10

India

The Challenges of Wrongful Pre-trial Detention

10.1 Introduction

This chapter will examine remedied wrongful convictions in India. There is no registry of such cases, and remedied wrongful convictions seem to be even rarer than in China. The available cases, however, suggest that appellate courts have been bold in correcting wrongful convictions in part because India does not use juries. The story from the limited and partial data set (Hamer, 2023) of remedied wrongful convictions is similar to that in China: many remedied wrongful convictions involving false confessions made as a response to torture in police custody.

India has been even less responsive to their remedied wrongful convictions than China. At the end of 2023, the Modi government enacted new criminal procedure and evidence laws that made it easier for the police to have custody of suspects and to detain them longer without even requiring regular medical examinations or the attendance of defence lawyers during interrogations. These laws increase rather than decrease the risks of wrongful convictions based on false confessions caused by police torture.

As in China, there is no evidence that false guilty pleas have been remedied in India. The new criminal procedure law prohibits appeals from guilty pleas (*Bharatiya Nagarik Suraksha (Second) Sanhita, 2023* (BNSS2S) Bill 174 of 2023 s.416) while also not requiring courts to ensure that there is a factual basis for the guilty plea. Appeals are also not allowed from summary trials (s. 417). The new law also imposes new time limits on applications to the executive to seek clemency, despite evidence that clemency has been used in India to prevent executions in weak cases (Batra, 2021). As in China, there are reasons to be concerned about increases in unremedied wrongful convictions. Progress on combatting wrongful convictions should not be assumed.

The new 2023 laws require increased use of forensic techniques in serious cases (BNSS2S s.176(3)). This responds to well-documented impunity

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for crime in India and low conviction rates, especially for sexual violence. At the same time, western experience suggests that increased use of forensic science, especially in an under-resourced environment that does not devote necessary resources to proper training, testing and quality control (Project 39A, 2023), will also introduce new sources of error in the criminal process. The 2023 law also does not guarantee that the accused will necessarily be able to cross-examine the expert who prepared a forensic report used at trial (BNSS2S ss.328 and 329). In 2025, the Home Secretary praised Modi for establishing a forensic science university in India that will graduate 36,000 people each year who can visit crime scenes and perform forensic tests. He argued that this new focus on forensic science was part of an abandonment of a colonial past and promised that "in the coming decade, India will have the highest conviction rate in the world" (India Ministry of Home Affairs, 2025).

Because of its relatively free press, a potential for an innocence movement exists in India that does not exist in China. An Innocence Network was formed and, in 2016, a People's Tribunal examined cases of "acquitted accused," generally Muslim terrorism suspects who were subject to years of pre-trial detention (People's Tribunal, 2016). These civil society groups take inspiration from American innocence projects but have actually focused on a quite different phenomenon: wrongful pre-trial detention that occurs without any conviction. It will be argued in this chapter that this was an appropriate approach to law reform that responded to the particular conditions of India, where three-quarters of all prisoners have not been convicted but are awaiting trial.

In 2018, the Law Commission responded to the problem of wrongful detention by proposing a statutory compensation regime that, as in some European countries and China, would provide compensation not only for the wrongfully convicted but also for those wrongfully detained before trial (Law Commission, 2018). It took a made in India approach and rejected the minimal compensation standards of Article 14(6) of the ICCPR as too restrictive for circumstances in India, where as much of the Global South, most prisoners are detained awaiting trial. It rejected proven innocence requirements for compensation used in both England and the United States.

Despite its interest in anti-colonialism and made in India approaches, the Modi government demonstrated no interest in its Law Commission's proposals when it hastily enacted new criminal procedure, evidence and criminal laws at the end of 2023. These laws, combined with China's waning concerns about wrongful convictions and the impact of the second

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Trump presidency, serve as a reminder that miscarriage of justice reforms may be neglected when punitive and authoritarian politics dominate.

Civil society resources in India seem to be focused on death penalty issues with the spectre of wrongful executions looming large. This follows patterns seen in the United States, China and England. It will be suggested that the experience of wrongful convictions undermines the Law Commission of India's 2015 argument that the death penalty should be retained for terrorism cases (McCartney and Walker, 2014; Roach, 2023b). As in other countries, however, the use of alternatives to the death penalty may be used to focus attention away from the inevitability of wrongful convictions (Jouet, 2022; Martin, 2002). Despite this, it will be argued that the Indian courts should no longer uphold the constitutionality of the death penalty because of the experience of wrongful convictions.

10.2 Remedied Wrongful Convictions

10.2.1 Terrorism Cases and False Confessions

A large number of remedied wrongful convictions in India involve terrorism cases. Often, the suspects have been convicted on the basis of false and coerced confessions (Jha, 2019: 63).

One of the best-known wrongful convictions is the Swaminarayan Akshardham Temple case. This case emerged from a horrible act of terrorism in which thirty-three people were killed and more than eighty were injured in an attack on a Hindu temple. The case had all the hallmarks of what Canadian commentator Bruce MacFarlane has identified as the predisposing circumstance for a wrongful conviction, namely, a heinous and well-publicised crime and pressure on the police to make arrests (MacFarlane, 2006). To its credit, the Indian Supreme Court took note that "shocking" and "cruel and revolting" cases require "more than ordinary care" because of their dangers to "dispassionate judicial scrutiny of the facts and the law" (*Adambhai Sulemanbhai Ajmeri v. State of Gujarat* (2014) 7 SCC 716 [132]). In 2006, three accused were sentenced to death and three accused were sentenced to life imprisonment. The convictions were upheld by the High Court even though the confessions were taken in police custody. This suggests that exceptions from standard rules against the admissibility of extrajudicial confessions in India should be reconsidered. Exceptions to procedural regularity create increased dangers of miscarriages of justice, especially in terrorism cases,

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which are often subject to exceptional rules that favour the state (Roach and Trotter, 2005).

Handwriting expert evidence was also accepted, linking the accused to the conspiracy. The High Court rejected that Urdu letters found on the deceased terrorists were planted even though the letters were in perfect condition partly on the questionable basis that "the truth is stranger than fiction" (*Adambhai Sulemanbhai Ajmeri v. State of Gujarat* (2014) 7 SCC 716 [33]). The High Court also rejected medical evidence that the accused had been subject to police abuse while in custody. This case has echoes of the so-called Irish wrongful convictions of the Birmingham Six, Maguire Seven and Guildford Four, which were finally recognised after allegations of police misconduct and forensic error had been rejected multiple times.

In reversing the convictions in 2014, the Supreme Court excluded the false confessions (2014: 90) and noted, "there is no independent evidence on record which corroborates the confessions of the accused persons which were subsequently retracted" (2014: 120). The Court also stressed the need for caution in accepting evidence of accomplices with an interest in placing the blame on others (2014: 93). It concluded, "We fear that the story against the accused persons and its corroboration through the statements of accomplices is an act of concoction to make up a case against them" (2014: 96).

The court adverted to police misconduct by stating that the investigation had been conducted "casually" and "with impunity" (2014: 111). It acquitted the accused after a critical review of the evidence, noting that "the story of the prosecution crumbles down at every juncture" (2014: 120). In reaching this conclusion, the Court stressed its wide and unique appellate powers under Article 136 of the Constitution, which allows the reversals of even findings of fact in the courts below if they would result in "a grave miscarriage of justice" (2014: 130).

Although false confessions and flawed expert evidence are universal causes of wrongful convictions found in all jurisdictions, the ability of an apex Court to grant special leave from the orders and sentences of any court is a feature particular to India. Appellate courts in the common law tradition generally defer to factual findings at trial because of deference to the jury and fears of becoming "the thirteenth juror." The causes of wrongful convictions may tend to be universal, while remedies for wrongful convictions may tend to be particular.

Another particular feature of this case was the willingness of India's Supreme Court to be very critical of the police and even to issue directions to them. The Court concluded its judgment by stating:

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> Before parting with the judgment, we intend to express our anguish about the incompetence with which the investigating agencies conducted the investigation of the case of such a grievous nature, involving the integrity and security of the Nation. Instead of booking the real culprits responsible for taking so many precious lives, the police caught innocent people and got imposed the grievous charges against them which resulted in their conviction and subsequent sentencing. (2014: 136)

The Court's comments recognised the seriousness of terrorism in India. At the same time, it properly stressed that the seriousness of terrorism is a reason for police, prosecutors and courts to ensure that they do not convict the wrong person.

The Court also recognised that when police charge and prosecute the wrong person, resulting in wrongful convictions, it will sometimes be impossible to bring the true perpetrators to justice. Such "who done it" cases where the wrong persons are convicted make it possible for all justice participants, including police and prosecutors, to recognise the evil of wrongful convictions that convict the innocent and at the very same time allow the guilty to go free. At the same time, new American and Canadian registries of wrongful convictions suggest that as of the end of 2024, between 40 and 33 per cent of all remedied wrongful convictions in those countries involve convictions for crimes that never happened and may simply be the product of the suspicions of the relevant criminal justice actors including police, prosecutors, forensic experts and even judges (Henry, 2020; Roach, 2023a: Part II)

In 2016, the Supreme Court upheld some convictions in a 1993 terrorist bombing but overturned others on the basis that the confessions taken from the accused were not voluntary and admissible. As in the 2014 case, the Court concluded that statements from a co-accused were not sufficiently corroborated (*Mohd. Jalees Ansari v. CBI* (2016) 11 SCC 544). In wrongful conviction cases, Indian courts have frequently insisted on corroboration, whereas in other common law systems, rigid requirements for corroboration have gone out of fashion. This may be related to the fact that India does not use juries, whereas appeal courts in other common law countries generally defer to the jury's determination of the adequacy of evidence (Nobles and Schiff, 2000).

