

# **Committee on Reforms of**

## **Criminal Justice System**

**Government of India, Ministry of Home Affairs**

**Report  
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**Committee on Reforms of Criminal Justice System**  
**Government of India, Ministry of Home Affairs**

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**“Everything has been said already, but as no one listens,  
we must always begin again.”**

● **Andre Gide**  
**French thinker and writer**

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The nation is grateful to Sri. L.K. Advani, Deputy Prime Minister and Home Minister, for his vision for comprehensive reforms of the entire Criminal Justice System including the fundamental principles and the relevant laws. Hitherto, efforts were made to reform only certain set of laws, or one particular functionary of the system in piecemeal. This type of compartmental examination missed the vital focus on justice to victims and national concern for peace and security. The commitment made by him and his distinguished colleague Sri. Arun Jaitley, Minister for Law and Justice, to implement the reforms, once the Committee makes its recommendations, is a fitting answer to the cynics that the Report on Reforms of Criminal Justice System will be one more addition to the several earlier reports that are gathering dust in the Archives of the Government.

The Committee is beholden to the then Chief Justice of India, Dr. A.S. Anand, for calling upon all the High Courts to provide all information and assistance the Committee needs. Our grateful thanks to former Chief Justice Sri. B.N. Kirpal for ensuring that all the High Courts send the reports sought by the Committee on the State of Health of Criminal Justice in their respective States. The Committee is grateful to Sri Justice V.N. Khare, the Chief Justice of India for avincing keen interest in the Committee's work.

Justice P.V. Reddy, Judge Supreme Court, the then Chief Justice of Karnataka High Court, placed at the disposal of the Committee, the building for housing the Committee's office in Bangalore. The Committee is grateful to him.

The Committee is grateful to all the State Governments, High Courts, Officers of the Police Departments, Prosecution Department, Law Departments and Home Department.

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Our sincere thanks to Chief Ministers, Ministers, Judges--- present and former, distinguished lawyers, Police Officers, media personalities, politicians, social scientists, institutions and organisations and NGOs who have assisted the Committee in organising or participating in seminars, group discussions or meetings.

A word of special gratitude to the respected Dr. R. Venkataraman, former President of India, Sri. Bhairon Singh Shekhawat, Vice-President of India, Former Chief Justices Ranganath Misra, Ahmadi and Kania, Justice Jagannatha Rao, Chairman, Law Commission of India, Justice Jayachandra Reddy, Chairman Press Council of India, Justice K.T.Thomas, Sri. Soli Sorabjee, Attorney General for India, Sri. Fali Nariman, President, Bar Association of India, Senior Counsel Dr. L.M. Singhvi, Sri. Venugopal, Sri. Shanti Bhushan, Sri. Dipankumar Gupta, Sri. V.R. Reddi, Sri. K.N. Bhat, Sri. C. S. Vaidyanathan, Sri Lalit Bhasin, Lord Goldsmith, Attorney General of England, Sri Badri Bahadur Karki, Attorney General of Nepal and experts from USA, Judge Kevin Burke, Mr. Robert Litt, Mr. Ranganath Manthripragada, Ms. Dianne Post from the USA and Mme Maryvonne Callebote, Mr. Jean Luis Nadal, Mr. Roussin, Mme. Claude Nocquet and Mr. Lothion from France.

The Committee appreciates the helpful gesture of the Governments of USA, France and UK in inviting the Committee to visit their States to acquaint the Committee with the functioning of their respective Criminal Justice Systems and the reforms they are undertaking. The Committee could not go to USA and UK for want of time. The Chairman and Sri. D.V. Subba Rao could visit France. Our grateful thanks to USAID for bringing in four experts to Delhi to brief the Committee about the American System.

The Committee would like to record its deep sense of appreciation for the excellent dedicated service of Sri. C.M. Basavarya rendered as Executive Director of the Committee.

The Committee is thankful to the Director General of CRPF for lending the staff consisting of Inspector K. Girithar, Sub-Inspectors Binu Menon and G. Yamini Rekha, Asst. Sub Inspector S.M. Reddy, Constables V. Raja and M.K. Uthaiiah to work for the Committee. The Committee records its appreciation and conveys its thanks to each one of them for excellent service and help to the Committee to complete its task on schedule.



**PART – I**  
**FUNDAMENTAL PRINCIPLES**

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## **NEED FOR REFORM OF CRIMINAL JUSTICE SYSTEM**

***“Law should not sit limply, while those who defy it go free and those who seek its protection lose hope”.*** (Jennison v. Baker (1972) 1 All ER 997).

### **COMMITTEE AND ITS WORK**

1.1. The Committee on Reforms of the Criminal Justice System was constituted by the Government of India, Ministry of Home Affairs by its order dated 24 November 2000, to consider measures for revamping the Criminal Justice System. (Annexure-1). The terms of reference for the Committee are:

- i. To examine the fundamental principles of criminal jurisprudence, including the constitutional provisions relating to criminal jurisprudence and see if any modifications or amendments are required thereto;
- ii. To examine in the light of findings on fundamental principles and aspects of criminal jurisprudence as to whether there is a need to re-write the Code of Criminal Procedure, the Indian Penal Code and the Indian Evidence Act to bring them in tune with the demand of the times and in harmony with the aspirations of the people of India;
- iii. To make specific recommendations on simplifying judicial procedures and practices and making the delivery of justice to the common man closer, faster, uncomplicated and inexpensive;
- iv. To suggest ways and means of developing such synergy among the judiciary, the Prosecution and the Police as restores the confidence of the common man in the Criminal Justice System by protecting the innocent and the victim and by punishing unsparingly the guilty and the criminal;
- v. To suggest sound system of managing, on professional lines, the pendency of cases at investigation and trial stages and making the Police, the Prosecution and the Judiciary accountable for delays in their respective domains;

- vi. To examine the feasibility of introducing the concept of “Federal Crime” which can be put on List I in the Seventh Schedule to the Constitution.

1.2. The Committee was constituted under the Chairmanship of Justice V.S.Malimath, former Chief Justice of Karnataka and Kerala High Courts, Chairman, Central Administrative Tribunal and Member of the Human Rights Commission. The other members of the Committee are Sri S. Varadachary, IAS (Retd), former Advisor, Planning Commission of India and Sri Amitabh Gupta, former Director General of Police, Rajasthan. Sri Durgadas Gupta, Joint Secretary (Judicial), Ministry of Home Affairs was made the Secretary. On the recommendation of the Committee Justice Sri T.S. Arunachalam, former Judge of Madras High Court and Prof. N.R.Madhava Menon, Vice-Chancellor, West Bengal National University of Juridical Sciences were co-opted. Later, Justice Sri. T.S.Arunachalam tendered his resignation on personal grounds where-upon Sri D.V.Subba Rao, Advocate who also happens to be Chairman of the Bar Council of India was co-opted in his place. Sri Durgadas Gupta, Secretary of the Committee was made the Member Secretary of the Committee. Sri C.M.Basavarya, former District Judge and Registrar of the Karnataka High Court was appointed as Executive Director so that the Committee has the benefit of trial court experience in criminal matters. The term of the Committee, which was six months from the date of its first sitting, has been extended till 31 March 2003. Thus it may be noted that there is a wholesome combination of expertise of all the relevant fields --- the Judiciary, the Bar, the Police, the legal academic and administrator.

1.3. The notification constituting the Committee does not expressly state the reasons for constituting the Committee, obviously for the reason that they are too well-known. The statement in the notification that the Committee has been constituted “to consider measures for revamping the Criminal Justice System” implies that the Criminal Justice System is in such a very bad state as to call for revamping. A former Chief Justice of India warned about a decade ago that the Criminal Justice System in India was about to collapse. It is common knowledge that the two major problems besieging the Criminal Justice System are huge pendency of criminal cases and the inordinate delay in disposal of criminal cases on the one hand and the very low rate of conviction in cases involving serious crimes on the other. This has encouraged crime. Violent and organised crimes have become the order of the day. As chances of convictions are remote, crime has

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become a profitable business. Life has become unsafe and people live in constant fear. Law and order situation has deteriorated and the citizens have lost confidence in the Criminal Justice System.

1.4. The ultimate aim of criminal law is protection of right to personal liberty against invasion by others – protection of the weak against the strong law abiding against lawless, peaceful against the violent. To protect the rights of the citizens, the State prescribes the rules of conduct, sanctions for their violation, machinery to enforce sanctions and procedure to protect that machinery. It is utter selfishness, greed and intolerance that lead to deprivation of life, liberty and property of other citizens requiring the State to step in for protection of the citizens' rights. James Madison writes in his book *The Federalist* that “if men were angels no government would be necessary”. It is the primary function of the government to protect the basic rights to life and property. The State has to give protection to persons against lawlessness, disorderly behaviour, violent acts and fraudulent deeds of others. Liberty cannot exist without protection of the basic rights of the citizens by the Government.

1.5. This is the first time that the State has constituted such a Committee for a thorough and comprehensive review of the entire Criminal Justice System so that necessary and effective systematic reforms can be made to improve the health of the system. Prison administration is one of the functionaries of the Criminal Justice System. However, it does not fall within the mandate of the Committee. All the earlier initiatives were of a limited character to bring about reforms in the relevant laws, substantive and procedural laws, judicial reforms or police reforms. The Committee is required to take into account the recommendations made by the Law Commission of India, the Conference of Chief Ministers on Internal Security, the Report of Task Force on Internal security and Padmanabhaiah Committee Report on Police Reforms.

1.6. The terms of reference are very wide and comprehensive. They require the Committee to examine the fundamental principles of criminal jurisprudence and relevant constitutional provisions and to suggest if any modifications or amendments are needed. If, on such review the Committee finds that any amendments to the Code of Criminal Procedure, the Indian Penal Code or the Indian Evidence Act are necessary to bring them in tune with the demands of time and the aspirations of the people, it can make necessary recommendations. The Committee is not called upon to take up a general review of all these three statutes. The mandate of the Committee is limited to recommending only such amendments to these statutes as may be necessary in the light of its findings on review of the fundamental principles of criminal jurisprudence. Therefore, the Committee has not undertaken any general review of these Statutes.

1.7. The well recognised fundamental principles of criminal jurisprudence are ‘presumption of innocence and right to silence of the accused’, ‘burden of proof on the Prosecution’ and the ‘right to fair trial’. Examination of ‘Adversarial System’ followed in India being an aspect of the concept of ‘fair trial’ falls within the purview of the Committee. Simplifying judicial procedures and practices, bringing about synergy among the judiciary, the Prosecution and Police, making the system simpler, faster, cheaper and people-friendly, and restoring the confidence of the common man are the other responsibilities of the Committee. This includes improving the investigation and trial procedures on professional lines for expeditious dispensation of justice and making the functionaries accountable. The Committee is also required to examine if the concept of ‘Federal Crimes’, can be put in List 1 of the Seventh Schedule of the Constitution so that it becomes the exclusive responsibility of the Central Government.

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#### STRATEGIES ADOPTED BY THE COMMITTEE

1.8. Realizing the importance and magnitude of the task, the Committee decided to reach out to every section of the society, which has a stake in the system, directly or indirectly. Accordingly the Committee decided to: -

- (1) Prepare a questionnaire and obtain responses from all walks of society.
- (2) Organize seminars on important issues in different parts of the country.
- (3) Participate in seminars or meetings organised by others.
- (4) Meet citizens from different States hailing from different walks of life.
- (5) Obtain the views of the State Governments.
- (6) Obtain the views of the High Courts and the Judges.
- (7) Obtain the views of Central and State Bar Councils and members of the Bar.
- (8) Seek the views of Attorney General and Advocate Generals of the States.
- (9) Obtain the views of the Heads of Police Departments.
- (10) Obtain the views of the Heads of Prosecution Departments.
- (11) Obtain the views of the Forensic Scientists.
- (12) Obtain the views of the academics in law.
- (13) Obtain the views of the media persons.
- (14) Get research done by scholars on important topics.

- (15) Study the relevant reports of the Law Commission of India, Report of Dharmavira Committee, Report of Padmanabhaiah Committee, Report of Vohra Committee, Report of Task Force on internal security, Report of Chief Ministers conference on Internal Security and other Commissions on topics relevant to the Criminal Justice System.
- (16) Study the Criminal Justice Systems in U.K, Australia, France, USA and other countries and the reforms undertaken by them.
- (17) Make a comparative study of Criminal Justice Systems in 20 selected countries from different continents.
- (18) Interact with experts from different countries in the world.
- (19) Examine Reports of the National Crime Bureau upto 2000.

1.9. After an in-depth study of the problem facing the Criminal Justice System the questionnaire was prepared and sent to 3,164 persons enclosing a pre-paid envelope to enable them to respond without incurring any expenditure. The list includes the Prime Minister, Home Minister, Law Minister, Attorney General, Home Secretary, Law Secretary, Govt. of India, Law Commission of India and functionaries of the State Governments such as the Chief Ministers, Home Ministers, Law Ministers, Chief Secretaries, Law Secretaries, Home Secretaries, Advocate Generals, D.GsP, Director of Prosecution, the Chief Justices of the High Courts, Senior District Judges, different Bar Associations and State and Central Bar Councils, Bar Association Lawyers. However the number of responses received is only 284.

1.10. Views of all the High Courts and information relating to institutions, pendency, disposal and other relevant information were sought from all the High Courts. As the response was not encouraging, the Chief Justice of India, on being requested by the Chairman, called upon all the High Courts to send their responses. As a result of the initiative of the Chief Justice, all the High Courts have sent their reports. (Refer Appendix 5, Volume II). However some of them have not furnished all the information sought, in the pro forma in regard to filing, disposal, pendency of criminal cases etc.

1.11. Similarly all the State Governments were requested to send their views. But only the States of Arunachal Pradesh, Haryana, Himachal Pradesh, Karnataka, Kerala, Madhya Pradesh and Jammu & Kashmir have submitted their replies. Other States have not responded inspite of repeated requests. (Refer Appendix 6, Volume II).

1.12. Reports on the functioning of the prosecution system in all the States were sought from the respective heads of Police Departments. Reports have been received from the States of Arunachal Pradesh, Bihar, Goa, Himachal Pradesh, Karnataka, Madhya Pradesh,

Orissa, Tamil Nadu, and Uttaranchal. Others have not responded. (Refer Appendix 7, Volume III).

1.13. The Committee organised seminars as follows: -

<u>Date</u>	<u>Place</u>	<u>Topic</u>
9 February 2002	Chennai	Media and Criminal Justice System
23/24 February 2002	Jaipur	Reforms of Criminal Justice System (Investigation, Sentencing and Prosecution)
22/23 March 2002	Mumbai	Economic Crimes and Financial Frauds
26/27/28 April 2002	Delhi	Fundamental Principles of Criminal Justice – A Fresh Look.

1.14. Several other seminars organised on the recommendations of the Committee by different organizations and many more seminars organised by different organisations on the topics concerning the Criminal Justice System in which the Chairman or members of the Committee actively participated are the following: -

<u>Date</u>	<u>Place</u>	<u>Topic</u>
16 February 2002	Haveri, Karnataka	Reforms of Criminal Justice System
10 July 2002	Delhi	Use of Handcuffing – a rational approach.
27/28 July 2002	Hyderabad	Forensic Science, its use and application in investigation and prosecution.
12 September 2002	Lucknow	Symposium on Criminal Justice Administration and Dalits
13 September 2002	Allahabad	Application of Information Technology in Legal System and Reforms Of Criminal Justice System.
4 October 2002	Delhi	Insulating Police from External Pressures.
10/11 October 2002	Delhi	Law of Arrest – Police Powers and Accountability.
11 January 2003	Pune	Reforms of Criminal Justice System --- Speedier and Efficient Procedure for Trial Of Criminal Cases.



1.15. It is heartening to know that many eminent personalities participated in these seminars. Notable among them are Dr. R.Venkataraman, former President of India, Sri Bhairon Singh Shekhawat (now Vice-President of India), Sri Arun Jaitley, Honourable Minister for Law, former Chief Justices Sri Ranganath Misra, Sri A.M. Ahmadi, Sri M.H. Kania, Dr. A.S. Anand, former Supreme Court Judges Sri. K.Jayachandra Reddy, Sri. Jaganadha Rao, Sri. K.T. Thomas and many Senior Advocates Sri. Fali Nariman, Sri Soli Sorabjee, Attorney General, Sri K.K.Venugopal, Sri Shantibhushan, Sri. P.P. Rao, Sri V.R. Reddy, Sri. Dipankar P.Gupta, Sri. K.N. Bhat.

1.16. The Chairman held discussions with Mr. Badri Bahadur Karki, Attorney General of Nepal who is engaged in reforming the criminal prosecution system in his country. The Chairman discussed with Lord Goldsmith, Attorney General of U.K and held discussion with particular reference to several reforms undertaken in that country. The Chairman and members Professor Madhava Menon and Mr. Subba Rao participated in a video conference on reforms with prominent criminal lawyers from U.K. The Chairman and member Mr. Subba Rao visited Paris on the invitation of the French Government to study the Inquisitorial System followed in that country. Similar invitation from USA Agency USAID could not be accepted for want of time. Therefore USAID was good enough to send four experts to New Delhi who enlightened the Committee about the salient features of the Criminal Justice System in USA.

1.17. The Committee made an in-depth study of the materials gathered in respect of all the 19 items mentioned in the earlier paragraph.

#### CRIMINAL JUSTICE SYSTEM – AN OVERVIEW:-

Whatever views one holds about the penal law, no one will question its importance to society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. Nowhere in the entire legal field is more at stake for the community or for the individual.

Herbert Wechsler

1.18. There was no criminal law in uncivilized society. Every man was liable to be attacked on his person or property at any time by any one. The person attacked either succumbed or over-powered his opponent. “A tooth for a tooth, an eye for an eye, a life for a life” was the forerunner of criminal justice. As time advanced, the injured person agreed to accept compensation, instead of killing his adversary. Subsequently, a sliding scale of satisfying ordinary offences came into existence. Such a system gave birth to the archaic criminal law. For a long time, the application of these principles remained with the parties themselves, but gradually this function came to be performed by the State.

1.19. Since Independence and the promulgation of our Constitution rapid strides have been made in almost all fields. The communication revolution has opened the eyes, ears and minds of millions of people, resulting in increasing expectations of an ever growing population. The desire for quick, fair and affordable justice is universal. Protection of life and liberty have been given a pre-eminent position in our Constitution by enacting Article 21 as a fundamental right and imposing a duty on the State to protect life and personal liberty of every citizen. Any deprivation or breach of this valuable right is not permissible unless the procedure prescribed by law for that purpose is just, fair and reasonable. Has the State been able to keep up to this promise in a substantial measure? The ground reality, however, is that this precious fundamental right is turning out to be a mere pipe dream to many millions to whom justice is delayed, distorted or denied more than its delivery in accordance with the ideals enshrined in the Constitution. The entire existence of the orderly society depends upon sound and efficient functioning of the Criminal Justice System.

1.20. Latest report of the National Crime Record Bureau, 2000 (NCRB) published by the Ministry of Home Affairs, shows that in the year 1951 there were 6,49,728 cognizable crimes under the IPC. This has risen to 17,71,084 in the year 2000. In the year 1953 (figures for 1951 are not available) there were 49,578 violent crimes whereas in the year 2000 the number of violent crimes has increased to 2,38,381 (for the sake of illustration only figures of cognizable IPC crimes have been taken). These figures indicate an abnormal increase in the number of serious crimes. At the same time the population of the country which was 361.1 million in 1951 has increased to 1002.1 million in 2000.

**Consolidated Statement of Police Strength and of Cases Investigated by the Police in India  
1996 to 2000**

S. No			1996	1997	1998	1999	2000
1.	Total strength of State Police Forces		9,56,620	9,87,378	10,20,171	10,32,956	10,26,917
2.	Total number of cases in which investigation was completed by the police –	IPC Cases	16,78,453	16,63,666	17,53,121	17,94,390	17,92,896
		SLL Cases	41,95,778	46,00,513	44,09,133	35,47,072	33,66,127
		Total	58,74,231	62,64,179	61,62,254	53,42,462	51,59,023
3.	Workload of Civil Police : Total cases investigated by police divided by total number of investigating officer (ASIs to Inspectors)	IPC Cases	18.7	17.8	17.8	17.2	16.5
		SLL Cases	41.7	42.9	39.3	28.3	26.1
		Total	60.4	60.7	57.1	45.5	42.6

**Consolidated Statement of Cases Dealt with by the Courts in India from  
1996 to 2000**

Sl No		1996	1997	1998	1999	2000
1	No. of IPC cases which came up for trial during the year including cases pending at the beginning of the year	52,97,662	54,81,004	56,60,484	58,90,744	60,23,134

Sl No		1996	1997	1998	1999	2000
2	No. of SLL cases which came up for trial during the year including cases pending at the beginning of the year	7120383	7751906	7910411	7219222	6717380
3	No. of cases in which trial was completed during the year					
	IPC cases	843588	879928	895414	930729	933181
	SLL cases	3487815	3732474	3679707	3221158	2518475
4	No. of cases pending trial at the end of the year	4252918	4395644	4585559	4775216	4921710
	IPC cases	3259637	3625072	3784163	3506947	3649230
	SLL cases					
	Total	7512555	8020716	8369722	8282163	8570940
5	Conviction rate of those cases in which trial was completed					
	IPC Cases	37.8%	38.2%	37.4%	39.6%	41.8%
	SLL cases	87.3%	87.9%	86.7%	87.9%	81.4%

Table 2

1.21. Out of every 100 cases (both IPC and SLL crimes) reported to and taken up by the Police for investigation, between 25 and 30 cases are IPC crimes and the balance is accounted for by SLL crimes. Of the IPC crimes taken up by police for investigation every year, investigation is completed by the police in 76% to 80% of these cases. The corresponding percentage in respect of SLL cases is between 85 and 95.

1.22. The above statistics suggest that as of January 2003, assuming that we have

The above statistics suggest that as of January 2003, assuming that we have a crime free society with Police not having to take cognizance of and investigate any crime (either IPC or SLL) from now on and the strength of the trial courts remain at the present level numerically and efficiency wise, (an unrealistic assumption indeed!) it will take a minimum of another four years for the courts to dispose of all these cases.

a crime free society with Police not having to take cognizance of and investigate any crime (either IPC or SLL) from now on and the strength of the trial courts remain at the present level numerically and efficiency wise, (an unrealistic assumption indeed!) it will take a minimum of another four years for the courts to dispose of all these cases.

1.23. These figures show that the courts have not been able to cope up with the number of cases that come before them for trial every year. According to Table 1 the total number of complaints received by the police and cases registered during the year 2000 in India is 56,62,773. It is a matter of common knowledge that several persons who are victims of crimes do not complain to the police. During the year 2000 the total number of cases charge-sheeted after investigation is 50,98,304. The total number of cases disposed of by the courts in the year 2000 is 9,32,774. So far as the cases under IPC are concerned, the analysis in the report on page 1 of the NCRB report shows that 79% of IPC cases were investigated in the year 2000, 78.4% of them were charge-sheeted, 18.3% of them were tried and 41.8% of them resulted in conviction. In many Countries like U.K., U.S.A, France, Japan and Singapore the rate of conviction is more than 90%.

1.24. Quality of justice suffers not only when an innocent person is punished or a guilty person is exonerated but when there is enormous delay in deciding the criminal cases. It is a trite saying that justice delayed is justice denied. Table 25(b) of the NCRB report, 2000 furnishes the duration of trial of cases during 2000. It is seen that 10,382 cases of the duration of 3 to 5 years, 6,503 cases of the duration of 5-10 years and 2,187 cases of the duration of over 10 years were disposed of by all the courts in India during 2000. Taking more than 3 years (sometimes even 10 years) amounts to denying fair trial. Speedy trial is a right of the accused that flows from Article 21 as held by the Supreme Court. If the accused is

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acquitted after such long delay one can imagine the unnecessary suffering he was subjected to. Many times such inordinate delay contributes to acquittal of guilty persons either because the evidence is lost or because of lapse of time, or the witnesses do not remember all the details or the witnesses do not come forward to give true evidence due to threats, inducement or sympathy. Whatever may be the reason it is justice that becomes a casualty.

1.25. Vulnerable sections of the society like women, children and other members of weaker sections of society like the Schedule Caste and Schedule Tribes suffer more when the Criminal Justice System fails to live up to expectations.

### Crime Against Women

Sl No	Crime Head	Year			Percentage variation in 2000 over 1999
		1998	1999	2000	
1.	Rape	15151	15468	16496	6.6
2.	Kidnapping and Abduction	16351	15962	15023	-5.9
3.	Dowry Death	6975	6699	6995	4.4
4.	Torture	41376	43823	45778	4.5
5.	Molestation	30959	32311	32940	1.9
6.	Sexual Harassment	8054	8858	11024	24.5
7.	Importation of Girls	146	1	64	63.0
8.	Sati Prevention Act	0	0	0	-
9.	Immoral Traffic (P) Act	8695	9363	9515	1.6
10.	Indecent Rep. of Women (P) Act	190	222	662	198.2
11.	Dowry Prohibition Act	3578	3064	2876	-6.1
	<b>Total</b>	<b>131475</b>	<b>135771</b>	<b>141373</b>	<b>4.1</b>

Table 3

Several disturbing features are seen from the figures given in this table. There is a 6.6% increase in the offence of rape from 1999 to 2000. So far as the percentage of sexual harassment during the same period is concerned, there is an increase of 24.5%. What is worst is the figures relating to importation of girls obviously for sex which has increased to 63% during 2000. This is quite shocking.

1.26. So far as offences against children are concerned, Table 4 furnishes information about the incidents of different types of offences against them between 1996 and 2000.

**Offences Against Children**

Sl No	Crime Head	Years					Percentage variation	
		1996	1997	1998	1999	2000	2000 over 1996	2000 over 1999
1.	Child Rape	4083	4414	4153	3153	3132	-23.3	-0.7
2.	Kidnapping and abduction	571	620	699	791	711	24.5	-10.1
3.	Procuration of minor girls	94	87	171	172	147	56.4	-14.5
4.	Selling of girls for prostitution	6	9	11	13	15	150.0	15.3
5.	Buying of girls for prostitution	22	13	13	5	53	140.9	960
6.	Abetment of Suicide	11	13	28	24	18	63.6	-25
7.	Exposure and abandonment	554	582	575	593	660	19.1	11.2
8.	Infanticide	113	107	114	87	104	-8.8	19.5
9.	Foeticide	39	57	62	61	91	133.3	49.2
10.	Child marriage restraint act	89	78	56	58	92	3.4	58.6
	<b>Total</b>	<b>5582</b>	<b>5980</b>	<b>5882</b>	<b>4957</b>	<b>5023</b>	<b>-10.0</b>	<b>1.3</b>

Table 4

The figures show a mixed trend during the last five years. There is an increase of 1.3% from 1999 to 2000.

1.27. So far as incidence of child rape is concerned, there were 744 victims below 10 years and 2,880 victims between of 10 and 16 years. This shows the extent of child abuse that is prevalent in India and the failure of the system to contain it. This is very disturbing.

1.28. So far as crime against other weaker sections of the society namely the SC and ST are concerned, the figures for the years 1998, 1999 and 2000 are furnished in the Tables 5 and 6.

