SPEEDY-TRIAL IN INDIA: CREATION, CHAOS AND INSTITUTIONAL CHOICES

- Sharad Verma*

ABSTRACT

This paper seeks to analyze the approach taken to ensure the realization of speedy-trial guarantees in the US and Canada, and assess the afflictions of the Indian scenario. Reports of various government and non-government organizations in India show that besides the institutional irregularities that plague the Indian legal system, which have been thoroughly documented - such as the high incidence of corruption; shortage of human and monetary resources, and the lack of institutional coordination - the disarray between the Supreme Court's pursuit of 'speedy justice' and the actual implementation of it may be attributed to the absence of efficient oversight institutions in India to independently monitor those constituent units of the administration of justice which should also be scrutinized for the present conditions, especially the police force.

I will argue that the wrongful violation of 'liberty' in custody is merely an 'effect' of institutional delay that confronts our "top-heavy" judiciary, and may initially be caused by unrestrained instances of wrongful arrest and arbitrariness that have become a manifest feature of the police's functioning. To be kept in check, such tendencies require instruments other than efficient courts. This was also the suggestion of the Supreme Court in Prakash Singh (2006), which led to the establishment of paper-tiger institutions all over India. Employing the 'institutional theory' to analyze why continuous oversight of value-entrusted institutions such as the police force is necessary, which was not done by the Supreme Court in Prakash Singh, I will present a critique of the institutions that stand at present, and by comparison, highlight certain imperatives to ensure the efficiency of such institutions, tailored to India's pendency concerns.

INTRODUCTION

The confluence of criminal law and constitutional values presents a choice between social control and individual liberty. To protect liberty from excessive or arbitrary intrusion by the State, most modern constitutions restrict State-power by placing constitutional limitations on the generally subordinate provisions of criminal law.[1] The standard to ensure that the State functions

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[1] Aparna Chandra & Mrinal Satish, *Criminal Law and the Constitution*, in THE OXFORD HANDBOOK OF INDIAN CONSTITUTIONAL LAW 795, 795 (New Delhi: Oxford University Press, 2016).

within constitutionally prescribed limits is maintained such that the State must justify every deprivation of liberty before an impartial tribunal, where individuals are guaranteed a "fair trial."[2]

A major component of the right to fair-trial caters to the individual expectation of timely and efficient justice. The Canadian Charter fulfils this expectation by guaranteeing the "right to be tried within a reasonable time" in s. 11(b).[3] The Sixth Amendment to the US Constitution also guarantees that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."[4] In comparison, the Constitution of India does the same, albeit in circumspect terms, wherein the 'right to speedy trial' has been interpreted by the Supreme Court of India as a part of the 'fair trial' guarantee in Art.21 of the Constitution.[5] In the seminal case of *Hussainara Khatoon* (1979),[6] the Supreme Court found 'speedy trial' to be essential to criminal justice, and held that "a delay in trial by itself constituted denial of justice."[7]

The current Indian scenario exhibits troubling realities about the legal system due to which thousands of under-trials, although presumed innocent until proven guilty, await justice for years, sometimes exceeding the possible period of punishment under the law itself.[8] A paradox presents itself in how since the Supreme Court's pronouncements favoring speedy trials in late-70s, the number of under-trials has simultaneously risen to the point where most of the incarcerated persons are not convicts, but simply those waiting for their day in court.[9]

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[2] *Id.*

[3] CANADA CHART. s.11. "Any person charged with an offence has the right (b) to be tried within a reasonable time."

[4] US CONST. amend VI.

[5] Per Bhagwati J., in Maneka Gandhi v. Union of India (1978) 1 SCC 248(India).

[6] Hussainara Khatoon v. Home Secretary, Bihar, 1979 AIR 1369(India).

[7] *Id.*

[8] Jayanth Krishnan & C. Raj Kumar, *Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective*, GEOR. J. OF INTL. LAW 755, 747-784 (2011).

[9] *Id.* at 750.

Institutional theorists Bernard and Engel[10] recommend that analysis of criminal law functionaries from an institutional perspective should be conceptualized according to the "individual behavior of criminal justice agents, the behavior of criminal justice organizations, and characteristics of the overall justice system and its components."[11]Following this framework, in Part I, I will begin with an analysis of 'fair trial' as understood by the Indian Courts and the related laws. I will attempt to exhibit how despite no express constitutional guarantee, the Supreme Court's resolve has led to the creation of a right to speedy-trial, but there exists dissonance between the constitutional ideals and highly discretionary laws that allow such ideals to be undermined, plausibly leading to the present situation.

In Part II, I will undertake a comparative analysis of the speedy-trial guarantee beginning with the US, analyzing the legal remedy created in *Barker* (1972). I will then trace the evolution of Canadian law on this subject, and highlight the essential choices that the Canadian judicial discourse exhibits, which can be referred to by Indian Courts when dealing with institutional delays in Part II. In Part III, I will present an institutional analysis of the recent Indian setup, and attempt to posit why an oversight mechanism is necessary, especially for value-laden functionaries such as the police force, and how the presence of a time-bound oversight authority may reduce unnecessary arrests, thereby stemming the problem of pendency.

PART I: INDIAN LAW AND EMPIRICS IN REVIEW

The National Crimes Records Bureau of India has reported that as of 2015, 67.2 per cent of prisoners in Indian prisons were 'under-trials' - people who were awaiting trial or whose trials were still ongoing, and who have not been convicted.[12] Meaning thereby, there are more than twice as many under-trials in Indian prisons as there are convicts. The under-trial population in India is estimated to be the 18th highest in the world, and the third highest in Asia.[13] In the US, which is estimated to have the highest incarceration rate in the world, only 20 per cent of

[10] Thomas J Bernard & Robin Shepard, *Conceptualizing Criminal Justice Theory*,18:1 JUS. QUAR., 18:1, 165, 163-181 (2001).

[11] *Id.*

[12] NATIONAL CRIME RECORDS BUREAU, *Prison Statistics India 2015*, at i, (2016); Abhinay Laha, *Two-thirds of prisoners in India are Under-trials*, THE HINDU, October 24, 2016.