In another case, the High Court of Delhi overturned a terrorism conviction based on two eyewitnesses identifying the accused as present in a location shortly before a bomb blast. The Court found no other evidence linking the accused to the crime and concluded that "suspicion … is no substitute for evidence" (*Mohd. Amir Khan v. State* 2006 SCC OnLine Del 866 [11]). In 2017, the Supreme Court reversed terrorism convictions

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again holding that confessions made by the accused while in custody were involuntary (*Seeni Nainar Mohammed v. State* (2017) 13 SCC 685 [8,9]). The Court also adverted to another universal cause of wrongful convictions, namely erroneous and suggestive eyewitness identification and concluded "that the test identification parade was a farce as after the pictures of the accused had been published in the newspaper, the identification parade which is a very weak piece of evidence should not have been conducted" (2017: 24). The case also involved a failure to translate all relevant material for the accused. Issues of inadequate or no translation are an underexplored but likely universal cause of wrongful convictions though one that reflects the particular linguistic make-up of each country and the resources that are available for translation.

All of these remedied terrorism wrongful convictions suggest that it would be a fatal mistake to exempt terrorism cases from the abolition of the death penalty, as suggested by the Law Commission of India in its 2015 report (Law Commission, 2015). These cases also demonstrate that false confessions in police custody are a leading cause of India's remedied wrongful convictions, as is also the case in China.

At the same time, it would be overly optimistic to think that there are no unremedied wrongful convictions in India perhaps especially in terrorism and other emotive cases. Although the judiciary is supposed to be independent and counter-majoritarian, including with respect to protecting the rights of the accused, there is a risk of judicial populism and a danger of the courts failing to correct wrongful convictions (Juss, 2020; Saikumar, 2019).

10.2.2 Terrorism Cases and the Importance of Equality

In overturning wrongful terrorism convictions in 2012, the Indian Supreme Court explicitly adverted to the importance of equality when it stated that "[i]n the country of Mahatma, 'means are more important than the ends.'" It added that "no innocent person" should be targeted because "My name is Khan, but I am not a terrorist." In that case, the Court stressed that the "gravity of the evil to the community from terrorism can never furnish an adequate reason for invading the personal liberty, except in accordance with the procedure established by the Constitution and the laws." It also recognized limits on access to justice for the wrongfully convicted when it stated, "We have been told that many of the accused, because of poverty or for the reason that they had already undergone the sentence, have not preferred appeals before this Court" (*Ashrafkjan v.*

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State of Gujurat (2012) 11 SCC 606). This case serves as an important recognition that prejudice against unpopular political, religious and racial minorities, as discussed in Chapter 7, can be a cause of wrongful convictions. The Indian Supreme Court deserves praise for recognizing this danger and calling it out. It is also an important improvement from a 1955 Supreme Court of India decision that summarily rejected arguments that equality rights had been violated simply on the basis that the accused were tried as individuals without any formal class-based distinctions (*Budhan Choudhry v. State of Bihar* [1955] SCR (1) 1045).

10.2.3 Mistaken Eyewitness Identification

Durga v. State Of Madhya Pradesh 2018 SCC OnLine MP 1519 involved a wrongful conviction and sentence of life imprisonment caused by a tainted eyewitness identification where the victim of an abduction was shown the suspect in the police station before the formal identification procedure. The Court concluded, "the purpose of test identification is not to identify the already identified person" (2018: para 13). This case also involved an identification of the accused while in the prisoner's dock in the courtroom, a practice that is also still used in other adversarial systems (Roach, 2023a: 205–206). The Supreme Court in *Durga* observed that while in dock identifications are permissible, they have limited value in proving whether the accused was guilty. The Court ordered the two accused freed after twelve years in prison. A strong case can be made for eliminating in dock identifications.

In a demonstration of a particular feature of the Indian legal system, the Court in *Durga* also awarded the two accused damages for violations of the constitutional right to life at the same time as it acquitted them. It concluded that the "State cannot wriggle out from its constitutional and tortious liability … Fundamental rights of a person cannot be sacrificed at the altar of misgovernance or at the whims or because of poor investigation. State Government would be at liberty to recover the said amount from the erring officers…" (2018: para 24). The damages awarded to the accused at the same time as they were acquitted drew on the widely recognized willingness of the Supreme Court of India to devise innovative remedies for constitutional violations. Providing damages at the same time as a person is acquitted would be revolutionary in the United States or in England. Remedies may be more influenced by particular local laws and conditions than the common and even universal causes of wrongful convictions.

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In 2019, a three-judge panel of the Supreme Court overturned four convictions in a case involving brutal murders of five people and a rape. The accused, members of a nomadic tribe that had once been classified as criminal (British Broadcasting Company, 2019), were identified by witnesses from photos and convicted on that basis even though there was little light for the witnesses to observe the offenders during the commission of the crimes. Three of the accused had been sentenced to death and had their convictions upheld by the High Court and by the Supreme Court in 2009. Up to that point, seven judges in three courts had found that accused who are "nomadic tribespeople and among India's poorest" to be guilty. In addition, both the state governor and the President of India had refused to grant executive clemency (British Broadcasting Company, 2019). In 2019, the Supreme Court reconsidered its decision and in acquitting the accused stressed that, "though the charge is of rape and murder, there is no forensic evidence corroborating the prosecution case" including no fingerprints or DNA of the accused even though both fingerprints and DNA were collected from the accused (*Ankush Maruti Shinde v. State of Maharashtra* (2019) 15 SCC 470 9.1, 9.7).

There is some potential for DNA exonerations in India, though it will require careful collection of biological material at the crime scene and accurate comparison with DNA samples obtained from suspects. In this case, it is reasonable to assume that the DNA and fingerprints taken from the accused did not match those found at the crime scene. There have been cases in the United States where prosecutors have maintained the accused was guilty as an accomplice even when he was excluded as the donor of DNA found at the crime scene (Garrett, 2011a). DNA can help reveal wrongful convictions. Even its defenders, however, admit that it is a "fallacy" to think "that truth can be poured out of a test tube and make every hard decision easy…" (Scheck, Neufeld and Dwyer, 2000: 332).

The Court also expressed concerns about the conduct of the identification parade noting there was "no statement that the dummies resembled the accused persons" (*Ankush Maruti Shinde v. State of Maharashtra* (2019) 15 SCC 470 at 9.6). It is best for proper identification procedures to be legislated with guidelines for the police, as opposed to relying on courts regulating identification procedures on an episodic case-by-case basis (Roach, 2023a: 207–214).

The Court also found unfairness through a lack of disclosure that a witness had identified people as perpetrators from a photo line-up who were not the accused. The witnesses told the police the suspects spoke Hindi but the accused spoke Marathi (British Broadcasting Company, 2019). Lack of full

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disclosure has also been a frequent cause of wrongful convictions in western democracies. Again, statutory disclosure rules that specifically direct the police and prosecutors may be more effective than case-by-case judicial regulation that places the onus to seek disclosure on the accused.

This 2019 *Ankush Maruti Shinde* case also demonstrated the willingness of Indian courts to order compensation and provide directions to the police in the same judgment that corrected the wrongful conviction. Compensation of 500,000 rupees or 2,600 rupees for each month the men was imprisoned, ordered and each man received total compensation equivalent to £5,696 (British Broadcasting Company, 2019). The Court gave the police six months to implement new training programs for the police to prevent the investigative errors seen in this case (*Ankush Maruti Shinde v. State of Maharashtra* (2019) 15 SCC 470 at 22). The Court also directed that the "erring officials/officers identified, as responsible for failure of a prosecution case, on account of sheer negligence or because of culpable lapses, must suffer departmental action" with investigations commencing within three months (2019: 23). In western democracies, police tunnel vision is a frequent cause of wrongful convictions, but one that courts have been reluctant to address. The famous willingness of Indian courts to engage in public law litigation can provide additional remedies for wrongful convictions. That said, the optimal protection against wrongful convictions will require a hybrid of judicial, executive and legislative regulation of practices that cause wrongful convictions (Findley, 2016).

10.2.4 Evidence from Incentivized Witnesses

The Supreme Court has overturned a drug smuggling conviction by stressing that evidence of a co-accused is "a very weak type of evidence which needed to be corroborated by some other evidence … . In the present case no such corroborative evidence has been led" (*Mohammed Fasrin v. The State* (2019) 8 SCC 811). In the same case, the Court classified the accused's confession in police custody as also "a weak piece of evidence" in the absence of corroborative evidence. The Court acquitted the accused because there was no other evidence linking them to the crime. The Supreme Court of India is much more willing than appellate courts in western democracies to reevaluate the sufficiency of evidence that has resulted in a conviction at trial. The judges have also defended their right to appoint judges as part of their anti-majoritarian role.

The Indian Supreme Court has long been alive to the risk of wrongful convictions. In an oft-quoted passage from a 1973 judgment that stresses

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the importance of giving the accused the benefit of a reasonable doubt, the Court stated that while "wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person." At the same time, the Court also recognized that "some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether" (*Kali Ram v. State of Himachal Pradesh* 1973 AIR 2773).

10.3 Missing Wrongful Convictions

The exact number of unremedied wrongful convictions is unknowable in any country. It is, however, possible to compare the characteristics of the relatively few remedied wrongful convictions in India with other remedied wrongful convictions commonly found in other countries. This can provide a rough and ready guide to understanding some wrongful convictions that may exist but have not been remedied.

10.3.1 The Lack of DNA Exonerations

None of the remedied wrongful convictions examined earlier or listed in an international registry that contains 379 wrongful convictions from India (Forejustice) include a DNA exoneration or one based on flawed forensics. Remedied wrongful convictions in India have been "low tech" both in the sense that they are not caused by faulty forensics or generally remedied through better forensic science including DNA testing. This may change in the future.