Sl No	Crime Head	Years			Percentage variation in	
		1998	1999	2000	1999 over 1998	2000 over 1999
1.	Murder	516	506	526	-1.9	4.0
2.	Rape	923	1000	1083	8.3	8.3
3.	Kidnapping & Abduction	253	228	268	-9.8	17.5
4.	Dacoity	49	36	38	-26.5	5.6
5.	Robbery	150	109	108	-27.3	-0.9
6.	Arson	346	337	290	-2.6	-13.9
7.	Hurt	3809	3241	3497	-14.9	7.9
8.	PCR Act	724	678	672	-6.3	-0.9
9.	SC/ST (Prev. of Atrocities) Act	7443	7301	7386	-1.9	1.2
10.	Others	11425	11657	11587	2.0	-0.6
	<b>Total</b>	<b>25638</b>	<b>25093</b>	<b>25455</b>	<b>-2.1</b>	<b>1.4</b>

Table 5



Sl No	Crime Head	Years			Percentage variation in	
		1998	1999	2000	1999 over 1998	2000 over 1999
1.	Murder	66	80	59	21.2	26.3
2.	Rape	331	384	403	16.0	4.9
3.	Kidnapping & Abduction	56	59	48	5.3	18.6
4.	Dacoity	5	3	5	-40.0	66.7
5.	Robbery	15	8	2	-46.6	-75.0
6.	Arson	38	43	32	13.2	-25.6
7.	Hurt	638	646	447	1.2	-30.8
8.	PCR Act	50	45	31	-10.0	-31.1
9.	SC/ST (Prev. of Atrocities) Act	709	574	502	-19.0	-12.5
10.	Others	2368	2608	2661	10.1	-2.0
	<b>Total</b>	<b>4276</b>	<b>4450</b>	<b>4190</b>	<b>4.1</b>	<b>-5.8</b>

Table 6

In the year 2000 there was an increase of 1.4% of crimes against the members of SC. So far as the members of the ST are concerned the figures indicate that there was an increase in the number of crimes like murder, rape, kidnapping, dacoity during 2000 compared to the figures of the previous year.

Economic crimes like smuggling, money laundering, tax evasion, drug trafficking, corruption and serious economic frauds are eating the vitals of the nation in a very big way.

1.29. Economic crimes like smuggling, money laundering, tax evasion, drug trafficking, corruption and serious economic frauds are eating the vitals of the nation in a very big way. Table 7 furnishes information about major frauds reported during 2000.

### Major Frauds Reported During 2000.

SL No	Value of Property lost / defrauded	Number of cases Registered under		
		CBT	Cheating	Total
1.	1-10 crores worth of loss	430	1192	1622
2.	20-25 crores	2	6	8
3.	25-50 crores	0	0	0
4.	50-100 crores	0	1	1
5.	Above 100 crores	1	0	1
	<b>Total</b>	<b>433</b>	<b>1199</b>	<b>1632</b>

Table 7

1.30. These figures show that there were 1,632 incidents of serious frauds during the year 2000 involving property worth several crores of rupees. The growing sophistication in the commission of serious economic crimes along with its complexities is a great challenge which the law enforcement agencies have not been able to effectively counter. The criminals adopt very special and sophisticated *modus operandi*. Normally individual persons are not the victims. It is the State that often suffers from such crimes. These offences are committed without being noticed by the high and the mighty, often taking advantage of deficiencies in the existing legal provisions. The system appears to be incompetent and impotent to deal with serious economic frauds like that of Harshad Mehta. Very little has been done to tackle economic frauds that have shaken the economy of the country.

1.31. Terrorism and organised crimes are growing menacingly in all parts of the world and India is no exception. To combat this problem the Government of India enacted the Terrorist and Disruptive Activities Act (TADA). After this statute lapsed, Prevention of Terrorist Activities Act (POTA) has been enacted by the Parliament. Similar laws have been enacted by Maharashtra and other States. These are very serious and complex crimes that transcend State boundaries. As many of these crimes are inter-State in character, it may be necessary to examine if some of these matters should be included in the Union list to enable the Govt. of India to meet this growing challenge in an effective manner.

1.32. The number of judges in India per million population is about 12-13 judges. Corresponding figures available for USA is 107, for U.K is 51, for Canada is 75 and for Australia

was about 41 about 12 years ago. This shows how grossly inadequate is the judge strength per million of population in India. That is the reason why the Supreme Court has in its recent decision in (2002) 4, S.C.C.247, All India Judges Association & Others Vs. Union of India and Others directed that the existing judge population ratio of 10:5 or 13 judges per million people should be raised to 50 judges per million people in a phased manner within five years.

1.33. The foundation for the Criminal Justice System is the investigation by the police. When an offence committed is brought to the notice of the police, it is their responsibility to investigate into the matter to find out who has committed the offence, ascertain the facts and circumstances relevant to the crime and to collect the evidence, oral or circumstantial, that is necessary to prove the case in the court. The success or failure of the case depends entirely on the work of the investigating officer. But unfortunately, the Criminal Justice System does not trust the Police. The courts view the police with suspicion and are not willing to repose confidence in them. Section 161 of the Code empowers the investigation officer to examine any person supposed to be acquainted with the facts and circumstances of the case and record the statement in writing. However section 162 of the Code provides that it is only the accused that can make use of such a statement. So far as the prosecution is concerned, the statement can be used only to contradict the maker of the statement in accordance with Section 145 of the Evidence Act. Any confession made by the accused before the Police officer is not admissible and cannot be made use of during the trial of the case. The statement of the accused recorded by the police can be used as provided under Section 27 of the Evidence Act to the limited extent that led to the discovery of any fact. The valuable material collected by the investigating officer during investigation can not be used by the prosecution. This makes it possible for the witnesses to make a contradictory statement during trial with impunity as it does not constitute perjury. The accused now-a-days are more educated and well informed and use sophisticated weapons and advance techniques to commit the offences without leaving any trace of evidence. Unfortunately, the investigating officers are not given training in interrogation techniques and sophisticated investigation skills. All these factors seriously affect the prosecution. This is a major cause for the failure of the system.

1.34. So far as the system of prosecution is concerned, it is often seen that best legal talent is not availed of for placing its case before the court. The accused is normally represented by a very competent lawyer of his choice. There is a mismatch in that, an equally competent lawyer is not there to represent the prosecution. The burden of proof being very heavy on the prosecution, it is all the more necessary for the prosecution to be represented by a very able and competent lawyer. Lack of co-ordination between the investigation and the prosecution is another problem. This makes things worse.

1.35. Apart from the main functionaries of the Criminal Justice System, others who have a stake in the system are the victims, the society and the accused. Other players are the witnesses and the members of the general public.

1.36. The victim whose rights are invaded by the accused is not accorded any right to participate except as a witness. The system does not afford him any opportunity to assist the court such as adducing evidence or putting questions to the witnesses. The system is thus utterly insensitive to the rights of the victim. The focus is all on the accused and none on the victim. The system has denied itself the benefit of this important source.

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1.37. Criminal cases largely depend upon the testimony of witnesses. Witnesses come to the court, take oath and quite often give false evidence with impunity. Procedure for taking action for perjury is not simple and the judges seldom make use of them. Witnesses turning hostile is a common feature. Delay in disposal of cases affords greater opportunity for the accused to win over the witnesses to his side by threats, or inducements. There is no law to protect the witnesses. The treatment given to the witnesses is very shabby. Even the basic amenities like shelter, seating, drinking water, toilets etc. are not provided. He is not promptly paid TA/DA. He is often paid much less than what he spends and nobody bothers about it. The cases are adjourned again and again making the witnesses to come to court several times leaving aside all his work. Witnesses who are treated in this manner become an easy prey to the machinations of the accused and his family.

1.38. These are some of the major problems that have contributed to the failure of the Criminal Justice System.

1.39. Justice V.R. Krishna Iyer has expressed his anguish about the failure of the system in his article in the Hindu of May 25, 1999.

“The glory and greatness of Bharat notwithstanding, do we not, even after the braggartly semicentennial noises, behave as a lawless brood, tribal and casteist, meek and submissive when political goons and mafia gangs commit crimes in cold blood, and canny corruption and economic offences ubiquitous? The criminal culture among the higher rungs and creamy layers of society, even when nakedly exposed, does not produce the public

outrage one should expect, with no burst of rage from those who must speak.....

Sans the punitive rule of law, democracy becomes a rope of sand.....

India is not a soft State, a sick society, a pathologically submissive polity.

In this darkling national milieu, the penal law and its merciless enforcement need strong emphasis. Alas the criminals are on the triumph, the police suffer from “dependencia syndrome” and integrity is on the decadence and the judges themselves are activists in acquittals of anti-social felons. Less than ten percent of crimes finally end in conviction and societal demoralization is inevitable”.

1.40. Nowhere have the broad objectives of the Criminal Justice System been codified, though these can be inferred from different statutes, including the Constitution and judicial pronouncements. As in every democratic civilized society, our Criminal Justice System is expected to provide the maximum sense of security to the people at large by dealing with crimes and criminals effectively, quickly and legally. More specifically, the aim is to reduce the level of criminality in society by ensuring maximum detection of reported crimes, conviction of the accused persons without delay, awarding appropriate punishments to the convicted to meet the ends of justice and to prevent recidivism.

1.41. The above survey of the status of the Criminal Justice system throws many challenges to the Criminal Justice System. The fundamental principles of criminal jurisprudence and the relevant laws have to be critically examined to bring out reforms in the following among other areas.

- i. To set an inspiring ideal and a common purpose for all the functionaries.
- ii. To instill a sense of urgency, commitment and accountability.
- iii. To improve professionalism, efficiency, expedition and transparency in all the functionaries.
- iv. Quickening the quality of justice by streamlining the procedures.
- v. To enhance the level of professional competence and to take measures to enhance credibility, reliability and impartiality in the investigation agency.
- vi. To improve the level of professional competence of the prosecutors and to ensure their function in co-ordination with the investigation agency.
- vii. To focus on the role of the accused in contributing to better administration of criminal justice.

- viii. To focus on justice to victims.
- ix. To tackle the problems of perjury and to ensure protection and better treatment to witnesses.
- x. To find effective response to the menacing challenges of terrorism, organised crime and economic crime.
- xi. Restoring the confidence of the people in the Criminal Justice System.

1.42. The task of the Committee is to find ways and means to reform the system to ensure that every innocent person is protected and every guilty person is punished with utmost expedition. As Sri. Fali Nariman put it 'this is the last bus to catch'.

The task of the Committee is to find ways and means to reform the system to ensure that every innocent person is protected and every guilty person is punished with utmost expedition. As Sri. Fali Nariman put it 'this is the last bus to catch'.

## **ADVERSARIAL SYSTEM**

2.1. The primary responsibility of the State is to maintain law and order so that citizens can enjoy peace and security. Life and personal liberty being very precious rights, their protection is guaranteed to the citizens as a fundamental right under Article 21 of our Constitution. This right is internationally recognised as a Human Right. Right to property which once had the status of a fundamental right in our Constitution is now relegated to a constitutional right under Article 300A of the Constitution. Many times deprivation of right to property leads to invasion of personal liberty. The State discharges the obligation to protect life, liberty and property of the citizens by taking suitable preventive and punitive measures which also serve the object of preventing private retribution so essential for maintenance of peace and law and order in the society. Substantive penal laws are enacted prescribing punishment for the invasion of the rights. When there is an invasion of these rights of the citizens it becomes the duty of the State to apprehend the person guilty for such invasion, subject him to fair trial and if found guilty to punish him. Substantive penal laws can be effective only when the procedural laws for enforcing them are efficient. This in essence is the function of the criminal justice system.

The State discharges the obligation to protect life, liberty and property of the citizens by taking suitable preventive and punitive measures which also serve the object of preventing private retribution so essential for maintenance of peace and law and order in the society.

2.2. The system followed in India for dispensation of criminal justice is the adversarial system of common law inherited from the British Colonial Rulers. The accused is presumed to be innocent and the burden is on the prosecution to prove beyond reasonable doubt that he is guilty. The accused also enjoys the right to silence and cannot be compelled to reply. The aim of the Criminal Justice System is to punish the guilty and protect the innocent. In the adversarial system truth is supposed to emerge from the respective versions of the facts presented by the prosecution and the defence before a neutral judge. The judge acts like an umpire to see whether the prosecution has been able to prove the case beyond reasonable



doubt and gives the benefit of doubt to the accused. It is the parties that determine the scope of dispute and decide largely, autonomously and in a selective manner on the evidence that they decide to present to the court. The trial is oral, continuous and confrontational. The parties use cross-

In the adversarial system truth is supposed to emerge from the respective versions of the facts presented by the prosecution and the defence before a neutral judge.

examination of witnesses to undermine the opposing case and to discover information the other side has not brought out. The judge in his anxiety to maintain his position of neutrality never takes any initiative to discover truth. He does not correct the aberrations in the investigation or in the matter of production of evidence before court. As the adversarial system does not impose a positive duty on the judge to discover truth he plays a passive role. The system is heavily loaded in favour of the accused and is insensitive to the victims' plight and rights.

2.3. Over the years taking advantage of several lacunae in the adversarial system large number of criminals are escaping convictions. This has seriously

The system is heavily loaded in favour of the accused and is insensitive to the victims' plight and rights.

eroded the confidence of the people in the efficacy of the System. Therefore it is necessary to examine how to plug the escape routes and to block the possible new ones.

2.4. There are two major systems in the world. There are adversarial systems which have borrowed from the inquisitorial system and vice versa. One school of thought is that the Inquisitorial system followed in France, Germany, Italy and other Continental countries is more efficient and therefore a better alternative to the adversarial system. This takes us to the examination of the distinguishing features of the inquisitorial system.

## INQUISITORIAL SYSTEM

2.5. In the inquisitorial system, power to investigate offences rests primarily with the judicial police officers (Police/ Judiciare). They investigate and draw the documents on the basis of their investigation. The Judicial police officer has to notify in writing of every offence which he has taken notice of and submit the dossier prepared after investigation, to the concerned prosecutor. If the prosecutor finds that no case is made out, he can close the case. If, however he feels that further investigation is called for, he can instruct the judicial police to undertake further investigation. The judicial police are required to gather evidence for and against the accused in a neutral and objective manner as it is their duty to assist the



investigation and the prosecution in discovering truth. Exclusionary rules of evidence hardly exist. Hearsay rules are unknown in this System. If the prosecutor feels that the case involves serious offences or offences of complex nature or politically sensitive matters, he can move the judge of instructions to take over the responsibility of supervising the investigation of such cases.

2.6. To enable the Judge of instructions to properly investigate the case, he is empowered to issue warrants, direct search, arrest the accused and examine witnesses. The accused has the right to be heard and to engage a counsel in the investigation proceedings before the judge of instructions and to make suggestions in regard to proper investigation of the case. It is the duty of the judge of instructions to collect evidence for and against the accused, prepare a dossier and then forward it to the trial judge. The

The accused is presumed to be innocent and it is the responsibility of the judge to discover the truth.

accused is presumed to be innocent and it is the responsibility of the judge to discover the truth. The statements of witnesses recorded during investigation by the judge of instructions are admissible and form the basis for the prosecution case during final trial. Before the trial judge the accused and the victim are entitled to participate in

the hearing. However the role of the parties is restricted to suggesting the questions that may be put to the witnesses. It is the Judge who puts the questions to the witnesses and there is no cross-examination as such. Evidence regarding character and antecedents of the accused such as previous conduct or convictions are relevant for proving the guilt or innocence of the accused.

2.7. The standard of proof required is the inner satisfaction or conviction of the Judge and not proof beyond reasonable doubt as in the Adversarial System.

2.8. Another important feature of the Inquisitorial System is that in respect of serious and complex offences investigation is done under the supervision of an independent judicial officer\_\_ the Judge of Instructions\_\_ who for the purpose of discovering truth collects evidence for and against the accused.

Another important feature of the Inquisitorial System is that in respect of serious and complex offences investigation is done under the supervision of an independent judicial officer\_\_ the Judge of Instructions\_\_ who for the purpose of discovering truth collects evidence for and against the accused.

2.9. In evaluating the two systems we should not forget the basic requirement of fairness of trial. In

the inquisitorial system the Judge of instructions combines to some extent the roles of the investigator and the Judge. Defence lacks adequate opportunity to test the evidence of the prosecution by cross-examination. The defence has only a limited right of suggesting questions to the Judge. It is left to the discretion of the Judge whether to accept the suggestions or not. Thus, the accused does not get a fair opportunity of testing the evidence tendered against him which is one of the essential requirements of fair trial.

2.10. In the Inquisitorial System followed in France the positions of Magistrates and Prosecutors are interchangeable. A person appointed as a Magistrate for one term may be appointed as a Prosecutor for the next term. It is by common selection that Prosecutors and Magistrates are selected and are subjected to a common training programme. It is one of the cardinal principles of justice that justice should not only be done but should appear to be done. The Judge who had functioned earlier as a prosecutor is likely to carry unconsciously a bias in favour of the prosecution. At any rate it is likely to cause an apprehension in the mind of the accused that he may not get a fair trial at the hands of such a Judge.

The Judge who had functioned earlier as a prosecutor is likely to carry unconsciously a bias in favour of the prosecution. At any rate it is likely to cause an apprehension in the mind of the accused that he may not get a fair trial at the hands of such a Judge.

2.11. In the Adversarial System, fairness of trial is adequately assured by the Judge maintaining a position of neutrality and the parties getting full opportunity of adducing evidence and cross-examining the witnesses. Thus it is seen that fairness of trial is better assured in the Adversarial System.

## WORLD SCENARIO

2.12.1. So far as world scenario is concerned it is enough to quote by Prof. Abraham S. Goldstein

“It is becoming increasingly apparent to criminal justice scholars that single theory models of criminal procedure – whether termed inquisitorial or adversarial – are being stretched beyond their capacity by the phenomena they are designed to control. Virtually everywhere, formal systems of charge and adjudication cannot possibly be enforced in accordance with the premises underlying them. There are simply too many offenses, too many

offenders and too few resources to deal with them all. One result has been a steady movement towards a convergence of legal systems – towards borrowing from others those institutions and practices that offer some home of relief”.

Israel Law Review, Vol.41-1997

2.12.2. United Kingdom and Australia who are engaged in the reform process do not favour switch over from the Adversarial System to the Inquisitorial System. However they have not hesitated to borrow some of the features of the Inquisitorial System.

#### VIEWS OF HIGH COURTS

2.13. The High Courts of Gauhati, Gujarat, Jammu & Kashmir, Karnataka, Patna, Rajasthan and Sikkim have not expressed any views. The High Courts of Allahabad, Andhra Pradesh, Kerala, and Punjab & Haryana have said that the present system is satisfactory. The High Courts of Jarkhand and Uttaranchal have opined that the Adversarial System has failed. The High Courts of Bombay, Chattisgarh, Delhi, Himachal Pradesh, Kolkata, Madras, Madhya Pradesh and Orissa have expressed that the present system is not satisfactory. Some of them say that there is scope for improving the Adversarial System by adopting some of the useful features of the Inquisitorial System.

#### VIEWS OF SOME STATE GOVERNMENTS

2.14. Governments of Arunachal Pradesh, Karnataka, Kerala, Madhya Pradesh, Haryana, Himachal Pradesh and Jammu & Kashmir are in favour of continuing the Adversarial System followed in India. Other Governments have not responded.

#### THE NEED FOR REFORM

2.15. The Adversarial System lacks dynamism because it has no lofty ideal to inspire. It has not been entrusted with a positive duty to discover truth as in the Inquisitorial System. When the investigation is perfunctory or ineffective, Judges seldom take any initiative to remedy the situation. During the trial, the Judges do not bother if relevant evidence is not produced and plays a passive role as he has no duty to search for truth. As the prosecution has to prove the case beyond reasonable doubt, the system appears to be skewed in favour of the accused. It is therefore necessary to strengthen the Adversarial System by adopting with suitable modifications some of the good and useful features of the Inquisitorial System.

## TRUTH AND JUSTICE

“Truth does not pay homage to any society ancient or modern. But society has to pay homage to truth or perish”

Swami Vivekananda.

2.16.1. The Indian ethos accords the highest importance to truth. The motto *Satyameva Jayate* (Truth alone succeeds) is inscribed in our National Emblem “Ashoka Sthambha”. Our epics extol the virtue of truth. Gandhiji gave us truth – as the righteous means to achieve independence by launching the movement of *Satyagraha*.

2.16.2. For the common man truth and justice are synonymous. So when truth fails, justice fails.

2.16.3. What is the place accorded to ‘truth’ in the Criminal Justice System in India?

2.16.4. It is worthwhile to recall the following observations of Dr. R.Venkataraman, former President of India.

“The Adversarial System is the opposite of our ancient ethos. In the panchayat justice, they were seeking the truth, while in adversarial procedure, the Judge does not seek the truth, but only decides whether the charge has been proved by the prosecution. The Judge is not concerned with the truth; he is only concerned with the proof. Those who know that the acquitted accused was in fact the offender, lose faith in the system”.

2.16.5. The Supreme Court has criticised the passive role played by the Judges and emphasized the importance of finding truth in several cases.

2.16.6. In the case of Ram Chandra vs. State of Haryana, AIR 1981. SC 1036, the Supreme Court has said:

...there is an unfortunate tendency for a Judge presiding over a trial to assume the role of referee or umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortion flowing from combative and competitive elements entering the trial procedure.

2.16.7. In the case of Mohanlal vs. Union of India, where best available evidence was not brought by the prosecution before the court, the Supreme Court observed as follows:

In such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions- whether discretionary or obligatory – according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done.

It is the duty of a Court not only to do justice but also to ensure that justice is being done.

2.16.8. In practice however we find that the Judge, in his anxiety to demonstrate his neutrality opts to remain passive and truth often becomes a casualty. Failure to ascertain truth may be on account of errors or omissions on the part of the investigation agency, the prosecution or the faulty attitude of the parties, the witnesses or inadequacies in the principles and laws regulating the system. There is no provision in the Code which expressly imposes a duty on the court to search for truth. It is a general feeling that it is falsehood that often succeeds in courts.

2.16.9. Truth being the cherished ideal and ethos of India, pursuit of truth should be the guiding star of the Criminal Justice System. For justice to be done truth must prevail. It is truth that must protect the innocent and it is truth that must be the basis to punish the guilty. Truth is the very soul of justice. Therefore truth should become the ideal to inspire the courts to pursue. This can

Concern for and duty to seek truth should not become the limited concern of the courts. It should become the paramount duty of everyone to assist the court in its quest for truth.

be achieved by statutorily mandating the courts to become active seekers of truth. It is of seminal importance to inject vitality into our system if we have to regain the lost confidence of the people. Concern for and duty to seek truth should not become the limited concern of the courts. It should become the paramount duty of everyone to assist the court in its quest for truth.

2.16.10. Many countries which have Inquisitorial model have inscribed in their Parliamentary Acts a duty to find the truth in the case. In Germany Section 139 of the so called 'Majna Charta', a breach of the Judges' duty to actively discover truth would promulgate a procedural error which may provide grounds for an appeal. Nothing great and worthy can be achieved without a great vision and an inspiring ideal. For courts of justice there cannot be any better or higher ideal than quest for truth. Preamble is the right place to incorporate the goal or ideal to pursue which the law is enacted. It may look rather unusual that the ideal for the law is being introduced in the preamble long after the law is enacted. But then, it is never too late to do the right thing for the right cause. The Committee therefore favours incorporating an inspiring ideal of 'quest for truth' in the Preamble and a specific provision in the Code imposing a fundamental duty to seek truth.

In Germany Section 139 of the so called 'Majna Charta', a breach of the Judges' duty to actively discover truth would promulgate a procedural error which may provide grounds for an appeal.

#### INHERENT POWERS

2.17.1 The Code which speaks in Section 482 of the inherent power of the High Court says that nothing in the Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give affect to any order under the Code or to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. In essence it speaks of the residuary power to do justice. As all the Criminal Courts are courts of justice there is no good reason to limit the exercise of inherent powers to the High Court. Limited conferring of inherent powers to the High Court has contributed to unnecessary litigation and delay. The inherent powers in civil matters are conferred by Section 151 of the Civil Procedure Code on all courts and are not

Inherent powers can be exercised in the interest of justice, in the absence of a statutory provision to meet the situation.

limited to the High Court. Now that every criminal court is enjoined the duty to seek truth there is no good reason why it should not be empowered to exercise inherent powers for seeking truth or to prevent

abuse of the process of any court or otherwise to secure the ends of justice. Inherent powers can be exercised in the interest of justice, in the absence of a statutory provision to meet the situation. The lower courts can be trusted to exercise inherent powers in accordance with settled principles.



2.17.2 The Law Commission in its 14<sup>th</sup> report (Paras 828 & 830) has also recommended conferment of inherent power but on the sessions courts. There is no good reason to deny inherent powers to other subordinate criminal courts.

#### COURTS' POWER TO SECURE EVIDENCE

2.18.1 Section 165 of the Evidence Act, invests the Court with the power to ask any question it pleases, in any form, at any time, of any witness, or the parties about any fact, relevant or irrelevant, and also to order the production of any document or thing. This power can be exercised by the Court, "in order to discover or to obtain proper proof of relevant facts". This Section does not expressly confer a power on the Court to summon witnesses, to give evidence. It can summon a witness only to produce any document or a thing.

2.18.2 Wide power has been conferred on the court by Section 311 of the Code to summon material witnesses or examine the persons present in the Court. It reads:

Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

2.18.3 First part of Section 311 gives discretion to the court to summon any person as a witness; the second part makes it obligatory to examine witness if it is essential for the just decision of the case. It does not say that the power should be exercised when it appears to the court that it is necessary to discover truth. The requirement of "just decision of the case" occurring in the latter part of the Section is not synonymous with the duty to discover truth.

2.18.4 The provisions discussed above do not cast a positive duty on the court to exercise the power to summon witnesses "in order to seek the truth" but only for "proof of relevant facts" or for "just decision" in the case. In practice it is seen that when the witnesses are examined the courts rarely ask any questions to the witnesses, fearing that their neutrality may be doubted.

2.18.5 Witnesses examined at the instance of the court are liable to be cross-examined by the rival parties to the proceedings. Aggrieved parties often challenge such intervention on

grounds of bias and denial of fair trial. The trend of judicial decisions is also that this power should be exercised with utmost circumspection and not to supplement the evidence for the prosecution or to fill up the gaps in the prosecution case. Thus the power under Section 311 is virtually rendered nugatory.

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2.18.6 Furthermore, the other provisions in the Code also appear to curtail this power, may be unintentional. So far as summons trial procedure is concerned Section 255 entitles the court to take into account in addition to the evidence produced by the prosecution, such further evidence as the court on its own motion causes to be produced. But there is no similar provision in respect of warrant (Section 238 to 250) and sessions (Section 225 to 232) trials. The court can consider only the evidence produced by the prosecution and not other evidence collected by invoking courts' power under Section 311. These restrictions should be removed and a provision similar to Section 255 should be made in respect of warrant and session's trial procedure also.

2.18.7 In England the court has power to cause production of evidence for elucidating truth as can be seen from the following observation of Lord Esher in *Coulson vs Disborough*, 1894, 2 Q.B, 316.

If there be a person whom neither party to an action chooses to call as witness, and the Judge thinks that the person is able to elucidate the truth, the Judge in my opinion is entitled to call him; and I cannot agree that such a course has never been taken by a Judge before.

2.18.8 It is therefore necessary to amend Section 311 imposing a duty on every court to suo motu cause production of evidence for the purpose of discovering truth and requiring every court to take into account

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## COURTS' POWER TO REGULATE INVESTIGATION

2.19.1 Quite often the Judge acquits the accused after recording a finding that the prosecution has miserably failed to prove its case against the accused attributing the failure to defective, incompetent or dishonest investigation. The courts rarely direct further or proper investigation by the same or other competent agency for discovering truth though they have the power as can be seen from Section 173(8) of the code which reads:

Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer-in-charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections(2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section(2).

