CRIMINAL LAW REFORMS IN INDIA: A STUDY ON PAST, PRESENT AND FUTURE

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ABSTRACT

The Criminal Justice System represents the cutting edge of governance. Towering over society, it parades an array of institutions, processes, people, and penalties to reinforce its images. This array includes policemen in uniform, constables with batons or lathis, the police station, courts, jail, bail, sentence, prisons, imprisonment, death row, the gallows, hanging and death. Each of these institutions and processes is part of the Criminal Justice System and yet partly autonomous within it. But a matter of great concern is that there arise multiple questions about whether these institutions are working/functioning properly within their ambit or not. Is there lack of implementation of provisions of criminal law by the enforcing agencies? Whether the recommendations of law commissions are adequately implemented? Whether the Malimath Committee's Report on Criminal Law Reforms are being adequately addressed and enforced. Is adversarial system of criminal justice in India suitable in the present-day context, or it is high time to accept few principles of inquisitorial system of justice as it is prevailing in common law countries. With these few questions, in the present paper, the researchers have made an attempt to introduce our criminal justice system. The researchers further focuses on reforms recommended by the Law Commission. Finally, the researchers have suggested some important changes/modifications required in the prevailing criminal justice system in India to make it more streamlined and strengthened.

Key Words: Criminal Justice System, Adversarial, Inquisitorial, Malimath Committee, Law Commission, Human Rights, Courts, Police, Bail etc.

INTRODUCTION

The primary objective of Criminal Justice System (herein after referred as CJS) is to preserve and defend the rule of law, that is, control of law, maintenance of law and order in the society, speedy trial, penalization of the wrong-doers etc. The existing CJS in India was implanted by the British and has gone through three identified phases which are as follows:-

i. the imperial phase which was celebrate as both 'civilizing' in its effect as well as a utilitarian necessity;
ii. the post-independence instrumental phase which consistent with Nehru's ideas of planned development, saw 'law' including criminal law as an instrument for social change and
iii. the post-emergency phase[3] which saw the rise of 'liberal' due process alongside new and fresh intimidatory anti-terrorist and other laws.

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Therefore, the British visualized 'criminal law and procedure' as the preserve of the legislature to be interpreted but not rewritten by the Judiciary.

In this context, it is noted here that two distinct trends are part of the advent of this, then, new 'law and development' thinking on criminal law. The first was 'strict liability' in Indian criminal law. The second was to create special procedures and courts and preventive administrative detention for certain kinds of offences and wrongs. The first trend was manifest in much socio-economic legislation which used criminal penalties as part of their enforcement. Common law notions of ascribing responsibility on the basis of intentional wrong were modified by concepts of strict liability in relation to such offences-not always to the liking of some judges of the Supreme Court.[4] This broad approach was encapsulated by former Chief Justice Gajendragadkar, who was himself a prime proponent of social engineering through law.[5] This trend continues to dominate Indian thinking on criminal law. Alongside, concepts of 'strict liability' developed a second trend of establishing 'special courts' and 'special procedures' for special offences. At first, the Supreme Court was wary of accepting too many 'special procedures and courts' which were likened to creating Star Chambers, and inconsistent with a Diceyan concept of the rule of law, which required all to be treated equally by the ordinary law.[6]

But this resistance soon wilted-especially after the Emergency (1975-77). Anxious to prosecute the guilty persons responsible for the Emergency, the Special Courts Bill, 1979, and its affirmation by the Supreme Court represents a point of no return for the creation of special courts and procedures for various classes of offences.[7] Special Courts have become the acceptable order of the day. Along with preventive detention, special Courts and processes were consecrated by anti-terrorist legislation (such as in TADA and POTA) and for anti-corruption cases.[8] It is pertinent to mention here that the Law Minister has created 'fast track' courts. The idea of 'fast' track legislation stems from an initiative of the then Law Minister Arun Jatley. The best evidence of what can go wrong is the "Best Bakery" case, where a vastly over-written judgment by a 'fast track' judge acquitted all the accused implicated in mercilessly roasting people in the Bakery to death.[9]

The advent of special procedures and courts has led to devising new rules of evidence not only in the case of crimes like rape or dowry deaths but more generally in anti-terrorist law to a point where the presumed innocence of an accused has been put in jeopardy.[10] With this,

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[4] *Kathi Ranning Rawat v. State of Saurashtra*, 1952 SCR 435.

