Sins of commission(s)

U P E N D R A  B A X I

India is a land full of sins of commissions. The cult of commission is India's proud contribution to democratic theory and practice; Indian political practice is characterized by what one might call 'commission-mania'. Commissions, looked at from the citizen-victim standpoint, represent the occult power of the state; they visit and revisit Indian citizens as so many incarnations of their political fate. From the standpoint of the rulers of India, whether secular, or 'pseudo'-secular, commissions comprise an important aspect of the ensemble of the Divine Right to Rule. Commissions are, in other words, blessed instruments of governance, designed to provide mystifications for political action or inertia. From the perspective of critical theory, commissions appear as aspects of the pornography of public power.

I approach the subject of commissions with a natural sense of reverence. And I look only at commissions concerned with justice and rights, neglecting in the process those directly implicated in the tasks of governance (for instance, the Planning Commission(s), Finance Commission; Agriculture Costs and Prices Commission). A rough mapping of commissions indicates a staggering variety, the closest analogue in nature being provided by biodiversity. One may understand the typology of commissions in various dimensions:

* time (commissions may be permanent; or of fixed, but renewable, tenures; or time-specific)

* authority (constitution, statute, executive powers)

* scope (universal/particular; diffuse/specific; vast/narrow)

* personnel (judicial, bureaucratic, political or a mix of these)

* resources (high, optimum, low)

* salience (charismatic/routinized; high profile (commissions)/low profile (committees)

* agenda (programmatic/directorial; psychotherapeutic/pacificatory;

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Exercising the prerogative of idiocy, let me describe some principal characteristics of 'commission' power in India. First, some commissions are 'necessary evils' in the sense that political power stands constrained in its arbitrary plenitude. Fortunately for the ruling classes in India such constraints are meagre in quantity but severe in mission. The Scheduled Castes and Tribes Commission and the Presidential prerogative to appoint Backward Classes Commission are the principal sources of constraint for political agents. The former is not negotiable; the latter is, in the sense that the President may not be advised to appoint any. But this distinction is inverted in practice. The Scheduled Castes and Tribes Commission in its constitutional cyclical temporality has been far less eventful than the Mandal Commission; the former has proved a more negotiable corpus of constraint than the latter to the sovereign prerogative of executive power.

Second, statutory commissions are also seen as being threatening to the plenitude of political power. The only two notable examples in the federal arena are the Press Commission and the Women's Commission. All others are manifestations of contingencies of political power. The role of commissions is to enlarge, not constrict, the bases and play of political power. Most commissions are concerned to promote the aims of governance, rather than the objectives of justice or rights.

Third, commissions are, accordingly, regime-sponsored devices to meet or fashion political contingencies. Members of commissions, despite honest mistakes of judgement, are chosen from the standpoint of broad regime compatibility, even when the choice is made from among sitting justices (the Thakkar-Natarajian Fairfax Commission being a recent example). The vast pool of retired justices is also, as it were, genetically screened to ensure a mature, regime-oriented political understanding of the agenda of governance.

Examples of these genres will prove contentious, especially during regime changes, the J.C. Shah Commission on Emergency Excesses being a most celebrated example. Not only was its legitimacy contested but it was argued out of legal existence by an elaborate decision (per Justice T.S. Chawla) of the Delhi High Court! But in settled regime-times, commissions not only perform their tasks as dictated by the regime and the hidden agenda behind the Terms of Reference (e.g. the Rangnath Mishra Commission on the massacre of Sikhs in 1984; or the Kural Commission on Gandhian institutions, as yet unauthorized as the Second Coming of Nathuram Godse) but also educate the regime on the needs and interests it has failed to anticipate (e.g. the Mathew Commission on the Samastipur bomb-blast which dedicated a whole learned chapter on disobedience of 'unjust' orders by security forces in the wake of the Total Revolution Movement.)

Fourth, the needs of a regime are multifaceted. One among the abiding needs is how to manipulate the political discourse on corruption. Commissions provide the best site to enact such a discourse. The appointment of judicial commissions is an act of political legitimation: one can no longer doubt a regime's bonafide concern to eliminate, or at any rate combat, corruption in high places. But in reality such commissions are instruments of political warfare (U. Baxi, The Indian Supreme Court and Politics, 1980), skilfully deployed to contain the power of political adversaries (within and across parties), to stifle political dissent, and to destabilize factional alliances. From the days of Pandit Jawaharlal Nehru—who truly inaugurated with rare charisma this duality of objectivities— till today, history amply substantiates this conclusion (A.G. Noorani, Minister’s Misconduct, 1974). As is to be expected, no action whatever has followed in about 200-odd commissions of enquiry on high political corruption (U. Baxi, Liberty and Corruption: The Antiluy Case and Beyond, 1989).