The majority of DNA exonerations in the United States involved cases of murder and rape where biological evidence was available (Garrett, 2011a). A 2023 report by the civil society group Project 39A has reported increased use of DNA in India, with fifteen labs performing DNA work between 2013 and 2017. At the same time, it found that these labs do not have adequate procedures or equipment to prevent contamination, and they do not perform internal validity testing. In addition, the majority of samples received by these labs are mixed DNA samples that have an increased risk of error (Project 39A, 2023: 18). Increased and accurate use of DNA testing in India would likely both prevent wrongful convictions and if available after conviction lead to increased exonerations. As of the end of 2023, there were 561 people on India's death row, most of whom were convicted of murder with sexual offences (Project 39A,

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2024: 18–19). If evidence was properly retained and analysed, it is likely that India could see death row exonerations similar to those in the United States, which, as discussed in Chapter 6, has led to wrongful conviction reforms.

10.3.2 No Remedied Guilty Plea Wrongful Convictions

As in China, none of the remedied wrongful convictions in India have involved false guilty pleas that have produced large numbers of wrongful convictions in England's post office scandal or mass exonerations in the United States associated with drug lab and policing scandals. At the same time, restrictions on plea bargaining in India may mean that there are less guilty plea wrongful convictions in India than in western democracies. In other words, India has demonstrated some of the formal suspicion of the use of guilty pleas, as seen in some states examined in Chapter 4 that use inquisitorial systems.

Before plea bargaining was authorized by legislation in India in 2006, Indian courts took the view that plea bargaining was illegal. In a 1980 judgment, Justice Bhagwati of the Supreme Court declared that plea bargaining would have the effect "of polluting the pure fount of justice because it might induce an accused to plead guilty to suffer a light and inconsequential punishment rather than go through a long and arduous criminal trial…" This early concern about false guilty pleas was also set off against Justice Bhagwati's fears that plea bargaining could "let off a guilty accused with a light sentence" and even "encourage corruption and collusion and as a direct consequence, contribute to the lowering of the standard of justice" (*Kasambhai Ardul Rehmanbhai Shaikh v. State of Gujarat* (1980) 3 SCC 120).

In the years since, commissions have recommended plea bargaining as a means of increasing the efficiency of the Indian criminal justice system and to decrease the time that many accused spent in pre-trial detention without always adverting, as Justice Bhagwati did, to the dangers of false guilty pleas. Since 2006, guilty pleas have been allowed in India but generally not in the most serious cases (Singh, 2021). As discussed in Chapter 4.5, similar restrictions are found in some countries based on inquisitorial systems. They have the potential to at least limit the harm of guilty pleas that are taken without sufficient attention to factual accuracy.

There is no requirement to determine factual accuracy before a guilty plea is accepted in India. Canada in 2019 added a requirement of a factual

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basis for a guilty plea to pre-existing requirements that the guilty plea be voluntary and informed. This legislative change responded to an egregious case in which an Indigenous man accused with a mental disability pled guilty to a break and enter that happened at a time when he was already imprisoned for another offence (*R. v. Catcheway* 2018 MBCA 54). Unfortunately, Canadian courts have been reluctant since the 2019 amendments to take steps to question the factual accuracy of pleas, especially in cases where the accused is represented by a lawyer (*R. v.C.K.* 2021 ONCA 826; *R. v. Zaworski* 2022 BCCA 144, Roach, 2023a: chs 1–3).

Extensive use of pre-trial detention and long trial delays in India creates incentives for pre-trial detainees to plead guilty. Given the bar on appeals from guilty pleas, it would be extremely difficult, if not impossible, for such person to correct false guilty pleas. Given India's very high rate of pre-trial imprisonment, it is likely that many accused in India are pleading guilty when they may not be guilty. This is a phenomenon that is increasingly recognized in Canada, the UK and the United States. At the same time, these jurisdictions have failed to come up with effective remedies to prevent false guilty pleas, especially given their use of plea bargaining and sentencing discounts for accused who pled guilty. India has attempted to restrict formal plea bargaining, but the exact incidence of false guilty pleas in India requires further research.

10.3.3 No Remedied Imagined Crime Wrongful Convictions

There is also an absence of remedied wrongful convictions in India for "imagined" crimes that did not happen even though they constitute 40 per cent of all remedied wrongful convictions in the American registry and a third in the Canadian registry as of the end of 2024. Such wrongful convictions are often the product of errors in forensic science, which pronounce accidental or natural deaths to be intentional crimes (Henry, 2020; Roach, 2023a: chs 4–6). Imagined crime wrongful convictions may be less prevalent in India and other developing countries that do not rely on forensic science as much as other countries. That said, imagined crime wrongful convictions can occur even in a "low-tech" criminal justice system to the extent that police may associate certain groups and individuals with crimes. In such cases, a combination of circumstantial evidence and stereotypes may be used to create wrongful convictions even though no crime has occurred.

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10.3.4 No Remedied Wrongful Convictions after Appeals Have Been Exhausted

A final striking omission in the Indian wrongful conviction cases is the absence of cases that have resulted in relief after ordinary appeals have been exhausted. Almost all of the cases examined earlier have been corrected by the Supreme Court on the accused's first appeal. The only exception that I am aware of is *Ankush Maruti Shinde v. State of Maharashtra* (2019) 15 SCC 470, where the Supreme Court revisited its decision to uphold murder and rape convictions that it had affirmed ten years earlier. This demonstrated a praiseworthy willingness to revisit a decision. Nevertheless, it is an exception. In contrast, over half of the cases in the United Kingdom registry were the result of second appeals on referrals by the Criminal Cases Review Commission. In the United States, many wrongful convictions are only corrected as a result of successive post-conviction proceedings or even by the use of pardons by the executive branch of government.

Articles 72 and 161 of the Indian Constitution give the President and State Governors powers to issue pardons but without any specific reference to new evidence that may cast doubt on guilt or even establish innocence. The language of pardon suggests forgiveness as opposed to a recognition of injustice. At the same time, a study of 275 requests for pardons by death row prisoners between 1947 and 2006 has found that "the executive has commuted a large number of sentences on the grounds of inadequate or unsatisfactory evidence" (Batra, 2021: 151–152) even when judges had not provided a remedy. The executive has responded to concerns about lingering doubts, breaks in the chain of the custody of evidence, questionable forensic evidence and inadequate defence that did not move the courts. This has been recognized as a "welcome development" given "the failures of the Indian criminal justice system – even in capital cases…" (Batra, 2021: 161). At the same time, Batra also warned that "the mercy jurisprudence of the executive also demonstrates significant arbitrariness, perhaps unsurprising for such a closed and secretive process" (2021).

Different Presidents of India have taken radically different approaches to executive clemency. Some have issued pardons in most cases, while others have issued none. Others have delayed making decisions for years despite judicial urging for a prompt decision. The Indian Supreme Court has responded to such delays in one case by commuting the sentence to life imprisonment (*Devender Pal Singh Bullar v. State* (2013) SC 1975).

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Because Articles 72 and 161 provide constitutional rights, the Indian courts will subject executive decisions about pardons to a limited form of judicial review (*Shatrughan Chauhan v. Union of India right* (2014) 3 SCC 1). From a legal process perspective, this demonstrates interaction or dialogue between the courts and the executive.

The use of executive clemency as the ultimate safeguard against wrongful convictions and wrongful executions can be compared favourably with the absence of executive clemency in China as discussed in Chapter 9.4 or the hypocrisy of the United States Supreme Court, which, as discussed in Chapter 6.4, has offered the availability of executive clemency as a reason for not recognizing a constitutional right to claim innocence while at the same time imposing no due process standards on the process when a convicted person seeks executive clemency. As will be seen in section 10.5, however, India's new 2023 criminal procedure code attempts to impose tight time limits on the executive's constitutional powers of pardon and can be seen as another regressive measure with respect to wrongful convictions.

10.3.5 Summary

Drawing on comparative experience of wrongful convictions, researchers and the Law Commission of India should examine whether the abovementioned "missing" remedied wrongful convictions found in other countries also happen in India. Increased use of DNA in India as encouraged by its criminal procedure law enacted in 2023 may reveal more wrongful convictions as well as confirm guilt, especially with respect to sexual crimes. At the same time, concerns have been expressed about the dangers of contamination and lack of validation tests in the fifteen labs in India that conduct DNA analysis (Project 39A, 2023). Increased use of other less reliable forensic science may result in more wrongful convictions for crimes that never occurred.

There is also a need to be attentive to the fact that those who plead guilty may be responding to their pre-trial detention and may not always be guilty. Although India excludes serious charges from plea bargaining for crime control reasons, such restrictions may also, as discussed in Chapter 4.5, have the unintended but valuable effect of limiting false guilty pleas, something that Justice Bhagwati to his credit recognized was possible in a 1980 Supreme Court decision declaring plea bargaining to be illegal (*Kasambhai Ardul Rehmanbhai Shaikh v. State of Gujarat* (1980) 3 SCC 120).

Although Indian appellate courts have discovered and remedied wrongful convictions, they are unlikely to catch all cases. The

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executive has, at times, used constitutional pardon powers as a safeguard (Batra, 2021). Thought should be given to expanding the ability to obtain remedies after appeals have been exhausted either to the courts or to an executive agency. For example, an advisory committee with investigative powers could be established to make recommendations to India's president and State governors on whether pardons should be granted because of concerns about the reliability of the conviction as well as other grounds including whether the courts have properly considered all mitigating factors in sentencing, including those that constitutionally should be considered in death penalty cases. In India, as in the United States, the death penalty has been upheld under the constitution but only on the basis of constitutional requirements that mitigating circumstances be considered (*Bachan Singh v. State of Punjab* (1980) 2 SCC 684). In a 2015 report, the Law Commission of India noted that retired judges of the Supreme Court had found a failure to consider such factors in at least sixteen of sixty-nine death sentences between 2003 and 2013 (Law Commission, 2015: 5.4.11).