2.19.2 This provision was invoked by the Supreme Court in AIR 1988 SC 1323 between *Kashmiri Devi vs. Delhi Administration* and others and the relevant observations are as follows:

- (5) “After hearing learned counsel for the parties and on perusal of the record we are satisfied that prima facie the police have not acted in a forthright manner in investigating the case, registered on the complaint of Sudesh Kumar. The circumstances available on record prima facie show that effort has been made to protect and shield the guilty officers of the police who are alleged to have perpetrated the barbaric offence of murdering Gopi Ram by beating and torturing. The appellant has been crying hoarse to get the investigation done by an independent authority but none responded to her complaint. The Additional Sessions Judge while considering the bail application of Jagmal Singh, Constable, considered the autopsy report and observed that Doctor had postponed giving his opinion regarding the cause of death although the injuries were ante mortem. The learned Sessions Judge referring to a

number of circumstances observed that the investigating officer had converted the case from S.302/IPC to S.304/IPC on flimsy grounds within hours of the registration of the case even without waiting for the post-mortem report. The learned Sessions Judge further observed that it was a prima facie case of deliberate murder of an innocent illiterate poor citizen of Delhi in Police custody and investigation was partisan.

- 6) .....Prima facie the police has acted in partisan manner to shield the real culprits and the investigation of the case has not been done in a proper and objective manner. We are therefore of the opinion that in the interest of justice it is necessary to get a fresh investigation made through an independent authority so that truth may be known.

2.19.3 Technical or non-fulfillment of any procedural requirement or inadequacies of evidence or non-examination of material witnesses, mistakes in investigation and similar other factors have quite often contributed to acquittals. This amounts to failure of the courts' to search for truth to do justice. Therefore the Committee is of the view, that in such situations, the court concerned should not be allowed the shortcut of acquitting the accused. A statutory obligation should be placed on the court to take such steps as may be necessary, or to issue such directions as may be required, to remove the deficiencies. This may include examining witnesses and directing fresh or proper investigation by any appropriate agency.

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2.19.4 Quality of investigation needs substantial improvements, more so when it is charged with the responsibility of discovering truth. These aspects are discussed in a separate chapter on investigation.

2.19.5 In the present system, the Directorate of Prosecution is expected to guide the investigation. In practice however this has not worked satisfactorily. The Committee has

examined the question of improving the functioning of the Directorate of Prosecution, in a separate chapter devoted to Prosecution.

#### VICTIM'S PARTICIPATION

2.20.1. In the Inquisitorial System the Judge of instructions is a part of the investigating machinery charged with the responsibility of ascertaining truth. In the Adversarial System, the Judge is not a part of the investigating machinery. As it is proposed to cast a duty on the court to discover truth we have to find ways and means of achieving this object without the Judge becoming a part of the investigating machinery.

2.20.2. Ordinarily the prosecution places such evidence as it considers necessary during the trial of the case. The court has no means to know if there is any other evidence which can throw light on truth of the case. The victim not being a party has no role to play in the trial except giving evidence as a witness. The victim may have information about the evidence available in regard to commission of the crime.

He would also be very much interested in the vindication of justice by securing conviction of the person who has committed the offence. He would be eager to assist the prosecution. Therefore the victim may be made a party to assist the court in discovering truth. He may

The victim may be made a party to assist the court in discovering truth. He may be permitted to put questions or suggest questions to be put by the court to the witnesses produced by the parties. He can also point out the availability of other evidence that would assist the court in discovering truth. On the victim furnishing such information the court may cause production of such evidence as it considers necessary to discover truth.

be permitted to put questions or suggest questions to be put by the court to the witnesses produced by the parties. He can also point out the availability of other evidence that would assist the court in discovering truth. On the victim furnishing such information the court may cause production of such evidence as it considers necessary to discover truth.

2.20.3. Active participation of the victim during investigation would be helpful in discovering truth. He can assist investigation in finding out the real offender and in collecting evidence to prove the commission of the offence by the assailant. He can also offer suggestions for proper investigation of the case. When the investigation proceeds on wrong lines the victim can move the court for appropriate directions to ensure proper investigation of the case.

2.20.4. In this way, the Judge does not become part of the investigation machinery as in the Inquisitorial System. He would maintain his position as a neutral judge and objectively consider the request of the victim for directions regarding investigation or production of evidence during trial.

2.20.5. Participation of the victim will also assist the court in exercising its discretion in regard to grant or cancellation of bail. The victim will also have opportunity to adduce evidence in regard to his loss, pain and suffering and assist the court in determining the quantum of compensation. In cases where prosecution seeks to withdraw from the case, the victim would be in a position to assist the court in proper exercise of its discretion and may even offer to take the responsibility of continuing the prosecution. Presence of the victim before the court would also facilitate in the matter of compounding or settlement of the case.

2.20.6. In cases where the victim is dead or otherwise not available, his dependent or next of kin or a recognized NGO permitted by the Court may be impleaded as a party.

2.20.7. The victim should have the right to be represented by a lawyer. If the victim is an indigent person and is not in a position to engage a lawyer, the State should provide him a lawyer. When the State has an obligation to provide a lawyer to the accused, there is no good reason why the victim should not be provided a lawyer at the cost of the State.

2.20.8. When the victim is arrayed as a party to the criminal proceedings he should take his turn after the prosecution or at such other stage as may be permitted by the court.

#### VICTIM'S RIGHT TO APPEAL

2.21. The victim or his representative who is a party to the trial should have a right to prefer an appeal against any adverse order passed by the trial court. In such an appeal he could challenge the acquittal, or conviction for a lesser offence or inadequacy of sentence, or in regard to compensation payable to the victim. The appellate court should have the same powers as the trial court in regard to assessment of evidence and awarding of sentence.

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## EVIDENCE REGARDING CHARACTER

2.22.1. Section 54 of the Indian Evidence Act provides that evidence regarding bad character is irrelevant except in cases where evidence has been led to show that the accused is of good character. Under Section 53 evidence regarding good character of the accused is relevant in criminal cases. Evidence regarding good character of the accused may show that he is not likely to have committed the offence. Logically it follows that evidence of bad character of the accused may show that he is more likely to commit the offence. At present the law in this behalf is heavily loaded in favour of the accused and against the prosecution. Just as evidence of good character of the accused is relevant, evidence regarding bad character of the accused should also be relevant. There is no good reason why evidence regarding bad character of the accused should be made relevant only when evidence is led about his good character.

The Committee therefore recommends that Section 54 of the Evidence Act be substituted by a provision to the effect that in criminal cases evidence of bad character and antecedents is relevant.

This is quite illogical and irrational. By the exclusionary rule of evidence prescribed by Section 54, the Court is denied of the benefit of a very valuable piece of evidence that would assist in the search for truth. In the inquisitorial system character and antecedents of the accused are relevant both in regard to determination of guilt and awarding of sentence. The Committee therefore recommends that Section 54 of the Evidence Act be substituted by a provision to the effect that in criminal cases evidence of bad character and antecedents is relevant.

2.22.2. Relevant recommendations regarding rights of the victim to participation, right to prefer an appeal against acquittals and right to compensation are incorporated in the separate chapter on 'justice to victims'.

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## **RIGHT TO SILENCE**

3.1 The right not to be compelled to testify against himself is a universally recognised right of the accused under Art 14 of the International convention on civil and political rights and is a fundamental right conferred by Art 20 (3) of the Constitution. It says that “No person accused of any offence shall be compelled to be a witness against himself”. This is often described as right to silence. History of mankind is replete with instances where under every type of regime the accused in custody was tortured within the four corners of the cell for forcing him to confess or disclose information, when there is none to hear his cries or to come to his rescue. That is why compulsion is prohibited by of Article 20(3). In AIR 1992 SC 1795, the Supreme Court has pointed out that compulsion in the present context means “Duress”. It does not prohibit admission or confession which is made without any inducement, threat or promise. It also does not bar the accused from voluntarily offering himself to be examined as a witness. Any confession made under compulsion is rendered inadmissible in evidence by virtue of S.24 of the Evidence Act. It cannot be disputed that accused is good source of information about the commission of the offence. But unfortunately this source is not fully tapped may be for the fear of infringing the accused’s right to silence granted by Article 20(3). To ascertain if there is any scope for tapping this source and to find out ways and means of enhancing contribution of the accused for better quality of criminal justice it is necessary to examine the true scope and limits of the Right to silence.

It cannot be disputed that accused is good source of information about the commission of the offence. But unfortunately this source is not fully tapped may be for the fear of infringing the accused’s right to silence granted by Article 20(3). To ascertain if there is any scope for tapping this source and to find out ways and means of enhancing contribution of the accused for better quality of criminal justice it is necessary to examine the true scope and limits of the Right to silence.



3.2 Art. 20(3) does not prohibit the accused being questioned during investigation or trial. When questioned the accused may deny or make a confession. When the accused is asked during trial whether he pleads guilty to the charge he may confess and plead guilty. If the accused is willing during investigation to make a confession, it can be got recorded by the Magistrate under section 164 of the Code. A voluntary statement by the accused leading to discovery of any incriminating fact is admissible under S-27 of the Evidence Act. Sections 306 and 307 of the Code empower the court to tender pardon to the approver who was a privy or an abettor in the commission of the offence, subject to the condition that he makes a full and complete disclosure of all the facts including his own involvement in the commission of the crime. If the person after accepting tender of pardon gives false evidence or willfully conceals any essential fact he can be deprived of the privilege of pardon and tried for the offences he is alleged to have committed as also for the offence of giving false evidence.

3.3 Section 313 of the Code confers power on the court to examine the accused only to explain any circumstances appearing in the evidence against him. Whereas Clause (a) of Sub-Section (1) of Section 313 empowers the court to put questions at any stage to the accused as it considers necessary, Clause (b) of Sub-Section (1) requires the court to question the accused generally on the case after the witnesses for the prosecution have been examined. Sub-Section (2) of 313 provides that no oath shall be administered to the accused when he is examined under Sub-Section (1). Sub-Section (3) provides that the accused shall not be liable for punishment for refusing to answer the questions put to him or for any false answers.

3.4 Sub-section(4) provides that the answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, or any other offence which such answers may tend to show he has committed. It does not empower the court to draw any inference when the accused remains silent or refuses to answer the question put to him.

3.5 If, in answer to the question put to the accused under Section 313 he voluntarily makes a self-incriminatory statement it can be taken into consideration for or against him as provided in Section 313(4). As no compulsion is involved Article 20(3) is not violated. If any incriminatory statement is voluntarily made by the accused in answer to the question put by a police officer, it cannot be regarded as one made under compulsion, vide AIR 1962 SC 1831, R.K. Dalmia Vs. Delhi Administration. In AIR 1965 SC 1251, State of Gujarat Vs. Shyamlal Mohanlal Choksi the Supreme Court has upheld the validity of Section 27 of the Evidence Act which renders the portion of the statement of the accused that leads to the discovery of any fact admissible in evidence.



3.6 Burden of Proof in Criminal cases is on the Prosecution as provided in section 101 of the Evidence Act. However, there are several statutory provisions which provide that the court may presume certain facts, place the burden on the accused of rebutting such presumption. If the accused fails to rebut the presumption the court can

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proceed to give its verdict on the basis of the presumption. For the sake of convenience we shall limit our examination to only a few statutory provisions which provide for raising certain rebuttable presumptions.

3.7.1 Section 114 of the Evidence Act gives several illustrations where the Court may presume existence of certain facts.

S.114 illustration (a) reads:

The court may presume

- (a) that a man who is in possession of stolen goods soon after theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession”.

3.7.2 If the accused remains silent and fails to account for possession of the goods the court may convict the accused on the basis of the statutory presumption for the offence of theft or offence of receiver of the stolen goods.

Illustration (h) to section 114 reads: -

“The court may presume

- (h) that if a man refuses to answer a question which he is not compelled to answer, by law, the answer, if given, would be unfavourable to him”;

3.8 The expression “man” used herein is in a generic sense and does not exclude the accused. If the accused refuses to answer the questions put to him an unfavourable inference can be drawn against him.

3.9 Section 113 A of the Evidence Act provides for a presumption that the husband has abetted suicide of his wife if suicide took place within seven years of marriage and the wife was earlier subjected to cruelty. Likewise Section 113 B raises a presumption of dowry death if it is shown that prior to her death she was harassed etc in connection with demand

of dowry. Again Section 114 A provides for presumption as to absence of consent in certain prosecutions for rape.

3.10 Similarly there are several special statutes which provide for raising certain presumptions placing the burden of rebutting them on the accused. Section 4 of Public Gambling Act 1867 provides that “Any person found in any common gambling house or in gambling or playing there-in shall be presumed until the contrary be proved to have been there for the purpose of Gambling”. Section 12 of the Protection of Civil Rights Act 1955 provides “where any act constituting an offence under this Act is committed in relation to a member of the Scheduled Caste as defined in clause (24) of Article 366 of the Constitution, the court shall presume, unless the contrary is proved that such act was committed on the ground of untouchability”. Certain presumptions are drawn under Section 3, 5 and 6 of Immoral Traffic (Prevention) Act 1956. In order to avoid such presumption taking effect the accused has to break his silence to rebut the presumption. This type of pressure on the accused is not regarded as compelling him to be a witness against himself in contravention of Article 20(3). The Supreme Court has held in AIR 1971 SC 2346 that no compulsion is involved in enacting a rule of absolute liability or conclusive evidence against the accused or to disclose his defence failing which an adverse inference may be drawn against the accused.

3.11 The common features discernible from the analysis of some of the statutes in India in the previous paragraphs may be summarized as follows:

- i. Article 20(3) does not prohibit the Investigating Officer from putting questions to the accused to elicit information about the commission of the crime and his involvement.
- ii. The court can put any questions to the accused during trial to give him an opportunity to explain the circumstances appearing against him in the evidence.
- iii. The accused has a right to answer or refuse to answer any question put to him during investigation or trial.
- iv. The court can draw appropriate inferences from the answers given by the accused when examined under Section 313 of the Code.
- v. There is no express provision empowering the court to draw an adverse inference against the accused on his failure to answer the questions put to him.
- vi. On the accused failing to rebut the statutory presumption the court can proceed to treat the presumption as absolute.

3.12 In the separate chapter on ‘Investigation’ the Committee has *inter-alia* made the

following recommendations to improve the competence and credibility of the investigating agency: -

- i. To provide a separate, independent, honest, competent and efficient investigation agency free from political and other pressures.
- ii. To ensure that during investigation the accused and witnesses are not subjected to any torture, threats or inducements and that only the voluntary statements made by them are recorded faithfully and accurately.
- iii. To suitably amend Sections 161 and 162 of the Code to provide for recording and signing the statements made by any person to the Police Officer and to render them admissible evidence.
- iv. To delete Sections 25 to 29 of the Indian Evidence Act.

3.13 Further discussion shall be on the basis of these recommendations.

3.14 We shall now examine how refusal of the accused to answer the questions put to him is dealt with in different countries.

3.15 In United States of America right to silence has been granted by the 5<sup>th</sup> amendment to the Constitution. No adverse inference of guilt can be drawn from the failure of the accused to testify. However some of the American Courts have held that adverse inference can be drawn from the silence of the accused for the limited purpose of determining the quantum of punishment. Professor Ingraham holds the view that:

Every citizen has a duty to give frank answers to relevant questions concerning the crime to the Police. An obdurate silence in the face of an accusation of involvement must be capable of leading to whatever reasonable inferences can be drawn there-from. One of those is concealment of guilt.

3.16 He further points out that common sense expects one who is accused of the crime to reply, explain, admit or exonerate himself and that this does not threaten the privilege from self-incrimination.

3.17 In Canada right to silence is recognised by Section 11(c) of the Canadian Charter of Rights and Freedom. Section 4(6) of the Canadian Evidence Act 1985 provides that failure to testify shall not entitle the court to draw an adverse inference against him.

3.18 In Italy, adverse inference is drawn against the accused for failure to testify. In

Japan the accused has the right to silence and no adverse inference can be drawn on his refusal to testify. In South Africa, right to silence is enshrined in Section 35 of the Bill of Rights and no adverse inference can be drawn against the accused for failure to answer any question during investigation or trial.

3.19 So far as Australia is concerned, in New South Wales, the accused has the right to silence and Section 20 provides that adverse inference can be drawn against the accused for failure to testify only when a comment is made by another accused in the case. The position is slightly different in the State of Queensland. In the Case of *Weissensteiner vs. Queen* (1993 178, Common Law Report 217) the majority has held that adverse inference can be drawn on the failure of the accused to testify where the evidence establishes a prima-facie case.

3.20 The Law Commission of North South Wales has in its recent report No.95 recommended that legislation based on Sections 34, 36 and 37 of the United Kingdom Criminal Justice and Public Order Act 1994 should not be introduced in South Wales. However they have made recommendations No.5 (a), 5(b) and No.10 to require the accused to disclose his defence in several respects and upon failure to do so to draw adverse inference and also to draw adverse inference on the refusal of the accused to testify.

3.21 United Kingdom has during last few years undertaken several measures to reform the Criminal Justice System. The reforms which have a bearing on the right to silence of the accused are contained in Sections 34, 35, 36 and 37 of the Criminal Justice and Public Order Act 1994. These provisions permit “proper inferences” being drawn from the silence of the accused to the questions put to him during investigation or trial.

3.22 In Northern Ireland there are similar provisions in the Criminal Evidence (Northern Ireland) Order 1988. In that Country the cases are tried with the help of the Jury. A case arising from Northern Ireland where silence of the accused was taken into account, came up for consideration in the House of Lords in the case of *Murray vs. DPP* (1993 Cr.APP.REP.151). In that case Lord Mustill observed that no finding of guilt can be arrived at merely on the basis of the silence of the accused unless the prosecution makes out a prima-facie case. On appeal, the European Court of Human Rights in *Murray Vs. United Kingdom* (1996) 22 EHRR-29 upheld the validity of the Irish Law holding that they did not have the effect of denying the right of the accused to a fair trial or of rebutting the presumption of innocence flowing from Article 6 of the European Convention. The Court however held that two conditions should be satisfied for drawing appropriate inferences from the silence of the accused, namely (i) that the prosecution must firstly establish prima-facie case and (ii) that the accused should be given an opportunity to call his Attorney when he is interrogated

during investigation or questioned during the trial. In the light of this decision of the European Court of Human Rights, the Criminal Justice and Public Order Act 1994 applicable to England and Wales was amended to bring it in conformity with the view taken by the European Court of Human Rights and a provision requiring the accused to be informed of his rights to call an Attorney was added.

3.23 Shortly thereafter a case arose from the United Kingdom in which the provisions of the English Act permitting appropriate inferences being drawn from the silence of the accused were challenged. The matter ultimately reached the European Court on Human Rights which rendered its judgment in *Condron Vs. United Kingdom* on the 2<sup>nd</sup> of May 2000. The European Court of Human Rights did not dissent from the view taken by it earlier in *Murray's* case. However the Court set aside the conviction of *Condron* on the ground that there was misdirection by the Court to the jury in the context of the stand taken by the accused that he remained silent on the advice of his Solicitor. The provisions of law which permit appropriate inferences being drawn against the accused on his silence were up-held following its earlier decision in *Murray's* case.

#### VIEWS OF EMINENT JURISTS

3.24 Eminent lawyer Sri Fali Nariman has said “It is time that we recognise the right of silence during a trial is not really a right, but a privilege and although every accused has a right to be presumed innocent till he is proved guilty, in terrorist related and other grave crimes the accused has an obligation to assist the discovery of truth”. Former Chief Justice Ahmadi is in favour of drawing an adverse inference on the silence of the accused only in relation matters which are within the special knowledge and not in other cases. Former Chief Justice Ranganath Misra says that requiring the accused to disclose his defence once the prosecution case/charge leveled against him is made known to him will not offend Article 20(3). He, however, says that no adverse inference should be drawn if the accused remains silent.

#### VIEWS OF THE HIGH COURTS

3.25 The High Courts of Guwahati, Jammu & Kashmir, Karnataka, Madras, Patna, Rajasthan, Sikkim and Uttaranchal have not expressed any views on the question of drawing adverse inference against the accused on his refusal to answer the questions put to him. They have also not expressed any opinion on the question whether the accused should be required to disclose his defence once the prosecution case/charge levelled is made known to him. The High Courts of Andhra Pradesh, Bombay, Chattisgarh, Delhi, Gujarat, Himachal

Pradesh, Jarkhand, Kolkata, Orissa and Punjab & Chandigarh are in favour of adverse inference being drawn on the accused refusing to answer the question put to him. They are also in favour of requiring the accused to disclose his defence.

#### VIEWS OF THE STATE GOVERNMENTS

3.26 Only the Governments of the States of Arunachal Pradesh, Karnataka, Kerala, Haryana, Himachal Pradesh and Jammu & Kashmir have offered their views on the 'Right to Silence'. The other States have exercised their Right to silence. The Governments of Arunachal Pradesh, Karnataka and Himachal Pradesh favour adverse inference being drawn against the accused on his silence. Kerala Govt. is not in favour of a general provision to draw adverse inference against the accused on his refusing to answer the questions put to him. Similar is the view of the Government of Jammu & Kashmir. The Governments of Karnataka, Haryana and Jammu & Kashmir are in favour of a provision being made requiring the accused to state his case in defence immediately after the charge is framed against him. Governments of Karnataka and Jammu & Kashmir favour issues being raised in regard to matters in dispute. Allegations which are admitted or not specifically denied need not be proved. It is further pointed out that the Supreme Court has held in AIR 1998 SC 6 between Sampath Kumar Vs. Enforcement Directorate that the disclosure of the defence by the accused is not violative of Article 20(3).

#### RESPONSES TO THE QUESTIONNAIRE

3.27 Substantial majority of those who have responded to the questionnaire sent by the Committee favour adverse inference being drawn if the accused remains silent when questions are put to him. They are also in favour of requiring the accused to disclose his defence once the prosecution case/charge leveled is made known to him.

#### VIEWS OF THE LAW COMMISSION

3.28 However the Law Commission of India has in its 180<sup>th</sup> Report on "Article 20 of the Constitution of India and the Right to silence" recommended to the Government of India that no changes in the law relating to the right to silence of the accused are necessary on the ground they would be violative of Article 20(3) and Article 21 of the Constitution of India. The Committee would therefore like to examine the reasons that persuaded the Law Commission to make such recommendations. The main reasons assigned by the Law Commission in support of their recommendations are as follows: -

- i. That though the validity of Sections 34 to 37 of the United Kingdom Criminal



Justice and Public Order Act 1994 has been up-held by the European Human Rights Court in the Condrón's case, these laws have yet to be tested with reference to the U.K. Human Rights Act 1998.

- ii. That the implementation of the two conditions laid down by the European Human Rights Court firstly that prima-facie case should be made out by the prosecution and secondly that the accused should be given an opportunity to call his Attorney when he is questioned are likely to create several difficulties and problems in their implementation.
- iii. So far as the position in Australia is concerned the Law Commission has noticed that there are provisions in North South Wales and other States which permit the Court to draw appropriate inferences against the accused from his silence subject to certain conditions which have been upheld in the decision in *Weissensteiner Vs. Queen* (1993 178 COMLAWREP 217). The Law Commission has also adverted to the recommendations of Law Reforms Commission Report No.95 of North South Wales in which it has recommended that no legislation based on Sections 34, 36 and 37 of the United Kingdom Criminal Justice and Public Order Act 1994 should be introduced in North South Wales. Alongside the Law Reforms Commission has made recommendations No 5(a), 5(b) and 10 which require the accused to disclose his defence in several respects and upon failure to do so to draw adverse inferences. The Law Commission says that these recommendations amount to compelling the accused to disclose various facts relating to defence failing which an adverse inference can be drawn against the accused. These, in the view of the Law Commission would violate the right against self-incrimination.
- iv. The Commission feels the view taken by American and Canadian courts which prohibit silence of the accused being taken into consideration before arriving at the finding of guilt beyond reasonable doubt is sound and must be accepted. It says that the accused should be questioned to seek his explanation only after the court has found the guilt of the accused beyond reasonable doubt.
- v. The Law Commission says that it would be impracticable to introduce changes on the United Kingdom pattern and further that any modifications would offend Article 20(3) and Article 21 of the Constitution.

3.29 The important question that requires serious examination is whether the provisions which permit the court to draw an adverse inference against the accused on his refusal to answer the question put to him during investigation or trial violate Article 20(3).

3.30 At the outset let us understand the true scope and limits of the right to silence.

The common man's common sense approach to the doctrine of Right to Silence is beautifully portrayed in the following extract:

It is normal for a child who has stolen a cookie to be questioned by his parent on its disappearance. It would be absurd if the child's defence is that he may not be questioned and in any event cannot be expected to reply as this might incriminate him. Yet when he has stolen a bicycle this is the accepted situation vis a vis police and court, entrenched in our Constitution. He does not even have to raise this defence, the constitution does it for him. And we don't find it absurd! We don't consider whether the legal walls which we erect that impede society's search for the truth are warranted. And we have no inkling of the cost of our strange procedure in monetary terms and in wasted judicial, prosecutorial and police man hours. Those that know are silent.

K van Dijkhorst.

3.31 The origin of the right to silence according to Wigmore is as follows:

In 1637 John Lilburn was charged with printing or importing seditious and heretical books. He denied the charges and was interrogated thereon by the Council of the Star Chamber and furnished answers. When the interrogation shifted to matters outside the scope of the charges he refused to answer as the interrogators were attempting to ensnare him in order to find other charges against him. He was whipped and pilloried for this refusal. He did not let the matter rest and petitioned parliament and eventually in 1641 the Star Chamber and the Court of High Commission for Ecclesiastical Cases were abolished, mainly as a result of his protests. This affair gave rise to the privilege against self-incrimination. It was essentially the right to refuse to answer and incriminate oneself in the absence of a proper charge. Not initially, the right to refuse to reply to a proper charge. And certainly not the right not to be questioned. From this developed a philosophy that the culprit may not be required to assist his adversary, the state, in giving him his just desserts – due punishment for his crimes. That would be unfair. It would be an unequal contest.



3.32 Bentham called the rule “one of the most pernicious and most irrational notions that ever found its way into the human mind”.

3.33 Professor Glanville Williams in *The Proof of Guilt* (p.50-53) calls it an irrational psychological reaction to past barbarism to refuse questioning of an accused and observes as follows:

The rule cannot, if dispassionately regarded, be supported by an argument referring to torture. No one supposes that in present-day England a permission to question an accused person, if accompanied, as it would be, by safeguards, would result in any ill treatment of him. The risk, if there is one, is just the opposite: that if dangerous criminals cannot be questioned before a magistrate or Judge, the frustrated police may resort to illegal questioning and brutal ‘third degree’ methods in order to obtain convictions”. Historically regarded, the rule against questioning the defendant is one example of the indifference of society to the need for securing the conviction of the guilty.

Those who seek to alter the accused’s freedom from interrogation ask only that the prosecution should be permitted, in court, to put questions to be accused person, whether (since 1898) he elects to give evidence or not. There would be no direct compulsion on the accused to answer the questions if he preferred to maintain a stolid silence; though of course this silence would almost certainly have a most serious effect upon his defence. The crux of the matter is that immunity from being questioned is a rule which from its nature can protect the guilty only. It is not a rule that may operate to acquit some guilty for fear of convicting some innocent. To quote Bentley’s words, ‘If all criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence.