[4] *Re Special Courts Bill*, (1979) 1 SCC 380; *V.C.Shukla v. Delhi Administration*, 1980 (Supp) SCC 249; *State of Maharashtra v. Mayer Hans George*, AIR 1965 SC 722; *State of Punjab v. Balbir Singh*, AIR 1994 SC 1872.

[5] P.B.Gajendragadkar, *Law, Liberty and Social Justice*, (Asia Publishing House, London,1965)

[6] *Anwar Ali Sarkar v. State of West Bengal*, 1952 SCR 284; *Lachamandass v. State of Bombay*, 1952 SCR 224 protesting and striking down laws with special 'pick and choose' procedures, but contrast more indulgent Court in *Kathi Ranning Rawat v. State of Saurashtra*, 1952 SCR 435.

[7] *Re Special Courts Bill*, (1979) 1 SCC 380; *V.C.Shukla v. Delhi Administration*, 1980 (Supp) SCC 249

[8] See Part III of the Terrorist and Disruptive Activities (Prevention) Act, 1987, Chapter-II of the Prevention of Corruption Act, 1988 and Chapter-IV of the Prevention of Terrorism Act, 2002.

[9] K.D.Gaur, *Criminal Law, Criminology and Administrtive of Criminal Justice 230*, (Central Law Publications, Allahabad, 4th e.dn.,2019)

[10] See Sections 113B and 114A of the Indian Evidence Act, 1872, Section 53 of the Prevention of Terrorist Act, 2002.

the CJS slides into an aggressive posture poised against the individual accused. This imbalance in the Indian CJS is acquiring a creeping significance which finds more audacious expression in the Malimath Report which recommends more radical changes.

REFORMS RECOMMENDED BY LAW COMMISSION

Although, the Indian CJS exudes a commitment to accepting rules of strict liability, special courts and procedures and rules of evidence, this has not been systematically thought through but has emerged over the years as the legislature has transited from legislation to legislation. In fact, there have been few systematic attempts to view criminal justice as a whole. One of the prime sources of generating 'reform' ideas is the Law Commission. But, its record on recommending changes in the criminal justice system has been sporadic. In 1958, the Law Commission's famous 14th Report was general in its approach to criminal courts. The 32nd Report, 1967 dealt with the discrete question of the appointment of additional session's judges by the High Court. Close on its heels, the 33rd report[11] negative the idea that public servants must mandatorily give evidence about bribery offences. The 36th report dealt with issues concerning granting bail. The 37th Report considered the Criminal Procedure Code's provisions dealing with criminal courts and investigation whilst the 41st Report (1969) re-examined the recommendations of the 37th Report. The 29th Report (1966) and 47th Report on the socio-economic offences (1972) merely explicate what had already become the basis on India's instrumental approach in using criminal law for inducing social change and development. The pressures to streamline the system at the expense of civil liberties by, inter alia, permitting confessions to senior police officers was considered with ambiguous support in the Law Commission's 48th Report (1972). After the Emergency, the Law Commission's 74th Report (1978) considered the admissibility of certain statements by witnesses to Commissions of Inquiry. This was obviously in the context of the record of Mrs. Gandhi's regime during the Emergency being examined by Commission at the time. The inevitable questions of delays in criminal trial courts surfaced without conclusive meaningful recommendations in the 78th Report (1979). There were significant reports on contemporary controversies over rape and allied offences[12] and 172nd Report (2000) and on dowry deaths[13]. Likewise, piecemeal reforms were considered in respect of sureties for keeping the peace[14], the power of criminal courts to restore cases dismissed for default[15], concessional treatment for those who plead guilty without bargaining[16] and on weeding out redundant statutes-both civil and criminal[17] and protection of

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[11] Law Commission of India, "33rd Report on sec 44, Code of Criminal Procedure, 1898", (September, 1967).

[12] Law Commission of India, "84th Report on Rape and allied offences some questions of Substantive Law, Procedure and Evidence", (1980).