10.4 Increasing Use of the Death Penalty

Unlike China and the United States, the use of the death penalty is increasing in India in large part in an attempt to respond to impunity for sexual and other forms of violence against women. It has also been used in terrorism cases, though some concerns have been raised about the guilt of some who have been hanged, including those on the periphery of terrorist attacks, such as the 2001 attack on India's legislature.

10.4.1 Special Procedures for Capital Cases

As in China, Indian law provides special restraints on cases involving the death penalty. The Code of Criminal Procedure requires confirmation of a death sentence by a High Court that can consider any point bearing upon the guilt or innocence of the convicted person. Somewhat similar to the mandatory review of death sentences now provided by the Supreme People's Court in China, this provision has the potential to safeguard against wrongful convictions by empowering courts to conduct necessary inquisitorial inquiries. In 2022, the High Court acquitted 43 of 101 prisoners who appealed their death penalty cases. In 2023, the High Court acquitted thirty-six cases, commuted the death sentence in another thirty-six cases and only confirmed one death sentence (Project 39A, 2024). As

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in the United States and China, the ability to engage in multiple appeals in death penalty cases restrains and delays its use.

Concerns have been expressed that courts in India, as in China, sometimes apply a theory of residual doubt. In such cases, courts may decide not to impose the death penalty because of doubts about the conviction, but still convict the accused, sentencing them to life imprisonment (Project 39A, 2020: 88–93). In this way, the death penalty could facilitate wrongful convictions even while avoiding wrongful executions. In 2022, appellate courts commuted 48 of 101 death penalty cases, and in 2023, they commuted another thirty-six death penalty cases (Project 39A, 2024). It is not known the degree to which these rulings reflected residual doubt or mitigating circumstances.

At the same time, Indian appellate courts are much more willing to acquit accused on appeal than courts in China or in many western democracies. Since Project 39A began collecting statistics in 2016, it has recorded twenty-nine acquittals entered by the Supreme Court in death penalty cases and 178 acquittals entered by the High Courts (2024). This suggests that Indian appellate courts are not reluctant to acquit people because of concerns about the sufficiency of the evidence in serious cases. They have prevented over 200 potential wrongful convictions in death penalty cases alone between 2016 and 2023. At the same time, there are 561 people on India's death row, reflecting an almost 50 per cent increase since 2016 (Project 39A, 2024). In some of its acquittals the Supreme Court did not hesitate to conclude that there was a reasonable doubt about guilt and criticize the police for their approach to the investigation, including not pursuing alternative suspects. For example, the Supreme Court was willing to find frailties in eyewitness identifications, whereas other appeal courts in different adversarial systems would have deferred to trial judgments on this issue (Project 39A, 2024: 58–62). The Indian courts do not require proven or obvious innocence as often required in China and the United States.

10.4.2 Increased Risk of Wrongful Convictions as a Reason to Abolish the Death Penalty

There is a potential for Indian law reformers to focus on the danger of wrongful convictions as a reason to abolish the death penalty. In 1980, four judges of the Indian Supreme Court upheld the constitutionality of the death penalty by asserting that "in India, ample safeguards have been provided by law and the Constitution which almost eliminate, the chances of an innocent person being convicted and executed for a capital offence"

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(*Bachan Singh v. State of Punjab* (1980) 2 SCC 684: [76]). The Supreme Court of India should reconsider its approach to the death penalty in light of increased experience in India of applying the death penalty and ample evidence of frequent acquittals on appeal of people sentenced to death. Although Indian appeal courts have done important work in correcting wrongful convictions in death penalty cases, it would be hubris that disregards human fallibility to think that appeal courts are able to correct every wrongful conviction.

India's experience with wrongful convictions confirms the wisdom of Justice Bhagwati's eloquent dissent in *Bachan Singh*, 1980 where he warned that "once a man is killed, the punishment is beyond recall or reparation." He stressed that it was impossible to eliminate the chance of error and of executing an innocent people and cited examples from the United States, France and England that led to the abolition of capital punishment. He explained:

> We are, by and large, ignorant of modern methods of investigation based on scientific and technological advances. Our convictions are based largely on oral evidence of witnesses. Often, witnesses perjure themselves as they are motivated by caste, communal and factional considerations. Sometimes they are even got up by the police to prove what the police believes to be a true case. Sometimes there is also mistaken eye witness identification and this evidence is almost always difficult to shake in cross-examination. Then there is also the possibility of a frame up of innocent men by their enemies. There are also cases where an over-zealous prosecutor may fail to disclose evidence of innocence known to him but not known to the defence. *(Bachan Singh*:251)

A majority of the Indian Supreme Court had previously adverted to the impossibility of repairing wrongful executions in a 1973 case that stressed that wrongful convictions did more damage than wrongful acquittals. It warned that most victims of wrongful convictions are not "fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled" (*Kali Ram v. State of Himachal Pradash* 1973 AIR 2773).

A concern about executing the innocent is not the only reason to abolish the death penalty. Given India's history and egalitarian aspirations, it may not even be the most important reason. In his 1980 dissent, Justice Bhagwati stressed that the death penalty was applied in a manner that was arbitrary and discriminatory against the poor and other disadvantaged groups (*Bachan Singh v. State of Punjab* (1980) 2 SCC 684: 366) The Law Commission in its 2015 report stressed that of 373 prisoners then on

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death row "over 75% belong to backward classes and religious minorities. 93.5% of those sentenced to death for terror offences are religious minorities or Dalits" (Law Commission, 2015: 5.3.10) (Jha, 2019). As discussed in Chapter 7.3, the United States Supreme Court rejected a challenge to the discriminatory application of the death penalty against Black people in 1987 (*McCleskey v. Kemp* 481 US 279 (1987)). Although the causes of wrongful convictions in capital cases may tend to be universal, remedies for wrongful convictions, including whether the death penalty will be retained or abolished, will reflect local circumstances.

The Indian Supreme Court could look to a Canadian decision for justification in overturning its 1980 decision upholding the death penalty. In 2001, the Supreme Court of Canada overruled its 1990 precedents that allowed extradition from Canada to face the death penalty. It cited increased remedied wrongful convictions in Canada, the United States and England, as well as the impossibility of providing a remedy once a person has been executed (*United States of America v. Burns and Rafay* 2001 SCC 7). Martin (2002) and Jouet (2022) have both warned that an exclusive focus on the risk of wrongful convictions in death penalty cases obscures the danger of wrongful convictions that result in life imprisonment. They have a point, but given the authoritarian nature of the Modi government and demands to use the death penalty as a visible response to highly publicized crimes, including those of sexual violence and terrorism, judicial abolition or restriction of the death penalty seems to be the only viable reform possibility for the time being. The Indian courts have not hesitated to push back against increased use of the death penalty raising the question of whether they should reconsider its constitutionality, especially in light of recent Indian developments that increase the risk of wrongful convictions. At the same time, the Supreme Court's undermining of the death penalty by frequently allowing appeals may result in less of a confrontation than ruling that the death penalty is unconstitutional. Populist support for the death penalty increased in the United States and spurred a backlash to its 1972 holding that the death penalty in its form at the time was unconstitutional (Garland, 2010). Judicial invalidation of the death penalty could result in renewed attempts by Modi to influence appointments to the judiciary.

10.5 The 2023 Laws and the Increased Risk of Wrongful Convictions

The *Bharatiya Nagarik Suraksha (Second) Sanhita, 2023* (BNSS2S) Bill 174 of 2023 was quickly enacted at the end of 2023 to replace the Criminal Procedure Code first enacted in 1973. The new legislation was enacted

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without effective Parliamentary opposition but as part of claims by the Modi government to renounce colonial laws and to better respond to sexual violence. The 2023 law is extremely disappointing because most of its few features that actually change previous laws will increase the risk of wrongful convictions including wrongful executions.

10.5.1 Increased Police Custody and Increasing the Risk of False Confessions

As in China, false confessions obtained by the police are the leading cause of remedied wrongful convictions in India. The danger of false confessions has long been recognized in Indian law. Section 26 of the Evidence Act, 1872 provided a general prohibition on the admissibility of confessions taken in the custody of a police officer unless the confession was also made in the immediate presence of a magistrate. This provision, however, was subject to statutory exceptions as well as the admissibility of evidence obtained as a result of an illegal police interrogation. Both of these loopholes were retained in the new evidence law enacted at the end of 2023 despite arguments made by the Law Commission that they should be closed.

The Criminal Procedure Law enacted at the end of 2023 increased this risk of false confessions. Under s.187(3) of the *BNSS2S*, police custody can be extended by a magistrate "on adequate grounds" for up to a new maximum of sixty or ninety days, depending on the seriousness of the charge. As Project 39A has argued, "Extended police custody magnifies the likelihood of custodial violence; practically nullifying the constitutional and other safeguards against police excesses which recognise the pervasiveness of custodial violence…" (Project 39A, 2023). Extended police custody will also increase false confessions and wrongful convictions.

The new law also facilitated transfers from judicial to police custody. This may make it easier for a suspect to make a false confession when they find themselves in police custody for a second or third time and perhaps after the police have had time to manufacture or exaggerate the evidence against the detainee. The potential to lengthen police custody itself may make it seem pointless for detainees to resist police pressure to make confessions.