[13] R. Walmsley, *World Pre-trial / Remand Imprisonment List: Pre-trial detainees and other remand prisoners in all five continent*s, London: International Centre for Prison Studies (2008). http://www.kcl.ac.uk/depsta/law/research/icps/downloads/WPTRIL.pdf (Last accessed: June 17, 2017).

prisoners are under-trials.[14] The incarceration rate in US is 707 per 100,000 of the national population, while in India it is 33 per 100,000.[15] However, the average occupancy rate in Indian prisons is 114 per cent, and is as high as 233.9 per cent in states such as Chhattisgarh.[16] The conviction rate in India is also dismal, at 37 per cent, which pales in comparison to countries such as Australia and USA, at 85 per cent each.[17]

Empirical research about the Indian judiciary highlights a routine failure on part of the courts to provide timely remedies to the aggrieved.[18] The knee-jerk judicial response to manage this problem has been fast-tracking of criminal cases, and the release of pre-trial detainees who have completed at least half their maximum prison term under s.436A of the Code of Criminal Procedure, 1973.[19] Through this, 12,92,357 under-trials were released during 2015 out of which 11,57,581 were released on bail.[20] However, a total of 2,31,340 under-trial prisoners from various States and Union Territories are still lodged in jails for committing crimes under Indian Penal Code, and 50,457 were under-trials under special laws, *e.g.* Customs Act, 1962; Narcotic Drugs and Psychotropic Substances Act, 1985; Excise Act,1944, *etc.*[21]

In the following analysis, the Indian legal system may appear to be 'liberal' on a preliminary glance. However, certain tendencies have manifested the criminal law discourse which aggravate the problem of pre-trial detention and will further be discussed in Part III of this paper.

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[14] W. Dobbie, *The effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, NBER Working Paper (2016) 1.

[15] Institute for Criminal Policy Research, *World Prison Brief* (2013), http://www.prisonstudies.org/country/india (Last accessed: June 17, 2017).

[16] Amnesty International India, *Justice Under Trial: A Study of Pre-Trial Detention in India* (2017) at 5. https://www.amnesty.org.in/images/uploads/articles/UT_Final.pdf (Last accessed: August 17, 2017).

[17] Muhammad Waheed, *Victims of Crime in Pakistan*, The 144th International Senior Seminar Participants' Papers, United Nations Asia and Institute for the Prevention of Crime and the Treatment of Offenders (2014) at 23.

[18] Galanter & Krishnan, *Debased Informalism: Lok Adalats and Legal Rights in India*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Stanford University Press, 2003) at 96.

[19] Bhim Singh v. Union of India, WP (Crl.) No. 310/2005, Supreme Court order dated 5th September 2014 (India).

[20] *Id.*

[21] NCRB, *supra* note 12.

A. **Constitutional Provisions and 'Fair Trial'**

The two perspectives towards criminal procedure, one being the 'liberty perspective' and the other being the 'public-order perspective' may not necessarily be considered mutually-exclusive.[22] Approaching constitutional law and criminal procedure from one perspective does not imply that the values of the other are negated, but does influence their *inter se* prioritisation.[23] Indian courts have been proactive in availing constitutional guarantees to the citizen, as well as progressively 'reading-in' newer aspects in constitutional provisions relating to 'liberty'.[24] The oft-cited constitutional provision enshrining the liberty perspective is Art.21 of the Constitution, which guarantees the right to "life and personal liberty", and can only be limited according to the "procedure established by law."[25] Through the expansive interpretation of Art.21, a 'fair-trial' guarantee was read into the Constitution by the Supreme Court.[26] The concept has come to be understood as a condition, that the State must justify every instance of deprivation of life or liberty before an impartial tribunal.[27]

Despite no express constitutional guarantee, speedy trial has been "read-in" as a part of fair trial, guaranteed under Art.21.[28] However, delay by itself is not considered to be a violation of the right. The accused must establish that 'prejudice' was caused because of the delay.[29] An important precedent in the context of Art.21 and its component phrase - "the procedure established by law" is *Maneka Gandhi*,[30] wherein the Supreme Court held that any law authorising the deprivation of liberty should be "reasonable, even-handed and geared to the goals of

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[22] Aparna Chandra & Mrinal Satish, *supra* note 1, at 795.

[23] Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PENN. L. R. 506, 575-77 (1972).

[24] Aparna Chandra & Mrinal Satish, *supra* note 1 at 795.

[25] INDIA CONST. art. 21 "Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law."

[26] Maneka Gandhi, *supra* note 4.

[27] J. Jayalalitha v. State of Karnataka (2014) 2 SCC 401 (India).

[28] Hussainara Khatoon, *supra* note 5.

[29] Dharmendra Kirthal v. State of UP (2013) 8 SCC 368 (India).

[30] Maneka Gandhi, *supra* note 4.

community good and State necessity."[31] In *Antulay*,[32] the right to speedy trial was clarified to encompass "all the stages: namely, the investigation, inquiry, trial, appeal, revision and re-trial."[33]

Further, Art.22 of the Constitution guarantees to an accused person the right to be informed of the grounds for arrest; not to be denied the right to consult and be represented by a counsel of choice; and to be produced before the nearest magistrate within twenty-four hours of being arrested.[34] In pursuit of these provisions, the Supreme Court of India in the important case of *DK Basu*,[35] furnished guidelines for the exercise of the power to arrest, which require the preparation of a memo of arrest– to state the time and date of arrest, be signed by at least one witness, and countersigned by the arrested person. During the arrest, an officer must also bear accurate, visible, and clear identification tags with the name and designation.[36]

Professors Aparna Chandra and Mrinal Satish in their analysis of Indian criminal procedure from a constitutional perspective hold that "India has demonstrated a shift from a liberty perspective to a public order perspective."[37] The judiciary has regularly understood the law of arrest as requiring a balance between the rights of the arrestee and protecting societal interests in reducing crime rates.[38] However, the Supreme Court's various perspectives have resulted in distinct practices and doctrinal construction, which helps explain the trajectory of the criminal process in India. To further understand this assertion, the constitutional ideals need to be compared to the legislative grants of power that cater to public order concerns and the functioning of criminal law in India.

B. **Arrest and Investigatory Provisions**

[31] *Id.*

[32] Abdul Rehman Antulay & Ors. v. R.S. Nayak & Anr., AIR 1992 SC 1701 (India).

[33] *Id.*

[34] INDIA CONST. art. 22.

[35] DK Basu v. State of West Bengal, AIR 1997 SC 610, 623 at ¶36 (India).

[36] *Id.*

[37] Aparna Chandra & Mrinal Satish, *supra* note 1, at 796.

[38] Joginder Kumar v. State of Uttar Pradesh (1994) 4 SCC 260 (India).

