ASIA-PACIFIC

Justice-seeking after mass violence: India and Indonesia compared

I was recently struck by the similarities in the headlines featured in two newspapers from different cities and different countries. In *The Jakarta Post* the headline read, 'Life goes on for May riot victims — with painful memories' (23 August 2004); and in *The Times of India*, 'Life goes on — but the grief remains' (25 August 2004). Events of mass violence and rioting between and against different communities in Indonesia and India have left behind victims seeking justice for the crimes committed against them. The responses and capabilities of the respective judicial and political systems in Indonesia and India are, however, producing different outcomes.

The Indonesian headline in *The Jakarta Post* referred to the rioting in Jakarta and other major cities, which took place in mid-May 1998. More than one thousand people died and over one hundred women were raped or gang-raped. Not a single person has been prosecuted for crimes carried out during the violence. Despite an official report calling for further investigation of elite military and political figures, no-one has been made accountable. More than six years later, there has been no resolution for the victims of this violence.

The headline in *The Times of India* was remembering the first anniversary of two bomb-blasts in downtown Mumbai and the centre of the tourist precinct, one at The Gateway of India itself. Fifty-two people died. The bombs were placed in the boots of taxis hired by 'terrorists' with sympathies with the Lashkar-e-Toiba (LeT), an international terrorist organisation. It is believed that the intent behind the bombs was to avenge the killings of over one thousand Muslims during riots in Gujarat in March 2002. The mass rioting between Hindus and Muslims in Gujarat in western India took place over many weeks with little effort made by the security forces or state or national governments to stop it. Three years later very few prosecutions have been pursued and the community remains divided and tense. However, in a landmark case currently before the courts, dubbed the 'Best Bakery' case, 19 accused are being re-tried for the murders of 14 people who died when the Hindu-owned bakery in which they worked, was set alight.

Indonesia and India are both faced with regular threats to public safety by bomb blasts. In Indonesia, for example, there have been the bombings in Bali in October 2002, at the JM Marriot in 2003 and at the Australian Embassy in 2004. In India, the Mumbai bombings were part of a series of explosions over the previous six months including one that went off on a city bus on 28 July 2003. In India and Indonesia, the spectre of 'terrorism' at home and the complicity of elite political and security figures or state-sponsored violence, is a daily reality. The difference in approaches by their respective legal systems to these cases of mass violence is, however, marked. As mentioned, in the case of the Indonesian May 1998 riots, which preceded the resignation of President Suharto and the end of his 30-year autocratic reign, the legal instruments available to victims and their supporters in Indonesia have produced nought. The initial investigation into the riots carried out by the Joint Fact Finding Team in May 1998, was led by the respected former head of the National Commission for Human Rights (Komnas HAM), Marzuki Darusman, and produced an important and brave report pointing to elite manipulation and orchestration of the violence. Since the report was issued in late 1998, subsequent efforts by the Komnas HAM to revive the investigation process and to petition the Attorney General's Office to establish an Ad Hoc Human Rights Court to try cases, have been mired in red tape and lack of political will. In *The Jakarta Post* article, Hasanuddin, who was inside a burning shopping mall during the rioting and was forced to jump several floors to save himself, discusses the trauma he continues to live with: 'I heard a cry for help. It was a woman's voice, but I couldn't do anything. I shut my eyes and jumped' (*The Jakarta Post*, 23 August 2004). Six years on he recounts: 'It feels as if I was still there, trapped inside with the woman's voice calling me'. Whilst victims' support networks and NGOs provide assistance to Hasanuddin and others, the Indonesian government and justice system have provided no compensation, and most gravely, no opportunity to face the perpetrators and to seek justice.

In India, the recent situation is vastly different. Only one year on from the Mumbai blasts, the trial of six accused in the case commenced with the police boasting that they had 'a watertight case'. The fact that the accused in this case are all Muslim may be seen by some from this minority community to account for the speed of bringing this case to trial. However, as a counterpoint, simultaneously in a nearby court in Mumbai a trial was underway of the 19 Hindus accused of killing 14 people (mostly Muslims and their Hindu employees) trapped inside the Best Bakery in Vadodara, Gujarat on 1 March 2002. The Best Bakery case, as it is known, has immense implications in India for human rights and justice seeking for communal violence and violence with links to the state. In an extraordinary move following petitions from NGOs representing the key witness in the Best Bakery trial conducted in a Gujarat court, which acquitted all the accused, the Supreme Court of India agreed to a re-trial of the case in a court outside of Gujarat on the grounds that the witness had been intimidated and threatened into suppressing her testimony. The decision was not made on appeal, but rather as an administrative decision of the Court. The Supreme Court maintained that it was necessary for the case to be heard in a neutral setting and the trial was moved from the state of Gujurat to Maharashtra state. Initially, lack of clarity about which state would appoint public prosecutors for the case and difficulties in re-arresting the accused presented delays to the trial. However, after

further directions from the Supreme Court, Mumbai-based prosecutors and a judge were appointed.