One protection against police abuse and false confessions is regular monitoring and medical examination of the accused to detect signs of abuse. Unfortunately, the new law did not follow the Supreme Court's suggestions of medical examinations of detainees at least every 48 hours

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(*D.K. Basu v. West Bengal* (2015) 8 SCC 744). Section 53 of the new law provided for one medical examination "soon after the arrest is made" and only one more subsequent examination if the medical person determines it is necessary. This presents dangers of increased false confessions. At the same time, it should be understood that the police can obtain false confessions without actual violence. Sometimes the threat of violence or other forms of stress may be sufficient. The new law also did not implement recommendations by the Law Commission that it should be presumed that the police caused injuries suffered by a detainee while in police custody.

Another safeguard against police abuse is the attendance of lawyers during interrogation. Unfortunately, s.38 of the new law provides that while the accused is supposed to be able to consult with a lawyer when "arrested and interrogated by the police," they do not have the right to have the lawyer "present throughout the interrogation." Another safeguard against police abuse is video and audio taping of interactions between the police and the suspect. Section 183(1) of the new law, however, makes it discretionary and not mandatory for magistrates to video and audiotape any confessions made by suspects in their presence. Section 183(4) also did not require that confessions be read back to suspects before being signed. This increases the risk that suspects, especially those with limited literacy, will not know the contents of the confessions that they sign. There is also discretion under s.180 about whether witness statements will be video or audio taped even though such records may be helpful in detecting witnesses who lie. As discussed in Chapter 3.4, s.22 of the new evidence law seems to prohibit unreliable confessions, but, as in China, the effect of this exclusionary rule will depend on the willingness of courts to enforce it. The law also contemplates the admission of confessions even if the accused was drunk or deceived.

10.5.2 Incentivized Witnesses

Another leading cause of remedied wrongful convictions is evidence from incentivized witnesses, such as jailhouse informants or accomplices, who falsely implicate the accused. Under sections 343 and 344 of the BNSS2S, accomplices and others may be encouraged to give testimony against the accused by the tendering of a pardon. Although there is still the possibility that a lying witness could be prosecuted for perjury, it will be important for any pardon or other benefit received by the prosecution's witnesses to be disclosed to the defence. Lack of full disclosure of all relevant evidence to the accused is also a leading cause of wrongful convictions.

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10.5.3 *Increased Emphasis on Forensic Investigations and Increasing the Risk of Forensic Error*

Section 176(3) of the BNSS2S provided for mandatory forensic investigations in cases punishable by seven years or more. Although an understandable attempt to improve the Indian criminal justice system, such mandatory requirements may require limited forensic resources to be wasted in cases where forensic evidence is not available. The attendance of investigators at the scene of the crime and their work with investigators also create dangers that they will be subject to the same form of confirmation bias that led FBI fingerprint analysts to falsely identify American lawyer and convert to Islam, Brandon Mayfield, as a suspect in the 2004 Madrid terrorist bombings (Morgan, 2023: 143). The Home Secretary has linked India's emphasis on forensic science with expected increases in conviction rates promising that in a decade India will surpass even China by having the highest conviction rates in the world (India Ministry of Home Affairs, 2025).

The dean of India's National Forensic Science University created by the Modi government in 2020 has written an overly optimistic account of the positive effects of the 2023 law arguing that it will allow forensic experts to provide "impartial, compelling and scientific evidence….with the ultimate goal of providing flawless justice" (Pokhariyal and Dubey, 2023: 4). His article expressed confidence not only in DNA testing but also in voice identification and polygraphs. He argued that certification of experts "ensures that these experts meet predefined standards of competence and ethical standards" (2023: 11). The article was written in a volume entitled *Forensic Science and Human Rights* and published by India's Human Rights Commission. Alarmingly, none of the chapters in the volume discussing fingerprinting, pathology, image identification, ballistics, handwriting analysis, forensic psychology and lie detection discuss the possibility that errors in forensic science can contribute to wrongful convictions or the experience with such errors in other democracies.

The civil society advocacy group Project 39A has raised concerns that most of India's forensic labs are controlled by the police, understaffed, unaccredited and do not use quality controls (Project 39A, 2023). Although forensic evidence can increase the accuracy of the justice system, it can also introduce errors that may not be detected, especially in the absence of a knowledgeable cross-examination of the person who provides opinion evidence.

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Sections 328 and 329 of BNSS2S restrict the ability of the accused to cross-examine forensic experts who prepared reports while also allowing their reports to be used at trial against the accused. There is no right to cross-examine the expert who prepared the report, as in the United States (*Melendez-Diaz v. Massachusetts* 557 US 305 (2009). Even if such a right were recognized, many accused in India would not have access to a defence lawyer, let alone a defence expert. The new law seems to assume that the expert report prepared for the state is "the gospel truth" (Goswami and Goswami, 2024).

Judges in India should use their powers under s.329(2) of the new law to summon the expert who prepared the report to testify at trial so that the expert can be cross-examined about the methods used to produce the reports and the conclusions reached in the report. As Project 39A has commented:

> Without oral examination of experts, courts cannot properly examine issues regarding the admissibility and weight of the forensic evidence. This includes the foundational validity of the techniques used, qualifications and necessary experience of the expert in that type of examination, and whether they reliably performed it in that particular case. Given the crucial role that forensic evidence plays in criminal justice administration, lack of adequate scrutiny of forensic reports would adversely affect the right to fair trial of both victims and accused, alike. (Project 39A, 2023: 64)

A refusal to allow cross-examination of an expert led to a man twice being wrongfully convicted of a sexual assault of a child before the man became India's first DNA exoneration (Goswami and Goswami, 2024).

Analogies can be drawn with South Africa, another country where there are concerns about the reliability of forensic science including a lack of trained forensic experts and consequent backlogs (Visser and Oosthuizen, 2009). Although accused in some South African cases have successfully challenged unreliable forensic science evidence including DNA, fingerprinting, shoe print comparisons and ballistics (Visser and Oosthuizen, 2009), Jo-Mari Visser (2015: 30–31) has warned that these challenges are exceptional. Most accused in South Africa depend on under-funded state legal aid, and South African courts accept the state's forensic evidence when it is not effectively challenged by the defence. She also warned that barriers to defence experts are an acute problem in "developing countries" (2015: 38) (de Visser and Scholtz, 2023). Similar problems have been experienced in the Caribbean (*Stubbs v. The Queen (Bahamas)* 2020 UKPC 27).

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By requiring forensic experts to attend to crime scenes in serious cases, the BNSS2S may as intended by the Modi government increase conviction rates but also introduce a new source of error that has frequently been a cause of remedied wrongful convictions in other countries. This is especially the case as India does not have an effective system of accrediting and regulating forensic service providers (Goswami and Goswami, 2024), and some in its forensic community seem oblivious to the risk of error (Pokhariyal and Dubey, 2023). As discussed in Chapter 3.5, forensic errors even with respect to DNA have required other countries such as Bermuda to audit cases for wrongful convictions (*Washington v. The King (Bermuda)* 2024 UKPC 34). It remains to be seen whether India will take similar steps to respond to inevitable forensic error.

The emphasis on the crime control value of forensic evidence in the 2023 Indian law is not unprecedented. As discussed in Chapter 6.3, far more money was allocated in the American *Justice for All Act* of 2004 towards the collection and analysis of DNA as a means to identify perpetrators of crime than to using DNA analysis after conviction to free innocent accused.

10.5.4 Increasing the Danger of False Guilty Pleas

The new law encouraged plea bargaining by allowing, in some cases, one quarter of the minimum punishment, including time spent in pre-trial detention, to be awarded as a reward for a guilty plea (BNSS2S, s.468). The only requirement for such guilty pleas is that they be voluntary, not that they be factually accurate (BNSS2S: s.468). This increases the risk of wrongful convictions through false guilty pleas in India. Those subject to horrendous conditions of pre-trial detention and trial delay in India may make perfectly rational decisions to plead guilty even if they are innocent or have a defence.

In addition, section 416 of the new law prohibits appeals from guilty pleas, thus preventing appeals by those who falsely pled guilty because of despair or a hope of being released sooner from pre-trial detention but subsequently had second thoughts. This suggests that not only may false guilty pleas increase in India but that as in China they will not be remedied. To be sure, India restricts the seriousness of the offence subject to plea bargaining. Nevertheless, plea bargains could be used in cases similar to the Post Office Scandal, which, as discussed in Chapter 5.9, was the largest mass miscarriage of justice in England.

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In the interests of efficiency, the BNSS2S provided for increased use of summary trials while also in section 417 not allowing appeals from them. These restrictions on appeals are especially unfortunate given that most remedied wrongful convictions in India have been corrected through successful appeals by the accused from convictions. As discussed in Chapter 4.5, wrongful convictions have been documented in Chile, Germany and Switzerland from the use of summary procedures. Those wrongfully convicted of more minor crimes under summary procedures in other democracies rarely have the incentives or means to seek their own remedies for wrongful convictions. Wrongful convictions for minor crimes are often only corrected with the assistance of Criminal Cases Review Commissions or when the state takes its own remedial actions and discovers the error.

10.5.5 New Time Limits and Limits on Judicial Review of Mercy and Commutation Applications

As discussed earlier, India's ultimate check on wrongful convictions is the constitutional powers of state and national executives to grant mercy (Batra, 2021). Section 472 of the 2023 BNSS2S, however, purports to restrict convicted persons to one pardon petition even though many wrongful convictions are only corrected after multiple attempts. It also purports to restrict all judicial review of the President's or Governor's pardon decision despite the Supreme Court having asserted limited judicial review powers if prerogative executive powers are exercised in bad faith, without taking into account relevant circumstances or taking into account irrelevant considerations or exercised in an arbitrary manner (*Epuru Sudhakar v. Govt. of Andhra Pradesh* (2006) 8 SCC 161. See also *R. v. Secretary of State ex parte Bentley* [1993] 4 All E.R. 442). This is an example of a populist backlash against the independent judiciary.