In India, it has become an entrenched practice in criminal law to cloak pre-trial detention as criminal justice, bypassing the legal restrictions on such procedures.[39] Chapter V of the Code deals with the arrest of persons, in which S.41[40] is the main provision for situations when police may arrest without warrant.[41] The Supreme Court has clarified that the power to arrest without a warrant is only confined to such persons who are accused or concerned with the offences or are suspects thereof.[42] Caution has been mandated for the Magistrates when an arrest is made under mere suspicion by the police, "as the power of arrest without warrant under suspicion is liable to be misused."[43]

Till now, the Indian Constitution was understood not to guarantee privacy against the state[44]. However, with the recent judgment of the Supreme Court in *K.S. Puttaswamy* (2017)[45], which unanimously held privacy to be a fundamental right guaranteed by Art.21, it is expected that standards such as the "reasonable expectation of privacy"[46] of the accused, and "reasonable and probable grounds"[47] of the law enforcement agent, which have not found relevance in India, may counter arbitrariness in arrest and investigatory procedures greatly, when and if they are read into the law. Currently, Chapter V of the Code further endows police officers with discretionary

[39] Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice,* (2001) 114 HARV L.R. 1433.

[40] §41, CODE CRIM. PROC.('CrPC'): When police may arrest without warrant.

[41] §42, CODE CRIM. PROC. specifies yet another situation where a police officer can arrest a person - when a person commits an offence in the presence of a police officer, or where he has been accused of committing a "non-cognizable offence" and refuses, on demand being made by a police officer to give his name and residence or gives false name or residence, such person may be arrested for the purpose of ascertaining his name and residence.

[42] Sham Lal v. Ajit Singh, 1981 CriLJ NOC 150 (India).

[43] Re: Shahadat Khan, AIR 1965 Tripura 27 (India).

[44] M.P. Sharma & Ors. v. Satish Chandra &Ors., AIR 1954 SC 300 (India); Kharak Singh v. State of U.P. &Ors., AIR 1963 SC 1295 (India).

[45] Justice K.S. Puttaswamy and Anr. v. Union of India and Ors., Writ Petition (Civil) No. 494 of 2012 (India).

[46] Katz v. United States, 389 U.S. 347 (1967) (USA); Hunter v. Southam, (1984) 2 SCR 145 (Canada) "An assessment must be made as to whether in a situation, the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy to advance its goals, notably those of law enforcement."

[47] R. v. Biron, (1976) 2 SCR 56 "The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibility-based probability replaces suspicion." (Canada)

powers to arrest through various provisions.[48] S.47 (1) enables the police officer to enter a place if he has "reason to believe" that the person to be arrested is at that place.[49] What runs as a general theme in terms of 'arrest provisions' in the Code is the width of the powers granted to police officers.

To compare, British law enables arrest only in serious cases on a 'reasonable suspicion' that the arrested person has committed an offence. Woolf LJ.'s decision in *Castorina* (1988)[50] makes this test objective, requiring all relevant, and not irrelevant, circumstances to be considered. If the 'reasonable suspicion' test is not satisfied, the police are liable to pay damages. Dr. Rajeev Dhavan, Senior Advocate of the Supreme Court notes that the difference between the British and the Indian law has been expounded by the Law Commission in various reports, but is left hanging in the air.[51] The generality of the Code's provisions and consequent wide discretion have been the very source of misuse, with the qualifying words 'reasonable' and 'credible' reported to "mean nothing in practice."[52]

The preventive and public order provisions in the Code add another branch which empowers the police to arrest persons with wide discretion. S.151 allows a police officer to arrest any person, without orders from a Magistrate, and without warrant.[53] Additionally, S.167(2) of the Code authorises a Judicial Magistrate to send an accused to police-custody for 15 days if the police investigation cannot be completed within 24 hours, and if the magistrate is satisfied with the legality of the arrest.[54] Beyond this, if the magistrate "is satisfied that adequate grounds exist", he or she may authorise further judicial custody up to 60 or 90 days.[55] It can be seen that, even

[48] §43, CODE CRIM. PROC. provides for a situation where an arrest can be made by a private person and the procedure to be followed on such arrest.

[49] §47, CODE CRIM. PROC. - Search of place entered by person sought to be arrested.

[50] Castorina v. Chief Constable of Surrey, [1988] NLJR 180 (UK).

[51] *Id.*

[52] LAW COMMISSION OF INDIA (Herein after "LCI"), Report No. 177, Report on the Law Relating to Arrest, 4 (2001).

[53] §151, CODE CRIM. PROC. - "…if it appears to such officer that such person is designing to commit a cognizable offence and that the commission of offence cannot be prevented otherwise."

[54] Vrinda Bhandari, *Pretrial Detention in India: An Examination of the Causes and Possible Solutions*, 11:2 ASIAN J. OF CRIM. 83, 80 (2016).

[55] Based on whether the alleged offence is punishable with a sentence of less than, or more than, 10 years.

though judicial magistrate is generally considered a sufficient check on the misuse of police powers, the legislation sets a very low standard of 'legality' for any incident of arrest to qualify. In 2014, the Supreme Court criticised the "cavalier manner" in which detention was authorised by magistrates and directed them to independently peruse the police report and record their satisfaction.[56]

C. **Bailable and Non-bailable Offences**

Prof. Jayanth Krishnan notes that by more than a two-to-one margin, there are more pre-trial detainees facing non-bailable murder charges (54,245 defendants) than any other crime.[57] In 'bailable' offences, where bail is a matter of right, s.436 of the Code requires the release of the accused, provided that the accused "is prepared" to give bail or execute a personal bond.[58] Any accused person arrested for a bailable offence willing to provide bail must be released.[59]A 2005 amendment inserted S.436A[60], which requires an accused who had been detained for "one-half of the maximum period of stipulated imprisonment" to be considered for release, and to be granted release on the completion of the maximum period of imprisonment.[61]

The judicial view regarding grant of bail has been that pre-trial detention is not opposed to the basic presumptions of innocence.[62] It has been observed that, "[E]nsuring security and order is a permissible non-punitive objective, which can be achieved by pre-trial detention. Where overwhelming considerations require of the denial bail, it must be denied in societal interest."[63] In practice too, the present system of bail is heavily influenced by economic status and

[56] Arnesh Kumar v State of Bihar, (2014) 8 SCC 273 (India).

[57] Krishnan and Kumar, *supra* note 7, at 763.

[58] Bhandari, *supra* note 54, at 85.

[59] Santh Prakash v. Bhagwandas Sahni, 1969 MLW (Cri) 88 (India).