3.34 Professor Salmond states in his treatise on Jurisprudence (11<sup>th</sup> edition p.178):

The most curious and interesting of all these rules of exclusion is the maxim *Nemo tenetur se ipsum accusare*..... it seems impossible

to resist Bentham's conclusion that the rule is destitute of any rational foundation, and that the compulsory examination of the accused is an essential feature of sound criminal procedure.

3.35 These great jurists have expressed very firmly and eloquently in favour of the right to question the accused to elicit relevant information. Drawing an adverse inference on the silence of the accused is a corollary that flows from the right to put questions to the accused.

3.36 Right granted by Article 20(3) is in reality an immunity to the accused from compulsion to speak against himself. Even when the accused is not compelled to speak, he has the discretion to speak or not to speak. If he chooses to speak, the court can draw appropriate inferences from his statement. Article 20(3) does not in terms speak of any immunity from drawal of appropriate inference when the accused refuses to answer. It is difficult to infer how immunity from drawal of appropriate inference including adverse inference flows from or is a part of the immunity against testimonial compulsions. If the court can draw an adverse inference against the accused from his silence there would be less incentive for the police to resort to compulsion or trickery to obtain a confession. If drawing of such adverse inference is not permissible it would tend to encourage such behaviour. Immunity from compulsion to be a witness against himself is a concept of ancient origin long before the time of the Star Chamber. The concept of immunity from adverse inference however is of the 20<sup>th</sup> century. This would suggest that immunity from adverse inference on silence of the accused would not flow from immunity against compulsion. It may not be right to say that adverse inference should always be drawn from the silence of the accused. Adverse inference should be drawn only where an answer is reasonably expected from the accused and not mechanically in every case. That adverse inference would be drawn by a trained judicial mind is sufficient to guarantee that it would be exercised reasonably and on irrelevant considerations.

3.37 Validity of the provision of Sections 34 to 37 of the United Kingdom Criminal Justice and Public Order Act 1994 has been up-held by the European Human Rights Court in Condron's case. A view similar to the one taken in Condron and Murray's cases has also been taken in Australia in Weissensteiner Vs. the Queen (1993 178 COMLAWREP 217). They have held that adverse inference can be drawn from the accused's refusal to testify when the evidence establishes prima-facie case. The Law Reforms Commission of North South Wales which has recommended that no legislation should be enacted based on Sections 34, 36 and 37 the United Kingdom Criminal Justice and Public Order Act 1994 has itself made recommendations in paragraphs 5 (a), 5 (b) and 10 which provide that the accused should

disclose his defence and upon his failure to do so, adverse inferences can be drawn. It however seems to restrict drawing of adverse inference only by the courts.

3.38 The Law Commission of India has pointed out that the United States of America and Canada do not permit adverse inference being drawn against the accused on his silence. It must be pointed out that many countries such as United Kingdom, Northern Ireland, Australia, France and Italy provide for adverse inference being drawn on the silence of the accused. The Law Commission has not been able to point out any decision of any superior court which has dissented from the view taken in the cases of *Condon* and *Murray*.

3.39 The paragraph from Glanville Williams book *The Proof of Guilt* (p.60) which quotes a passage from Mr. Justice Swift's charge to the jury has a convincing answer to those who oppose drawing of adverse inference from the silence of the accused. It reads:

'Members of the jury, there is one person in this court who could tell you a great deal about the disappearance of this little child. A great deal! For it is admitted that he was with her on the evening and during the afternoon of the day on which she was last seen.

He could tell you much, and, members of the jury, he sits before you in the dock. But he has never been there [pointing to the witness-box]. Would you not think that he would be willing-nay, eager to go into the box, and on his oath tell you all he knows? But he stays where he is. Nobody has ever seen that little girl since twelve o'clock on January 6th. Nobody knows what has become of her...

There is one person in this court who knows, and he is silent. He says nothing to you at all.

The witness-box is there open and free. Why did he not come and tell you something of that strange journey beginning in the Guildhall Street, Newark, when she inquired: 'How is Auntie? I should like to see Peter'?

There is one person in this world who could have made it all plain to you. There is one man in the world who knows the whole story, and when you are trying to elicit that which is true he sits there and never tells you a word.

When [counsel for the defendant] says there is no evidence of what happened on January 5th and 6th I venture to ask: 'Whose fault is that?'

You are not to speculate, but you are entitled to ask yourselves: ‘Why does he give us no information? Why is he silent when we are wondering and considering what has happened to that little girl?’...

The position is, therefore, that the accused will normally give evidence; or if he does not, the Judge will comment on the fact and the jury will probably convict’.

3.40 In the considered view of the Committee, drawing of adverse inference against the accused on his silence or refusing to answer will not offend the fundamental right granted by Article 20(3) of the Constitution as it does not involve any testimonial compulsion. Therefore the Committee is in favour of amending the Code to provide for drawing appropriate inferences from the silence of the accused.

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3.41 The English Law permits adverse inference being drawn when the accused remains silent both at the stage of investigation and at the stage of trial. The European Human Rights Court has held that adverse inference from the silence of the accused can be drawn subject to two conditions (i) that there is prima-facie case against the accused and (ii) the accused has access to a lawyer. It is not easy to ensure access to lawyer during investigation in every case and difficulties may arise in regard to due compliance with this condition in the present Indian context. It is also difficult to expect a prima facie case being established before the investigation is complete. The Law Commission of India has said that it is not easy to ensure compliance with the second condition namely of providing access to the lawyer at the stage of investigation. The procedure established by law must be just, fair and reasonable to conform to Article 21 of the Constitution. Fulfillment of the above two conditions is necessary to render the drawal of adverse inference just, fair and reasonable. As it is not reasonably possible to satisfy these two conditions the Committee is not in favour of drawing adverse inference against the accused on his silence when interrogated during investigation. This does not mean that the accused should not be questioned during investigation or that the answers given by him should not be taken into consideration at the appropriate stage by the court. The Committee is therefore not in favour of making provisions on the lines of Sections 34 and 36 of the United Kingdom Criminal

Justice and Public Order Act 1994. Section 35 of that act deals with similar situation arising during trial before the court.

3.42 However such problems will not arise if the accused is questioned during trial after the charge is framed. It is after investigation is complete and the statements of witnesses and other relevant materials are collected the court on being satisfied that there is a prima facie case frames the charge. Thus the court would be examining the accused only after prima-facie is made out by the prosecution. So far as access to the lawyer is concerned, it does not confront any difficulty for the simple reason that the accused is entitled to take the assistance of a lawyer of his choice and if he cannot afford one, at the cost of the State. Therefore both the conditions are satisfied when the accused is examined during trial. As it is, Section 313 (1)(a) of the Code provides for the accused being examined without any previous warning for the limited purpose of giving an opportunity to the accused to explain the circumstances brought out by the prosecution in its evidence against him. Now without affecting that right it is proposed to empower the court to put questions to the accused for the purpose of discovering truth. This power must be liberally used by the courts to discover truth. If the accused does not answer one or few questions the court should put other questions to the accused and try to elicit as much information as possible. Much depends on the tact of the Judge and the attitude of the accused. The court is expected to use the new power of questioning the accused vigorously and proactively inspired by the new objective of seeking truth. However this does not give any right to the parties to ask questions to the accused. If they have any questions they may suggest them to the court which will put the questions to the accused if it is satisfied that it will assist in discovering truth or otherwise advance the cause of justice. Power to put questions includes the power not to ask questions if it is found that it is unnecessary. As no amendments to sub-sections 2 and 3 are proposed, the accused will not be administered oath and he will not be liable for punishment for refusing to answer the questions or for giving false answers. The Committee recommends a provision being made in the Code on the lines of Section 35 of the United Kingdom Criminal Justice and Public Order Act 1994 to authorize the court to ask questions to the accused for discovering truth and to draw adverse inference against the accused on his silence or refusal to answer the questions put to him. No modification is called for to Section 315 of the Code under which the accused can volunteer to be a witness and give evidence on oath.

3.43 The Committee feels that examination of the accused during trial should be done as at present after all the witnesses of the prosecution have been examined and before he is called upon his defence, to elicit his explanation.

3.44 Another aspect that needs examination is the use of the courts power under



Section 313 (1)(b) of the Code to examine the accused to give him an opportunity to explain the circumstances in evidence against him. There is a catena of judicial decisions which have held that it is the duty of the court to invite the attention of the accused to every circumstance that has come in evidence against him. If there is any omission to bring any material circumstance to the attention of the accused, it often leads the higher court setting aside the conviction. In the considered view of the Committee such elaborate examination is an unnecessary and avoidable exercise. As the accused is furnished with all the copies of the statements of witnesses recorded during investigation and the copies of documents on which the prosecution relies, the witnesses for the prosecution are examined during trial in the presence of the accused, he would be well aware of all the evidence and circumstances brought out against him. Besides he is assisted by a lawyer. In cases where there are more than one accused this would consume considerable amount of court time. It is common experience that the accused rarely comes forward with any explanation. His response is mostly one of bare denial. Even at the appeal stage lot of time is spent in arguing that a particular question was not put to the accused and therefore the trial is vitiated. Almost every trial Judge with whom we interacted conveyed to us in unequivocal terms that this is an unnecessary exercise and waste of precious time of the court. In these circumstances it is unnecessary waste of time of the court to invite the attention of the accused to every circumstance against him. It is enough to ask if the accused has any explanation to offer in respect of the evidence produced by the prosecution against him. Therefore it is felt necessary to amend Section 313 of the Code to provide for questioning the accused only generally inviting him to offer his explanation. It is after this mandatory questioning that the court may put such questions to the accused as it considers necessary to discover truth about the commission of the offence and his involvement.

3.45.1 The United Kingdom Criminal Justice and Public Order Act, 1994 has made several other reforms relating to investigation and trial. They have introduced the concept of disclosure of their respective cases by the prosecution as well as the accused. Relevant provisions are found in Chapter-25 of the Criminal Procedure and Investigation Act, 1996. Brief summary of the relevant provisions is as follows:

3.45.2 Part I (“DISCLOSURE”) contains 21 sections. Sections 3 and 4 make it obligatory for the prosecution, to disclose to the accused any material, it may have withheld on the ground that it may affect the prosecution or a statement that no such material is withheld. This disclosure must conform to the Code of Practice enumerated in Section 24. In addition, the accused must be also given copies of documents containing the evidence.

3.45.3 After such compliance by the prosecution, it becomes compulsory for the accused

under Section 5, “to give a defence statement to the court and the Prosecutor,” within a time frame stipulated under Section. 12. The Defence Statement [Section 5(6)] should:

- i. Set out in general terms the nature of the accused’s defence.
- ii. Indicate the matters on which he takes issue with the Prosecution.
- iii. Set out in the case of each such matter, the reason why he takes issue with the prosecution.

3.45.4 Sub-Section (6) stipulates, that in case of a defence of alibi, the accused must also furnish the names and address of witnesses believed to be able to give evidence in support of the alibi and any information in accused’s possession which might be of material assistance, in finding such witnesses.

3.46 Section 6 enables the accused to make a similar voluntary disclosure. Under S.7, it becomes the duty of the prosecutor, to disclose to the accused any prosecution material which has not been previously disclosed, but which might be reasonably expected to assist the defence. However, such material need not be disclosed, if it is the result of interception under Interception of Communications Act, 1985. Section 8 enables an accused to apply for the production of material envisaged in section 6. Section 9 casts a further obligation on the prosecutor, to continue to keep these matters under a review, till the final stages of the trial. Failure to comply with these provisions may either result in stay of the proceedings, for abuse of process, and if it involves delay, it may amount to denial of fair trial.

3.47 Faults in disclosure by accused (section 11), such as inconsistent stands, or the examination of witnesses different from the ones cited or a different defence altogether, would invest the Court or any other party, with the leave of the court, to make such comment as appears appropriate, and to draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned.

3.48 Part III, section 29 enumerates the purpose of preparatory hearings such as:

- i. Identifying issues which are likely to be material to the verdict of the jury;
- ii. Assisting their comprehension of any such issues;
- iii. Expediting the proceedings before the jury;
- iv. Assisting the Judge’s management of the trial.

3.49 The procedure introduced by these provisions is very useful in reducing unnecessary waste of time and focusing attention to the real issues in controversy. It casts responsibility on the parties to disclose their stand so that none of the parties is taken by surprise and the cause of justice is advanced.

3.50 In our system it is the prosecution that furnishes to the accused copy of the allegations and the supportive materials collected during investigation. The accused is not required to disclose what his defence is going to be. He may spring a surprise at any stage. This is not fair and hampers dispensation of justice. So far as documents produced by the prosecution or the accused are concerned, section 294 of the Code provides that the opposite party can be called upon to admit or deny the genuineness of each document and if not disputed, to admit the same without proof. Logically the same principle can be extended to the allegations making out the case of the prosecution.

3.51 In criminal cases the onus of proving everything essential to the establishment of the charge against the accused lies upon the prosecution because the accused is presumed to be innocent until the guilt is established by the prosecution. Section 105

of the Evidence Act is an exception to this general rule and provides that when a person is accused of any offence, the burden of proving the existence of circumstances bringing his case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances. It releases

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the prosecution of the burden and necessity of proving the absence of facts which might bring the case within the general or specific exception, or exempted or proviso under the IPC or other criminal law. This Section involves both (i) the presumption and (ii) a rule as to the burden of proof following it. As the court is required to presume the non-existence of circumstances bringing the case within the exception, the accused who relies on its existence, has to prove the same. There is no law requiring the accused to plead before he can claim the benefit of any general or special exceptions in the Penal Law. At present he may take such a plea after the conclusion of the prosecution evidence, when he is examined under section 313 of the Code. If at that stage the benefit of exception is claimed the prosecution will be prejudiced as it would be deprived an opportunity of leading evidence to negate the claim of the accused.



As quest for truth shall be the guiding star of the Criminal Justice System any impediments to discovery of truth have to be eliminated. Therefore it is necessary to require the accused to specifically plead at the earliest stage of the trial of the case and disclose the general or special exception he claims. After the charge is framed and supporting allegations called the 'Prosecution Statement' are served on the accused, he should be required to file his reply called the 'Defence Statement' in which he should state as to which of the allegations he accepts and which he does not. He should specifically plead the general exceptions in the IPC or any special exception or proviso contained in any other part of the Code or any law defining the offence which he claims, failing which he shall not be entitled to claim the benefit of such exceptions. Along with the defence statement the accused should file the documents on which he relies and the list of witnesses whom he proposes to examine.

3.52 In the light of the stand taken in the 'Prosecution Statement' and the 'Defence Statement', the court should frame the points for determination indicating the party on whom the burden of proof lies. Allegations which are admitted or not denied shall not be required to be proved by the prosecution. The allegations which are denied or not admitted will give rise to a point of determination. Burden of proving the conditions for claiming the benefit of the exceptions claimed shall be on the accused. However a provision may be made giving discretion to the court to allow a belated plea being raised on the accused showing sufficient cause.

3.53 If, in the light of the plea taken by the accused in his defence statement, it becomes necessary for the Prosecution to investigate the case further, it may do so with the leave of the court. The copies of the materials collected during further investigation and relied upon by the Prosecution shall be furnished to the accused.

3.54 As the accused is represented by a lawyer and as all the parties are before the court it cannot be said that the suggested procedure is, in any manner unfair or unjust or likely to cause prejudice to the accused. The amendments proposed are necessary to conduct a fair trial with focus on the quest for truth a shared responsibility of all the functionaries of the Criminal Justice System.

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## **RIGHTS OF ACCUSED**

4.1 The overarching aim of the Criminal Justice System should be to find out the truth. The person who is most likely to know the truth of an offence which has been committed, is the offender himself. It must be emphasised that the suspect/accused like the other players in the Criminal Justice System can also contribute to the search for truth. It is true that except where there has been a voluntary confession, the suspect/accused is unlikely to incriminate himself; to which in a democracy, he is entitled to under the rights guaranteed to him by the Constitution.

4.2 The rights of the accused include the obligation on the part of the State to follow the due processes of law, a quick and impartial trial, restraint from torture and forced testimony, access to legal aid etc.

The rights of the accused include the obligation on the part of the State to follow the due processes of law, a quick and impartial trial, restraint from torture and forced testimony, access to legal aid etc.

4.3 The present day approach of the Courts - in their attempt to find out whether or not there is evidence “beyond reasonable doubt” that the accused has committed a particular offence – is only to look at the evidence for or against the accused and balance the evidence rather than seek the truth. In attempting to get away from a situation of such balancing of evidence and the Judge acting as an umpire, the Committee feels that it would be useful to put in place the search for truth as the basis.

4.4 Accused has a right not to be convicted for any offence for the commission of an act which was not an offence at the time of the commission of the act nor to be subjected to a penalty greater than the one prescribed at the time of commission of the Act. [Art 20 (1)]. The rights of the accused under the Constitution and laid down by the Supreme Court in A.I.R. 1994 S.C. 1349, Joginder Kumar vs. State of Uttar Pradesh and A.I.R. 1997 S.C. 610 D.K. Basu vs. State of West Bengal are as follows:

1. Accused has a right against double jeopardy. [Art 20 (2)].
2. Accused has a right not to be compelled to be a witness against himself. [Art 20 (3)].
3. No accused shall be deprived of his life or personal liberty except in accordance with procedure established law which is just, fair and reasonable. [Art 21].
4. Accused has a right to fair and speedy trial. [Art 21].
5. Accused has a right to assistance of a Counsel. [Art 22 (1)].
6. Right to be produced before the Magistrate within 24 hours of arrest excluding the time for travel. [Art 22 (2)].
7. Right not to be detained in custody beyond 24 hours after arrest excluding the time for travel without the order of the Magistrate. [Art 22 (2)].

### **Arrest and Rights of Accused**

8. An arrested person being held in custody is entitled, if he desires, to have one friend, relative or other person, who is known to him or likely to take an interest in his welfare, told as far as practicable that he has been arrested and where he is being detained.
9. The police officer shall inform the arrested person when he is brought to the police station of this right.
10. The entry shall be required to be made in the diary as to who was informed of the arrest.

### **Obligation of Police Officers after arrest:**

11. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tag with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
12. That the Police Officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.
13. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is

being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

14. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.
15. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
16. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.
17. It has been pointed out that in grave crimes such as those relating terrorism, organised crime etc. investigation may be frustrated if compliance with the directions contained in paras 14, 15 and 16 regarding the opportunity to be given to the arrestee to communicate with a friend or advocate are insisted upon. Verification of information revealed during interrogation is a time consuming process specially when several co-accused and conspirators are involved. Compliance with the directions may lead to alerting the co-accused or the accomplices who may not only evade arrest but also destroy or shift materials and evidence and defeat the timely recovery of crucial evidence. Deviation from this rule may be permitted for a reasonable period in public interest. If an Investigating Officer has reasonable ground to believe that compliance with such directions would adversely affect the investigation, he may, with the permission of the supervisory officer, dispense with compliance with the direction for the reasons to be recorded in writing. He shall forward a copy of the same to the court concerned at the earliest.
18. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.
19. The arrestee should be subjected to medical examination by a trained doctor every 48 hours of his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State of Union Territory. Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

20. Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.
21. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.
22. A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

#### 4.5 DUTY OF THE MAGISTRATE WHEN THE ACCUSED IS PRODUCED

When the arrested person is produced before the Magistrate, he has a duty to enquire with the accused as to when he was arrested and the treatment meted out to him including subjecting him to third degree methods, and about the injuries if any on his body.

#### 4.6 HANDCUFFING OF ACCUSED

- (i) As a rule handcuffs or other fetters shall not be forced on prisoners convicted or under-trial –while lodged in a Jail anywhere in the country or while transporting or in transit from one Jail to another or from Jail to Court or back. The Police and the Jail authorities, on their own, shall have no authority to direct the handcuffing of any inmate of the Jail in the country or during transport from one Jail to another or from Jail to Court or back.
- (ii) Where the Police or the Jail authorities have well grounded basis for drawing a strong inference that a particular prisoner is likely to jump Jail or break out of the custody then the said prisoner be produced before the Magistrate concerned and a prayer for permission to handcuff the prisoner be made before the said Magistrate. In rare cases of concrete proof regarding proneness of the prisoner to violence, his tendency to escape, he being too dangerous / desperate and finding no other practical way of forbidding escape is available, the Magistrate may grant permission to handcuff the prisoner.
- (iii) In all the cases where a person arrested by Police, is produced before the Magistrate and remand---judicial or non-judicial—is given by the Magistrate, the person concerned shall not be handcuffed unless special orders in that respect is obtained from the Magistrate at the time of the grant of the remand.
- (iv) When the Police arrests a person in execution of a warrant of arrest obtained from a Magistrate, the person arrested shall not be handcuffed unless the police has

also obtained orders from the Magistrate for the handcuffing of the person to be so arrested.

- (v) Where a person is arrested by the Police without warrant, the Police Officer concerned may if he is satisfied, on the basis of the guidelines given by the Supreme Court in para above, that it is necessary to handcuff such person, he may do so till the time he is taken to the Police Station and thereafter his production before the Magistrate.

4.7 In most of the countries handcuffing is permitted as a rule. The above restrictions on the right of the police to handcuff the accused have created lot of practical difficulties. It is not always easy to prevent the accused from escaping. At the same time it is necessary to ensure that this power is not misused. As now-a-days accused are becoming more daring and are even prepared to risk their life to escape, it may be necessary in larger public interest to remove the onerous restrictions now placed on the right of the Police Officer to handcuff the suspect. Therefore, the Committee is of the view that appropriate provision in the Code should be made prescribing the conditions for handcuffing and providing an in-house mechanism to correct the aberrations including punishing the Officer for misusing the power. Seeking review of the decision of the Supreme Court may also be considered.

4.8 **Interrogation:** The suspect has a right to counsel during interrogation and should be allowed to meet his counsel; but the counsel need not be present throughout the interrogation; where necessary, he is entitled to free legal aid and enjoys the right to remain silent. A woman or a child below 16 years of age cannot be taken to a police station for interrogation. This should apply equally to those who have serious physical or mental problems. Though this does not apply to the suspect/accused, it may be necessary to introduce this change.

4.9 **Torture, violence, rape etc.:** If tortured, an accused should have the freedom to apprise the Magistrate of the incident, when produced before him. In such cases, the magistrate can remand him to judicial custody. This should be true of any violence or sexual offence perpetrated against an accused person in custody. In all such cases, there must be a detailed enquiry.

#### 4.10 BAIL

4.10.1 A person accused of a bailable offence is entitled to bail as a matter of right. Similarly, persons accused of non-bailable offence may be granted bail at the



discretion of Court, on application. The main purpose behind the denial of bail is that the person can help the police during investigation and not tamper evidence, threaten the witness or impede the course of justice. The bail may be granted at the discretion of the Court depending on the charge against the person and progress of the case. A person seeking bail must furnish bond of necessary value before he is released. He is granted bail on the condition that he presents himself as and when required by the investigating authority and not leave the Country till the trial is complete. The amount of bail should be reasonable and not excessive.

4.10.2 A person who has reason to believe that he may be arrested in future for a non bailable offence, may apply to the competent Court for grant of anticipatory bail. The Court considering the circumstances of the case may grant anticipatory bail so that in the event of arrest, he shall be released on bail.

4.10.3 Bail may be cancelled depending on the behaviour of the person after the grant of bail. If there is sufficient reason to believe that the accused may abscond, repeat the offence, tamper with evidence, threaten witnesses, then the Court may cancel bail on obtaining sufficient proof regarding the involvement of the accused in crime.



## **PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF**

5.1 Every man is presumed to be innocent until he is proved guilty. This is the cardinal principal of criminal law. In recognition of this right of the accused the burden of establishing the charge against the accused is placed on the prosecution. The concept of burden of proof is one of the most important contributions of Roman law to the criminal law jurisprudence. This principle is based on fairness, good-sense and practical utility and accepted in the English Common Law. In the case of *Woolmington vs. Director of Public Prisons* 1935 AC 462 the law has been lucidly restated by Viscount Sankey, LC as follows:

Throughout the web of the English criminal law, one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of, and on the whole of the case, there is a reasonable doubt created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention the prosecution has not made out the case, and the prisoner is entitled to acquittal.

5.2 This principle has been followed in India vide decision of the Supreme Court in *Dahyabhai Chhaganbhai Thakkar vs. State of Gujarat* AIR 1964 SC 1563. This is a universally recognised right and Article 14(2) of the International Covenant on Civil and Political Rights, 1966 provides "Every one charged with a criminal offence shall have the right to be presumed innocent until he is proved guilty according to law". It is left to the law making authority to prescribe the procedure for proof.

5.3 Section 101 of the Evidence Act provides that the party who seeks a Judgement from the court about any legal right or liability dependent on the existence of certain facts must prove that those facts exist. Section 102 provides that the burden of proof lies on that person who fails, if no evidence at all is given on either side. Section 103 provides that burden of proof as to any particular fact lies on that person who wishes the court to believe in

its existence unless otherwise provided by law. Section 105 provides that burden of proving that the case of the accused comes within any of the exceptions lies on him.

5.4 Section 106 provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Section 3 defines the expression “**proved**” as follows:

A fact is said to be proved when, after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

5.5 Section 3, while adopting the standard of the prudent man as an appropriate concrete standard by which to measure ‘proof’ also contemplates of giving full effect to the circumstances or condition of probability or improbability. Section 3 does not speak of proof beyond reasonable doubt. The Supreme Court has in AIR 1974 SC 859 Collector of Customs, Madras vs. D.Bhoormall, held:

All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man’s estimate as to the probabilities of the case.

5.6 However, the cardinal principle of criminal law jurisprudence that the burden rests on the Prosecution of proving its case has been deviated in several statutes. Under Sections 105 to 114(A) of the Indian Evidence Act, burden of proof is shifted to the accused. As an example we may advert to illustration (b) to Section 106 which says that when “A” is charged with traveling on railway without a ticket, the burden of proving that he had a ticket is on him. There are other provisions where burden of proof shifts to the accused after the Prosecution establishes certain facts, e.g. sections 107, 108, 109, 110, 111-A, 112, 113-A, 113-B, 114-A. By way of illustration we may advert to Section 114-A which says that where sexual intercourse by the accused is proved and the victim states in her evidence that she did not consent, the court shall presume that she did not consent and the burden shifts to the accused to prove that she had given her consent. Similar provisions are found in several special statutes.

5.7 Presumptions are legal devices whereby courts are entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Presumptions may be either of fact or of law. It may be either conclusive or rebuttable. But presumptions of facts

are always rebuttable. The Supreme Court of India has in several cases up-held the constitutionality of statutes providing for such presumptions. In 1991 SCC (Cri) 734 K.Veerawamy Vs. Union of India, the Supreme Court has up-held the validity of Section 5(1)(e) and Section 5(3) of the Prevention of Corruption Act which place the burden on the accused to rebut the statutory presumption. It is held that this law is just, fair and reasonable and does not contravene Article 21 of the Constitution. In (1986) 2 SCC 486 Sodhi Transport Co. vs. State of U.P, the Supreme Court has held: -

A rebuttable presumption which is clearly a rule of evidence has the effect of shifting the burden of proof and it is hard to see how it is unconstitutional when the person concerned has the opportunity to displace the presumption by leading evidence.