Fifth, among the less permanent needs are those arising from the crisis of governance. The crisis emerges when practices of power are seen to produce political evil on a massive scale, threatening the popular belief—the constant and voluminous manu-
facture of which is the signature tune of liberal democracy—that governance is all about production of public good. The only way to mask the sudden, widespread emergence of political evil is to appoint a commission. Thus, every so-called ‘communal riot’ is visited by a commission of enquiry; so are incidents of police atrocities or custodial violence in jails. These are routinized ways of dealing with the breaches of illusion that practices of power always aim to produce public good.

But there arise exceptional situations, mainly from runaway technologies producing mass disasters. Even here, some become routinized like aircraft disasters, train accidents, maritime accidents and marine pollution. Some, however, like the Bhola catastrophe and, on a lesser scale, the Macchu Dam burst, require innovative handling. In both these cases, commissions were established with impressive terms of reference. But just when they marshalled cogent evidence (the commissioners themselves being either chosen by honest mistake or because of the extraordinary novelty of their task) they were summarily wound up. The Gujarat High Court at least accepted my argument (on behalf of the Consumer Education Research Centre, Ahmedabad) that since commissions can, under the 1952 Act, only be set up on grounds of eminent public interest, they could not be wound up without overwhelming demonstration of cessation of public interest. But the Supreme Court thoughtlessly upheld the winding up of the commission on appeal.

Sixth, despite the fanfare, commissions of enquiry do not have any real adjudicatory powers. They are glorified prima facie investigative agencies; their reports have to be processed by the executive in order to ensure what further action, if any, is required (and usually no action ensues). Although invested with powers of civil courts to summon and interrogate witnesses, commissions of enquiry have no power to punish anyone for its contempt. And the suggestion—especially by Justice Grover in the Devraj Urs Commission Report—that such power be given has fallen on deaf political ears.

Seventh, one would imagine that even though commissions are toothless—for good reasons or bad—the reports will at least have educational/public opinionating significance. This does not happen because the reports are indirectly censored. They are published but usually not priced; as a result they are available only through political access, no matter how modest. When Justice M.H. Beg sought my advice as a Chairperson of the Minorities Commission, I said that the best contribution he could make is to publish in every Indian language all the ‘communal riot’ reports. There is hardly a single library in India which possesses all these reports! He agreed with me but was unable, understandably, to accomplish the task. His successors have not even tried! This form of censorship privatizes knowledge of regime-sponsored violence against the citizens and sustains what E.P. Thompson, in another context, named as a secret state.

Eight, the hegemonic device of commissions is pre-eminent successful in using time as a political management resource. The commissions move with the urgency of infinity; they overrun their terms and are constantly renewed. During this period, all normal processes of law enforcement (which would have otherwise been, however inefficiently, operative) come to a standstill. Even after reports are submitted, the schedule of (in)action follows the trajectory of governance. And when published, as noted, public discourse is effectively rendered evanescent by indirect censorship. And while all these processes are at work, many more commissions are put into place. Only super-citizens, with exotic democratic dedication, can escape the cunning of the state. Such species are already endangered in India today.

Ninth, commissions are devices to organize and disorganize public memory. Power lies in control over memory and forgetfulness. Public memory is not short, as the saying goes; rather it is made short by processes of domination. As Milan Kundera presciently observed: ‘The struggle of men (and women) against power is the struggle of memory over forgetfulness.’ Commissions are powerful devices which organize public oblivion on a scale so massive as to inhibit even the impulse of struggle.

Similar processes are at work with relatively ‘permanent’ commissions charged with reform and amelioration. The increasingly infrequent reports of the Scheduled Castes and Tribes Commission receive very little national—policy or public—attention. The 28th Report (by Commissioner B.D. Sharma)—next only in order of historic significance to the Constitution of India—would have generated massive debate and action in any civilized society. But political processes—and the academic establishment—completely censored this report.

I have traced the similar saga of the Indian Law Commission, in my Crisis of the Indian Legal System (1982). Eleven years later, the situation is the same. Nehru resisted the idea of a statutory law reform commission; his legacy, in this respect, has not only been steadfastly followed by his less noteworthy successors. Implementation of the Law Commission's reports has been an exception rather than the norm. The commission itself is an extension of the Law Ministry, despite its eminent judicial composition; superannuated justices—including the former Chief Justices of India—are clearly not embarrassed either by demotion in their status or bureaucratic indifference to their work. They do not use their historic presence to ensure that much needed and well worked out reform measures are in fact adopted. Living in hope, they seem content to reinforce the gerontocratic model of law reform.