[60] §436A, CODE CRIM. PROC.

[61] Bhandari, *supra* note 54, at 85.

[62] LCI, Report No. 268, Report on Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail, Law Commission of India (May 2017), at 11.

[63] State v. P. Sugathan 1988 Cr. LJ 1036 (Kerala, India).

discriminates against the impoverished and the illiterate.[64]

Importantly, the Law Commission remarks that the "judicial system seems to have evolved two approaches to bail - bail as a right for the financially able; and for rest, bail is dependent on the judicial discretion, exercised through manipulation of the 'reasonable' amount that will be required for bail."[65] However, as per one of the Supreme Court's various views, 'reasonableness' entailed not using pre-trial detention through the denial of bail as a punitive measure.[66] In relation to the legal-aid guarantees[67] of the Constitution and its Preamble[68] for bail, in *Raghunathji*,[69] the Supreme Court has held that "social justice would include 'legal justice', which means that the system of administration of justice must provide a cheap, expeditious and effective instrument for realization of justice by all section of the people irrespective of their social or economic position or their financial resources."[70]

The Indian legal scenario exhibits contending values of the courts and the police force. Whereas the judiciary can be credited with humanization of law administration even in the face of pre-constitutional laws on a case-by-case basis, statistically, these ideals do not seem to have percolated the justice system as a 'value'. Subsequently, when faced with institutional delay, the Supreme Court will be seen to make choices potentially contrary to its 'fair-trial' pursuit.

PART II: SPEEDY-TRIAL IN A COMPARATIVE PERSPECTIVE

The American notion of dismissing charges, *carte blanche*, against a defendant whose speedy trial right has been violated raises interesting issues, especially when comparing it to other legal systems.[71] The framework, termed as the 'exclusionary rule', has been referenced by the Canadian judiciary, and will also be useful for considering the essential choices before India's

[64] LCI, *supra* note 62, at 12.

[65] *Id.*

[66] Gudikanti Naraisimhulu v. Public Prosecutor (1978) SCC 240 (India).

[67] INDIA CONST. art.39 and art.39A.

[68] INDIA CONST. Preamble - "…to secure to all its citizens: JUSTICE, social, economic and political…"

[69] L. Babu Ram v. Raghunathji Maharaj and Ors., AIR 1976 SC 1734 (India).

[70] *Id.*

[71] Krishnan and Kumar, *supra* note 7, at 749.

common law system which regularly takes inspiration from the US.[72]

A. **The American Conception - *Barker* v. *Wingo***

In the United States, the Sixth Amendment guarantees "the right to a speedy and public trial", in all criminal prosecutions.[73] The right has been recognized as "one of the most basic rights preserved by our Constitution."[74] To give effect to the guarantee, in *Barker* (1972),[75] the "dismissal with prejudice" remedy was formulated by the US Supreme Court as "the only possible remedy"[76] for speedy-trial violations. The Court enunciated a four-part balancing test meant to clarify when the right would be violated.[77]

Following *Barker*, the US Speedy Trial Act of 1974 was signed into law by President Gerald Ford on January 3, 1975.[78] Upon signing the bill, President Ford expressed that the dismissal of the indictment with potential preclusion of subsequent indictment (in the trial judge's discretion) would result in unnecessary exoneration of criminal defendants for serious offenses.[79] Essentially the same argument has been adopted by various commentators regarding the 'exclusionary' rule, holding that by making complete dismissal the only remedy for a speedy trial violation, lower court judges would not be in favour of defendants when such claims were brought, because of the inevitable, drastic outcome - unconditional release.[80] However, the US Supreme Court has

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[72] *Id.*

[73] US CONST., *supra* note 4.

[74] Anne Conway, *Speedy Trial: The Path to Protecting the Rights of Citizens and Defendants*, 7th Annual Conference on Legal & Policy Issues in the Americas (2006) 1.

[75] Barker v. Wingo, 407 U.S. 514 (1972).

[76] Akhil Amar, *Sixth Amendment First Principles*, 84 GEO. LJ. 641, 645 (1996) ("The only possible remedy" for speedy trial violations, the Court has unanimously proclaimed, is dismissal of the case with prejudice-in effect, excluding all evidence of guilt forever.")

[77] Wingo*, supra* note 75, 514, 529–32, which include:
1. the length of delay;
2. the reason for the delay;
3. the time and manner in which the defendant has asserted his right; and
4. the degree of prejudice to the defendant which the delay has caused.

[78] Statement on Signing the Speedy Trial Act of 1974, 1 PUB. PAPERS 7-8 (January 4, 1975).

[79] *Id.*

[80] Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1515 (2009).

adhered to *Barker*, and the consequent legislation has ingrained unconditional release upon inordinate delay in the American system.

B. **The <u>Canadian Approach – From *Askov* to *Jordan*</u>:**

There exist various parallels between an accused person's rights in Canada and the US, both of which evolved out of the British Common Law system.[81] S. 11(b) of the Canadian Charter provides any person charged with an offence, "the right to be tried within a reasonable time."[82] According to the Supreme Court of Canada, like the US conception, the minimum remedy for a violation of s. 11(b) is a permanent stay of the proceedings.[83] As to whether the protection of the provision extends to appellate proceedings, in *Potvin*,[84] Supreme Court held that the right does not extend to appeals from conviction or acquittal.

The matter of systemic or institutional delay was for the first time considered by the Canadian Supreme Court in *Askov* (1990).[85] To check whether institutional delay was unreasonably long, the Court designed a test for comparing jurisdictions across Canada, by comparing the questioned jurisdiction to the standard maintained by the best comparable jurisdiction.[86] The test created, known as the 'Comparative-Jurisdictions Test', required all the factors to be considered as to whether the length of the delay of a trial has been 'unreasonable', grouped under the headings of length of the delay, explanation for the delay, waiver, and prejudice to the accused. No mechanical time-limit was set in *Askov*, and the determination of 'reasonableness' had to be made by the 'comparative jurisdiction test', upon balancing of the four factors.[87]

Later, in *Morin* (1992),[88] the Court's approach revised the emphasis on discretion and 'actual

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[81] Marc W. Patry et al, *Recent Supreme Court of Canada rulings on Criminal Defendants' Right to Counsel*, PSYCH, CRI& L. J., 741, 749 (2013).

[82]CANADA CHART., *supra* note 3.

[83] Rahey (1987) 57 CR (3d) 289 (SCC) (Canada).