5.8 It is therefore clear that “proof beyond reasonable doubt” is not an absolute principle of universal application and deviations can be made by the legislature. Deviations can take different forms such as shifting the burden of proof to the prosecution or prescribing a standard of proof lower than “proof beyond reasonable doubt”. As long as the accused has the opportunity to adduce evidence to nullify the adverse effect such deviation will not offend Article 14 or 21 of the Constitution. Even in England the principle in Woolmington case would apply only in the absence of a statutory provision to the contrary.

5.9 While the concept of “presumption of innocence” maintains its pivotal position in the criminal law jurisprudence, there is a steady shifting of burden of proof to tackle the new problems such as growing socio-economic problems, emergence of new and graver crimes, terrorism, organised crimes, poor rate of conviction, practical difficulties in securing the evidence etc.

5.10 What is meant by “proof beyond reasonable doubt”? It is not defined and is not easy to define. Prof. Wigmore in his classic treatise on Evidence points out the difficulty in ascertaining how convinced one must be to be convinced beyond a reasonable doubt. He says:

The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be as yet no successful method of communicating intelligibly a sound method of self-analysis for one’s belief. And yet the choice of the standard of proof makes a difference.

5.11 Judge Harlan of the US Supreme Court has explained in 397 US 358, 25 L.ED how this principle will more often set guilty free than send the innocent to prison.

5.12 Whereas the civil cases are governed by the standard of proof prescribed by section 3 of the Indian Evidence Act namely, preponderance of probabilities, the criminal cases are governed by a higher standard of “proof beyond reasonable doubt” laid down by judicial decisions.

5.13 The protagonists of reforms contend that there is no justification for applying a higher standard of proof than the one prescribed by the law made by Parliament, in criminal cases. They argue that “proof beyond reasonable doubt” is a vague, unreasonable, unfair, unjust and impractical standard which has done more harm than good to the society. They want that the lower standard of “preponderance of probabilities” should govern criminal cases. We should examine the arguments against the higher standard of ‘proof beyond reasonable doubt’ in the context of the new ethos of quest for truth.

5.14 The standard “proof beyond reasonable doubt” places a very heavy burden proof on the Prosecution. It is vague and not easy to define. Professor Glanville Williams in his book *The Proof of Guilt* says:

To say that the burden of proving a crime is generally on the prosecution does not conclude all questions. What degree or quantum of proof is needed: is it mere likelihood, or certainty, or something in between these two extremes? This question in turn raises a fundamental issue of penal policy: how far is it permissible, for the purpose of securing the conviction of the guilty, to run the risk of innocent persons being convicted?

5.15 The courts believe that it is better that ten guilty persons escape rather than one innocent person suffer. It is from such concern of the courts to safeguard personal liberty of the citizens that flows the standard of ‘proof beyond reasonable doubt’. This fails to take into account that it is as much as a miscarriage of justice to acquit a guilty person as it is to convict an innocent. Professor Glanville Williams has narrated the adverse affects flowing from acquittal of the guilty persons in the following words:

The evil of acquitting a guilty person goes much beyond the simple fact that one guilty person has gone unpunished. It frustrates the arduous and costly work of the police, who, if this tendency goes too far, may either become daunted or resort to improper methods of obtaining convictions. If unmerited acquittals become general, they tend to lead to a disregard of the law, and this in turn leads to a public demand for more severe punishment of those who are found guilty. Thus the

acquittal of the guilty leads to a ferocious penal law. An acquittal is, of course particularly serious when it is of a dangerous criminal who is likely to find a new victim.

5.16 Courts have quite often observed that though they are convinced that the accused is guilty they have to acquit him because there is some reasonable doubt. Chief Justice Ahmadi says that in actual practice, in a large number of cases “proof beyond reasonable doubt” virtually becomes “proof beyond doubt”. There is considerable subjective element involved in coming to the conclusion that the doubt is a reasonable one. In the process, instead of focusing on discovering truth, attention is drawn to the doubts and about their reasonableness. It is common knowledge that most of the acquittals flow from the finding of the court that the prosecution has failed to prove its case beyond reasonable doubt and that therefore the accused is entitled to the benefit of doubt. Very grave consequences flow from the large percentage of acquittals of guilty persons. More the number of acquittals of the guilty, more are the criminals that are let loose on the society to commit more crimes. This they would do with greater daring for they know by their own experience that there is no chance of their being punished. If the loopholes are not tightened, there will in course time be more criminals in the society to cause more harm to innocent citizens. Such criminals may occupy important and sensitive position in public life. If criminals start ruling the country one can imagine the consequences. If crimes go unchecked anarchy will not be a matter of distant future. Peace and law & order situation depend to a large extent on the efficacy of the Criminal Justice System. There is therefore an imperative need to provide a fair procedure that does not allow easy escape for the guilty. In (1973) Cri.L.J. 1783 Shivaji vs. State of Maharashtra, Justice Krishna Iyer while criticizing the view that it is better that several guilty persons should escape than making one innocent person to suffer said that public accountability is one of the most important responsibilities of the judiciary. Therefore, if the accused is acquitted on the basis of every suspicion or doubt, the judicial system will lose its credibility with the community. Proof beyond reasonable doubt clearly imposes an onerous task on the prosecution to anticipate every possible defence of the accused and to establish that each such defence could not be made out.

There is considerable subjective element involved in coming to the conclusion that the doubt is a reasonable one. In the process, instead of focusing on discovering truth, attention is drawn to the doubts and about their reasonableness.

5.17 Realisation of these problems has contributed to a steady watering down the rigour of this standard. Justice K.T.Thomas, former Supreme Court Judge has in his ‘Justice Sir Sayed Mahmood Memorial Lecture’ has observed the following:

Even regarding the pristine doctrine of proof beyond reasonable doubt, the pre-independence approach was one of strict adherence to that doctrine. In some cases, even that extreme view was crossed by saying what is meant by it is to prove beyond a shadow of doubt. But the case-law which developed during the post-independence period relaxed the rigor of the doctrine and reached the level of making it as “proof with reasonable certainty will tantamount to proof beyond reasonable doubt”. The case law further advanced by narrowing down the meaning of the word “doubt” as something much higher than a hunch or hesitancy. They said that reasonable doubt is what a conscientious mind judicially entertains with a good level of reasonableness.

5.18 The standard of proof is becoming flexible. In (1994) 1 S.C.C. 73, *State of West Bengal vs. Orilal Jaiswal*, the Supreme Court said “.....there is no absolute standard of proof in a criminal trial and the question.....must depend upon the facts and circumstances of the case..... The doubt must be of reasonable man and the standard adopted must be a standard adopted by a reasonable and just man.....”

5.19 Following the observations of Lord Denning in (1950) All ER 458, Justice Sabyasachi Mukharji observed “reasonableness of doubt must be commensurate with the nature of the offence to be investigated. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts..... Letting guilty escape is not doing justice according to law.”

5.20 Thus, it is seen that there is no strict adherence to “proof beyond reasonable doubt” and the courts have not hesitated to modify the standard depending upon the needs of justice.

5.21 In USA, the standard of proof adopted in criminal cases is “proof beyond reasonable doubt”. But in cases of fraud some of the States in USA have adopted a lower standard called the “clear and convincing standard”. This demonstrates that depending upon the local conditions and the requirements of the situation, the law-makers have prescribed standards lower than “proof beyond reasonable doubt”.

5.22 “Proof beyond reasonable doubt” is not a standard of universal application. France has not adopted this standard. The French standard is “in time conviction” or inner conviction, the same as “proof on preponderance of probabilities”. International Convention on Civil



and Political Rights has recognised in Article 14(2) the right of the accused ‘to be presumed innocent until proved guilty according to law’. In other words though presumption of innocent is universally recognised the mode of proof which includes the standard of proof is a matter which is left to be regulated by law made at the discretion of the respective States. Therefore, the Indian Parliament is entitled to prescribe any other standard of proof which it considers appropriate.

5.23 “Proof beyond reasonable doubt” is understood by different Judges differently. How this principle actually operates in the minds of the decision maker is not easy to gather. In England the responsibility of assessing the evidence produced by the prosecution and to decide whether the accused is guilty or not rests with the jury which consists of common citizens in the locality. After the evidence for the prosecution is adduced and the time for the jury to make its decision arrives, the Judge, trying the case has to address the jury and tell them that they have to decide whether the accused is guilty or not bearing in mind that the burden is on the prosecution of proving the case beyond reasonable doubt. Thus if they entertain any reasonable doubt in their minds, the benefit of that doubt must be given to the accused and he be pronounced not guilty. Judges have to explain to the jury what the expression “proof beyond reasonable doubt” means. In the Woolmington’s case, the House of Lords approved the explanation of the trial Judge to the jury that “proof beyond reasonable doubt” required “a clear conviction of guilt and not merely a suspicion, even a strong suspicion, though on the other hand a mere fanciful doubt where it was not in the least likely to be true would not prevent conviction”. Shortly thereafter in Summer’s case (1952) 36 C.A.R.14, the Court of Appeal ruled that the expression “reasonable doubt” ought to be abandoned because it could not be satisfactorily defined. Instead, the court said that the jury should have been directed that they must be “satisfied” of guilt or “satisfied so that they can feel sure” of it. In a later case in which the Judge told the jury that they should be satisfied of guilt the court of appeal held that it is not an adequate way of informing the jury that the accused is entitled to the benefit of doubt if there is one. This only demonstrates the practical difficulties in understanding and explaining what ‘proof beyond reasonable doubt’ means. It is of essence that the law affecting the rights of the citizens should be clear and certain. Different meanings contribute to uncertainty and confusion.

5.24 In the case of Brown vs. Stott 2001 (2) All ER 17 PC it was observed that “there was need therefore to maintain a fair balance between the general interest of the community and the personal right of the individual”.

5.25 The principle “proof beyond reasonable doubt” was evolved in the context of the system of jury trial in the UK. The verdict on the guilt of the accused was the responsibility of



the jury. The jury consisted of ordinary citizens in the locality. As they are not trained Judges they may jump to conclusions without due care and concern for the rights of the accused. Therefore standard of “proof beyond reasonable doubt” appears to have been evolved for the guidance of the jury. That principle which was originally meant for the guidance of the jury is being followed by all the courts of the countries which follow common law.

5.26 Though the trial Judge in the jury system asks the jury to take a decision bearing in mind that the burden is on the prosecution of proving the case beyond reasonable doubt, it is doubtful whether in practice the members of the jury would make a conscious effort to apply this principle in deciding the case. As the jury consists of laymen who are not used to the judicial ways of assessing evidence, they would decide the matter in the same manner they take decisions in their day to day affairs and not following the un-common way of looking for reasonable doubt. That standard which a prudent man would apply is of “preponderance of probabilities”. But so far as Judges are concerned they being trained in the art of decision making try to apply the ‘proof beyond reasonable doubt’ standard.

As the jury consists of laymen who are not used to the judicial ways of assessing evidence, they would decide the matter in the same manner they take decisions in their day to day affairs and not following the un-common way of looking for reasonable doubt. That standard which a prudent man would apply is of “preponderance of probabilities”.

5.27 The legislative practice of prescribing statutory presumptions indicates how the legislature has been prescribing a lower standard of proof. For example under section 4 of the Public Gambling Act 1867, “any person found in a common gambling house.....shall be presumed until the contrary be proved to have been there for the purpose of gambling”. The mere fact that the person is found in the common gambling house does not mean that he is necessarily there for the purpose of gambling. He may be there for any innocent purpose. In the absence of this presumption, the prosecution had to prove not only that the accused was found in the common gambling house but also that he was there for the purpose of gambling. As a result of the presumption under section 4 the prosecution is absolved of the burden of proving that the presence of the accused was for the purpose of gambling. If such taking away the burden of proof of the prosecution can be done by enacting a law for that purpose, there is no good reason why a law cannot be made to prescribe a lower standard of proof than “proof beyond reasonable doubt”.

5.28 Requirement of “proof beyond reasonable doubt” was laid down long back with regard to the prevailing circumstances of the time. At that time offences were few, ways and

habits of the people were simple, people were more honest, by and large witnesses readily came forward to give truthful evidence before the court. The modes adopted for committing the offences were simple. Now there is a sea change in all these aspects. People now-a-days are better informed. The Press, the radio, the T.V, films and various types of literature have enormous influence in educating and enlightening people of different ways of committing crimes. They use sophisticated weapons and employ techniques so as not to leave any trace of evidence that may implicate them. The accused are becoming more daring and reckless. The level of morality has gone down and regard for truth is waning. Witnesses do not come forward to give evidence on account of threats or inducements and those who come, quite often turn hostile. It looks as though the criminals are emerging stronger than the law enforcing agency. The existing laws and procedures are proving inadequate to meet the new challenges. The changing scenario has to be taken into account to evaluate the efficacy of the present standard and to find suitable solutions to meet the new challenges.

5.29 While proof on “preponderance of probabilities” followed in civil cases provides a lower standard of proof, “proof beyond reasonable doubt” followed in criminal cases provides a higher standard of proof bordering on certainty. The cherished object of the Criminal Justice System is to ensure that every guilty person is punished and every innocent person is protected. Our experience shows that operation of the standard “proof beyond reasonable doubt” has contributed to large number of guilty persons escaping punishment. This standard followed all these years has failed to achieve the main object of ensuring that the guilty are punished. What then is the answer and what are the options available to remedy the mischief? Should we opt for the standard of “proof on preponderance of probabilities” that is applied in civil cases? On a careful examination the Committee is of the view that this standard is not adequate to lend assurance that the innocent will be protected. Therefore, we have to find standard of proof which, while protecting the innocent is adequate to prevent the guilty escaping punishment. A standard in between these two standards seems to be the answer.

5.30 In this connection it is useful to advert to the following observation in *Riley Hill General Contractor vs. Tandy Corp*, 737 P.2d 595 (Or.1987):

There are three standards of proof: “a preponderance”, “clear and convincing” and “beyond a reasonable doubt”.

5.31 The middle course, in our opinion, makes a proper balance between the rights of the accused on one hand and public interest and rights of the victim on the other. This standard is just, fair and reasonable. It is operated not by layman but by Judges who are sensitive to the rights of the accused and recognised in criminal jurisprudence. Safety lies in the

fact that the accused is assisted by a lawyer and the Judge is required to give reasons for his findings. This will promote public confidence and contribute to better quality of justice to victims. It is time for realm of doubts to pave way for search for truth and justice.

#### VIEWS OF EMINENT JURISTS

5.32 Mr. Fali Nariman favours modification of the principle of “proof beyond reasonable doubt” and says that there is a need to maintain a proper balance of justice for the victims as well as fairness to the accused. Former Chief Justice Sri Ranganatha Mishra however feels that proof beyond reasonable doubt is a better alternative to proof on preponderance of probabilities. Former Chief Justice A.M.Ahmadi favours the removal of the extraordinary burden of “proof beyond reasonable doubt” subject to the safeguards available to the accused under the Evidence Act and the Code.

#### VIEWS OF THE HIGH COURTS

5.33 The High Courts of Allahabad, Bombay, Himachal Pradesh, Jarkhand, Karnataka and Punjab and Haryana are not in favour of proof on the basis of preponderance of probabilities in criminal cases. The High Courts of Delhi, Gujarat, Kolkata, Madras, Orissa and Uttaranchal are in favour of proof on preponderance of probabilities. The High Courts of Andhra Pradesh and Madhya Pradesh are in favour of middle course which they describe as ‘strict proof’. The High Court of Chattisgarh says that proof beyond reasonable doubt should be restricted to cases that hinge upon circumstantial evidence.

#### VIEWS OF STATE GOVERNMENTS

5.34 The State Governments of Arunachal Pradesh, Haryana, Kerala and Madhya Pradesh are not in favour of proof on preponderance of probabilities and do not favour any modification of the principle of proof beyond reasonable doubt. The State Governments of Karnataka and Jammu & Kashmir favour proof on preponderance of probabilities. The State Government of Himachal Pradesh favours proof on preponderance of probabilities except in cases which provide deterrent punishment. The other State Governments have not responded.

## **JUSTICE TO VICTIMS**

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### **INTRODUCTION**

6.1 Referring to the state of criminal justice in India today, the Government Notification constituting the Criminal Justice Reforms committee observed :

.....People by and large have lost confidence in the Criminal Justice System ..... Victims feel ignored and are crying for attention and justice ..... there is need for developing a cohesive system, in which, all parts work in co-ordination to achieve the common goal.

6.2 Very early in the deliberations of the Committee, it was recognized that victims do not get at present the legal rights and protection they deserve to play their just role in criminal proceedings which tend to result in dis-interestedness in the proceedings and consequent distortions in criminal justice administration. In every interaction the Committee had with the police, the Judges, the prosecution and defense lawyers, jail officials and the general public, this concern for victims was quite pronounced and a view was canvassed that unless justice to the victim is put as one of the focal points of criminal proceedings, the system is unlikely to restore the balance as a fair procedure in the pursuit of truth. Furthermore, it was pointed out that support and co-operation of witnesses will not be forthcoming unless their status is considerably improved along with justice to victims. This perception was strengthened while the Committee examined the systems prevalent in other jurisdictions. The U. N. system also wanted member countries to guarantee rights of victims of crime through their respective legal systems. In the circumstances, the Committee resolved to give adequate importance to the idea of justice to victims of crime in the scheme of reform to be recommended. This chapter of the report is specifically addressed to rights of victims with a view to solicit their maximum support to criminal proceedings and to restore the confidence of people in Criminal Justice System.

6.3 Basically two types of rights are recognized in many jurisdictions particularly in continental countries in respect of victims of crime. They are, firstly, the victim's right to participate in criminal proceedings (right to be impleaded, right to know, right to be heard and right to assist the court in the pursuit of truth) and secondly, the right to seek and receive compensation from the criminal court itself for injuries suffered as well as appropriate interim reliefs in the course of proceedings.

Basically two types of rights are recognized in many jurisdictions particularly in continental countries in respect of victims of crime. They are, firstly, the victim's right to participate in criminal proceedings (right to be impleaded, right to know, right to be heard and right to assist the court in the pursuit of truth) and secondly, the right to seek and receive compensation from the criminal court itself for injuries suffered as well as appropriate interim reliefs in the course of proceedings.

6.4 It is interesting to find that the European system assigned a very active role assigned to the victim or his representative in criminal proceedings. For example, in France, all those who suffer damage on account of the commission of an offence are entitled to become parties to the proceedings from the investigation stage itself. He can assist investigation on proper lines and move the court for appropriate directions when the investigation gets delayed or distorted for whatever reasons. His active participation during trial will be of great help in the search for truth without inconveniencing the prosecution. He may suggest questions to the court to be put to witnesses produced in court. He may conduct the proceedings if the public prosecutor does not show due diligence. He can supplement the evidence adduced by the prosecution and put forth his own arguments. He would be of help to the court in the matter of deciding the grant or cancellation of trial. He will adduce evidence in the matter of loss, pain and suffering to decide on his entitlement of interim reliefs and compensation by way of restitution. Wrongful attempts to withdraw or close the prosecution due to extraneous factors can be resisted if the court were to have the continued assistance of the victim. For all these reasons and more, it is clear that if the criminal proceedings have to be fair to both the parties and if the court were to be properly assisted in its search for truth, the law has to recognize the right of victim's participation in investigation, prosecution and trial. If the victim is dead, or otherwise not available this right should vest in the next of kin. It should be possible even for Government Welfare bodies and voluntary organizations registered for welfare of victims of sexual offences, child victims, those in charge of the care of aged and handicapped persons to implead themselves as parties whenever the court finds it appropriate for a just disposal of the case.

6.5 The right of the victim should extend to prefer an appeal against any adverse order passed by the trial court. The appellate court should have the same powers to hear

appeals against acquittal as it now has to entertain appeal against conviction. There is no credible and fair reason why appeals against acquittals should lie only to the High Court.

6.6 The right of representation by lawyer is a constitutional right of every accused and there is no reason why it should not be available to the victim as well. If the victim is an indigent person, the Legal Services Authority should be directed by the Court to provide a lawyer at State expense.

### **VICTIMS UNDER THE EXISTING CRIMINAL JUSTICE SYSTEM**

6.7.1 Historically speaking, Criminal Justice System seems to exist to protect the power, the privilege and the values of the elite sections in society. The way crimes are defined and the system is administered demonstrate that there is an element of truth in the above perception even in modern times. However, over the years the dominant function of criminal justice is projected to be protecting all citizens from harm to either their person or property, the assumption being that it is the primary duty of a State under rule of law. The State does this by depriving individuals of the power to take law into their own hands and using its power to satisfy the sense of revenge through appropriate sanctions. The State (and society), it was argued, is itself the victim when a citizen commits a crime and thereby questions its norms and authority. In the process of this transformation of torts to crimes, the focus of attention of the system shifted from the real victim who suffered the injury (as a result of the failure of the State) to the offender and how he is dealt with by the State. Criminal justice came to comprehend all about crime, the criminal, the way he is dealt with, the process of proving his guilt and the ultimate punishment given to him. The civil law was supposed to take care of the monetary and other losses suffered by the victim. Victims were marginalized and the State stood forth as the victim to prosecute and punish the accused.

In the process of this transformation of torts to crimes, the focus of attention of the system shifted from the real victim who suffered the injury (as a result of the failure of the State) to the offender and how he is dealt with by the State.

6.7.2 What happens to the right of the victim to get justice to the harm suffered? Well, he can be satisfied if the State successfully gets the criminal punished to death, a prison sentence or fine. How does he get justice if the State does not succeed in so doing? Can he ask the State to compensate him for the injury? In principle, that should be the logical consequence in such a situation; but the State which makes the law absolves itself



of such liability. Not only the victim's right to compensation was ignored except a token provision under the Criminal Procedure Code but also the right to participate as the dominant stakeholder in criminal proceedings was taken away from him. He has no right to lead evidence, he cannot challenge the evidence through cross-examination of witnesses nor can he advance arguments to influence decision-making.

6.7.3 What is the present role that victim is assigned under the existing criminal law? When a person who has been the victim of a cognizable offence gives information to the police regarding the same, the police is required to reduce the information into writing and read it over to the informant. The informant is required to sign it and get a copy of the FIR [section 154 (1) & (2) of Cr.P.C.]. If the police refuses to record the information, the victim – informant is allowed to send it in writing and by post to the S. P. concerned [Section 154 (3)]. If the police refuses to investigate the case for whatever reason, the police officer is required to notify the informant of that fact [Section 157 (2)].

6.7.4 Alternatively, victims are enabled by Section 190 of the Cr. P. C. to avoid going to the Police Station for redress and directly approach the Magistrate with his complaint.

6.7.5 Complainants say that they are treated indifferently by police and sometimes harassed when they go to them with their grievances. There are complaints that the police do not truthfully record the information but distort facts as found convenient to them. Cognizable cases are made non-cognizable and vice-versa. Complainants are sometimes made the accused and investigations initiated accordingly. Though these are unauthorized by the law and are rare, yet whenever it happens the victim gets disillusioned and alienated from the system itself.

6.7.6 The investigation process is exclusively a police function and the victim has a role only if the police consider it necessary. There are administrative instructions given by police departments of certain States to give information on progress of investigation to the victim when asked for. Otherwise till police report (charge sheet) is filed under Section 173 Cr. P. C., the victim's plight is pitiable. This is the time victims need assistance the most and the law is silent on it. After the police report is taken cognizance of by the Magistrate, if he decides to drop the proceedings, it is required of him to hear the victim-informant by issuing notice to him [1997 Cr. L. J. 4636 (S.C.)] The Court seems to have recognized a gap in the statutory provision and enjoined the court not to drop proceedings without giving an opportunity to the victim to ventilate his grievance.

6.7.7 Pending investigation and prosecution, there are several things that a victim-friendly



Criminal Justice System needs to address on an urgent basis. For example, victims of rape and domestic violence etc. require trauma counseling, psychiatric and rehabilitative services apart from legal aid. The object is to avoid secondary victimization and provide hope in the justice system. At the police station level, with or without the assistance of voluntary organizations, victim support services need to be organised systematically if the system were to redeem its credibility in society.

6.7.8 The existing law only envisages the prosecutor appointed by the State to be the proper authority to plead on behalf of the victim. However, the Code does not completely prohibit a victim from participating in the prosecution. A counsel engaged by the victim may be given a limited role in the conduct of prosecution, that too only with the permission of the court. The counsel so engaged is to act under the directions of the public prosecutor. The only other privilege a victim might exercise is to submit again with the permission of the court, written arguments after the closure of evidence in the trial. This requires change on the lines proposed above.

6.7.9 In the granting and cancellation of bail, victims have substantial interests though not fully recognized by law. Section 439 (2) may allow a victim to move the Court for cancellation of bail; but the action thereon depends very much on the stand taken by the prosecution. Similarly prosecution can seek withdrawal at any time during trial without consulting the victim (Section 321 Cr. P. C.). Of course, the victim may proceed to prosecute the case as a private complainant; but he seems to have no right to challenge the prosecution decision at the trial stage itself. This is another change the Committee would recommend for justice to victims.

6.7.10 Victims have a right to testify as prosecution witness. However, victims often fall prey to intimidation and harassment by offenders which tend to dissuade them from testifying freely and truthfully. Though it is the duty of the State to prevent such things, the situation according to available evidence is disturbing. There is no victim protection law as such and police is not in a position to protect every victim. Such conduct, of course, is prohibited under the IPC (Section 504 IPC).

6.7.11 The situation is alarming in respect of victim-witnesses who belong to vulnerable sections of society. The adversarial trial built around cross-

The situation is alarming in respect of victim-witnesses who belong to vulnerable sections of society. The adversarial trial built around cross-examination of witnesses often result in adding insult to injury against which even the Court may not be of much help.

examination of witnesses often result in adding insult to injury against which even the Court may not be of much help. In several offences the experience may be a nightmare to victims acknowledging this predicament, Government has adopted recently an amendment preventing character assassination during trial of sexual offences.

6.7.12 There is need for an officer equivalent to Probation Officer to take care of victim interests in investigation and trial. He may be called Victim Support Service Co-ordinator who may work closely with the police and Courts to monitor, co-ordinate and ensure delivery of justice during the pendency of the case.

6.7.13 Compounding is a process through which the offender and the victim come to an agreement to put an end to the tension arising out of the criminal action. Offences which are compoundable and the persons by whom they could be compounded are indicated in Section 320 of the Cr. P. C. The Section specifies two lists of offences : one, compoundable without the permission of the Court, and the other, relatively more grave offences, which are compoundable with the permission of the Court. Sometimes the requirement of permission of the Court before compounding is got over by making the complainant and other prosecution witnesses retract their statements given to police and to depose favourably to the accused. The Committee is in favour of giving a role to the victim in the negotiation leading to settlement of criminal cases either through courts, Lok Adalats or Plea-bargaining.

## **6.8 COMPENSATION FOR VICTIM**

6.8.1 The principle of compensating victims of crime has for long been recognized by the law though it is recognized more as a token relief rather than part of a punishment or substantial remedy. When the sentence of fine is imposed as the sole punishment or an additional punishment, the whole or part of it may be directed to be paid to the person having suffered loss or injury as per the discretion of the Court (Section 357 Cr.P.C.). Compensation can be awarded only if the offender has been convicted of the offence with which he is charged.

6.8.2 While Section 357 (i)(c) provides for the payment of compensation out of the fine imposed, Section 357 (3) makes way for the payment of compensation even if fine does not form part of the punishment. The amount of compensation which the Court can thus order is flexible enough to make it real and truly compensatory. It may be paid directly to the beneficiary before the court on a fixed date and if not so paid, may be reconsidered as a fine.

6.8.3 Compensation may also be ordered even in case the convicted person is released

after due admonition or on probation of good conduct (Sections 3 & 4 of Probation of Offenders Act, 1958). Costs can also be made payable under such circumstances.