[13] Law Commission of India, "91st report on Dowry Deaths And Law Reform: Amending The Hindu Marriage Act,. 1955, The Indian Penal Code, 1860. And The Indian Evidence Act, 1872", (August, 1983).

[14] Law Commission of India, 102nd Report on "Sec 122 of the Code of Criminal Procedure, 1973: Imprisonment for breach of bond for keeping the peace with surety", (April, 1984).

[15] Law Commission of India, 141st Report on "Need for amending the law as regards power of courts to restore criminal revisional applications and criminal cases dismissed for default in appearance",(1991).

[16] Law Commission of India, 142nd Report on "Concessional treatment for offenders who on their own initiative choose to plead guilty without any Bargaining",(1991).

[17] Law Commission of India, 178th Report on "Recommendations for Amending Various Enactments, Both Civil and Criminal", (December, 2001).

informers generally[18]. The point behind recounting these efforts to consider law reform is to show that they have been either too general or issue specific, without necessarily following a systematic approach. They have been generally marginal in their significance and depth as they responded to the fashion or problem of the day.

The Law Commission did attempt reviews of aspects of the Criminal Procedure Code[19], Penal Code[20] and Evidence Act[21] but without providing comprehensive fresh insights. Discrete journeys have also taken place into the right to silence[22] which need careful examination since any tampering with this valuable right must be subject to strict scrutiny. While it s report on the law relating to arrests[23] has a lot of useful suggestions on not arresting people in respect of a large number of offences, this Report has generally been ignored as presenting a liberal face which the Government does not wish to countenance at a time when the latter is preaching harsh criminal law and strict procedures. More acceptable to the government has been the sustenance of the laws against Narcotics[24], and more significantly, the report on the Prevention of Terrorism Bill, 2002[25] which lead to a sea change in the anti-terrorist laws.[26] This last report was nor above criticism. The National Human Rights Commission (NHRC) immediately published its own recommendations against the Law Commission's approach to caution for laws more protective of civil liberties.

While the Law Commission's tough advice on certain harsh enactments has been appropriated by the government, the Law Commission itself has failed to impress as a prime body on criminal justice reform. It has not really opposed the general drift to stronger anti-libertarian laws and often applied itself to trivia rather than more meaningful questions in an incisive way. Perhaps, that is the reason the Government relied on the Malimath Committee for suggesting a new framework for criminal justice in India.

FUNDAMENTAL RIGHTS VIS-A-VIS HUMAN RIGHTS

While dealing with the right of an accused not to testify against oneself, the Committee begins by laying stress on Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 20(3) of the Convention but proceeds to do a balancing act by recommending an adverse inference to be drawn when the accused remains silent. Thus, according to the Committee, the accused is to present a statement of defense at the beginning of the trial and should answer when the Court puts questions to him, failing which adverse inference may be drawn against him. The Committee’s rationale for a Defense Statement is that the present system is not fair and hampers dispensation of justice as it allows “the accused

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[18] Law Commission of India, 179th Report on “The Public Interest Disclosure (Protection Of Informers) Bill 2002”, (Janurary,2003)

[19] Law Commission of India, 154th Report on “The Code of Criminal Procedure, 1973”, (1996).

[20] Law Commission of India, 156th Report on “The Indian penal code, 1860”, (August, 1997).

[21] Law Commission of India, 185th Report on “The Indian Evidence (Amendment) Bill, 2003”, (March, 2003).

[22] Law Commission of India, 180th Report on “Article 20(3) Of The Constitution Of India And The Right To Silence”, (May, 2002).

[23] Law Commission of India, 177th Report on “Law Relating To Arrest”, (December, 2001).

[24] Law Commission of India, 155th Report on “The Narcotics Drugs and Psychotropic substance”,(July, 1997).

[25] Law Commission of India, 173rd Report on “Prevention Of Terrorism Bill, 2000”, (April, 2000).