[84](1993), 23 CR (4th) 10 (SCC) (Canada).

[85] (1990) 79 CR (3d) 273 (SCC) (Canada).

[86]DON STUART, CHARTER JUSTICE IN CANADIAN CRIMINAL LAW, 303 (5th ed., Toronto: Carswell, 2010).

[87]Barker, *supra* note 75.

[88] R. v. Morin (1992) 12 CR (4th) 1 (SCC) (Canada).

prejudice' to the accused, curtailing the right substantially.[89] In the balancing process, the Court sought to introduce subtle changes from the *Askov* approach which were restrictive of the accused's rights, such as the 'seriousness' of the offence. Unlike the US Supreme Court's approach in *Barker* - that once the accused had satisfied that the delay was "*prima facie* unreasonable", the onus shifted to the Prosecution to justify the delay - the Court in *Morin* found it "preferable to evaluate the reasonableness of the lapse of time having regard to the factors referred."[90] The comparative jurisdiction test was also abandoned in *Morin*.[91]

The "proof of prejudice" caused to the accused became the key factor leading to the decision in *Morin*, and its departure from *Barker*. According to Sopinka J., prejudice may be inferred from the delay, but when it is not inferred and otherwise proven, "the basis for the enforcement of the individual right is seriously undermined."[92] This approach led the Court in *Morin* to hold that despite a delay of 14 and a half months between the arrest and the trial, the accused had led no evidence of prejudice and did not respond to the Crown as to whether the defence counsel wished to have any of his cases expedited on account of prejudice.[93]

In 2016, the Supreme Court of Canada overruled *Morin* in the 5:4 decision of *R* v. *Jordan*,[94] in which new presumptive ceilings for unreasonable delay were set at 18 months for cases being heard before provincial courts, or 30 months for cases that are either before the superior court or before the provincial court following a preliminary inquiry. Upon incurring delay exceeding the ceilings, the prosecution (the Crown) would have to demonstrate that it is attributable to exceptional circumstances outside its control. The burden to show reasonableness was effectively put back on the Crown, and 'exceptional circumstances' were defined as being "circumstances which are reasonably unforeseeable or reasonably unavoidable, and which Crown counsel cannot reasonably remedy once they have arisen."[95] The Court further allowed the accused persons

[89] Don Stuart, *supra* note 86, at 402.

[90] Morin, *supra* note 88, at 11-12.

[91] *Id.*at 19-21.

[92] *Id.*at 23.

[93] Don Stuart, *supra* note 86, at 406.

[94] 2016 SCC 27 (Canada).

[95] *Id.* at 73-74.

wishing to challenge delays that fall below the ceiling, with the burden of demonstrating that the delay is unreasonable, requiring them to demonstrate both that the defence made a meaningful and sustained effort to expedite proceedings and that the case took 'markedly' longer than it should have.[96]

What is interesting about the revised Canadian framework is its continued emphasis on 'prejudice' caused to the claimant, as well as the due weight given to arbitrariness of any kind on part of the state-functionaries. Subsequently, the contrary will be seen in the Indian Supreme Court's approach towards the accused in a controversial case involving 37 years of delay.

C. **The Indian Approach towards 'Unreasonable Delay'**

Like the choices made by the Canadian Supreme Court from time to time when faced with institutional constraints and delay, in *Ranjan Dwivedi* (2012),[97] a 37-year-old criminal case pending trial brought certain similar issues before the Supreme Court of India. Besides the complex history of the case, it was the polyvocality of the Court that stood exposed after its judgment.

The petitioners were accused and tried for the assassination of L.N. Mishra, the Union Railway Minister in 1975, who was injured in a bomb-blast at a railway station in 1975, and later succumbed to his injuries. The CBI filed charges in 1975. The trial proceeded for twelve years, and was subject to political interference, as was reported before the Court.[98] In 1987, the trial having remained pending for over 12 years, the accused petitioned for quashing of the charges and proceedings. The Supreme Court rejected these petitions in 1991, with a direction to the trial court to expeditiously complete the trial on a day-to-day basis. However, these directions were not followed by the trial court.[99]

The judgment in this case in 2012 was rendered pursuant to a second request by the accused petitioners to quash the trial, this time after 37 years of delay. The counsel for the petitioners laid the issue before the Supreme Court unequivocally: "Whether any judicial system would tolerate such an inordinate delay" and "whether the fact that the judicial system works in a particular way

[96] *Id.* at 82.

[97] Ranjan Dwivedi v. The CBI, (2012) 8 SCC 495 (India).

[98] *Id.* at ¶3.

[99] *Id.* at ¶4.

can be a justification for its failure to complete the trial."[100] Engaging in a "balancing process", the Court held that it must weigh several relevant factors, and that the nature of the offence and other circumstances in a case may be such that quashing of proceedings may not be in the interest of justice.[101]

Unlike the Canadian Supreme Court in *Jordan*, the Indian Supreme Court rejected the idea of an upper-limit, holding that "it is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one." In fact, referring to an earlier decision of seven judges in *P.Ramachandra*,[102] in the face of a trial pending for 37 years, the Court nullified the time-limits prescribed in earlier decisions. It was held that "criminal courts are not obligated to terminate trial or criminal proceedings merely for the lapse of time", which was wrongly directed in *Common Cause (I)*.[103]

The Court went on to lament that "…our legal system has made life too easy for criminals and too difficult for law abiding citizens. Our Constitution does not expressly declare that right to speedy trial is a fundamental right."[104] These observations are curious not only because the Court based its views on the absence of 'speedy trial' in the Constitution, as if it was never read in earlier cases,[105] but also because the Court essentially denied relief to the petitioners without finding any evidence of wrong-doing against them which may have stalled the process in any manner.

Surprisingly in consonance, Prof. Lon Fuller remarkably predicted that when faced with a 'polycentric'[106] issue, an adjudicator, "instead of accommodating procedures to the nature of the

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[100] *Id.*at ¶5.

[101] *Id.*

[102] P. Ramachandra v. State of Karnataka, (2002) 4 SCC 578 (India).

[103] Common Cause v. Union of India, 1996 (4) SCC 33. The Court further nullified the time-limits prescribed in Raj Deo Sharma (I), 1998 (7) SCC 507 and Raj Deo Sharma (II), 1999 (7) SCC 604 (India).

[104] Ranjan Dwivedi, *supra* note 97, at ¶16.

[105] Hussainara Khatoon, *supra* note 6.