6.8.4 The payment of compensation by the offender is not possible where there is acquittal or where the offender is not apprehended. Further, the payment remains suspended till the limitation period for the appeal expires or if an appeal is filed, till the appeal is disposed of (Section 357(2) Cr. P. C.) The delay in the realization of the amount often adds to the woes of the victim.

6.8.5 In 1992 the U. P. Government through an amendment to Section 357 provided that where the victim is a member of a scheduled caste or scheduled tribe and the person convicted is not such a member, then it shall be obligatory for the Court to order compensation to the victim of crime.

6.8.6 A person who fails to pay the fine/compensation is normally required to undergo imprisonment in default of the said payment. There are many cases of default for a variety of reasons. The result is again denial of compensation for the victim even in those few cases which end in conviction. The hopeless victim is indeed a cipher in modern Indian criminal law and its administration.

6.8.7 Sympathizing with the plight of victims under Criminal Justice administration and taking advantage of the obligation to do complete justice under the Indian Constitution in defense of human rights, the Supreme Court and High Courts in India have of late evolved the practice of awarding compensatory remedies not only in terms of money but also in terms of other appropriate reliefs and remedies. Medical justice for the Bhagalpur blinded victims, rehabilitative justice to the communal violence victims and compensatory justice to the Union Carbide victims are examples of this liberal package of reliefs and remedies forged by the apex Court. The recent decisions in Nilahati Behera V. State of Orissa [ (1993) 2 SCC 746] and in Chairman, Railway Board V. Chandrima Das are illustrative of this new trend of using Constitutional jurisdiction to do justice to victims of crime. Substantial monetary compensations have been awarded against the instrumentalities of the State for failure to protect the rights of the victim.

6.8.8 These decisions have clearly acknowledged the need for compensating victims of violent crimes irrespective of the fact whether offenders are apprehended or punished. The principle invoked is the obligation of the State to protect basic rights and to deliver justice to victims of crimes fairly and quickly. It is time that the Criminal Justice System takes note of these principles of Indian Constitution and legislate on the subject suitably.

6.8.9 In 1995 the Indian Society of Victimology based in Chennai prepared a bill for Victim compensation and submitted to the Government which the Committee feels is an appropriate draft for initiating action.

## **6.9 VICTIM RIGHTS INTERNATIONALLY AND IN CRIMINAL JUSTICE SYSTEM ELSEWHERE**

6.9.1 Victims of crime are important players in criminal justice administration both as complainant/informant and as witness for the police/prosecution. Despite the system being heavily dependent on the victim, criminal justice has been concerned with the offender and his interests almost subordinating or disregarding the interests of victim. In the civil law systems generally, the victims enjoyed a better status in administration of criminal justice. Towards the last quarter of the twentieth century, the common law world realized the adverse consequences arising from this inequitable situation and enacted laws giving rights of participation and compensation to the victims. "Victims" mean the person or persons who have suffered financial, social, psychological or physical harm as a result of an offense, and includes, in the case of any homicide, an appropriate member of the immediate family of any such person. In the Constitutions of certain countries, rights of victims have been recognized thereby forcing changes in criminal justice goals and procedures. In the United States the Supreme Court ruled that consideration of Victim Impact Statements during sentence hearing was Constitutionally permissible [Payne V Tennessee, III S. Ct. 2597 (1991)] This enabled victims to describe the extent of any physical, emotional, or psychological effects caused by the crime. Eventually in U.S., Victim Impact Statements became part of plea bargains and parole hearings.

6.9.2 According to some studies, victim's participation in plea bargain negotiations has been shown to contain their vengeful instincts, decrease their assessment of the system being too lenient on criminals and inculcate of feeling of fairness in the whole process. Increased victim satisfaction will, in effect, enhance the efficiency of the Criminal Justice System by ensuring his future support to the system.

6.9.3 In 1985 the United Nations General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The Declaration recognized the following rights of victims of crime :-

- i. Access to justice and fair treatment – This right includes access to the mechanisms of justice and to prompt redress, right to be informed of victim's rights, right to proper assistance throughout the legal process and right to protection of privacy and safety.
- ii. Restitution – including return of property or payment for the harm or

loss suffered; where public officials or other agents have violated criminal laws, the victims should receive restitution from the State.

- iii. Compensation – when compensation is not fully available from the offender or other sources, State should provide financial compensation at least in violent crimes, resulting in bodily injury for which national funds should be established.
- iv. Assistance – victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary and community-based means. Police, justice, health and social service personnel should receive training in this regard.

The Declaration specially ask States to provide by law the above rights for victims of abuse of political or economic power.

6.9.4 In Europe, the Convention on the Compensation of Victims of Violent Crimes (1983) do incorporate the essential rights of victims as stipulated in the U. N. Declaration. The Council of Europe has recommended the revamping of criminal justice incorporating victim's rights in every stage of criminal proceeding. Following it many States in Europe and elsewhere enacted laws aimed at providing increased participation and more substantive rights to victims of crime. Illustrative of this legislative trend are the Criminal Injuries Compensation Act, 1995 of the United Kingdom, The Victims of Crime Assistance Act, 1996 of Victoria, The Victims and Witnesses Protection Act, 1982 of U.S.A., The Victims Rights and Restitution Act, 1999 of U.S.A. etc.

6.9.5 In an informative report on “Criminal Justice: The Way Ahead” presented to the British Parliament (February, 2001) the Home Department found that despite having a fairly advanced Criminal Injuries Compensation Scheme, victim satisfaction with the police has gone down in U. K. and many victims felt “that the rights of these accused of a crime take precedence over theirs”. Every time a case collapses, or the verdict is perceived to be unjust, a victim's suffering is made worse. One of the key recommendations which formed the foundation for criminal justice reform according to the U. K. report was :

“We will put the needs of victims and witnesses at the heart of the Criminal Justice System and ensure they see justice done more often and more quickly. We will support and inform them, and empower them to give them best evidence in the most secure environment possible”.

6.9.6 Among the many steps proposed to translate this principle into practice, the U. K. White Paper promised to do the following :

- (a) legislate to entitle victims with information about release and management of the offenders and progress of their cases;
- (b) enable victims to submit a “victim personal statement” to the courts and other criminal justice agencies setting out the effect of the crime on their lives.
- (c) Introduce measures for vulnerable and intimidated witnesses, such as screens, pre-recorded video evidence and TV links;
- (d) extend specialized support for victims of road traffic incidents and their families;
- (e) establish a Victim’s Commissioner (Ombudsman)
- (f) enable victims to report minor crime online and to track the progress of their case online;
- (g) legislate to produce a Victim’s Code of Practice setting out what protection, practical support and information every victim of a crime has a right to expect from the criminal justice agencies.

6.9.7 The above strategies being introduced in the United Kingdom for reforming the Criminal Justice System to give a better deal for victims should be considered for adoption in India, of course, with suitable modification for effective implementation. This is over and above the victim compensation scheme which has been in operation in Britain for a fairly long period. Of course, victim support strategies depend for their effectiveness on the reform steps undertaken in the overall structure and policies in criminal law and criminal justice administration. The idea is to reduce victimization in the first place by reducing crime itself. The idea also is to ensure that the victim gets as much justice out of the system as the accused. The recommendations that follow are made keeping these objects in view in the Indian context.

**PART – II**

**INVESTIGATION**

**PROSECUTION**



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## **INVESTIGATION**

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7.1 The primary responsibility of Police is to protect life, liberty and property of citizens. It is for the protection of these rights that Criminal Justice System has been constituted assigning important responsibility to the Police. They have various of duties to perform, the most important among them being maintenance of Law and order and investigation of offences. The police are charged with the responsibility of protecting precious Human Rights of the citizens. Whenever there is invasion or threat of invasion of one's human rights it is to the police that the citizen rushes for help. Unfortunately the contribution of the police in this behalf is not realized and only the aberrations of the police are noticed, highlighted and criticized. The aberrations must be corrected and the police respected for the difficult role they play even at the cost of their lives in the process of protecting the rights of the citizens.

7.2 The manner in which police investigations are conducted is of critical importance to the functioning of the Criminal Justice System. Not only serious miscarriage of justice will result if the collection of evidence is vitiated by error or malpractice, but successful prosecution of the guilty depends on a thorough and careful search for truth and collection of evidence which is both admissible and probative. In undertaking this search, it is the duty of the police to investigate fairly and thoroughly and collect all evidence, whether for or against the suspect. Protection of the society being the paramount consideration, the laws, procedures and police practices must be such as to ensure that the guilty are apprehended and punished with utmost dispatch and in the process the innocent are not harassed. The aim of the investigation and, in fact, the entire Criminal Justice System is to search for truth. To achieve this objective, the investigating officers must be properly trained and supervised and necessary scientific and logistical support should be made available to them.

7.3 The police perceive themselves psychologically and morally bound to do everything possible to curb crime and investigate the cases successfully to meet the peoples' expectations. In this process the police often resort to short cut methods and exhibit negative traits of police sub-culture, namely, rudeness, use of third degree methods, defensiveness in face of criticism, lack of innovativeness etc.

7.4 Even though investigation is the foundation of the Criminal Justice System it is unfortunate that it is not trusted by the laws and the courts. Sections 161 and 162 of the Code provide that the statements of the witnesses examined during investigation are not admissible and that they can only be used by the defence to contradict the maker of the statement. The confession made by accused is also not admissible in evidence. The statements recorded at the earliest stage normally have greater probative value but can't be used in evidence. The observations of the courts in several criminal cases show that the Judges are reluctant to accept the testimony of police officers. Such is not the position in other countries. This is a historical legacy of the colonial rulers. It is common knowledge that police often use third degree methods during investigation. There are also allegations that in some cases they try to suppress truth and put forward falsehood before court for reasons such as corruption or extraneous influences political or otherwise. Unless the basic problem of strengthening the foundation is solved the guilty continue to escape conviction and sometimes even innocent persons may get implicated and punished. It is therefore necessary to address ourselves to the problems and strengthen the investigation agency.

## 7.5 CRIME: A QUANTITATIVE ANALYSIS

### COGNIZABLE CRIMES REGISTERED DURING 1995-2000.

Year	I.P.C.	S.L.L.	Total	Ratio (IPC:SLL)
1995	16,95,696	42,97,476	59,93,172	1:2.53
1996	17,09,576	45,86,986	62,96,562	1:2.68
1997	17,19,820	46,91,439	64,11,259	1:2.73
1998	17,78,815	44,03,288	61,82,103	1:2.47
1999	17,64,629	31,47,101	49,11,730	1:1.78
2000	17,71,084	33,96,666	51,67,750	1:1.92

Table 8

During the year 2000, in addition to 51,67,750 crimes registered by the police, the other investigating agencies under the Central and State Governments also registered 70,648 cognizable crimes.

7.5.1 From the above statistics, it would appear that IPC crimes, through on the increase from 1995 to 1998, showed a downward trend in 1999 and slight upward trend in 2000. The

IPC crimes registered an increase of 0.4% in 2000 compared to 1999. SLL crimes, however, registered a much higher increase of 7.9% in the same period.

7.5.2 Of IPC crimes, violent crimes constituted 13.4%, property crimes, 20.6%, economic crimes, 3.2% and other IPC crimes, 62.1% in the year 2000. Violent crimes, which were about 8% in the 1950s and 1960s have almost doubled in last three decades. This is disturbing.

7.5.3 The crime rate i.e. incidence of crime per lac of population, is universally taken as a more realistic indicator since it balances the effect of growth in population. The crime rate of total cognizable crimes (i.e. IPC+SLL) was 515.7 in 1999. The crime rate of total cognizable crimes increased marginally by 3.6% in 2000 vis-à-vis 1999. The IPC crime rate in 2000 was 176.7 while it was 178.9 in 1999, thereby recording a decline of 1.2% during this period.

7.5.4 It may be noted that in 2000 at All India level, a total of 22,74,026 IPC cases including those pending from the previous years were pending investigation with the police. 17,92,896 cases i.e. 84% cases were disposed of during the year and 4,75,536 cases (i.e. 20.9%) remained pending. Broadly speaking, 4/5 of the cases were disposed of by the police and 1/5 remained pending. This is the pattern which obtains since last several years. As regards SLL cases, 93.7% were disposed of in 2000; investigation was denied in 0.8% cases and the remaining 5.5% remained pending at the end of the year.

## **7.6 DIFFICULTIES OF THE INVESTIGATING OFFICERS**

7.6.1 The Committee has interacted with a cross-section of the police officers at all levels and in different States. The police officers have mentioned the following difficulties before the Committee in ensuring speedy, effective and fair investigation:

- i. Excessive workload due to inadequacy of manpower and long working hours even on holidays and the absence of shift system;
- ii. Non co-operative attitude of the public at large;
- iii. Inadequacy of logistical and forensic back up support;
- iv. Inadequacy of trained investigating personnel;
- v. Inadequacy of the state-of-the-art training facilities in investigation, particularly in- service training;
- vi. Lack of coordination with other sub-system of the Criminal Justice System in crime prevention, control and search for truth;
- vii. Distrust of the laws and courts,
- viii. Lack of laws to deal effectively the emerging areas of crime such as organised crime, money laundering etc.

- ix. Misuse of bail and anticipatory bail provisions;
- x. Directing police for other tasks which are not a part of police functions;
- xi. Interrupting investigation work by being withdrawn for law and order duties in the midst of investigation.
- xii. Political and executive interference;
- xiii. Existing preventive laws being totally ineffective in curbing criminal tendencies of hardened criminals and recidivists.

## **7.7 QUALITY OF INVESTIGATION**

7.7.1 The Committee is required to address itself primarily to the role of the Police in investigating crimes. The word 'investigation' has been defined in section 2(b) of the Criminal Procedure Code as:

All the proceedings under the Code for the collection of evidence by a police officer or by any other person (other than a Magistrate) who is authorized by the Magistrate in this behalf.

7.7.2 Investigation is basically an art of unearthing the truth for the purpose of successful detection and prosecution. In the words of the Supreme Court (in H.N. Rishbud v/s State of Delhi : AIR 1955 SC 196: 1955 SCJ 283,) the investigation generally consists of the following steps:

- 1) Proceeding to the spot;
- 2) Ascertainment of the facts and circumstances of the case;
- 3) Discovery and arrest of the suspected offender;
- 4) Collection of evidence relating to the commission of the offence which may consist of the examination of:
  - a) various persons (including accused) and the reduction of statements into writing, if the officer thinks fit;
  - b) the search of places and seizure of things considered necessary for the investigation and to be produced at the trial; and
- 5) Formation of the opinion as to whether on the materials collected, there is a case to place the accused before a Magistrate for trial and, if so, taking the necessary steps for the same for the filing of a charge sheet u/s 173 Cr.P.C.

7.7.3 The standard of police investigation in India remains poor and there is considerable room for improvement. The Bihar Police Commission (1961) noted with dismay that "during the course of tours and examination of witnesses, no complaint has been so universally made before the Commission as that regarding the poor quality of police investigation". Besides

inefficiency, the members of public complained of rudeness, intimidation, suppression of evidence, concoction of evidence and malicious padding of cases. Almost in the same vein, the Punjab Police Commission (1961-62) bemoaned poor quality of police investigation. A frequent complaint relating to the method of investigation received by the Punjab Police Commission was that all cases were not investigated by one officer but several officers in succession.

7.7.4 The West Bengal Police Commission (1960-61) also referred to noticeable deterioration in the standard of investigation. The Second West Bengal Police Commission (1988) reaffirmed the downward trend and observed that during the intervening years the standard of investigation had further gone down. Many cases did remain undetected. It also observed that conviction figures had also gone down.

## **7.8 INADEQUACY OF STAFF**

7.8.1 In the first place, there is inadequacy of the investigating staff. The police officers are hard pressed for time with multifarious commitments and, thus, not able to devote adequate time for investigational work. A sample survey done at the instance of the National Police Commission (Fourth Report of the National Police Commission-page 3) in six States of the country revealed that on an average, the investigating officer is able to devote only 27% of his time on investigational work, while the rest of the time is taken by other duties connected with the maintenance of law and order, VIP bandobust, petition enquiries, court attendance, collection of intelligence and other administrative work. The Committee on Internal Security constituted by the group of Ministers (GOI) in the wake of Kargil conflict in 2000 was informed by the DGP, Uttar Pradesh, of the startling fact that the police could devote only 13% of its time on investigations. Similarly, a random survey done at the instance of Second West Bengal Police Commission revealed that a Sub-Inspector of an urban police station in West Bengal, on an average, spent 20-25% of his time on investigational work; a Sub-Inspector in Calcutta City spent about 41% his time on it and a Sub Inspector in rural areas spent 16 to 18% of time in investigative work due to long distances involved. Inadequate number of I.Os. coupled with low percentage of their time being devoted to investigational work, resulting in perfunctory and delayed investigations, paved way for the acquittal of the accused.

7.8.2 An investigating officer on an average, investigates 45 cases in a year. There is, however, a wide variation amongst States, with the workload of IO ranging from a low of 12.7 cases in Orissa to a high of 145.3 cases in Andhra Pradesh. The National Police Commission had suggested a workload of 60 cases per IO. Given the heavy commitment of police officers in law and order, VIP security and other 'Bandobast' duties, there is need for fixing a more

realistic norm. It may be apt to add that the prevailing norms regarding workload of 10 in the CBI are two cases per year in the Central Units and 4 cases per year in the Territorial Units.

The Committee has interacted with police officers at the highest level as well as at the executive level. It has also discussed relevant issues with SHOs and their immediate supervisory officers and seen their work regarding investigation in some States. On the basis of observations and interaction, the Committee is of the opinion that for improving quality of investigation, the workload of an IO (or a team of IOs) should not exceed 10 cases per year. This norm is suggested for investigation of serious crimes.

## **7.9 SEPARATION OF INVESTIGATION WING FROM LAW & ORDER WING**

7.9.1 As of now, the police have a combined cadre of Officers and men who perform both investigational and law and order duties, resulting in lack of perseverance and specialisation in investigations, especially of the serious cases. It needs to be emphasised that the duties of the police as prescribed in section 23 of the Indian Police Act, 1861, have become totally out-dated. Much water has flown down the Ganges since then. Terrorism, particularly State sponsored terrorism from across the borders, has drastically changed the ambit and role of police functions and duties in certain parts of the country. Besides, organised crime having inter-State and trans-National dimensions has emerged as a serious challenge to the State authority. This has compelled the Police Departments to divert a large chunk of their resource to these areas, leaving as much less for the routine crime work.

7.9.2 The need for expeditious and effective investigation of offences as contributing to the achievement of the goal of speedy trial cannot be gain said. The investigation of crime is a highly specialised task requiring a lot of patience, expertise, training and clarity about the legal position of the specific offences and subject matter of investigation. It is basically an art of unearthing hidden facts with the purpose of linking up of different pieces of evidence for successful prosecution. The Committee is of the view that investigation requires specialisation and professionalism of a type not yet fully achieved by the police agencies.

It is basically an art of unearthing hidden facts with the purpose of linking up of different pieces of evidence for successful prosecution. The Committee is of the view that investigation requires specialisation and professionalism of a type not yet fully achieved by the police agencies.

7.9.3 The National Police Commission by a sample survey in six States in different parts of the country found that an average IO was able to devote only 30% of his time to investigational



work while the rest of the time was taken in other duties. The National Police Commission stopped short of categorically recommending separation of the investigation wing from the law and order wing but recommended restructuring of the police hierarchy for increasing the cadre of IOs.

7.9.4 The Law Commission of India discussed this issue threadbare in its 154<sup>th</sup> report and categorically recommended separating the investigating agency from the law and order police. The Law Commission adduced the following grounds in support of its recommendations:

- i) it will bring the investigating agencies under the protection of judiciary and greatly reduce the possibility of political or extraneous influences;
- ii) efficient investigation of cases will reduce the possibility of unjustified and unwarranted prosecutions;
- iii) it will result in speedier investigation which would entail speedier disposal of cases;
- iv) separation will increase the expertise of the investigating officers;
- v) the investigating police would be plain clothes men and they would be able to develop good rapport with the public;
- vi) not having been involved in law and order duties entailing the use of force, they would not provoke public anger and hatred which stand in the way of public police cooperation in tracking down crime and criminals and getting information, assistance and intelligence from the public.

7.9.5 The Committee on Police Reforms constituted by the Government of India under the chairmanship of Sri K. Padmanabhaiah also recommended separation of investigation from the law and order wing.

We feel that the long standing arguments whether crime and law and order should be separated should be ended once and for all. Most police officers are agreed that they should be separated but feel that the separation may not be practical. We are of the view that such a separation should be made in urban areas in all States as a beginning. Separation of crime from law and order will lead to greater professionalism and specialisation and will definitely improve the quality of investigation. In UP, this separation has already been put into effect in municipal and bigger towns from April, 2000. Maharashtra is also in the process of doing it. The rest of India must follow suit.

7.9.6 It has been brought to our notice that separation in the two wings has already

been effected in certain large cities in the country. In Chennai Police Commissioner's office, there are separate police stations for Law and Order and crime. The Crime Police Stations in Chennai register and investigate cases relating to property offences. The rest of the offences are handled by the Law & Order PSs. There are separate Assistant Commissioner of Police to supervise the work of respective police stations. The work of both types of PSs is coordinated by the territorial Dy. Commissioner of Police. In other urban areas, in the State, the above system prevails. The rural PSs, however, work in a traditional system.

7.9.7 The Tamil Nadu pattern is being followed in Andhra Pradesh also. In cities/big towns, namely, Hyderabad, Vishakhapatnam, Vijaywada, Rajahmundry, Guntur and Eluru etc., there are separate PSs for law and order and crime, though both types of PSs function from the same building. While investigation of offences relating to property are taken up by the Crime PSs, investigation of other offences is handled by the law and order PSs. Unlike, Chennai, the work of both types of PSs is supervised by the territorial supervisory officers i.e. SDPOs, DCPs etc. Hyderabad City Police Commissionerate also has a Central Crime Police Station which takes up investigation of important crimes. In the rural areas, the traditional system prevails.

7.9.8 We have given a serious thought to the matter and are of the view that all serious crimes, say sessions triable cases, and certain other classes of cases are placed in the domain for the Crime Police and the remaining crimes including crimes under most of the Special and Local laws are handled by the Law and Order Police. The Committee strongly feels that:

- (i) The staff in all stations in urban areas should be divided as Crime Police and Law and Order Police. The strength will depend upon the crime & other problems in the PS area.
- (ii) In addition to the officer in-charge of the police station, the officer in-charge of the Crime Police should also have the powers of the officer in-charge of the police station.
- (iii) The investigating officers in the Crime Police should be at the least of the rank of ASI and must be graduates, preferably with a law degree, with 5 years experience of police work.
- (iv) The category of cases to be investigated by each of the two wings shall be notified by the State DGP.
- (v) The Law & Order police will report to the Circle officers/SDPO. Detective constables should be selected, trained and authorised to investigate minor offences.

This will be a good training ground for them when they ultimately move to the crime police.

- (vi) A post of additional SP (Crimes) shall be created in each district. He shall have crime teams functioning directly under him. He will carry out investigations into grave crimes and those having inter district or inter state ramifications. He shall also supervise the functioning of the Crime Police in the district.
- (vii) There shall be another Additional SP (Crime) in the district who will be responsible for (a) collection and dissemination of criminal intelligence; (b) maintenance and analysis of crime data; (c) investigation of important cases; (d) help the Crime Police by providing logistic support in the form of Forensic and other specialists and equipment. Investigations could also be entrusted to him by the District SP.
- (viii) Each state shall have an IG in the State Crime Branch exclusively to supervise the functioning of the Crime Police. He should have specialised squads working under his command to take up cases having inter District. & and inter-state ramifications. These could be (a) cyber crime squad; (b) anti terrorist squad; (c) organised crime squad; (d) homicide squad; (e) economic offences squad; (f) kidnapping squad (g) automobile theft squad; (h) burglary squad etc. He will also be responsible for (a) collection and dissemination of criminal intelligence (b) maintenance and analysis of crime data (c) co-ordination with other agencies concerned with investigation of cases.

## **7.10 INVESTIGATION BY A TEAM**

7.10.1 It has come to the notice of the Committee that investigations of even grave and sensational crimes having inter-State and even trans- national ramifications are being conducted by a single IO. The Committee feels that by virtue of the nature of such cases, application of a single mind is not enough to respond to the modern needs of the art and science of investigation — may it be inspection of site, picking of the clues and developing them and handling of other multidimensional related matters.

7.10.2 The investigation of all such crimes needs to be conducted by a team of officers, the size and level of the team depending on the dimensions of the case, with the senior most officer working as the leader of the team. This would ensure continuity between investigative efforts as also proper appraisal of evidence and application of law thereto. It will also avert or minimise the scope of misuse of discrimination by the police and ensure greater transparency in the investigations. Integrity of the team, needless to mention would obviously be higher.

## **7.11 LEVEL OF THE INVESTIGATING OFFICER**

7.11.1 It may be apt to point out that the rank of the IO investigating a case also has a bearing on the quality of investigation. The minimum rank of an SHO in the country is SI. However, some of the important police stations are headed by the officers of the rank of Inspector. It has been observed that investigations are mostly handled by lower level officers, namely, HC and ASI etc.. The senior officers of the police stations, particularly the SHOs generally do not conduct any investigations themselves. This results in deterioration of quality of investigations.

7.11.2 While no hard and fast rule can be laid down as to the rank of the IO for a particular type of case, the Committee, however, recommends that, as far as possible, all Sessions triable cases registered in the police stations should be investigated by the senior most police officers posted there, be they SIs or Inspectors. This has obvious advantages as they will be able to do a better job because of their superior intelligence, acumen and experience and control over the resources.

## **7.12 INSULARITY AND INTEGRITY OF THE INVESTIGATING AGENCY**

7.12.1 Another important aspect impacting on the quality of investigation is the insularity of the investigating officers and the supervisory ranks. For fair and impartial investigation, it is imperative that the investigating machinery is immune from political and other extra influences and acts in consonance with the law of the land and the Constitution. It has, however, been observed that the people in authority think nothing of wielding influence to scuttle and, even thwart, criminal investigations or to bend them to suit their political or personal conveniences. What is worse is that in certain States, the 'Desires System' in the posting of District and Thana level police officers is ruling the roost. The things have come to such a pass that no transfer can be affected without the 'desire' of the local MLA and MPs and certainly not always for altruistic reasons or in public interest. This practice, wherever it prevails, is not desirable in any wing of the Government and certainly not in the Police Department and needs to be discontinued.

7.12.2 It is strongly felt that the investigating officers should have the requisite independence responsible to act according to law and the constitution. Mere change of mind set would not suffice unless appropriate legal backing is provided in this regard.

7.12.3 Integrity of the I.O has a vital bearing on the integrity of the investigation conducted by him. The misconduct of the IOs has often been overlooked due to misplaced and

misconceived service loyalties. The Committee feels that the Dist. Supdts. of Police, Range Dy.IGs and the DGPs must ensure that the IOs function with utmost integrity and bad elements amongst them are identified and excluded from investigative process. This would necessitate strengthening of the Police Vigilance set-ups at the State level and constitution of a similar mechanism at the Range/District. level.

### 7.13 Placement Policy of Investigating Staff

7.13.1 Another related aspect is frequent transfer of cases from one IO to another and from District. Police to the Range Office or the State Crime Branch due to extraneous considerations. This practice not only demoralises the initial investigating officer or agency but also cools the trail of investigation and renders immunity to the criminals, at least temporarily, from penal consequences.