[26] See the Prevention of Terrorism Act, 2002.

to spring a surprise at any stage".[27] This does not take into account the fact that the prosecution has the advantage of being in a position to dictate the proceedings and has access to investigative resources that are superior to those available to the defendant in most criminal cases. In fact, the presumption of innocence also tips the balance to ensure fairness. What the Committee fails to accept is that the right to silence is mainly concerned about involuntary confessional self-incrimination. The accused may choose to break his silence before a Magistrate but only if he does so voluntary and without duress or inducement. Article 20 (3) notes that no person accused of an offence shall be compelled to be a witness against himself. By drawing an adverse inference, when a person seeks to exercise his constitutional right not to answer question, the Committee short-circuits constitutional guarantees.[28]

While considering that the presumption of innocence is a hallowed right that needs to be preserved, the Committee reads down the content of the right to be presumed innocent until proven guilty. While quoting from English and Indian judgments and Article 14(20 of the ICCPR, the Committee makes the observation that it is left for each law making authority to prescribe the procedure for proof to suggest a shifting from the 'beyond reasonable doubt' test to a standard of proof which would be higher than the 'balance of probabilities' but lower than "proof beyond reasonable doubt". This introduces a new and nebulous standard to evaluate the evidence to convict if "the Court is convinced that it is true".[29] Although purportedly suggested to ensure a balance between the rights of the accused and the rights of the victim, such an approach leaves too much to the subjectivity of the judge without guidelines or reserve. In an interesting interpretation to Article 14(2) of the ICCPR, the Malimath Committee notes that it is left to each nation to determine the burden of proof. This goes against the views of the ICCPR Human Rights Committee which notes that the presumption of innocence remains until the charge has been proved beyond all reasonable doubt.[30]

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[27] See Malimath Committee Report, p. 49 where the Committee quotes Bentham as saying that the Rule is "one of the most pernicious and most irrational notions that ever found its way into the human mind"; . Also see Recommendation 8 p. 267 which suggests for amendment of Section 313 of the Code of Criminal Procedure, 1973.

[28] See Malimath Committee Report, p. 53 for the adverse inference to be drawn when an accused refuses to answer questions and pr. 3.50 and 3.51 pp. 56-57 where the Report notes that the accused should present a statment of defence at the beginning of the trial.

[29] See Malimath Committee Rport, Recommendation 13, p. 270. Accordingly, the Committee recommends that a clause be added in Section 3 on the following lines: "In criminal cases, unless otherwise provides, a fact is said to be proved when, after considering the matters before it, the Court is convinced it is true.". Also see P.Venkatesh and B.Subramainan titled "Presumption of Innocence in Criminal Law", 2000, Criminal Law Journa, p. 129.

[30] Article 14(2) of the ICCPR provides "Every one charged with a criminal offence shall have the right to be presumed innocent until he is proved guilty according to law"; See also the ICI Position Paper, p. 21 where from the Human Rights Committee of the ICCPR is quoted to have stated that "by reason of the presumption of innocence, the burden of proof is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt".

JUSTICE V. S. MALIMATH COMMITTEE REPORT

The Malimath Committee has recommended that evidence recorded in video and audiotapes before a police officer of the rank of a superintendent should be admitted as evidence. It notes that, at present, confessions recorded by police are not admissible as evidence on the belief that the police often resort to torture to extract a confessional statement but suggested that with the strides in technology, videotapes could be used so that a Magistrate can determine whether the person making the confession is under duress.[31] While tapes can be re-recorded, the problem of coercive duress and torture will remain. While it is known that many jurisdictions allow the use of video recorded evidence to safeguard against torture, this alone is not a sufficient safeguard. Nor is it enough to ordain recording under the oversight of a superior police officer if there is no safeguard on the independence of such supervision. Those who record investigation on video are unlikely to film their misdemeanors whether before or after the interrogation. There are no safeguards in the present statutory framework that would ensure the fair use of this recommendation and the Committee does not make any concrete suggestions in this regard beyond its misplaced faith in technology.[32]