Specific-purpose reports like those of the National Police Commission, the Mulla Committee on Jail Reforms and Sarkaria Commission on Federalism are also subjected to benign neglect. The first two reports have great human rights relevance; the last report suggests a regime of constraints on the overweening power of the Union Government, a matter of supreme importance to humane and just governance. Yet, their neglect by the government for a long stretch of time has not enth-
used human rights groups to launch a national programme of mobilization of public opinion and pressure. The apathy of activist organizations towards structural reform of the legal system is simply incomprehensible, given their abundant enthusiasm for expose and rectification on episodic violation of human rights in India.

Even a cursory look at the National Police Commission's (NPC) reports would show how much we have missed accomplishing since 1979. The NPC recognized that human rights in the administration of criminal justice can be jeopardized by the lack of 'an institutionalized arrangement for effectively guarding against excesses and omissions' in law enforcement; it recognized 'the vast scope for misconduct by police personnel' at all levels and, in particular, grievances among the weaker sections arising out of 'police activity or indifference'.

The NPC highlighted, with a mass of statistics, that existing procedures for enquiry within the police system were marked by a variety of deficiencies—obsession with preserving the morale of the force, camaraderie, dishonesty or corruption, casual examination of witnesses, often also witness intimidation; the tendency to suppress alleged misconduct, especially in cases of torture, and impunity when the enquiry is against an officer with 'political contacts'. It recommended the creation of a complaint cell headed by a deputy superintendent of police; special cells to invigilate the enquiry process under each range DIG; maintenance of a scrupulous record of complaints and a code of conduct for departmental enquiry. In cases of serious violations of human rights, the NPC commends mandatory—rather than the present mode of 'ad hoc' judicial enquiry.

Such an enquiry would be mandatory in cases of alleged custodial rape, death or grievous hurt in police custody, and death of two or more persons in dispersal of unlawful assemblies. The mandatory enquiry shall be held by a designated (by the High Court) Additional Sessions Judge permanently in session in each district; the District Inquiring Authority, so constituted, shall proceed day by day, and be completed within four months; the report of the authority shall be published; and the relevant government shall also be bound to act on such a report.

In addition, the NPC recommended the institution of a Police Complaints Board, relatively autonomous of the executive. It also made significant recommendations to combat police corruption at all levels, including the mala fide exercise of police discretion and power. Further, the NPC prescribed a code of conduct for law enforcement officials. And it vigorously propounded an operative ideology of police accountability to citizens, rather than to corrupt power-brokers.

The Mulla Committee on Jail Reforms also proposed a whole range of measures for a humane correctional system. Notable among these was the formulation of a Bill of Rights for the prisoners as well as a charter of duties for jail officials, which I was privileged to formulate, consistent with the United Nations minimum standards of correctional justice.

The complete lack of activist citizens' concern with all those eminently sane recommendations—made, among others, by law enforcement and correctional officials themselves—has retarded the mission of human rights attainment, adding to the agony of victims of an increasingly lawless Indian state. Compared with this, the engagement by human rights communities in India with the proposed Human Rights Commission is extraordinarily striking, especially when the proposed commission by itself, without these structural reforms, is unlikely to achieve very much for the victims. A future historian of India will have to pause a long while to decipher the true significance of this complicitous relationship between the state and human rights communities, and to count the colossal costs which hapless Indian citizens have to bear as a result.

This much is clear: commissions in India have not spectacularly served the cause of human rights, justice or structural reform of the legal order. This is so because the political structure is not seriously seized with these values. But it must be said also that whenever commissions promised potential (even a by-product of rights, justice, reform), social activists, including human rightists, have failed to make best use of this.

Have commissions then proved useful as instrumentality of governance? The answer has to be in the affirmative. However, their effectiveness in the short run symptomizes in reality a pervasive crisis of governability. The problems to which commissions are an expedient response don't go away; indeed, they grow in their explosive potential.

If the decade-old recommendations of the National Police Commission had been implemented, policing and security in India would have substantially improved by now; the human rights gains from the implementation of Mulla Committee on Jail Reforms would also have been impressive. The Law Commission's various recommendations on judicial manpower planning, reform of law of evidence (including a recommendation that it be presumed when death occurs in police custody that it was not due to natural causes, unless otherwise proved), on liability of state in torts and many others—could have substantially improved the administration of justice in India.

By sustained inaction on commissions of enquiry on 'communal' riots and corruption, India has been brought to the brink of urban guerrilla movements cruelly epitomized by the bomb-blasts in Bombay and Calcutta. In other words, short-term condemnation of evil practices of the politics of crime has, in not too long a run, brought India to a major crisis of governability. The none too well thought out proposal for a Human Rights Commission is also patterned on political thought and practice which resolutely ignore the dramatic emergence of the crisis of governability.

One may here raise the question: 'Where have all the commissions gone?' The answer is tragic: they have gone in the direction of unmaking India envisioned by the Constitution.