Perhaps most ominously, the new law provides a new and short thirty-day time limit from the time of being informed of the adverse judicial decision for a mercy petition to be made. There is also a sixty-day time limit for petitions to the President after the state Governor has rejected a mercy petition. These deadlines may fall even before exhaustion of all avenues to seek judicial relief including under Article 136 of the Constitution. They could result in the executive allowing executions before all possible appeals have been exhausted, something that as discussed in Chapter 6.6.3 happened in the waning days of Trump's first term as President.

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Executive clemency has provided a safeguard against wrongful convictions in India, and the 2023 statutory restrictions on the constitutional powers of pardons may be subject to constitutional challenges in the courts. Regardless of the result of such challenges, the new statutory restrictions on executive clemency demonstrate a neglect of the inevitability of wrongful convictions and an impatience about taking time to correct such miscarriages of justice.

10.5.6 Efficiency over Accuracy?

The main purpose of India's 2023 BNSS2S was to make the Indian criminal justice system more efficient. To this end, it imposed many time limits both on police investigations and various court proceedings including limiting adjournments that may be necessary for an adequate defence. It also allowed proceedings when the accused does not understand the proceedings or is not present (BNSS2S ss.356–357). Victims are able to appeal acquittals but accused who pled guilty or are found guilty of petty crimes are denied appeals (BNSS2S ss.413, 416–417). The new law elevated social interests in efficiency and the interests of crime victims over the interests and rights of those accused of crime who may be victims of miscarriages of justice.

The 2023 law increases the time suspects can spend in police detention thus increasing the risk of false confessions. Its new emphasis on forensic investigations may introduce another source of error, especially given concerns about the delivery of forensic services that have been documented in India. At the same time, it is possible that increased use of DNA may lead to DNA exonerations. As in the United States, these exonerations will occur mostly in cases involving sexual assault even though one of the aims of the 2023 law is to increase conviction rates in cases of sexual violence.

It remains to be seen whether Indian courts will continue in the face of the 2023 laws and opposition from the Modi government to be concerned about a broad range of miscarriages of justice. The Indian Supreme Court has closely reviewed and overturned many death penalty cases. Such acts of anti-majoritarian judicial independence may continue. Conversely, there may be, as in the United States, attempts to appoint judges who are less interventionist in criminal justice matters. DNA exonerations could also provide a model for a more conservative Indian judiciary to adopt a more restrictive standard of post-conviction review that requires proven or obvious innocence.

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10.6 Compensation and the Unmet Challenges of Wrongful Pre-trial Detention

One of the problems of a focus on a "global innocence movement" (Godsey, 2017) and an international right to claim innocence (Garrett, Helfer and Huckerby, 2021) is that it may ignore local problems and priorities. The Indian courts have long been concerned with the plight of pre-trial detainees or undertrials. In a 1979 case, the Indian Supreme Court in a decision by Justice Bhagwati ordered legal aid for pre-trial detainees. He concluded that the detainees were disproportionately disadvantaged and that the state had an obligation to provide them with both legal counsel and a speedy trial (*Hussainara Khatoon v. State Of Bihar*, 1979 SCR (3) 532). Despite adopting branding used by innocence organizations in the United States, a 2016 report coordinated by the Innocence Network of India examined not the wrongfully convicted but the "innocent acquitted," people who were detained between three and twenty-three years in pre-trial detention before eventually being acquitted of terrorism charges (People's Tribunal, 2016). In the same year, the Delhi High Court asked the Law Commission of India to examine compensation for those who were acquitted after many years of pre-trial detention. This reflected recent statistics that 77 per cent of all prisoners in India are held in pre-trial detention awaiting trial, with 30 per cent of these prisoners being detained for a year and 8 per cent detained for three years or more, as well as India's low conviction rates at trial (Roach, 2023b)

10.6.1 The Law Commission's Wrongful Prosecutions *Report*

The Law Commission's subsequent 2018 report on *Wrongful Prosecutions* demonstrated the importance of reformers responding to local conditions. It rejected both the American proven innocence approach and the many restrictions imposed on compensation for wrongful convictions by Article 14(6) of the ICCPR as unsuited for Indian conditions. It also raised some compelling normative arguments in favour of a broader approach to compensation for a broad range of miscarriages of justice.

The Law Commission defined miscarriages of justice to include a "misconception of law, irregularity of procedure, neglect of proper precaution leading to apparent harshness of treatment or some underserved hardship to individuals" (Law Commission, 2018: 1.4). Its understanding of miscarriages of justice included "wrongful or malicious prosecution, whether or not it leads to a conviction by any court of law, and whether or not it

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leads to any incarceration. These are the cases where the accused was not guilty of the offence, and the police and/or the prosecution engaged in some form of misconduct in investigating and/or prosecuting the person" (2018: 1.9). This definition followed academic definitions (Walker, 1993, 1999) in not limiting miscarriages of justice to wrongful convictions as discussed in Chapter 2.2. This recognized that wrongful detention even without a criminal conviction is still a grave harm.

By focusing on wrongful prosecutions, the Law Commission rejected the narrower focus in Article 14(6) of the ICCPR. It did so on the basis that "a requirement that all avenues of appeal be exhausted" under Article 14(6) and that the accused produce "a new fact shows that there has been a miscarriage of justice" was not realistic given conditions in India. The Commission noted that because of "delays in the criminal trial/appeal process; the accused person may be in the prison (or suffer otherwise) for the period which may be as long as or longer than the sentence for the offence for which he is ultimately acquitted" (2018: 5.4). It was also concerned that Article 14(6) by excluding compensation if the convicted person was at fault "would disqualify from relief cases where the accused are forced to confess under duress and they do so despite being innocent; a practice endemic to criminal investigations in India" (2018: 5.6). In my view, the Commission was correct to recognize both the importance of local conditions and circumstances in India and to take note of the limitations of Article 14(6) which, as will be discussed in Chapter 11.5, was drafted in the 1950s before much learning about the frequency of false guilty pleas and false confessions among wrongful convictions.

The Commission recognized that India has agreed to the terms of the ICCPR and did not urge rejection of the restrictive compensation obligations in Article 14(6). Instead, it proposed a much more generous approach to compensation that included all forms of wrongful conviction and wrongful detention. International law recognizes the importance of local conditions in part through concepts such as subsidiarity and margin of appreciation. These concepts seem relatively benign when used, as the Commission did, to justify more generous standards of rights protection than the minimal standards established by international law. At the same time, the Commission's generous approach to rationing justice and funds devoted to compensation was not implemented when the Modi government enacted three new laws to govern criminal justice at the end of 2023.

The Commission rejected proven factual innocence requirements for compensation as not suitable for India given that "the forensic investigation system is not that well developed, and the use of DNA-based

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technology in criminal investigation and proceedings is yet to gain ground" (2018: 5.5). Again, the Commission wisely recognized the need to consider local circumstances before transplanting legal reforms and concepts from other countries.

The Commission also rejected a proven innocence requirement for normative reasons related to protecting the presumption of innocence. It was concerned that a third verdict of innocence would create "a hierarchy of acquittals" that was "especially problematic because, as noted earlier, factual innocence is very difficult to prove" (2018: 5.7). As discussed in Chapter 2.5, the presumption of innocence is based on liberal values of restraint in the criminal law. One example of such restraint and the asymmetrical treatment of the accused and crime victims that it demands is a 1973 statement by the Supreme Court of India that "It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society" (*Kali Ram v. State of Himachal Pradesh* (1973) 2 SCC 808). At the same time, liberal criminal laws are vulnerable in India, as elsewhere, to populist concerns. In the very same year as the Supreme Court expressed the above-mentioned preference for wrongful acquittals over wrongful convictions, it also warned "too frequent acquittals of the guilty may lead to a ferocious criminal law, eventually eroding the judicial protection of the guiltless" and suggested that "a miscarriage of justice may arise from the acquittal of the guilty as well as the conviction of the innocent" (*Shivaji Sahebrao Bobade v. State of Maharashtra* AIR 1973 SC 2622). This underlined the fragility of the traditional liberal preference for wrongful acquittals over wrongful convictions, especially in societies where crime is or is perceived to be high (Garrett and Mitchell, 2023; Xiong, 2022).

The Law Commission proposed that new legislation be enacted creating special courts that could award damages for anyone subject to a wrongful prosecution. The report initially defined wrongful prosecutions as "malicious or negligent investigation of an innocent person" (Law Commission, 2018: 5.12) but later limited wrongful prosecutions deserving prosecutions to malicious prosecution. Although the Commission in an early part of its report noted that subjective fault on the part of police and prosecutors will often be lacking (2018: 4.59), it later seemed to require high levels of fault such as the giving of false evidence that are already offences in India's Penal Code (2018: 4.59). The proposal of a high fault

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requirement and the creation of a specialized court may have reflected the Commission's awareness of India's high acquittal rates and concerns about overburdening both criminal courts and the state with requests for damages after every acquittal. In other words, the Law Commission may have been using a tragic choices approach (Calabresi and Bobbitt, 1978; Nobles and Schiff, 2000) to ration the funds that would be payable under its proposals (Roach, 2023b, 2024a) In any event, the Modi government chose not to implement these recommendations in the comprehensive 2023 legislation.

The Commission contemplated non-pecuniary compensation that could include "counseling services, mental health services, vocational or employment skills development, and such other services for loss of family life" and that would respond to "stigmatization that is harm to reputation or similar damage" as well as "psychological and emotional harm caused to accused" (Law Commission, 2018: 6:11). This recognized some of the non-pecuniary damages caused by wrongful imprisonment. The limits of monetary compensation and the frequent focus on such compensation will be discussed in Chapter 11.