[106] JEFF KING, JUDGING SOCIAL RIGHTS, 209 (Cambridge University Press 2012) ("According to Lon Fuller, a polycentric problem is one that comprises a large and complicated web of interdependent relationships, such that a change to one factor produces an incalculable series of changes to other factors. Fuller never gave a succinct one-line definition of what a polycentric task was.").

problem he confronts, may reformulate the problem to make it amenable to solution through adjudicative procedures." [107] Unlike the prudent Canadian approach to avoid viewing unintentional delay as causing 'prejudice' to the accused, and yet taking into account institutional factors in determining 'unreasonableness', the Indian Supreme Court held that "unintentional and unavoidable delays or administrative factors over which prosecution has no control"[108] cannot be held to violate the "accused's right to a speedy trial, and need to be excluded while deciding whether there is unreasonable and unexplained delay."[109] This approach indubitably dampens the cause of speedy-trial in the country, especially considering the reality that it is only judicial efforts till now that have led to positive changes in terms of 'fair trial' in India, and exhibits the polyvocality that judicial decisions are capable of.

INSTITUTIONAL REQUIREMENTS OF CONSTITUTIONAL IDEALS

On the face of it, the Indian Constitution organizes the country's judicial system with striking unity. Appeals progress upstream in a set of hierarchically organized courts, whose judges interpret law under a single national Constitution.[110] However, there exists a clear distinction between the higher judiciary and subordinate levels. Since 2014, there are twenty-four High Courts in India, which range in size from 160 sanctioned judges in Allahabad, to 3 in Sikkim.[111] There are 640 districts, each with its own district court, with a clear distinction between judges on the criminal side and the civil side.[112]

[107] Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. R. 353, 401 (1979) ("*First*, the adjudicative solution may fail. Unexpected repercussions make the decision unworkable; it is ignored, withdrawn, or modified, sometimes repeatedly. *Second*, the purported arbiter ignores judicial proprieties – he 'tries out' various solutions in post-hearing conferences, consults parties not represented at the hearings, guesses at facts not proved and not properly matters for anything like judicial notice. *Third*, instead of accommodating his procedures to the nature of the problem he confronts, he may reformulate the problem to make it amenable to solution through adjudicative procedures").

[108] Ranjan Dwivedi, *supra* note 97, at ¶19.

[109] *Id.*

[110] Nick Robinson, *Judicial Architecture and Capacity*, in THE OXFORD HANDBOOK OF INDIAN CONSTITUTIONAL LAW 331 (New Delhi: Oxford University Press, 2016).

[111] *Id.*, at 333.

[112] *Id.* ("A 'district' is the chief unit of administrative coordination below the state level.")

A. **<u>The 'Top-Heavy' Indian judiciary</u>:**

Each State in India provides funds for the operation of the state-judiciary, which has implications on the performance of such units, since the states in India are socio-economically diverse, leading to varying budgetary allocations.[113] For example, in Maharashtra, over 2 per cent of the budget was allocated for judicial administration in 2011, while in Chattisgarh it was 0.25 per cent.[114] This also indicates a variation in the litigant profile, the legal cultures, and the governance capability of different states.[115]According to estimates, at the current rate, if the Supreme Court takes no fresh cases and there is no increase in judicial office-holders strength, a dedicated period of 9 months of fulltime attention would be needed to clear the backlog.[116] On average, High Courts would need about 31 months, and lower courts about 21 months. Due to the inter-state disparities mentioned earlier, this figure would vary among various high courts and lower courts. Allahabad High Court, for example, would need about 72 months to clear its backlog while Sikkim High Court would need 14 months.[117]

One solution suggested for pendency is to take these calculations and hire enough judges to clear the backlog even as efficiency is increased through other means.[118] General explanations for the pendency rates in Indian courts include poor management of cases; procedural complexity; the rare use of plea bargaining.[119] In a comprehensive analysis of institutional delay in the Indian judiciary on all levels, the researchers suggest "litigiousness" as being one of the obvious factors for pendency.[120] However, despite the evident clogging of cases, India has a relatively low per capita litigation rate.[121] Prof. Robinson argues that the current low per capita litigation rate in

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[113] THE SUPREME COURT OF INDIA, *National Court Management System Policy and Action Plan*, 1.1 (2012).

[114] *Id.*

[115] Robinson, *supra* note 110, at 335.

[116] O.P. Jindal Global University, *Justice Without Delay: Recommendations for Legal and Institutional Reforms in Indian Courts*, 9 Research Paper No. 4/2011, Center on Public Law and Jurisprudence (2011).

[117] Rohit Kumar, *Pendency of Cases in India Courts*, 2 PRS Legislative Research (2009).

[118] LCI, Report No. 120, Manpower Planning in the Judiciary (1987) (suggested a formula for the fixation of judge strength, adopting a demographic approach).

[119] LCI, Report No. 142, Concessional Treatment for Offenders (1991) at 24.

[120] Justice Without Delay, *supra* note 116, at 12.

[121] Theodore Eisenberg & Nick Robinson, *Litigation as a Measure of Well-Being*, 62 DEP. L.R. 241, 247 (2013).

India indicates that as the country develops economically, it can expect to have even more cases filed in its courts.[122]

As has been illustrated in the analysis in Part I of this paper, since the values relating to the liberty and public order perspectives are sourced largely from constitutional law, cases in relation to arrest have a tendency of reaching directly before the higher judiciary in petitions, which is a statutory as well as constitutional right.[123] What this spells in terms of pendency figures is alarming. Prof. Krishnan holds that "the problem is not with too many cases coming in; it's with too few coming out."[124] Between 2005 and 2011, the number of cases that were appealed to the Supreme Court increased by 44.8 per cent, and the number of cases that were accepted by the Court for regular hearing increased by 74.5 per cent.[125]Prof. Robinson argues that this pattern seems to indicate that litigants are bypassing the subordinate judiciary where possible, appealing as a matter of right[126] to the Supreme Court or High Courts in greater numbers, and increasingly adding to the appeals pending.[127] By these accounts, it appears that the rate of pendency is only bound to rise, and the focus must shift to other institutions involved in the administration of law, regulation of which may reduce the incidence of wrongful arrests and investigation, and the consequent need for "due process" which consumes judicial resources, causing pendency.

B. **The 'High-Handed' Indian Police**

The institutional issues plaguing criminal law administration in India must be analyzed in tandem with the police force and its tendencies. Besides codification of the substantive aspects of criminal law in 1860, the Indian Police Act of 1861 was passed by the British administration of the time to structure a police-force in India. According to Art.246 of the Constitution[128] and S.3

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[122] Robinson, *supra* note 110, at 336.