For the purposes of discussion, only certain recommendations have been highlighted. There have been a number of Recommendations by the Committee that would make things better for witnesses and victims. A number of recommendations seek to provide a right for the victim within the criminal justice system. Other recommendations seek to separate the public order responsibilities of the police from crime detection and investigation. Similarly, the report re-opens the 'qualifications' debate as far as the judges are concerned by suggesting a review process to ensure that highly competent judges alone are appointed. The report also seeks to reform rape laws by broadening the notion of penetration under Section 375 of the IPC and providing for the speedy completion of investigation and trial. Trying to tackle the problems faced by witnesses by making commonsense recommendations to protect witnesses and ensuring that the witnesses are treated with dignity and respect, assigning an official to take care of witnesses, providing separate facilities like toilets, drinking water, searing, resting and so on for witnesses; permitting a seat for the witness when s/he gives evidence in Court and creating a witness protection program,[33] the report, at least in this regard, makes humane suggestions to enlarge the scope of criminal due process. Some of these suggestions can be ordained by the Supreme Court through constitutional interpretation.

The Malimath Committee has been sprung on public discourse at a time when there is a considerable and renewed emphasis on tough policing, wider investigation powers for the police powers, fast track trials and severe sentencing. By suggesting overhauling the system by increasing police powers, moving to an inquisitorial system and changing the standard of proof, there is much in the report that we have to be wary about. It exults support for and exalts

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[31] See Malimath Committee Report, Recommendation 37 at p. 276.

[32] See Malimath Committee Report, p. 123 where it is noted that "if the conclusion is audio/video recorded, it would lend further assurance that the accused was not subjected to any form of compulsion".

[33] Malimath Committee Report, Recommendation 14 at p. 270-272 (Rights of the victim); Recommendation 15 p. 272 (separation of the investigation and the law and order wings0; Recommendation 63 p. 280 (review of qualifications prescribed for appointments of judges at different levels) ; Recommendations 79-89 pp. 284-85 (rights of witnesses); Recommendation 119 p. 291 (broadening the definition of 'penetration' in Section 375 of the Indian Penal Code)

the so called European criminal justice systems without adequate knowledge of how they work and what makes them workable. The Committee's research is episodic and intuitive. It makes suggestions without carefully examining the Indian conditions into which these suggestions are sought to be transplanted. No doubt, the Malimath Report should be the subject of rigorous public discussion. But its prescriptions need careful evaluation. They ask for too much whilst giving too little.

From the point of view of civil liberties, a system has to be looked at so as to examine its design as well as working even if our rulers preach that we should not look a gift horse in the mouth. India’s criminal law was designed to over-empower the police at the arrest and investigative stages. The general power and temperament of the police has led to these empowerments to be viewed with apprehension and fear. Atrocity after atrocity is committed at these arrest and investigative stages. People picked up by the police live in fear unless they have someone influential to watch over their interest. The custodial crimes of assault, humiliation, injury and death are prevalent. Indeed, the Supreme Court's criminal due process was a response to the shocking incidents of custodial blinding, rape and continued detention which were paraded before the Court. If the Court triumphed with the new jurisprudence, it was precisely because it responded to practices that were widely known but crying out for redressal. In a huge country of over a billion people in which caste, community and communal rivalries infect the working of any system, the poor, disadvantaged, dalits and disempowered suffer ignominious tribulations in ways that defy correction. From the point of view of human rights and inhuman wrongs, it is this experiential aspect of what people actually suffer which is the core of the problem. Beyond that are incessant delays, temperamental decision making, the absence of legal aid and support (which makes an expensive system unattainable to all but a few) and a prison system that leaves a lot to be desired.

There is a converse point of view largely based on India's un-governability whereby more and more powers are demanded for the police while seeking changes in the law relating to the right to silence, pre-trial confessions, changes in the burden of proof and a relaxation of the principle that the guilt of an accused must be proved beyond reasonable doubt. The Malimath Committee represents this trajectory of establishment thinking. Within this framework, a countervailing emphasis has also been written into these proposed reforms to argue for better trained police, a better informal oversight, and magisterial control of pre-trial confessions and better management of courts. Thus, there is a ‘pro-establishment’ pressure, which echoes glamour for tougher policing, a less liberal due process and stricter tougher sentencing and imprisonment norms. In this climate, the cause of civil liberties suffers diminution. The new due process declared by the Court is left half way-strong in its declarations but unfulfilled in its remedial rigor. Meanwhile, piecemeal changes continue as knee jerk reactions as demonstrated by the recent Criminal Law (Amendment) Bill, 2003 which intrudes into the right of self-incrimination and introduces plea bargaining without adequate and due consideration of the full implication of the change.