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7.13.2 The Committee is of the opinion that:

- a) The National Security Commission at the national level and the State Security Commissions at the State level should be constituted, as recommended by the National Police Commission. Constitution of the aforesaid Commissions would give an element of insularity to the police forces in the country and invoke faith and trust of the people in its functioning.
- b) Police Establishment Boards consisting of DGP and 3 to 4 other senior police officers should be set up at the Police Headquarters in each State. Posting, transfer and promotions etc. of District. level officers should be made on the recommendation of such Boards, with the proviso that the Government may differ with the recommendations of such Boards for reasons to be recorded in writing.
- c) No case should ordinarily be transferred from one IO to another or from District. Police to the Range office or the State Crime Branch by the competent authority unless there are very compelling and cogent reasons for doing so and such reasons should be recorded in writing by the concerned authority.
- d) The 'superintendence' of the Police in the State vests in the State Govt. As there are allegations, not always unfounded, of misuse of this power for extraneous considerations, it would be desirable to delimit the ambit and scope

thereof by adding an explanation underneath section 4 of the Indian Police Act, as recommended by the NPC, to the following effect:

Explanation: The power of superintendence shall be limited to the purpose of ensuring that the police performance is in strict accordance with law”.

7.13.3 Understandably format of a new Police Act is already under consideration of the Govt. of India. We feel that this exercise should be completed without loss of any time.

## **7.14 SUPERVISION**

7.14.1 Another important reason for the decline in the quality of investigation is lack of effective and timely supervision by the senior officers. There is a hierarchy of officers above the SHO who are empowered to monitor and guide the investigations in terms of section 36 Cr.P.C., namely, Deputy SP, Additional SP, Superintendent of Police and even the Range DIG. But most of them do not devote adequate time and energy to supervisory work. This has been affirmed in a study conducted by the BPRD in respect of murder cases of Faridabad, Gurgaon, & Union Territory, Delhi, which resulted in acquittals during the period 1984-86.

7.14.2 Further, it has to be pointed out in view of our fractured polity and social dissonances, it has now become a regular feature to embellish the FIRs and statements, giving incorrect facts and circumstances, with the objective of roping in innocent persons for political reasons or to settle personal scores. This happens even in grave offences like murder and rape etc. Witnesses and victims even make false statements before the Magistrates u/s 164 Cr.P.C. It is, therefore, the duty of the supervisory officers to properly guide the investigations right from the beginning so as to ensure that innocent persons are exculpated and the real guilty ones brought to justice. It is easier said than done. It needs hard work, professional expertise, and to top it all, moral courage to call a spade a spade, unmindful of the parties and pressure groups involved. The I.O alone, lowly in rank, cannot do it; he needs professional and moral support of his seniors, which, unfortunately, is missing either due to professional inaptitude or political compulsions.

7.14.3 The Committee feels that the quality of investigations would not improve unless the supervisory ranks in the police hierarchy i.e. Circle Officers/ District. Supdt. of Police/Range Dy.IGP, pay adequate attention to the thorough and timely supervision over the progress of individual investigations. The National Police Commission in para 27.35 of its 4 report observed that effective supervision of an investigation would call for:



- (i) Test visit to the scene of crime;
- (ii) A cross check with the complainant and a few important witnesses to ensure that their version has been correctly brought on police record and that whatever clues they had in view have been pursued by the police;
- (iii) Periodic discussion with the investigating officers to ensure continuity of his attention to the case; and
- (iv) Identification of similar features noticed in other cases reported elsewhere, and coordinated direction of investigation of all such cases.

7.14.4 Needless to say, supervision ensures proper direction, coordination and control and this helps efficiency. Effective supervision by the District. Supdts. of Police and Circle Officers also reduces the utilisation of opportunities and misuse of coercive powers vested in the officers from the SHO down to the constabulary, to the minimum. If the supervision of the District. SP and the CO is lax and ineffective, it is bound to breed inefficiency and corruption in the force. The efficiency and honesty of the force depends largely in the manner in which superior officers discharge their responsibilities through example and precept. Thus, close and constant supervision by senior officers over the work of subordinate officers is absolutely essential. Close supervision of individual investigations is also essential to check the canker of corruption.

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7.14.5 Some of the areas in which Supervisory Officers can play a vital role are enumerated below:

- i. Crimes are freely registered.
- ii. Crimes are registered under the appropriate sections without minimizing the occurrence for the sake of statistics;
- iii. There is no minimization or lessening of the value of property in order to reduce supposed police responsibility;
- iv. Complaint, if made orally, is recorded at once carefully and accurately in plain and simple language by the senior most officer present in the police station or by someone to his dictation without omitting any of the important and relevant details.
- v. There is no interpolation while writing complaints and if any fact is omitted, it is



written afresh at the bottom, and if anything is scored out, it is done neatly with initials and date and in such a manner that it could be read;

- vi. If investigation is refused u/s 157(1)(b), it is done on proper grounds;
- vii. The investigation in all cases is prompt, thorough and sustained;
- viii. Final reports are submitted without delay and charge-sheets are accompanied by complete evidence that is to be led at the trial;
- ix. Cases are not routinely closed as false unless there are reasons to do so and in case it is decided to close the case, steps are taken to prosecute the accused u/s 182 or 211 IPC;
- x. After the case has gone to the Court, its progress is watched and it is ensured that the witnesses, including the investigating police officers, attend the Court on the due dates and depose properly and that the Public Prosecutors perform their duties competently;
- xi. They should coordinate with the neighboring police stations or neighboring Districts. and even States in investigation of Inter District or Inter-State crimes;
- xii. Investigation is kept on the right track and no extraneous influences and political and otherwise are allowed to influence it;
- xiii. Investigations are conducted in an honest and transparent manner;
- xiv. Scientific aids to investigation are optimally utilized in investigations and that FSL experts are taken to the spot in specified crimes for preservation and collection of evidence.
- xv. Articles/exhibits seized in investigation are sent to the FSL for expert opinion and that such opinion is promptly obtained and cited as evidence alongwith the charge sheet.
- xvi. The Medico Legal Reports are obtained from the experts quickly so as to reach a fair and just conclusion in a case;
- xvii. Case diaries are properly maintained as per law and entries in the General Diary;
- xviii. The power of arrest is not abused or misused;
- xix. The human rights of the accused are protected;
- xx. The witnesses coming to the police station are not made to wait for long hours and they are disposed of as promptly as possible;
- xxi. Third degree methods are avoided in the investigation;
- xxii. The inbuilt system of timely submission of case diaries etc. to supervisory officers is reinforced and investigations completed expeditiously.

7.14.6 The mandate of the supervisory officers enumerated above is only illustrative and not exhaustive. In cases of grave crimes, supervisory officers have to coordinate with other

Districts and other States police forces and may when necessary undertake tours to places outside their jurisdictions. Given the present crime scenario, the supervisory officers must, lend a helping hand to because of their superior caliber, better mobility and superior contacts.

7.14.7 The Circle Officers should be left alone to concentrate on their primary job of supervision, and investigations generally, should be conducted by the Inspectors, Sub-Inspectors and AS! etc. posted in the police stations. Nonetheless, both the COs and the IOs need to be made responsible and accountable for ensuring correctness of investigation.

## **7.15 INADEQUATE TRAINING**

7.15.1 Crime investigations is a specialized work where the I.Os can perform their duties properly only when they are properly trained and possess necessary skills and expertise. There is, thus, great need to develop and sharpen investigative skills of the officers through regular training programmes at the induction stage and periodical in-service training courses. These are two main problems in this regard: lack of training institutions, let alone state-of-the-art institutions; and more importantly, lack of willing trainers. Presently, there are three Central Detective Training Schools at Calcutta, Chandigarh and Hyderabad. Most of the States also do have their own training institutions but the present training facilities appear to be unable to cater to the total requirements of training. Further, the existing training institutions impart the training in old disciplines. As the complexity and nature of crime is changing fast, training facilities in emerging disciplines such as forensic accounting and information technology etc need to be developed and imparted to the I.Os.

7.15.2 The Committee is of the view that:

- 1) Adequate number of Training Institutions should be set up by the State Governments as also by the Central Government for initial training of various ranks of the police personnel as also for in-service training. These instructions should focus on:
  - (i) Protection of scene of crime;
  - (ii) Collection of physical evidence there from with the help of experts, including forensic experts;
  - (iii) Inculcating the art of interrogation of suspects and witness;
  - (iv) Developing the art of collection, collation and dissemination of criminal Intelligence;
  - (v) Developing and handling informers etc.
- 2) The trainers should be handpicked by a Committee constituted by the DGP and

officers having professional skills and aptitude alone should be inducted in the Training Institutions. They need to be given adequate monetary incentive and a fixed tenure, say of three years. The old system of 30% of the basic pay to the trainers may be revived.

- 3) Facilities should be developed for imparting training in modern disciplines such as Forensic Accounting, Information Technology, Cyber Crime, Economic and Organised Crimes etc.

## **7.16 COMPREHENSIVE USE OF FORENSIC SCIENCE FROM THE INCEPTION**

7.16.1 It can hardly be gainsaid that the application of forensic science to crime investigation must commence from the stage of the very first visit by the IO to the crime scene so that all relevant physical clues, including trace evidence, which would eventually afford forensic science examination, are appropriately identified and collected. This can best be done if the IO is accompanied to the crime scene by an appropriately trained scientific hand. The standard practice in most of the advanced countries is to provide such scientific hands, variously designated as 'Field Criminalists', 'Scene of Crime Officers' (SOCO), Police Scientists etc., in the permanent strength of each police station. In some cases, these personnel are drawn from scientific cadre, while in some others, they are policemen themselves, specially selected for their flair for scientific work and their academic background of science subjects. These personnel are then provided in-depth training in crime scene management and in the identification of different types of scientific clues to be looked for in different types of crimes.

It can hardly be gainsaid that the application of forensic science to crime investigation must commence from the stage of the very first visit by the IO to the crime scene so that all relevant physical clues, including trace evidence, which would eventually afford forensic science examination, are appropriately identified and collected.

7.16.2 The present level of application of forensic science in crime investigation is some-what low in the country, with only 5-6% of the registered crime cases being referred to the FSLs and Finger Print Bureau put together. There is urgent need to bring about quantum improvement in the situation, more so when the conviction rate is consistently falling over the years in the country and the forensic evidence, being clinching in nature, can reverse the trend to some extent.

7.16.3 There are only 23 Central Forensic Science Laboratories /Forensic Science

Laboratories and about 17 Regional Laboratories in the country. On the other hand, USA has about 320 Forensic Science Laboratories (including private sector Laboratories). It would, thus, appear that the number of Forensic Science Laboratories in the country is grossly inadequate and certainly not commensurate with our requirements. The Committee strongly feels that Forensic Science facilities in India need heavy augmentation.

7.16.4 It may be added that a National Seminar on “Forensic Science; Its Use and Application in Investigation and Prosecution; was organised by this Committee and the Bureau of Police Research and Development at Hyderabad on 27 July 2002. A number of Judges (including High Court Judges), Senior Police Officers and Directors of most of the Central and State Forensic Science Laboratories of the country participated in the seminar and made valuable suggestions for improving the Forensic Science scenario in the country. The members of the Core Group constituted by this Committee formulated the recommendations in this matter and submitted to our Committee. The Committee is of the opinion that the following recommendations of the Core Group should be implemented:

- (1) Police Manuals and Standing Orders of different States/Union Territories need to be amended to make the use of Forensic Science mandatory, as far as practicable, in investigation of all grave and important crimes such as those involving violence against the persons, sexual offences, dacoity, robbery, burglary, terrorists crimes, arson, narcotics, poisons, crimes involving fire-arms, fraud and forgery and computer crimes.
- (2) Police Manuals and Standing Orders should mandate the supervisory officers to carefully monitor and scrutinize, if or not the IOs have exploited the possibility of the use of forensic science in the investigation of each crime right from the threshold of investigation.
- (3) The State Governments should immediately create appropriate forensic science facilities in each District. This should include one or more Mobile Forensic Science Units, depending on the size of the District, the incidence of crime, terrain and communication conditions in each District. Each unit should have a Forensic Expert, a Finger Print Expert, a Photographer and a Videographer. The job of these mobile units would be not only to identify, collect and preserve the evidence but also to tender necessary opinion, on the spot, to the IO, if scientifically feasible.
- (4) Each police station should be provided with a set of Scientific Investigation Kits for identification and lifting of scientific clues from the crime scene.
- (5) Arrangement should also be made to create proper facilities for packaging, storage and preservation of scientific clue material collected from the crime scene or suspects, to ensure their protection against contamination, degradation or damage at the police station or in the District Headquarters. Standard material for packaging

and preserving scientific evidence should be supplied for this purpose from time to time by the State FSLs.

- (6) Appropriate number of Regional FSLs at the headquarters of each Police Range should be set up by the State Govt.
- (7) The Central and State FSLs are facing acute shortage of men power. According to a study conducted by NICFS, the vacancies in the FSLs range from 17 to 71% of the sanctioned posts of scientists. The Governments concerned should take appropriate steps to fill up these vacancies. Further, the sanctioned strength itself is pegged at far below the yardsticks formulated by BPR&D. The States must, therefore, revise the sanctioned strength of their respective FSLs in the light of the BPR&D guidelines.
- (8) There are virtually no facilities for training of Forensic Scientists in the country and they mostly learn on the job. It must be noted that a trained scientist is far more productive than several untrained or semi-trained hands. We, therefore, recommend that NICFS should take upon its shoulders the responsibility of imparting professional training to the scientific personnel. We also recommend that NICFS must expand and strengthen its core facilities in emerging areas such as forensic DNA, Forensic Explosives and Computer Forensics etc.
- (9) The Finger Print Bureaux in the country are generally undermanned and are storing and analyzing data manually. The analysis and retrieval, therefore, takes a long time and the storage capacity is also limited. We, therefore, recommend that modern electronic gazettes must be used in collection, storage, analysis and retrieval of finger print related data.
- (10) Most of the FSLs suffer from financial crunch. The budgetary position of the FSLs should be reviewed and sufficient funds should be made available to them.
- (11) A mandatory time limit should be prescribed for submission of reports to the police/Courts by the FSLs.
- (12) A national body on the pattern of Indian Council of Medical Research should be constituted in the country to prescribe testing norms for the FSLs and ethical standards for the forensic scientists.
- (13) Forensic Science, unfortunately, has not assumed the status of an academic discipline in India. We recommend that the UGC should consider creating the departments of Forensic Science in at least all the major universities. Later, Forensic Sciences could be introduced as subjects at the school level. Funds should also be ear-marked and allotted for research in these departments.
- (14) A polygraph machine for lie detector test should be provided in each district. The regular use will obviate the need for extra legal methods of interrogation.

## 7.17 MEDICO LEGAL SERVICES

7.17.1 The Medico Legal Services play an equally important role in the investigation of crime and prosecution thereof. The state of Medico Legal Services in the country is far from satisfactory. One of the main contributory factors for this is that the entire apparatus of the Medico Legal Services is administratively controlled by the Department of Health under the State Governments who are not concerned with the police or with the Criminal Justice System. Even, the Forensic Medicine Departments attached to the Medical Colleges are in a poor and neglected state. The Doctors doing Medico Legal work i.e. conducting postmortems of dead bodies and preparing Injury Reports etc. are also a dispirited lot and in a poor state of morale. They feel forsaken by their parent departments and not owned up by the Police departments for which they seemingly work. Keeping in view the prevailing scenario, the Committee recommends that:

- (i) On the pattern of Tamilnadu, a Medico Legal Advisory Committee should be set up in each State under the Senior Most Medico Legal Functionary/Professor of Forensic Medicine/Police Surgeon, with at-least two Board members, including one from the State FSL. One of the main tasks of this Committee would be to resolve the differences of opinion between the Medico Legal Professionals and the Forensic Experts.
- (ii) The condition of mortuaries is dismal all over the country. Appropriate mortuary rooms with adequate infrastructure and equipment should be made available to each Medical College.
- (iii) At places where there are no Medical Colleges, Medico Legal work is being done by the Doctors who are not adequately trained in such work. Resultantly, they often turn out sub-standard reports which create confusion for the IOs as well as for the Courts. The State Governments must prepare a panel of qualified Doctors, adequately trained in Medico Legal work, and post them in the Districts and other Mufassil Hospitals for attending to such work.
- (iv) The State Government must prescribe time-frame for submission of Medico Legal reports. We recommend the following time frame:
  - a) Injury Report : 6 hours;
  - b) Postmortem Report : 24 hours
- (v) There has been a tendency on the part of some Medico Legal experts to reserve their opinion as to the cause of death etc., pending receipt of the reports of FSLs on toxicological examination even in cases where it is possible for them to give a definite opinion about the cause of death. This tendency should be eschewed.



## **7.18 DELAYED SUBMISSION OF EXPERT REPORTS**

The report of FSL experts and Medical Jurists play a seminal role both at the investigation stage and at the trial stage in the determination of facts. The police and the court complain that these reports are not being submitted in time by the experts concerned. The delay hampers the investigations and delays trials. Certain State Governments have laid down the time frame for submission of reports by the experts but these norms are not being adhered to partly due to inadvertence and partly due to over-loading of these institutions.

## **7.19 REGISTRATION OF CASES**

7.19.1 According to the section 154 of the Code of Criminal Procedure, the officer incharge of a police station is mandated to register every information oral or written relating to the commission of a cognizable offence. Non registration of cases is a serious complaint against the police. The National Police Commission in its 4<sup>th</sup> report lamented that the police “evade registering cases for taking up investigation where specific complaints are lodged at the police stations”. It referred to a study conducted by the Indian Institute of Public Opinion, New Delhi, regarding “Image of the Police in India” which observed that over 50% of the respondents mention non registration of complaints as a common practice in police stations.

7.19.2 The Committee recommends that all complaints should be registered promptly, failing which appropriate action should be taken. This would necessitate change in the mind-set of the political executive and that of senior officers.

7.19.3 There is yet another aspect that needs consideration. Section 154 Cr.P.C. provides that it is the officer in-charge who will register a case relating to commission of a cognizable offence. The SHO are often busy in investigational and law and order duties and are also on tours in connection with court appearances etc. In their absence from the police stations, the informants are made to wait till their return. it causes avoidable harassment to the informant and also results in the disappearance of evidence. We, therefore, recommend that the State Govts./DGPs must issue firm instructions to the field formations to the effect that a case shall be registered by the SHO of the police station if he is present at the police station and in his absence by the senior most police officer available at the station, irrespective of his rank.

7.19.4 There are two more aspects relating to registration. The first is minimization of offences by the police by way of not invoking appropriate sections of law. We disapprove of this tendency. Appropriate sections of law should be invoked in each case



unmindful of the gravity of offences involved. The second issue is relating to the registration of written complaints. There is an increasing tendency amongst the police station officers to advise the informants, who come to give oral complaints, to bring written complaints. This is wrong. Registration is delayed resulting in valuable loss of time in launching the investigation and apprehension of criminals. Besides, the complainant gets an opportunity to consult his friends, relatives and, sometimes, even lawyers and often tends to exaggerate the crime and implicate innocent persons. This eventually has adverse effect at the trial. The information should be reduced in writing by the SHO, if given orally, without any loss of time so that the first version of the alleged crime comes on record.

## **7.20 INVESTIGATION OF COGNIZABLE AND NON-COGNIZABLE OFFENCES**

7.20.1 Section 2(c) of the Code defines ‘Cognizable Offence’ and ‘Cognizable case’ as follows: -

“Cognizable Offence” means an offence means an offence for which, and “Cognizable case” means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant”.

7.20.2 It says that those offences which are specified in the schedule to the Code in which police officer can arrest without warrant are cognizable offences. But when we look at the Schedule we find that there is no enumeration of offences where police officer can arrest without warrant. This is a patent anomaly. However the Schedule specifies the offences which are cognizable and which are not. It also gives information about punishment for each offence, whether the offence is bailable or non-bailable, and the name of the court where the offence can be tried.

7.20.3 The question for examination is as to whether the distinction between cognizable and non-cognizable offences is conducive to satisfactory dispensation of criminal justice.

7.20.4 ‘Offence’ as defined in Section 2 (n) means:-

Any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under Section 20 of the Cattle Trespass Act, 1871 (1 of 1871).

7.20.5 Whenever any offence is committed it results in the invasion of the rights of the citizen and the victim is entitled to complain about such invasion. In this connection the

Code makes a distinction between cognizable and non-cognizable offences. Cognizable offences are by and large serious in nature.

7.20.6 Section 154 provides that any information received in the police station in respect of a cognizable offence shall be reduced into writing, got signed by the informant and entered in the concerned register. Section 156(1) requires the concerned officer to investigate the facts and circumstances of such a case without any order from the Magistrate in this behalf. If Magistrate receives information about commission of a cognizable offence he can order an investigation. In such cases citizen is spared the trouble and expense of investigating and prosecuting the case.

7.20.7 However, the position is different so far as non-cognizable offences are concerned. They are regulated by Section 155 of the Code. When a citizen goes to the concerned police station complaining about commission of a non-cognizable offence the police officer is required to enter the substance of the information in the relevant register and refer the informant to the Magistrate. Sub-section 2 of Section 155 says that the police officer shall not investigate such a case without the order of the Magistrate. In such cases the citizen is forced to approach the Magistrate to file his complaint. The Magistrate will examine the complainant and the witnesses present and decide whether there is sufficient ground for proceeding further. The burden of adducing evidence during trial is on the accused.

7.20.8 The offences that are non-cognizable include Public servants disobeying law to cause injury to any person; bribery during election; giving or fabricating false evidence; escape from confinement; offences relating to weights and measures; some offence affecting public health, safety, convenience and morals; causing miscarriage; causing heart; buying or disposing of any person as a slave; rape of wife under 12 years; dishonest misappropriation; cheating; mischief; forgery; making or using documents resembling currency notes or bank notes; offences relating to marriage; criminal intimidation; causing annoyance in a state of intoxication in a public place etc. These are some of the offences which seriously affect the citizens. Some of them carry imprisonment from a few months to imprisonment for life. Offence under Section 194 I.P.C carries death sentence. Quantum of punishment prescribed indicates the seriousness of the crime and its adverse affect on society. But even such serious offences adverted above are non-cognizable. There is no good reason why such offences should not be investigated without the order of the Magistrate.

7.20.9 The object of the penal law is to protect life, liberty and property of the citizen. All citizens who are victims of crimes punishable under the Indian Penal Code are entitled to be treated fairly, reasonably and equally. By categorizing large number of offences as non-

cognizable, unreasonable burden has been placed on the citizens by requiring them to investigate the case, collect evidence and produce them before the Magistrate. The citizen would be also obliged to engage a lawyer to conduct his case as he may not be familiar with court procedures. Sometimes witnesses will not be willing to co-operate with the complainant. The complainant would be required to spend a lot of time to investigate. This is not easy for a private citizen who has no training in investigation. Thus a heavy burden, financial and otherwise is placed on the victims of non-cognizable offences.

7.20.10 A common citizen is not aware of this artificial distinction between cognizable and non-cognizable offences. There is a general feeling that if any one is a victim of an offence the place he has to go for relief is the police station. It is very unreasonable and awkward if the police were to tell him that it is a non-cognizable offence and therefore he should approach the Magistrate as he cannot entertain such a complaint.

7.20.11 It has come to the notice of the Committee that even in cognizable cases quite often the Police Officers do not entertain the complaint and send the complainant away saying that the offence is not cognizable. Sometimes the police twist facts to bring the case within the cognizable category even though it is non-cognizable, due to political or other pressures or corruption. This menace can be stopped by making it obligatory on the police officer to register every complaint received by him. Breach of this duty should become an offence punishable in law to prevent misuse of the power by the police officer.

7.20.12 The present classification of offences as cognizable and non-cognizable on the basis of the power to arrest with or without order of the Magistrate is not based on sound rational criteria. Whether in respect of any offence arrest should be made with or without the order of the Magistrate must be determined by relevant criteria, such as the need to take the accused immediately under custody or to prevent him from tampering with evidence, or from absconding or the seriousness of the crime, and its impact on the society and victim etc.

7.20.13 Because of the burden placed on investigating and producing evidence large number of victims of non-cognizable offences do not file complaints. They stand deprived and discriminated. This is one of the reasons for the citizens' losing faith and confidence in the Criminal Justice System. As justice is the right of every citizen it is not fair to deny access to justice to a large section of citizens by classifying certain offences as non-cognizable. Law should provide free and equal access to all victims of crimes. This can be done by removing the distinction between cognizable and non-cognizable offences for the purpose of investigation of cases by the Police Officer.

7.20.14 Considerable time of court is now being spent in dealing with registration of complaints regarding non-cognizable offences. The time saved can be utilized for dealing with other judicial work.

7.20.15 This may contribute to more aggrieved persons filing complaints thereby increasing the work-load of the police. As the state has the primary duty to maintain law and order, this cannot be a good reason against the proposed reform.

7.20.16 Another apprehension is that this may encourage false and frivolous complaints. An experienced police officer will not find it difficult to summarily dispose of such frivolous complaints without undue waste of time.

## **7.21 REGISTRATION OF FALSE CASES**

7.21.1 *According to crime in India Report 2000* false cases registered constituted 6.55% of the total cases disposed of during 2000. False registration of cases results in wastage of police resources, time and effort and also causes harassment to the opposite party. This tendency needs to be curbed.

7.21.2 The Committee recommends that institution of a false case either with the police or with a Court must be made an offence punishable with imprisonment which may extend to 2 years.

## **7.22 CRIME SCÈNE VISITATION:**

7.22.1 Investigation involves several stages and the crime scene visitation is one of the most important of them, excluding perhaps, white-collar crimes. Recognizing this need, the Police Manuals in most of the States have mandated immediate despatch of an officer to the scene of crime for inspecting it, preserving the evidence and preparing the site plan etc. Such inspection of scene crimes should be done by a team consisting of forensic scientist, finger print experts, crime photographer, legal advisor etc. and not just by a single investigating officer.

7.22.2 In the National Seminar on “Forensic Science”: Use and Application in Investigation and Prosecution” held on 27 July, 2002, at Hyderabad held under the auspicious of this Committee, in which Judges, senior police officers, senior forensic scientists and Medical Jurists had participated, the forensic scientists lamented that their services were not being utilized for crime scene visitation as a result of which valuable forensic evidence is being lost.

- 7.22.3 In this context, the Committee is of the opinion that:
- i) The scene of crime must be visited by the investigating officer with utmost dispatch;
  - ii) The IO must photograph/videograph the scene of crime from all possible angles or get it done by an expert;
  - iii) He should preserve the scene of crime so that no evidence is lost due to disturbance by the inmates of house or curious onlookers, including VIPs;
  - iv) The Investigating Officer should either prepare the sketch or plan of the scene of crime himself or get it done by a Patwari or an expert, if deemed fit;
  - v) The investigating officer should take along-with him a Forensic Scientist and Finger Print Expert or any expert of the relevant discipline to collect physical evidence from the scene of crime. If it is, somehow, not possible due to exigencies of the situation, the Investigating Officer should preserve the scene of crime and immediately requisition the services of forensic experts for the above purpose.