[123] INDIA CONST. art. 32 and art. 226.

[124] Justice Without Delay, *supra* note 116, at 12.

[125] Robinson, *supra* note 110, at 337.

[126] Madhav Hoskot v. State of Maharashtra, AIR 1978 SC 1548 (India);P.C. Garg v. Excise Commissioner, AIR 1963 SC 996, at 999 (India).

[127] Bhim Singh v. Union of India & Ors., Writ Petition (Crl.) Nos. 310/2005 (India).

[128] INDIA CONST. Art.246 specifies the subject matter of laws made by Parliament and by the Legislatures of States, to be read with E. 2 of List II of the Seventh Schedule.

of the IPA,[129] the police force is a "state subject" and is not dealt with at the central level. Each state government has the responsibility to draw guidelines, rules and regulations for its police force. These regulations are found in the state police manuals.[130]

Police misconduct and the failure to effectively respond to situations have been found to undermine public confidence in the system.[131]The widespread belief that the police functions with impunity, and officers are rarely held to account for their omissions and commissions is breaking the faith of the public in the police.[132]Wrongful arrests add to the aspect of pendency because all instances of misuse of police authority under the various legislations covered in Part I of this paper are amenable to a challenge before the courts only, on a case-by-case basis. Since the only option to check police actions flouting the various judicial guidelines, is to file a case, the cause of 'speedy justice' and 'fair trial' suffers, adding to ever-mounting pendency.

The Malimath Committee[133] observed that the standard of policing in India remains poor and there is considerable room for improvement.[134] Besides inefficiency, members of the public complain of rudeness, intimidation, suppression of evidence, concoction of evidence and malicious padding of cases.[135] Further, there exists no code of practice disciplining the police other than the broad due-process guidelines laid down in *D.K. Basu's* case,[136] and certain subsequent decisions.[137] Additionally, registering a criminal case against a police officer is a long and cumbersome process. Sanction requirements of S.132[138] of the Code prevent courts from

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[129] §2, IND. POL. ACT.

[130] Maja Daruwala, G.P Joshi & Mandeep Tiwana, *The Police Act, 1861: Why we need to replace it*, 16 Commonwealth Human Right Initiative Report (2005).

[131] Committee on Reforms of Criminal Justice System Government of India, Ministry of Home Affairs, March 2003 (Known as the 'Malimath Committee') at 55.

[132] CHRI report, *supra* note 129, at 16.

[133] Malimath Committee, *supra* note 131, at 91.

[134] *Id.*

[135] *Id.*

[136] Basu, *supra* note 35.

[137] Joginder Kumar v. State of Uttar Pradesh, (1994) 4 SCC 260. (The Supreme Court laid extensive guidelines governing arrest powers and procedures to be followed by the police.)

[138] §132, CODE CRIM. PROC. provides sanction-protection against prosecution for acts of enlisted functionaries.

taking cases of alleged offences in the discharge of official duty, for various categories of public servants including police officers. Thus, the legal quagmire ensures less responsibility, unrestrained discretion and unsustainable backlogs before courts at all levels.

The impunity with which the Indian police has been observed to function, due to the discretionary power to arrest under Indian law is also factor which contributes to pendency figures in India.[139] The present institutional requirement, besides those that are routinely suggested,[140] including the prospect of a legislative overhaul,[141] is to create a continuous institutional check on the police force in India which ensures that illegitimate arrests as a matter of routine are not made in the first place, thereby checking the systemic harassment that has been reported to persist.

C. **Institutional Theory of Police**

There are well-founded reasons besides emulation of more successful models as to why an oversight and complaint mechanism to monitor police functioning may help in reducing unnecessary arrests, and the consequent need for litigation. 'Institutionalized organizations' such as the police force operate in environments that are complex, and function with certain values.[142] Distinguishing 'institutionalized' organizations from 'technical' or 'business' organizations, Prof. John Crank explains that "the technical capacity of such organizations to produce this service is not well-known or well-established. However, these organizations succeed in their institutional environment to the extent that they conform to structures (procedures, programs, or policies) that are widely accepted as being correct, even though the relationship of these structures to actual performance is not well established."[143]According to this conception of institutionalism, institutions should function within procedurally defined 'means' that provide for appropriate or customary ways of acting.[144] Skolnick and Fyfe suggest that "a redesign of police performance

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[139] SANKAR SEN, ENFORCING POLICE ACCOUNTABILITY THROUGH CIVILIAN OVERSIGHT, 25 (Sage Publications, July 2010).

[140]Justice Without Delay, *supra* note 116, at 53.

[141] LCI, *supra* note 118.

[142] John P. Crank, *Institutional Theory of Police: A Review of the State of the Art*, 26 INTL. POL. J., 186, 187 (2003).

[143] Stephen Mastrofski et al, *Compliance on Demand: The Public's Responses to Specific Police* Requests, 33:269, J.OF CRI.AND DELINQ. 305 (1996).

[144] Crank, *supra* note 142.

standards and rigorous overview of officer-behaviour is necessary to bring the police into conformity with propriety-conceptions."[145] They describe this need as "coercive isomorphism", *i.e.*, an obligated expectation that the department must conform with.[146]

The need for providing statutory safeguards to prevent abuse of power of arrest has been emphasized time and again in various reports.[147] However, for procedural obligations to be routinely practiced, the more practical option appears to be a sufficiently empowered and time-bound external oversight body, rather than a judge expounding case-by-case, individually. Internationally, it is considered good practice for an independent, external body to have oversight over the entire complaints system and share responsibility with the police for the visibility and accessibility of the system.[148]

D. **The Need for Oversight**

In *Prakash Singh* (2006),[149] the Supreme Court of India passed certain directives for structural reform of the police, one of which was that all state governments and union territories must devise Police Complaints Authorities (PCAs) at the state and district levels, with immediate effect.[150]Till now, 14 out of the 29 Indian states and 7 Union Territories have passed Police Acts in response to the Court's judgment,[151] with variations that blunt the effectiveness of the directive.[152]The Police Act of 1861 does not put in place any mechanism to ensure external accountability, unlike police legislation in the UK, South Africa, Canada and Northern

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[145] JEROMEH. SKOLNICK, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE, 97 (Free Press, New York: 1993).

[146] *Id.* at 98.

[147] LCI, *supra* note 118, at 16.

[148] *Id.* at 36.