The Law Commission's 2018 report was not perfect, and it neglected some innovations by Indian courts in awarding damages to accused who are acquitted after a wrongful conviction or a wrongful detention (*S Nambi Narayanan v. Sibly Mathewas* (2018) 10 SCC 804 [39–40]; Roach, 2023b). As will be discussed in greater depth in Chapter 11.6, its focus on compensation as opposed to prevention produced a risk of legitimating miscarriages of justice through the payment of compensation that will not fully repair the irreparable harm of unjustified imprisonment (Roach, 2024a). Nevertheless, the report was well received in scholarly circles in India. It is a praiseworthy example of law reform proposals that are responsive to local conditions. It is unfortunate that its "made in India" proposals were not implemented by the Modi government at the end of 2023.

10.6.2 The Need for Law Reforms to Reduce Wrongful Prosecutions and Pre-trial Detention

Even if the Modi government had enacted the Law Commission's proposals, there would still have been a need for additional law reform to decrease India's high use of pre-trial detention.

India has to its credit engaged in some bail law reform. Section 436A of the Criminal Procedure Code enacted in 2005 provided that a person denied bail could re-apply for bail after serving one-half of the maximum

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sentence for the offence. This was a recognition of the intertwined problems of delayed trials and wrongful prosecutions. At the same time, the provision did not apply to cases punishable by death. These restrictions were expanded in s.479 of the 2023 BNSS2S to also include offences punishable by life imprisonment and categorical statutory denials of bail where an accused was facing multiple charges or even multiple investigations. This punitive and inflexible approach presented a danger of wrongful pre-trial detention of those "known to the police." The fact that an accused faces multiple charges does not necessarily mean that they are guilty. This is another sign that the presumption of innocence, as discussed in Chapter 2.5, is under siege in many parts of the world.

To its credit, the 2023 law required jailers to trigger mandatory bail reforms, which are important because most undertrials are not legally represented. It also accelerated mandatory bail reviews so that they applied after a third rather than a half of the maximum sentence had been served. Unfortunately, the only group that benefits from this reform is "the first-time offender (who has never been convicted of any offence in the past" (BNSS2S s.479(1)). Even the use of the word "offender" in this section betrays the presumption of innocence.

10.6.3 Summary

The payment of compensation for those wrongfully prosecuted – proposed by the Law Commission in 2018 but still not implemented in India – should not have been an excuse for preventing the irreparable harm of wrongful pre-trial detention. To be fair, pre-trial screens in many other countries are also lacking and, as will be discussed in Chapter 11.5, many parts of the world have high levels of pre-trial detention. Nevertheless, India could have improved its pre-trial safeguards in part because it is not burdened by the need to defer to the jury's ability to decide disputed facts. High rates of pre-trial detention may also lead to detainees pleading guilty to offences when they may be innocent or have a defence. Many accused and especially those who already have a criminal record or who are facing multiple charges may well see a false plea of guilty as the best means to obtain their release or shorten their imprisonment.

10.7 Legitimation and Wrongful Conviction Washing?

Unlike China under Xi Jinping, the Modi government has not felt the need to enact some wrongful conviction reforms in an attempt to respond

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to public discontent or to legitimate the system. As discussed earlier, the laws pushed through the legislature at the end of 2023 will increase the risk of wrongful convictions by, for example, increasing the time that accused may spend in police custody, where in India, as in China, they may be subject to police torture or threats that will produce false confessions. At the same time, it should be remembered that police torture has in the not so distant past also produced false confessions and wrongful convictions in England and the United States.

The Modi government saw no need to implement the 2018 recommendations of the Law Commission despite concerns raised by the Innocence Network of India in 2016 about the need for compensation (People's Tribunal, 2016) and similar concerns of the Delhi High Court, which asked the Law Commission to write its report (Law Commission, 2018). One factor may be that many of the remedied wrongful convictions discussed earlier in this chapter were in terrorism cases with accused who are members of religious minorities in India that are not likely to benefit from the Hindu nationalism of the Modi government. This again affirms the importance of equality when dealing with miscarriages of justice (Dworkin, 1985).

Even if the Law Commission's recommendations on compensation for a broad range of miscarriages of justice had been implemented, the result could have been criticized as miscarriage of justice washing by paying compensation to the wrongfully detained and wrongfully convicted without addressing necessary reforms to prevent those injustices. The limits of compensation and its possible contribution to wrongful conviction washing will be explored more fully in Chapter 11.6.

In the absence of legislative reforms, the prevention of wrongful convictions in India has fallen to the judiciary. As discussed earlier, both the High Court and the Supreme Court have not hesitated to acquit or commute in their review of death penalty cases. Unfortunately, less is known about their record in non-death penalty cases. Even in death penalty cases, there is a risk of condoning wrongful convictions in cases where the death penalty is commuted but the conviction is sustained. The Modi government has promised that India will have the highest conviction rate within a decade (India Ministry of Home Affairs, 2025), and it may be tempted to attempt to curb the independence of the judiciary, which is frequently overturning death penalty convictions because of their concerns about miscarriages of justice.

In countries that retain the death penalty, there is a danger that wrongful conviction research and reform will be focused on trying to avoid the

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risk of wrongful executions. This itself could be criticized as a form of legitimation. Even if the Supreme Court of India, like the Supreme Court of Canada, ruled the death penalty to be unconstitutional, this could be criticized as legitimating wrongful convictions in other cases (Jouet, 2022; Martin, 2002). Concerns have been expressed about the limited effects of India's "aspirational constitutionalism" (West, 1993) as advanced by its courts and especially its Supreme Court. At the same time, concerns about possible legitimation can be taken too far. The work done by High Courts and the Supreme Court in restraining the use of the death penalty in India should be praised if only to the extent that it has prevented up to 200 executions (Project 39A, 2024).

10.8 The Future of Innocence Movements in India

There is room for more optimism about innocence movements in the world's most populous democracy than in China. This is related both to the comparative freedom of India but also to the fact that India seems to have sufficient self-awareness and confidence not to mimic the American emphasis on proven innocence.

10.8.1 The Dangers of Friend Enemy Distinctions and Populist Pushbacks to the Courts

Modi defines non-Hindus as enemies and when possible non-citizens. His Home Secretary, Amit Shah, has long been loyal to him but is also suspected of extrajudicial killings of suspected terrorists who are Muslims (Dev, 2024). In India, Muslims and Dalits have recently suffered such violence. As in the Jim Crow south, concerns about sexual relations between enemy males and women who belong to majority groups are a fertile source for miscarriages of justice. Specifically, Muslim men involved with Hindu women are vulnerable to private violence as well as prosecution under both criminal laws and laws against religious conversion (Roy, 2024; Sharma and Jenkins, 2024). As in China, there is an element of the unadorned extra-legal in India. Criminal prosecutions of perceived enemies in India, as in the Jim Crow United States, can be undertaken under the threat of lynching.

The ability of a populist government to mobilize around a leader's cult of personality has the potential both to quash or perhaps to selectively advance the cause of remedying miscarriages of justice. Much will depend on whether the beneficiaries of remedies are characterized as political

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friends or enemies. Trump speeded all the executions he could after he lost the 2020 election but in 2025 granted wholesale pardons to friends who committed serious crimes in attempts to keep him in power. Modi could similarly selectively champion concerns about miscarriages of justice especially given that almost 40 per cent of his Cabinet was facing criminal charges in 2024. Increased political polarization may degrade the ability of executive clemency to act as a final safeguard against wrongful convictions.

As discussed earlier, the Indian courts have taken the lead in remedying some wrongful convictions and entering many acquittals and commutations in death penalty cases. They have also championed some bail reforms to minimize pre-trial detention. This raises a danger whether the Modi government, like Trump, will try to appoint only loyal supporters to the court. Judges play a key role in appointing other judges in India, but the Modi government has attempted to have more influence over the appointment of judges. There are concerns that judicial independence may erode in India, especially on issues involving Hindu nationalism (Fuchs, 2024). As discussed earlier, the 2023 BNSS2S attempts to limit judicial review of executive clemency but not judicial review of death penalty cases.

10.8.2 The Importance of Civil Society Activism

India, unlike China, is a democracy, and Modi has received less support in his 2024 re-election. Innocence organizations and civil society groups associated with universities like Project 39A can operate more freely than in China. Project 39A was formed in 2008 in conjunction with the National Law University, Delhi. Its concerns are not limited to wrongful convictions but include legal aid, torture, forensics, mental health in prisons and the death penalty. It has not focused on the American debate about whether those exonerated from death row are really factually innocent (Bedeau and Radalet, 1987; Markman and Cassell, 1988). Rather, it has less legalistically and more humanely conducted interviews with those on death row and their families, humanizing them through displays of their art and poetry. It also examined the role of mental disorders and intellectual disability on death row that have resulted in errors of sentencing.

Project 39A has also engaged on the issue of pre-trial detention that also was the subject of the Law Commission's 2018 report. One of its studies found that between 2016 and 2019 less than 8 per cent of undertrials in the Indian state of Maharashtra used legal aid. When efforts were made to increase access to legal representation under legal aid, 4,237 out of 9,570 undertrials who obtained legal representation were released on bail. In

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addition, 62 per cent of those released subsequently received acquittals, discharges or had their charges compounded. This work was facilitated by thirty Legal and Social Work Fellows (Project 39A, 2022a). Again, this focus demonstrates the advantage of allowing local advocacy groups to focus on their own priority issues rather than relying on a proven innocence template taken from American innocence projects (Garrett, 2017a; Garrett, Helfer and Huckerby, 2021).