The Supreme Court decision to allow a re-trial of this volatile case and to shift it out of Gujarat is a bold move in the face of great opposition and resistance from the BJP Chief Minister of Gujarat, Narendra Modi. Chief Minister at the time of the riots, Modi is widely believed to have advocated the violence against Muslims, which took place following the murder of Hindus in a packed train carriage returning from Ayodhya in late February 2002. Alarmingly, Atal Bihari Vajpayee, the BJP Prime Minister of India, home to 120 million Muslims remarked on 12 April 2002: 'Wherever Muslims live, they don't like to live in co-existence with others, they don't like to mingle with others; and instead of propagating their ideas in a peaceful manner, they want to spread their faith by resorting to terror and threats. The world has become alert to this danger'. Bihari Vajpayee clearly placed blame for the murders of the one thousand or so Muslims with the victims themselves: 'What happened in Gujarat? If a conspiracy had not been hatched to burn alive the innocent passengers of the Sabarmati Express, then the subsequent tragedy in Gujarat could have been averted. But this did not happen. People were torched alive. Who are those culprits?' (English translation of a speech given by the then Prime Minister Atal Bihari Vajpayee at a public meeting in Goa on 12 April 2002, *Concerned Citizens Tribunal – Gujarat 2002*, <http://www.sabrang.com/tribunal/voli/annex/annex18.html>)

The decision by the Supreme Court to re-try the Best Bakery case was already in motion before the results of the April-May 2004 election were known. However, the passage of bringing them to reality has undoubtably been made easier by the absence of the BJP in government. Despite Modi's dogged attempts (or bullying) to stop this case and subsequent cases from being shifted out of Gujarat he has failed, without serious support in Delhi. The decision to move the trial out of Gujarat is a clear attempt by the Supreme Court to expose the lack of transparency and opportunity for a fair trial in the Supreme Court cases related to the 2002 Gujarat communal violence in which the police and politicians have been heavily implicated. Once again in India the judicial system is demonstrating its power and will to confront political corruption and intimidation. As a consequence of the precedent set by the decision over the Best Bakery trial already another case has been stayed and has also been moved to Mumbai. This case sees prosecution for the gang-rape of Muslim women during the Gujarat riots. Further, the Supreme Court has asked the Gujarat Advocate General to consider challenging the acquittal of the accused in about 200 other riot cases. Potentially a further 2,100 cases earlier closed by Gujarat police could be re-opened due to serious concerns regarding fairness of the police investigations and subsequent trials.

As human rights activists and lawyers will quickly inform you, this achievement has come, however, after a long battle against the political forces in Gujarat. In relation to other incidents of rioting in India's recent past, the Supreme Court's decision is a much-awaited change to a situation often prone to sloppy or corrupt police investigations and trials. With Gujarat, the Supreme Court has decided that in cases where the state is complicit in the crimes committed it cannot be given the responsibility to record victims reports, investigate and then bring it to a court of law in an unbiased and fair manner. The victim cannot be assured of justice. Removing these trials from Gujarat is an attempt to allow for neutrality in order that the judicial processes may proceed without these impediments.

There is a stark contrast between this recent situation in India and the situation of those seeking justice for similar crimes and other human rights abuses in Indonesia. Cases including the May 1998 riots in Jakarta, the killings of student protesters by security forces in November 1998 and again one year later, the post-referendum violence in East Timor and the killings of Muslim protesters in Tanjung Priok are currently the most pressing issues before Komnas HAM and the Attorney General's office.

In Indonesia, however, there is a political hurdle, absent in the Indian case, which has prevented substantial progress towards justice for the victims. Legislation signed by President Abdurrahman Wahid on 23 November 2000 about the Human Rights Court (Law No 26 of 2000) includes provision for Ad Hoc courts (Article 43) to hear cases of crimes committed before the legislation was introduced. Established in August 2001, the creation of the Human Rights Court was a critical moment in Indonesian human rights law. For victims of human rights abuses carried out during the New Order period (from 1966 until May 1998) and before November 2000, the Ad Hoc Court represented great hope. Internationally, the Court was seen as crucial in order to enable Indonesia to try those allegedly responsible for the mass violence which accompanied the East Timor referendum in September 1999. Together with the East Timor case, among the first groups to call for an Ad Hoc Human Rights court were families and victims of the Tanjung Priok incident of 12 September 1984, during which dozens of Muslims were killed when members of the armed forces opened fire on them as they staged an anti-government protest. Requests for a trial were also made by the families of the victims of the killings at Trisakti on 12 May 1998 and of the incidents at Semanggi in 1999 and 2000, during which demonstrating students were shot and killed when they were fired on by the military. Recently, Komnas HAM has also campaigned for a trial for the May 1998 violence.