[149] Prakash Singh and Others v Union of India and Others, (2006) 8 SCC 1 (India).

[150] Devika Prasad, *Police Complaints Authorities in India - A Rapid Study*, Commonwealth Human Rights Initiative, 3 (2012). ("However, this being a judicial measure, there was no legislative mandate for the same to be complied with uniformly throughout the country.")

[151] *Id.* ("Assam, Bihar, Chhattisgarh, Gujarat, Haryana, Himachal Pradesh, Karnataka, Kerala, Meghalaya, Punjab, Rajasthan, Sikkim, Tripura and Uttarakhand. While 26 states have established SSCs on paper, only 14 states have seen Commissions move from paper to actually functioning.")

[152] Anuradha Nagar & Devika Prasad, *State Security Commissions: Bringing Little to the Table*, Commonwealth Human Rights Initiative, 66 (2014).

Ireland.[153] Presently, as civilian-oversight mechanisms, India has the National Human Rights Commission and the Central Vigilance Commission, but no specialized police complaints handling body.[154] However, neither of these bodies are arms-length institutions, because they hold a wide portfolio of responsibilities, remaining ineffective in ensuring oversight of police actions.

To formulate the modalities for an oversight institution for India and its constituents is beyond the scope of this paper. However, general concerns that have been recognized by Indian researchers in their reviews of the working of these nascent institutions can be addressed. Specifically, in relation to expediency, there is no time-frame set for the conduct of inquiries by Police Complaints Authorities in any state or union territory in India.[155] Further, because the PCAs have not been given binding powers, they function as advisory bodies whose recommendations can be ignored by the government when they are inconvenient.[156] Since most of the police complaint authorities in India came into being after government notifications were issued, the accountability of such institutions itself is not provided for.[157]

The current requirement is for a central legislation to furnish structural framework for oversight institutions, as well as the scope of their powers.[158] A separate legislation offers two key benefits: makes it easier for people to understand oversight bodies, and confirms their independence.[159] A comprehensive model for an arms-length oversight institution should provide for departments which investigate police-civilian interactions that result in serious injury or death; a public complaints authority; and an independent office to adjudicate police disciplinary hearings, and

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[153] CHRI, *supra* note 130 at 23.

[154] Dr. Changwon Pyo, *Examining Existing Police Oversight Mechanisms in Asia*, Asia-Europe Democratisation and Justice Series - Improving the Role of the Police in Asia and Europe, 13(2008).

[155] Devika Prasad, *supra* note 150, at 18.

[156] Anuradha Nagar, *supra* note 152, at 11.

[157] *Id.* at 15.

[158] This was also done in the case of Lokpal, through the Lokpal and Lokayuktas Act of 2013, in which the setting up Lokayuktas in the states was made mandatory within a period of one year from the date of commencement of the Act, but the consent of state governments was requisite for the adoption of the central legislation's model (S.63 of Act No.1 of 2014).

[159] Justice Michael Tulloch, *Report of the Independent Police Oversight Review*, recommendation 4.1 at 65, (2017). (Report written in context of police oversight agencies of the province of Ontario, Canada.)

appeals.[160]Needless to mention, completion times for specific stages of the oversight process should be mandated to ensure timely review of police actions.[161]

Besides maintaining a continuous check on the police, delegating limited adjudicatory functions to the oversight institution would enhance the speed at which claims relating to procedural impropriety would be assessed,[162] and the routine requirement of every claim reaching the regular judicial machinery would reduce, thereby positively affecting pendency.[163] In practice, continuous oversight and the 'exclusion' remedy empirically aid the trial process, with a primary benefit being the determination of whether a trial is needed, at all, in the first place.[164]

CONCLUSION

There are simply too many offenses, too many offenders and few resources to deal with them all. A burgeoning population and socio-economic conditions exert unexpected pressures on institutions designed in an earlier time. Even though the law relating to arrest and investigation has till now been humanized by judicial pronouncements, a case-by-case adjudication of every instance of non-conformity is impracticable, since there is no option but to retain the accused in custody till contending claims regarding the arrest are settled. It is incumbent upon academia to recognize the challenge, and present real solutions to the pendency issue.

"It is becoming increasingly apparent to criminal justice scholars that models of criminal procedure are being stretched beyond their capacity by the phenomena they are designed to control."[165] Whether institutional delay is a reason to sympathize with the accused's plight, or it should not be an excuse to release the accused back in society presents is a choice contingent

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[160] *See* ANDREW GOLDSMITH& COLLEEN LEWIS, CIVILIAN OVERSIGHT OF POLICING: GOVERNANCE, DEMOCRACY AND HUMAN RIGHTS, 331(Portland: Hart, 2000).

[161] *See* N. MELVILLE, THE TAMING OF THE BLUE: REGULATING POLICE MISCONDUCT IN SOUTH AFRICA, 209 (Pretoria: HSRC, 1999).

[162] Joel Miller, *Civilian Oversight of Policing, Lessons from the Literature*, 31 Global Meeting on Civilian Oversight of Police, 2002.

[163] David Bull & Erica Stratta, *Police Community Consultation: An Examination of its Practice in Selected Constabularies in England and New South Wales, Australia*, 27 AUS. AND NZ. JOUR. OF CRIM., 237, 249 (1994).

[164] United States Department of Justice, *The Impact of the Speedy Trial Act on Investigation and Prosecution of Federal Criminal Cases*, 36 (1985).

[165] Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest,*31 ISR. L. R. 169, 169 (1997).

upon the perception of institutional propriety, having serious individual and societal consequences. Cases such as *Ranjan Dwivedi*, which go on to question whether a right to speedy-trial even exists must not be considered one-off incidents. The urgent need is for legislative and institutional reform to ensure that arrests are only made when necessary, and fail with consequences, when found to be unreasonable or unjustified.

"There has been a steady movement towards a convergence of legal systems – towards borrowing from others, institutions and practices that offer some home of relief." [166] A comparative analysis of the Indian position with the Canadian and US conceptions exhibits the choices that are before the Indian policy-makers and the judiciary to adopt, especially the "dismissal with prejudice"[167] remedy. Further, the recent recognition of privacy as a fundamental right opens new avenues to object to unscrupulous police tactics, in which efficient oversight institutions will prove to be instrumental. To fulfill grand constitutional ideals, the requirement is to create accountable institutions that rein in the existing functionaries, and induce confidence towards a responsible police-force.

[166] *Id.*

[167] Akhil Amar, *supra* note 76.