Some interest has been expressed in India about the import of the American Innocence Project model despite the Law Commission's warnings that it might not be appropriate given conditions in India (Law Commission, 2018). A number of law students in India have written admiring articles about the American Innocence Projects, but not always with sufficient attention to the limits of their post-conviction relief approach in the Indian context (Shivakumar, 2022; Singh and Majumdar, 2018).

Interest in the American innocence project model was expressed by Dr. GK Goswami, the chief of the Uttar Pradesh police squad, who received Fulbright funding to study innocence projects in the United States. Dr. Goswami has expertise in DNA and policing, and he has won awards for excellence in policing. He has made important warnings about the need to qualify and cross-examine experts under India's 2023 laws and the need for forensic service providers in India to be accredited and regulated (Goswami and Goswami, 2024). At one level, Dr. Goswami's leadership makes sense given the number of remedied wrongful convictions in terrorism cases. At another level, however, it raises concerns that a person who worked with the Central Bureau of Investigation would be the lead in forming Indian innocence projects. To be sure, some former police, prosecutors and state-employed forensic scientists have played a role in American innocence projects (Petro and Petro, 2010), though as discussed in Chapter 6, this search for bipartisan consensus seems less realistic in the Trump era. In some of his writings, Dr. Goswami seems to reject the Law Commission's warnings about the limits of a proven innocence approach in India and insist on exoneration through the proof of innocence beyond a reasonable doubt, a near impossible standard, especially in a country without an extensive DNA data bank and testing (Goswami and Goswami, 2020: 40). There is a danger that providing remedies for the clearly innocent could be used as a means to legitimate the imposition of the criminal sanction in other cases.

Others who have taken inspiration from American innocence organizations in India have implicitly rejected their focus on proven factual innocence. The Innocence Network of India, in its 2016 People's Tribunal

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report, focused on the plight of the accused subject to lengthy pre-trial detention only to be acquitted after many years of terrorism offences. Its report was not shy about criticizing "draconian anti-terrorism laws" or providing a platform for those who may remain deeply unpopular despite their actual acquittal of terrorism offences (Peoples Tribunal, 2016). In contrast, the American innocence movement has not engaged on issues of terrorism. The National Registry lists only four exonerations in terrorism cases as of the end of 2024. The cases involved unreliable informants and prosecutorial misconduct, but not innocence organizations (National Registry, Karim Koubrit, Uzair Paracha).

10.8.3 The Importance of Equality

As discussed in Chapter 1.8, Ronald Dworkin concluded that while people did not have a right to the most accurate criminal justice system, the risk of wrongful convictions should not be disproportionately imposed on those from some groups rather than others in violation of their right to equal concern and respect (Dworkin, 1985, ch 3). To his credit, Professor Dworkin maintained his principled focus on equality with respect to the increased risk of wrongful detention as the United States responded to 9/11 including with indiscriminate military and immigration detention (Dworkin, 2002; Roach, 2011).

Although Dworkin did not advert to this fact, the overrepresentation of disadvantaged groups in the prisons of many countries makes his argument about the lack of a right to the most accurate possible criminal justice system somewhat irrelevant. This is especially true in India, where many prisoners are illiterate, many are members of scheduled castes, and all of them are imprisoned in overcrowded jails often spending years in pre-trial detention. The prison population are the population most at risk for miscarriages of justice including wrongful convictions and wrongful detention, and innocence movements should respect the knowledge and concerns of these groups. As discussed earlier, there are also particular dangers that non-Hindus and especially Muslims will be targeted for miscarriages of justice and that Indian courts may pay a political price for defending their rights.

10.9 Conclusions

The Law Commission of India's, 2018 admirable concern about wrongful pre-trial detention fits within broader understandings of miscarriages of justice that are not limited to wrongful convictions or proven innocence.

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It has recognized that a narrower focus on wrongful convictions, even when promoted by India's obligations for compensation under Article 14(6) of the ICCPR, does not fit local conditions in India, where over three-quarters of those in prison are in pre-trial detention.

The broader focus on miscarriages of justice that include wrongful detention may be a better fit not only for India but many other developing countries. Criminologists in Indonesia have recently concluded that a focus on wrongful conviction does not fit the circumstances in Indonesia. They have proposed a broader concept of "wrongful criminal justice process" (Rahmawati and Dermawan, 2023: 191) that is similar to the Indian Law Commission's focus on wrongful prosecutions (Law Commission, 2018).

At the same time, the Law Commission's report on wrongful prosecutions and pre-trial detention is underinclusive in focusing only on compensation and not addressing criminal justice reforms that could prevent both wrongful prosecutions and wrongful convictions. Such reforms would include those designed to make bail more accessible to those accused of all crimes. They would also allow the accused to challenge the sufficiency of the prosecution's case during the pre-trial process. All of this would require increased legal representation through legal aid at the pre-trial stage. There is some evidence that such representation can help weed out weak cases and reduce by almost half the numbers held in pre-trial detention (Project 39A, 2022b). Although compensation can be justified, many of the harms of wrongful prosecutions and pre-trial detention are irreparable. The government should not simply be allowed to violate the right to liberty by paying damages.

In any event, the Law Commission's proposed reforms to compensate wrongful pre-trial detention as well as wrongful convictions were not included in three new comprehensive criminal laws enacted by the Modi government at the end of 2023. These new laws have enhanced the risk of wrongful convictions by increasing the time detainees spend in police custody, where they may be coerced into making false confessions. Even if the confession is excluded, evidence obtained as a result of the confession may still be admitted. The new laws rejected other recommendations made by both the Law Commission and the courts to decrease the risk of false confessions. India is doing less about preventing false confessions than China even though police coercion that produces false confession is the leading immediate cause of remedied wrongful convictions in both countries.

India has also increased its use of the death penalty and continued to ignore 2015 recommendations by its Law Commission that the death

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penalty be abolished except in terrorism cases. At the same time, High Courts and the Supreme Court have not hesitated to acquit in death penalty cases because of concerns about reasonable doubts about the accused's guilt. They have closely reviewed the sufficiency of evidence in a manner that appellate courts in other common law countries would not embrace because of a perceived need to defer to the finality of convictions and the jury (Nobles and Schiff, 2000). At the same time, the frequent use of commutations of death sentences by Indian appellate courts raises concerns that, as in China, wrongful convictions may be condoned even while wrongful executions are prevented.

The experience of remedied wrongful convictions in India illustrates that the Law Commission was wrong to recommend that terrorism cases be exempted from the abolition of the death penalty (Law Commission, 2015). Many of India's remedied wrongful convictions have been in terrorism cases, and there are concerns that those accused of terrorism are often subject to years of pre-trial detention only to be acquitted (People's Tribunal, 2016). The Supreme Court of India has corrected some wrongful convictions in terrorism cases and recognized how prejudice against the unpopular political, religious and racial minorities frequently charged with terrorism can contribute to wrongful convictions (*Ashrafkjan v. State of Gujarat* (2012) 11 SCC 606). An Indian approach to death penalty abolition need not be confined to the innocence-based concerns used by the Supreme Court of Canada (*United States v. Burns and Rafay* 2001 SCC 9) or in American states such as Illinois. It could also be combined with concerns voiced by Justice Bhagwati in his 1980 dissent in *Bachan Singh* and again by the Law Commission in 2015 that the death penalty is applied in a discriminatory manner that disproportionately harms the disadvantaged. At present, judicial abolition of the death penalty appears to be the only viable option. There are concerns that the Modi government may engage in populist pushbacks and attempts to influence appointments to Indian appellate courts, given that they frequently block the use of the death penalty.

One of the dangers of demands to recognize an international right to claim innocence (Garrett, Helfer and Huckerby, 2021) is that it will be built on models of post-conviction relief that do not fit well with the actual conditions of India's criminal justice system or those of many other developing countries. Indian appellate courts are concerned with a broad range of miscarriages of justice, especially when they review death penalty cases. The possibility that DNA exonerations will happen in India with increased use of forensic investigations cannot be discounted. At the same

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time, the import of a proven or obvious innocence approach from either American post-conviction law or through emulation of American innocence organizations would have regressive effects in India.

The absence of wrongful convictions corrected by DNA and other forms of science, false guilty pleas, wrongful convictions for imagined crimes that never happened and wrongful convictions involving relief after appeals have been exhausted in India is striking from a comparative perspective. The absence of such remedied wrongful convictions in India likely reflects problems of access to justice rather than the absence of such wrongful convictions.

The lack of effective defence lawyering and guaranteed rights to cross-examine forensic experts, combined with mandatory requirements for forensic investigations in cases punishable by seven years imprisonment or more in the 2023 BNSS2S, will likely increase wrongful convictions by introducing new sources of forensic error by understaffed but perhaps overconfident and underregulated forensic service providers (Pokhariyal and Dubey, 2023: 4; Project 39A, 2023). The Modi government has associated increased use of forensic science with its attempt to increase India's low conviction rates, especially in sexual assault cases (India Ministry of Home Affairs, 2025).

Wrongful conviction reform in India should build on some unique strengths of the Indian legal system. These include the willingness of appellate courts, including the Supreme Court, to take a hard look at the sufficiency of evidence supporting a conviction without the spectre of usurping the jury's role. Another strength of the Indian legal system is the ability of appellate courts to award damages and order other more systemic public law remedies at the same time as they acquit the accused. Law reformers in India should be cautious about importing law reforms from other countries.

Wrongful convictions may often have common causes throughout the world, but both the remedies that are crafted to prevent and remedy them and the priority given by law reformers to wrongful convictions over other forms of miscarriages of justice such as wrongful pre-trial detention should be guided by attention to each country's local and often distinct conditions and circumstances.

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