Of these cases, so far the East Timor and Tanjung Priok incidents have been successful in being granted Ad Hoc hearings with the East Timor trials concluding in early 2003 and the Tanjung Priok trials commencing in October the same year. Yet, as was evidenced in the East Timor trials, there is every indication that justice for victims will not be found in what remains a highly corrupt and dubious legal system. Of the 18 suspects tried by the Ad Hoc Human Rights Court for crimes committed in East Timor, 16 were acquitted. An Appeals Court reversed the initial guilty finding for four military officers including Major General Adam Damiri, the highest-ranking military official to face trial for crimes against humanity in East Timor. His three-year sentence was overturned on appeal in June 2003 due to a finding of insufficient evidence. The two guilty judgments were brought against the only citizens tried by the Court, including militia commander, Eurico Guterres, and East Timor's former governor, Abilio Jose Soares, presently serving sentences. Both men are also East Timorese ('Conviction Squashed for Crimes in East Timor', *New York Times*, 8 August 2004).

The process for establishing each Ad Hoc court, as described in Article 43 of Law No 26 of 2000 depends on parliamentary support. This is the primary reason for the difficulties seen during these trials, and which saw only the second such court opened in October 2003, over three years after the legislation

was introduced. Article 43 states that the request for an Ad Hoc court must be presented to the President by a special committee from the House of Representatives (DPR): politicians rather than legal experts or Komnas HAM. The procedure for making a petition to the DPR for an Ad Hoc court has so far been initiated in each case by victims and their families themselves. Komnas HAM then forms a Commission of Investigation into Human Rights Violations (KPP HAM), which submits its findings to the DPR special committee for their consideration. In the absence of international pressure, as in the case of East Timor or Presidential pressure, as in the case of Tanjung Priok from Abdurrahman Wahid, the outcomes have been predictable.

The prevalence in both Indonesia and India of violence by the state and by civilians against each other, have created an environment where violence — defined as terrorism or communal or some other term — is a part of daily life. Though both proud democracies, the separation between the political institutions of the state, the judiciary and internal security apparatus are, however, far from clearly defined. The implications for seeking justice after mass violence that has ethnic or religious overtones are clearly seen in both countries in the experiences of victims who are struggling for justice. The bold decision by the Supreme Court of India to re-try the Best Bakery case outside Gujarat demonstrates a positive move to combat corruption in the judiciary and to lay down the boundaries between it and the political institutions. Though India has a very long way to go, Indonesia could learn important lessons from its experience.

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now pursued, the claim must evidence the necessary degree of particularity and authenticity.

ICHEIC provides an avenue for appeal where claimants are dissatisfied with a valuation or a decision where a claim for an insurance policy has been rejected. There is an international panel of judges and arbitrators who have the jurisdiction to hear appeals de novo and to uphold, amend or reverse decisions, subject to either Swiss or English law depending on the circumstances.

Since its inception in 1998, ICHEIC has reviewed more than 82,000 claims and has awarded over US$117 million to Holocaust survivors and victims' heirs. These awards have allowed many of those who survived the Holocaust to finally close that chapter of their lives, as far as that is possible. However, ICHEIC has been required to strike a difficult balance between compensating Holocaust victims and survivors and recognising the legitimate interest that insurance companies have in an enduring legal peace in these matters. For this reason ICHEIC is no longer accepting new claims for unpaid insurance policies and aims to close down its operations in 2006.

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The quantity of content available through new technologies also creates concern. Although child pornography existed before the Internet, the Internet allows a huge amount of material to be transmitted and accessed easily, quickly and cheaply. Over two million pornographic images of children were allegedly detected by Operation Auxin in September 2004. Police commented that the scale of the operation 'paints a worrying picture in relation to the extent and spread of online child pornography'.[28] A Perth man reportedly paid just $58 to download 1500 images of child pornography.[29]

In addition to the quantity of material which can be accessed via the Internet, that the Internet is a global phenomenon makes controlling its use problematic. It is notable that Operation Auxin's initial investigations were sparked by information from police in the United States regarding the use of credit cards by Australians to purchase child pornography from Eastern Europe. Therefore, while international cooperation is helpful to identify illegal content and providers and users of it, Australia needs itself to deal with the regulation and enforcement of law in this area.

In Australia, this is clearly better dealt with at a national level than at a State or Territory level. Australia's involvement in external affairs has always been a matter for the Commonwealth government. It is at this level that Australia can cooperate and negotiate with other countries in which the content may be produced or uploaded or through which it may be transmitted. However, because child pornographic content is ultimately delivered to individuals in the States and Territories, activity is best undertaken at a national level to try to stop that content coming into Australia and to deal more uniformly with that content when it does come into Australia. For this reason, the continuing differences in this area between Commonwealth and State and Territory legislation are illogical, may complicate the policing of distribution and possession of child pornography and make a mockery of the Australian legal system.

Conclusion

Operation Auxin and the criminal laws dealing with Internet child pornography in Australia reveal but one area of inconsistency within our legal system. However, the inconsistent outcomes produced by Operation Auxin and the distinctive nature of Internet content and its wide accessibility create a strong case for the harmonisation of child pornography law. The divergent outcomes produced when individuals are charged with similar child pornography offences but under different laws according to the State or Territory in which they live detracts from the strength of our legal system.

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REFERENCES

28. Ibid.

29. Paige Taylor, 'Jail for $58 porn library', *The Australian; IT News* 10 November 2004.