true that the media would selectively broadcast scenes of pandemonium in legislatures but often fail to report serious and sincere work done by parliamentarians. Who can then blame the politicians for thinking that there is no reward for hard work, and that the only way to attract attention is to turn up the volume?

Deserves credit

The journey of the much reviled Prevention of Torture Bill, 2010, in the Rajya Sabha so far is a good example of how legislators ought to perform their law-making function, and therefore deserves credit. The Bill, ostensibly designed to criminalise acts of torture by public servants, was rightly condemned as a fig-leaf, the real purpose of which was to

ensure that public servants could resort to torture with impunity. Among its many defects was the impunity provision contained in Clause 6 of the Bill, which required that no court could proceed with a complaint of torture unless the government of the day permits the prosecution of the suspect public servant.

This clause duplicated a colonial-era provision that is now recited unfailingly in most of our criminal statutes: from Section 197 of the Code of Criminal Procedure, 1973 to Section 19 of the Prevention of Corruption Act, 1988. Indeed, Section 6A of the Delhi Special Police Establishment Act, 1946 (the law that constitutes and governs the functioning of the Central Bureau of Investigation) goes a step further. It sets down that the CBI cannot even conduct an enquiry or investigate, let alone prosecute, a corruption case without prior sanction from the Central government. These impunity provisions have been the main stumbling blocks to the prosecution of public servants, whether it is for corruption or for torture.

Committee's report

The government managed to use its numbers to get the Prevention of Torture Bill passed in the Lok Sabha after a brief, late-evening debate last year. By the time the Bill reached the Rajya Sabha, however, civil society had had a chance to examine its deplorable provisions. At least some Rajya Sabha MPs listened, and were convinced that the provisions of the Bill needed to be scrutinised more closely. The government wisely conceded their demand and a Select Committee was set up under the chairpersonship of Ashwani Kumar.

The December 2010 Report of the Rajya Sabha Select Committee on the Prevention of Torture Bill is remarkable for the sincerity and seriousness with which it treats the issue of torture. The committee's recommendations, if accepted, will fix most of the infirmities of the original Bill. Although the entire report is worth commenting upon, its discussion and recommendations with regard to impunity provisions are particularly noteworthy.

Adopting a sagacious approach to the problem of prior sanction requirements, the committee recognised the need to “insulate honest public servants from false, frivolous, vexatious and malicious prosecution.” At the same time, it felt that such a provision should not be used to shield those officials who have, in fact, “intentionally tortured or abetted the torture of individuals.” Thus, the committee captured the classic dilemma in prosecuting public servants — we want them to discharge their duties without fear and favour, but want to ensure that they are accountable for what they do (or fail to do). Impunity provisions such as Clause 6 of the original Torture Bill, or Section 197 of the Code of Criminal Procedure, only take into account the need to shield public servants. They give no consideration to the need to ensure accountability. Instead of finding a proportional solution that adequately caters to both concerns, it completely ignores the second.

Recommendations

The committee finds a more appropriate balance “so as to provide adequate safeguards to honest and upright officials, while at the same time ensuring that the sanction provision was not used to deny the victims ... their right to justice through speedy trial.” To accomplish this nuanced goal, it recommends an amended Clause 6 (re-numbered as Clause 7 in the Bill recommended by the committee), which has the following provisions.

First, while retaining the general requirement of prior governmental sanction for prosecution of public servants, the committee recommends the inclusion of a deeming provision: if the government has not acted on a request for sanction for three months, sanction would be deemed to have been given. This will ensure that a government cannot frustrate prosecution by simply refusing to act on a request for sanction.

Second, the committee recommends that should the government refuse to sanction prosecution, it must record its reasons in writing. Under the current practice, the government has no obligation to justify publicly why it has refused to sanction the prosecution of any public servant. This opacity allows the government to use the power of sanction to settle political scores rather than to ensure accountability.

Third, and perhaps most importantly, the committee recommends that an order refusing such sanction may be appealed before a High Court by an aggrieved person. Currently, a person can only file for a judicial review of a decision to refuse sanction; there is no right to appeal. The difference between an *appeal* and a *review* is significant. The powers of a review court to correct a decision are much more limited than that of an appellate court. A review court mainly ensures that certain technical rules of decision-making were followed, and that the decision was not so unreasonable that no reasonable person could have made it. An appellate court, on the other hand, can examine the issue on merits and substitute its own judgment for that of the government. In sum, the possibility that its decision may be appealed will require the government to act on judicial rather than on political grounds while granting or refusing sanction.

These recommendations strike the right balance between the need to protect honest officers and to hold public servants to account. The Rajya Sabha committee's work deserves commendation. Indeed, the formula stipulated by the committee should not be restricted to torture alone. It may well prove to be the best answer to the problem of impunity in corruption cases too. Will the government continue to use this arbitrary power as a bargaining tool to gain allies or as a punishment for its foes? Or will Parliament follow the Kumar Committee's recommendation and put in place safeguards that are necessary to check its misuse?

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