CONCLUSION AND SUGGESTIONS

From the above discussions, debate and deliberations, the researchers are of the opinion that, the existing criminal justice system needs review and revamp but not along the lines suggested by the Malimath Committee and its supporters. The following are the suggestions for streamlining and strengthening Indian Criminal Justice System:

1. A separate independent authority, by whatever name called, fully insulated from political interference, comprising a Chairman and at least two members (with Director-General of Police of the concerned State/UT as ex-officio member) should be created in each State/UT to supervise the progress of investigation and regulate the flow of cases to Court by examining if the case is prima facie strong enough to be put up for trial before the Report under Section 173 is submitted. The Appointment of the Chairman and members should be made with the concurrence of the Chief Justice of the State. This will also reduce the population of under-trial prisoners and avoid their association with hardened criminals. This will help reduce the colume of weak of cases being carried to Court.
2. An independent investigation agency should be established, fully insulated from political interference under the exclusive control of the Authority which should impart intensive and extensive training in scientific investigation that would eschew partiality, bias and third degree practices and be answerable for posting, promotion and transfer to the said Authority only. Such agency should have facility in major police stations in the city for providing immediate finger print forensic and pathological assistance to the investigating officer, while awaiting the official report to arrive from the established laboratory/finger print bureau.
3. The procedure of 'plea bargaining' has been introduced in Summons Cases with adequate safeguards as indicated earlier to ensure that the plea is voluntary and not coercive. If the experience is successful, it could be further extended. This would also reduce the population of under-trial prisoners who are not able to furnish bail.
4. Since the accused has a right to be defended by a lawyer of his choice or through the legal aid system, he should be informed of his right immediately on arrest and his counsel should be permitted to advise him during investigation. This would also act as a restraint on use of third degree.
5. A more liberal (proactive) role should be allowed to the Magistrate/ Presiding Judge than enjoyed at present to get to the truth by putting questions through Court, without appearing to enter the arena.
6. If, and only if, all the existing safeguards provided by the Code and Evidence Act in favour of the suspect/accused continue and are not diluted through adverse presumptions or exceptions built into the law, the degree of proof of innocence should apply and the onus of proof should, throughout the trial, rest on the prosecution.
7. The concerned Government should work out a time table for equipping the investigation machinery with the skills and tools needed for scientific investigation.
8. Legal aid to be provided to the accused should be of a high order, particularly in cases where the sentence provided is of five years or above. It must be remembered that legal aid is a matter of right under Article 39A of the Constitution and should not be reduced to a mere formality by providing an inexperienced or incompetent advocate. So also, in sensitive matters where a

highly reputed and senior lawyer represents the defence, it may be advisable to engage a reasonably competent lawyer as Special Public Prosecutor to present the prosecution case.

9. The right to silence should not be eroded by raising adverse presumptions which would require the accused to prove the negative; the presumption, if at all, should be in relation to a matter which can be within the special knowledge of the accused alone.
10. The terms of employment of Public Prosecutor should be liberalized and their emoluments should be revised upward to attract good talent to match competent defence lawyers and similarly lawyers of reasonably good talent should be engaged to defend the accused under legal aid scheme or as required under Section 304 of the Code of Criminal Procedure, 1973.
11. The Judges trying gender bias cases should be sensitized to ensure that certain mind-sets and bias do not affect their judgment and they should be specially instructed to ensure that a deliberate offensive line of cross-examination in not allowed.

To conclude, in the backdrop of the above discussion, it is pertinent to mention here that society cannot afford to make the criminal justice system so inefficient as to result in an acquittal ratio of over 90% and at the same time so time-consuming. After all, the security of life and property of every citizen must be of paramount importance. It is time that within the system such changes is introduced as would ensure that the guilty do not escape and the innocent stand protected. It must be realized that mush depends on the integrity of the process to win credibility for the end result. While the changes suggest may not bring about transformation, they I hope will substantially improve the system and yield better results. It would streamline and streamline the existing Criminal Justice System prevailing in India.