## **7.23 RECORDING OF STATEMENTS OF WITNESSES – SECTION 161 & 162 OF THE CODE**

7.23.1 Section 161 deals with examination of witnesses by the police during investigation and Section 162 provides that statements of witnesses recorded by the police shall not be required to be signed by the witnesses and further that such statement can be used by the accused and with the permission of the court only for the purpose of contradicting the witness in accordance with Section 145 of the Evidence Act. In other words such statement cannot be used as a previous statement for the purpose of corroborating the maker. This flows from the distrust of the police about their credibility. Several measures have been recommended in this report to remove that distrust and to ensure credibility of the police. These measures include among others, separation of the investigation wing from the law and order wing, insulating it from political and other pressures so that the investigating officers can function impartially, independently and fearlessly by constituting the State Security Commission as recommended by the National Police Commission Volume VIII Chapter III, improving professionalism and efficiency of the investigating officers, etc. Once that is done it paves the way to repose trust and confidence in the investigating officers. This would justify suitably amending Sections 161 and 162 of the Code to enable the statements of witnesses recorded during investigation being treated on par with any previous statements and used for corroborating and contradicting the witness. Section 161(3) gives discretion to the police officer to reduce the statement of the witness into writing. The Law Commission in its 14th Report has observed that if the statement of a witness is not reduced in writing, the whole purpose of section 173 would be defeated by a negligent or dis-interested police officer. The Commission, therefore, recommended that the police officer should be obliged by law to

reduce to writing the statement of every witness whom he has examined. This view was emphasized in the 37th Report of the Law Commission. It went on further to suggest that statement of every witness questioned by the police u/s 161 Cr.P.C. must be recorded, irrespective of whether he is proposed to be examined at the trial or not.

7.23.2 The Committee is of the view that the investigating officer should be mandated to reduce to writing the statements made to him in the narrative or questions and answers form. Section 163(3) should be suitably amended.

7.23.3 As per section 161 Cr.P.C., a witness is not mandated to accord his signatures on a statement made by him to the 10. This has often encouraged witnesses to turn hostile at the trial due to threats, fear or greed and giving a version different from the one given to the Investigating Officer. This happens as the witness has not signed his statement before the police. In the 41st Report, the Law Commission recommended that where the person can read the statement recorded by the police, his signature can be obtained after he has read the statement. The Law Commission also favoured sending the witnesses to the Magistrate for recording his statement on oath under section 164 Cr.P.C.

7.23.4 In the circumstances, the Committee is of the opinion that:

- i) Section 161 Cr.P.C. should be amended to make it obligatory to record statements made by the witnesses during investigation in the narrative or in the question and answer form. The statement should be read over if admitted correct should be got signed by the witness;
- ii) a copy of the statement should be immediately given to the witness.
- iii) Section 162 of the Code should be amended so that the statement can be used both for corroboration and contradiction.

## **7.24 VIDEO/AUDIO RECORDING OF STATEMENTS OF WITNESSES, DYING DECLARATION AND CONFESSIONS**

7.24.1 Frequent changes in statements by the witnesses during the course of investigation and, more particularly, at the trial are really disturbing. This results in miscarriage of justice. Hence, modern science and technology should be harnessed in criminal investigation. Tape recording or video recording of statements of witnesses, dying declarations and confessions would be a meaningful and purposive step in this direction. Unfortunately, the existing law does not provide for it. It is understandable as these facilities did not exist at the time when the basic laws of the land were enacted. Now that these facilities are available to the investigating agency, they should be optimally utilised.



7.24.2 Section 32 of the Prevention of Terrorism Act, 2002, provides that a police officer of the rank of Superintendent of Police may record a confessional statement of an accused either in writing or on a mechanical or electronic devices like cassettes, tapes or sound tracks from out of which sound or images can be reproduced. Such evidence has been rendered admissible at the trial. A similar provision exists in section 18 of the Maharashtra Control of Organised Crime Act, 1999.

7.24.3 The Committee is of the view that the law should be amended to provide for audio or video recording of statements of witnesses, dying declarations and confessions etc. and about their admissibility in evidence. A beginning may be made to use these modern techniques at least in serious cases

## **7.25 FACILITIES FOR INTERROGATION**

It can hardly be over emphasized that interview of witnesses and interrogation of suspects/accused should be done in a professional manner so as to elicit the truth. This is possible only when the Investigating Officer possesses professional competence, has adequate time at his disposal and the interview/interrogation is conducted in a proper ambience. The police stations in the country are generally small and located in crowded areas, particularly in the urban centres. Some of them are even operating out of tents. Neither the investigating officer nor the witnesses/suspects/accused have any privacy in this atmosphere. The Committee, therefore, feels that a room equipped with proper facilities such as video cameras, voice recorders etc. should be set apart in each police station for the purposes of interrogation/interview.

## **7.26 ARREST OF ACCUSED**

7.26.1 Chapter 5 of Criminal Procedure Code deals with the arrest of a person. Section 41 of Cr.P.C. is the main section providing for situations when the police may arrest without warrant. Section 42 empowers a police officer to arrest a person who commits an offence in his presence or where such person has been accused of committing a non-cognizable offence, and he refuses to give his name and residence or gives false name or residence to the officer. Section 43 speaks of a situation where an arrest can be made by a private person. Section 44 deals with arrest by a Magistrate. Section 47 enables the police officer to enter a place if he has reason to believe that the person to be arrested has entered into that place or is within that place. Section 48 empowers the police officer to pursue offenders into any place in India beyond his jurisdiction. Section 50 creates an obligation upon the police officer to communicate to the person arrested person full particulars of the offence for which he has been arrested.



Sections 53 and 54 provide for medical examination of the arrested person at the request of the police officer or at the request of the arrested person, as the case may be. Section 56 provides that the arrested person shall be produced before the Magistrate within 24 hours, exclusive of the journey time.

7.26.2 Despite constitutional safeguards provided in Article 22 of the Constitution, there are often allegations of misuse of power of arrest by the police. At the same time, we are not unaware that crime rate is going up in the country for various reasons. Terrorism, drugs and organised crime have become so acute that special measures have become necessary to fight them not only at the national level but also at the international level. A fine balance, therefore, has to be struck between the interests of the society and the rights of the accused.

7.26.3 The National Police Commission in its 3<sup>rd</sup> Report, referring to the quality of arrest by the police in India had mentioned that power of arrest was one of the chief sources of corruption in the police. The report suggested that by and large nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the prison department.

7.26.4 Notwithstanding the above, the Commission took the view that the arrest of a person may be justified during the investigation of a cognizable case in one or other of the following circumstances:

- (i) The case involves a grave offence like murder, dacoity, robbery, rape etc. and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror stricken victims.
- (ii) The accused is likely to abscond and evade the processes of law.
- (iii) The accused is given to violent behavior and is likely to commit further offence, unless his movements are brought under restraint.
- (iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.

7.26.5 In England, the Royal Commission suggested the following criterion for arrests:

- i) the person's unwillingness to identify himself so that a summon may be served upon him.
- ii) the need to prevent the continuation or repetition of that offence.
- iii) the need to protect the arrested person himself or other persons or property.
- iv) the need to secure or preserve evidence of or related to that offence or to obtain such evidence from the suspect by questioning him.

- v) the likelihood of the person failing to appear at Court to answer any charge made against him”.

7.26.6 The Royal Commission also recommended the Ontario Scheme wherein the police officers issue ‘Appearance Notice’ to the accused, whereupon the concerned persons are required to appear before the police, thereby obliterating the need of their arrest.

7.26.7 The Indian Penal Code divides offences into four categories, namely;

- a) non-cognizable and bailable;
- b) cognizable and bailable;
- c) cognizable and non bailable;
- d) non cognizable and non bailable.

A police officer is empowered to arrest in category (ii) i.e. cognizable and bailable offences but this arrest is only a technical one and the arrested person is required to be released on bail as soon as he furnishes sureties. This power, therefore, is not open to much abuse. The real power of arrest lies in category (iii) offences i.e. cognizable and non bailable offences, which, it is alleged, is open to misuse. The number of such offences in the IPC is 57. (offences relating to the Army, Navy and Air Force), which are 23 in number and in which arrests are rarely made, are excluded only 34 offences remain in which the police is empowered to arrest and detain in custody. In view of the spiralling crime graph in the country and the menace posed by terrorism, organised crime and drug mafia, the Committee is of the view that power of arrest is necessary for dealing with serious crimes.

7.26.8 Power of arrest is often misused. The person arrested apart from suffering considerable inconvenience, also suffers by loss of his image in the society. Even if ultimately he is found to be innocent that damage done to the arrested person can not be undone. There is an erroneous impression in the minds of the police that the first thing for him to do is to arrest the suspected person even without making any inquiry. It may be necessary to arrest the person when the offence involved is fairly serious and the accused is likely to abscond or evade the process of law or there is reasonable apprehension of the accused committing offences or when he would be a serious threat to the victim, or witnesses, or is likely to tamper the evidence, or when it is necessary in the circumstances to restore a sense of security in the locality and similar other considerations as pointed out by the Law Commission in its 154<sup>th</sup> report.

7.26.9 In the opinion of the Committee no arrest shall be made by the police if 1) the punishment is fine only or 2) fine is an alternative punishment to imprisonment.

7.26.10 However a person suspected of being involved in, or accused of having committed an offence, shall be bound to give his name, address, and such other particulars on demand by a Police Officer, and if so called upon, shall be liable to appear in the Police Station on any date and time intimated to him by the Police Officer, and on his failure to do so, he shall be liable to be arrested by such officer, in order that his name, address or other particulars may be ascertained. Section 42 of the Code be amended by substituting the word “any” for the words “of non-cognizable”.

7.26.11 Bailable offences are now specified in the first schedule to the Code. Now that the Committee has recommended that no arrest shall be made in respect of certain offences consequential amendments shall be made in the column relating bailability. No modification is suggested regarding bailability of other offences specified in the schedule.

7.26.12 As the Committee has recommended removal of the distinction between cognizable and non-cognizable offence consequential amendments may be carried out. In the First Schedule, for the expression ‘Cognizable’ the expression ‘arrestable without warrant’ and for the expression ‘non-cognizable’ the expression ‘arrestable with warrant or order’ shall be substituted.

7.26.13 In the light of the anomaly pointed out by the committee in first schedule, the removal of the distinction between cognizable and non-cognizable offences and amendments regarding arrestability of offences the Committee suggests that the first schedule be amended providing columns for the following: -

- i. Section
- ii. Offence
- iii. Punishment
- iv. No arrest / arrestable with warrant or order / arrestable without warrant or order.
- v. Bailable or non bailable
- vi. Compoundable or non-compoundable
- vii. By what court triable.

Consequential amendments shall be made to part-II of the first Schedule in respect of offences against other laws.

## **7.27 MECHANISM FOR COLLECTION OF CRIMINAL INTELLIGENCE:**

7.27.1 The present day crime situation in India is of alarming concern to the police force and enforcement agencies of the Central Government. To tackle the challenge of terrorism (including narco-terrorism anti terrorist-funding), organised crime, drug trafficking,

economic crimes such as bank-scams etc. and crimes having inter-State and trans-national ramifications, new strategies are called for. What is of immediate concern is to have accurate and real time intelligence on organised crime activities so as to prevent major catastrophes in the future.

7.27.2 While a structured system for collection and dissemination of political intelligence exists in the States and at the Central level, no such system, however, is in place as far as the criminal intelligence is concerned. This deficiency has definitely hampered the crime control effort and calls for immediate remedial action.

7.27.3 The Committee feels that concrete steps ought to be taken to institutionalize criminal intelligence system and recommends that:

- i) An apex body at the national level headed by an officer the rank of DGP/IGP to be called the National Bureau on Criminal Intelligence should be set up. Its head office and permanent secretariat would be at Delhi. It would consist of officers drawn from all parts of the country and representing a cross-section of the police forces and central investigating agencies. The main task of this body would be to collect, collate and disseminate information about major criminal gangs operating in the country involved in organised crime, terrorism, narco terrorism, cyber crimes, wild life crimes and environmental crimes, economic crimes etc. Its exact charter would be determined by the Central Government. This body would function as a Clearing House of the criminal information regarding specified grave crimes and would have a computerised data base, accessible to all State Police forces/central agencies.
- ii) A similar body may be set up at the State level. It may be headed by an IGP/DIGP level officer, responsible to the DGP through the head of the State Crime Branch. This agency would also have a computerised data base accessible to the national level body, its counter-parts in other States and all Districts within the respective States.
- iii) The State Governments/DGPs should set up Criminal Intelligence Cells in each District. An Additional SP level officer may head this Cell in each district on full time basis. The District MOB may be merged into this Cell. This Cell will collect information through the police stations as well as through its own staff and will have a computerized data base.
- iv) A Criminal Intelligence Unit should be set up in each police station. It may consist of Core Intelligence Unit of 3 or 4 ASI/HC, well trained and motivated for the work and equipped with adequate transport and communication facilities.

7.27.4 The Committee feels that it would be useful to involve the public spirited and

politically neutral NGOs with record of moral rectitude and the Community Liaison Groups or other such organisations by whatever name called in the collection of criminal intelligence at the police station and District. level.

## **7.28 CONSTITUTION OF SPECIALIZED UNITS AT THE STATE AND THE DISTRICT LEVEL**

7.28.1 In addition to the above, the Committee feels that specialised squads are necessary for investigating cases of murder, burglary, economic offences, forgery, robbery, dacoity, kidnapping for ransom and automobile thefts etc. The National Police Commission vide para 49.82 of its report had recommended constitution of such specialized teams. The Committee suggests the constitution of the following specialized squads at the State level:

- (i) Homicide Squads;
- (ii) Burglary Squads;
- (iii) Economic Offences and Forgery Squads;
- (iv) Robbery/Dacoity Squads;
- (v) Kidnapping/Missing Persons Squads;
- (vi) Automobile Thefts Squads;
- (vii) Squads for tracking criminals.

7.28.2 The State Govts. must make available adequate manpower, mobility, equipment and other logistical support to these squads.

7.28.3 Teams of investigating officers should also be available with the Addl.SP (Crime) in each district. This has been dealt with in detail earlier.

7.28.4 Besides, the Committee feels that for better management of crime work, at least 2 Addl. Ss. P. should be exclusively ear-marked for this purpose in a District. One Addl. SP would deal with crime prevention, criminal intelligence, tracking of criminals, surveillance, collection of crime statistics and empirical studies etc. He will also carry out investigations specially entrusted to him. The second one would personally investigate heinous crimes occurring in the District. The Committee feels that these measures would result in improvement in detection percentage of the above class of cases, the quality of investigation would improve and higher rate of conviction would be secured.

## **7.29 USE OF EXPERTS IN INVESTIGATION**

7.29.1 Investigation of crime is a highly specialized and complex matter, requiring a lot of expertise, patience and training. Given the complexity of crime, it is not possible for the

police officers themselves to understand various facets of crime and conduct competent investigations all by themselves. They would need help of experts from various disciplines such as Auditing, Computer Sciences, Banking, Engineering, Revenue services and so on.

7.29.2 The Committee feels that a pool of competent officers from the above disciplines should be created at each Police Headquarters to render assistance in investigation of crimes all over the State. The State Governments may either second these officers from their parent departments to the Police Department; on a tenure basis or a cadre of such officers may be created in the Police Departments themselves.

### **7.30 COORDINATION AMONGST INVESTIGATORS, FORENSIC EXPERTS AND PROSECUTORS**

7.32.2 No case can succeed at the trial unless it is properly investigated and vigorously prosecuted. Forensic experts evidently play a key role both at the investigation stage as also at the prosecution stage. The investigators, forensic experts and prosecutors should act in cooperation with each other.

7.32.3 The mechanism of integration between the investigators and the forensic experts can be implemented at the following stages:-

- i) initial investigation i.e., at the crimes scene level;
- ii) search of the suspects, suspects' premises and collection of physical evidence there-from;
- iii) framing request for laboratory analysis;
- iv) interpreting the analytical results of the laboratory;
- v) evaluating the probative value of the result in accordance with prosecution needs;
- vi) pre-trial discussion with the prosecutors;
- vii) offering the testimony before the Court;
- viii) prosecutors' arguments on the case;
- ix) review of effectiveness of forensic evidence as indicated in the judgment.

### **7.31 NEED FOR NEW POLICE ACT**

7.31.1 Law is an important instrument for prevention and control of crime. The Committee feels that for effectiveness of the Criminal Justice System, not only certain new laws need to be enacted but the deficiencies in the existing laws, which adversely affect investigation and prosecution of cases, need to be rectified. After a careful consideration of the matter, the Committee suggests the enactment of the following new laws:



7.31.2 The police system in the Country is functioning under the archaic Indian Police Act which was enacted in 1861 for the perpetuation of the British Empire. The police now have an obligation and duty to function according to the requirements of the Constitution, law and democratic aspirations of the people. Further, the police is required to be a professional and service-oriented organisation, free from undue extraneous influences and yet be accountable to the people. Besides, it is necessary to have the police force which is professionally controlled and is politically neutral, non-authoritarian, people friendly and professionally efficient. The National Police Commission had recommended enactment of a new Police Act for achieving the above objectives about two decades back. The Central Govt., however, has not taken any action. The Committee strongly feels that a new Police Act may be enacted by the Central Govt. on the pattern of the draft prepared by the National Police Commission.

### **7.32 POLICE REMAND**

- 7.32.1 (i) Section 167 (2) Cr. P. C., provides for a maximum of 15 days in police custody. It is not possible to fully investigate serious crimes having inter-state ramifications in this limited period. The law should be amended to provide for a maximum police custody remand of 30 days in respect of grave crimes where punishment is more than five years.
- (ii) As per section 167 Cr.P.C., the accused is liable to be released on bail if the charge sheet is not filed against him within 90 days from the date of his arrest. It is not always possible to investigate a case comprehensively within this period particularly cases having inter-State or trans-national ramifications. This results in accused involved in grave crimes being enlarged on bail. It would be desirable if the law is amended to provide another 90 days to the investigating agencies in case of grave crimes if, on the report of the investigating officer, the court is satisfied that there are sufficient reasons for not filing the chargesheet within the initial period of 90 days.
- (iii) Under Section 167(2) an accused cannot be taken on police custody remand after the expiry of first 15 days from the date of his arrest. This has emerged as a serious handicap in sensitive investigations. This issue was deliberated upon by the Law Commission of India which recommended in their 154 report that the law should be amended to enable the CBI to take the accused in the police custody remand even after the expiry of the first 15 days so long as the total police custody remand of the accused does not to exceed 15 days. In our view, such discrimination between the State Police and CBI would not be justified. The law, therefore, is required to be amended to on the lines permitted to C.B.I.



7.32.2 Many times accused are admitted in Hospitals during police custody on health grounds and stay there for several days. During this period interrogation of accused is not possible. Thus the police officer is handicapped in investigation. To overcome this difficulty a suitable provision be made in Section 167(2) to exclude the period of hospitalization or such other cause for computing the period available for police custody.

### **7.33 ANTICIPATORY BAIL**

A Session Court or High Court is empowered to grant anticipatory bail u/s 438 Cr.P.C. irrespective of the fact whether it has the jurisdiction to hear the matter or not. Further, the law does not require the Public Prosecutor being heard, irrespective of the gravity of the offence. This provision has been often mis-used by rich and influential people. The Govt. of Uttar Pradesh has dispensed with this provision through a local amendment. After considering the pros and cons of the matter, we are of the view that the provision may continue subject to the following conditions:

- (a) that the Public Prosecutor would be heard by the court; and
- (b) that the petition for anticipatory bail should be heard only by the court of competent jurisdiction.

### **7.34 MISCELLANEOUS**

7.34.1 The police often have to take into police custody the accused persons who are in the judicial custody of another judicial magistrate. The standard practice is to request the Executive Magistrate to issue the Production Warrant. Generally, the Executive Magistrate does issue the Production Warrant to be executed by the Jail Authorities where the criminal is lodged. Some Magistrates, however, decline to issue the Production Warrants on the ground that there is no specific provision in the Cr.P.C.. It is a fact that there is no express provision in the Cr.P.C. We, therefore, recommend that this ambiguity be removed and a clear provision incorporated in the Cr.P.C.

7.34.2 The police have to arrange Test Identification Parade for the identification of the accused by chance witnesses as also for the identification of the stolen property. This practice has been going on far decades, without there being an express statutory provision either in the Cr.P.C. or the Evidence Act. At present, such T.I. Parades are being brought within the ambit of Section 9 of the Evidence Act. But there is no prescribed procedure for holding the T.I. Parade. We recommend that an express provision should be made in the Cr.P.C. for arranging a T.I. Parade.

7.34.3 Several provisions in the Cr.P.C., like Sections 93 to 95 and 100 deal with searches and they enjoin the police officers to call for independent and

respectable inhabitants of the locality or of another locality if no such inhabitant of the said locality is available or willing to be a witness to search etc. There are also other provisions where presence of such witnesses is required in documents prepared by the police. Enactments like Prevention of Food Adulteration Act, Excise Act which contain a minimum sentence of imprisonment do not provide for the presence of witnesses from the locality or neighbourhood. The Committee therefore suggests that the investigation agency should be able to secure the presence of independent witnesses in cases where such presence is required. This will totally do away with the witnesses of the localities reluctance to give evidence or becoming hostile etc. and the incorporation of the word “independent witnesses” will exclude the presence of stock witnesses which is a charge generally leveled against such witnesses by the defence.

### **THE INDIAN EVIDENCE ACT**

7.35 Section 25 of the Indian Evidence Act provides that no confession made to a Police Officer shall be proved against a person accused of any offence. This bar applies to recording of confession by a police officer irrespective of his rank. This provision deprives the Investigating agency of valuable piece of valuable evidence in establishing the guilt of the accused. Confessions made before the Police have been made admissible in different parts of the World. Singapore, which virtually follows the same system as ours, has empowered the Sergeant-level officers to record confessional statements.

7.35.1 In India, confessions made to certain law enforcement agencies under the following provisions are admissible in evidence.-

1. Section 12 of the Railway Protection Force Act, 1957;
2. Section 8 and 9 of the Railway Property Unlawful Possession Act, 1996; and
3. Section 108 of Customs Act, 1962;
4. Section 18 of TADA of 1987 (the Constitutionality of the same is upheld by the Supreme Court in KARTAR SINGH v STATE OF PUNJAB: (1994) 3 SCC. 569. The Act has since lapsed.)
5. Section 18 of the Maharashtra Control of Organised Crime Act, 1999;
6. Section 32 of POTA, 2002.

7.35.2 We may also point out that the Law Commission in its 48th Report had recommended that the confession recorded by a Superintendent of Police or a higher ranking Officer should be admissible in evidence subject to the condition that the accused is informed of his right to consult a legal practitioner.

7.35.3 The Committee has made several recommendations in this Report to improve the credibility of the investigating Police and to improve its efficiency and professionalism and insulate it from external pressures. These reforms would ensure that interrogation and criminal investigation would be done on a scientific basis and not by use of impermissible means such as third degree methods. Officers of the level of Superintendents of Police or higher level officers are entrusted under the laws referred to above to record confessions fairly and without subjecting the accused to duress or inducement. If the confession is audio/video recorded, it would lend further assurance that the accused was not subjected to any form of compulsion. It is not our case that the conviction should be based only on a confession. The confession should be considered by the courts along with other evidence.

7.35.4 Hence, we recommend that section 25 of the Evidence Act may be suitably substituted by a provision rendering admissible, the confessions made before a Police Officer of the rank of Superintendent of Police and above. Provision should also be made to enable audio/video recording.

### **7.36 IDENTIFICATION OF PRISONERS ACT, 1920**

7.36.1 Section 4 and 5 of the Identification of Prisoners Act, 1920, empower a Magistrate to permit taking of finger prints, foot prints and photographs of a convict or of an accused arrested for an offence punishable with imprisonment of one year or more. There is no law binding the accused to give his specimen writings or blood samples for DNA finger printing. Similarly, under the existing law, an accused cannot be compelled to give the samples of his hair, saliva or semen etc. Sections 45 and 73 of the Evidence Act, are not comprehensive enough to admit of such samples being taken on Court orders. Due to be above lacunae, it is difficult to build up a strong case, based on forensic evidence, against the accused. In fact, section 27 of POTA, 2002 makes a specific provision in this regard. It is, therefore, essential that a specific provision is incorporated in the Cr.P.C. and the Evidence Act empowering a Magistrate to order an accused to give samples of hand writing, fingerprints, footprints, photographs, blood, saliva, semen, hair, voice etc, for purposes of scientific examination.

### **7.37 PHYSICAL SURVEILLANCE AND INTERCEPTION OF WIRE, ELECTRONIC OR ORAL COMMUNICATION**

7.35.6 Close watch over the movements of suspects/criminals by the police is an effective means of prevention and detection of crime. The police have been mounting surveillance over suspects/criminals for the above purpose.. The Apex Court decision in Govind vs State of MP (AIR 1975 SC 1378) has observed that considering the object for

which surveillance is made, it cannot be said that surveillance by the police is an unreasonable restriction on the right to privacy. It is now an established fact that electronic devices are being used by the criminals to run their criminal enterprises. Section 14 of the Maharashtra Control of Organised Crime Act, 1999, and sections 36 to 48 of the POTA, 2002 provide for such surveillance.

7.35.7 The provision in Maharashtra Act has been recently struck down on the ground that the powers are vested only in the Centre. The Committee feels that adequate statutory provisions be made providing for electronic surveillance and interception in criminal cases.

### **7.38 SPREAD OF AWARENESS**

7.38.1 Citizens who may have to participate in the Criminal Justice System as complainants/informants, victims, accused or witnesses are often not aware of their rights and obligations. They also do not know whom and how to approach and what to expect from them. Awareness of these matters will help the citizens to assert their rights and to protect themselves from unreasonable, arbitrary and corrupt officials. Therefore, the Committee recommends that rights and responsibilities of the complainants/informants, victims, accused and witnesses and the duties of the concerned officials be incorporated and annexed as Schedules to the Code. The Committee further recommends that leaflets incorporating the same in the regional languages of the respective States should be printed and made available free of cost to the citizens.

## **PUBLIC PROSECUTION**

8.1 The investigation of a criminal case, however good and painstaking it may be, will be rendered fruitless, if the prosecution machinery is indifferent or inefficient. One of the well-known causes for the failure of a large number of prosecutions is the poor performance of the prosecution. In practice, the accused on whom the burden is little---he is not to prove his innocence---engages a very competent lawyer, while, the prosecution, on whom the burden is heavy to prove the case beyond reasonable doubt, is very often represented by persons of poor competence, and the natural outcome is that the defence succeeds in creating the reasonable doubt on the mind of the court.

8.2 Another important factor for the success of the prosecution is proper coordination between the prosecutor and the Investigating Officer without in any manner undermining the independence of the Prosecutor by making subordinate to the police hierarchy. It is to be pointed out that prior to the Code was amended in 1973, the prosecutors appearing in the courts of Magistrates were functioning under the control of the Police Department. Eminent advocates of proven merit were being appointed by the Government for a reasonable term, to function as Public Prosecutors in Sessions Courts. The Prosecutors in those days were giving advice on legal matters wherever necessary.

The papers before filing in Courts would be scrutinized by the Prosecutor, and advice given wherever any deficiencies came to be noticed. Only after the rectification of the same, would the papers filed in Court. The Prosecutor would keep a close watch on the proceedings in the case, inform the jurisdictional

Another important factor for the success of the prosecution is proper coordination between the prosecutor and the Investigating Officer without in any manner undermining the independence of the Prosecutor by making subordinate to the police hierarchy.

police, and get the witnesses on dates of trial, refresh the memory of witnesses where necessary with reference to their police statements, and examine the witnesses, as far as possible at a stretch. In view of the close monitoring of the progress of trial witnesses turned hostile in very few cases

and when they turned hostile they would be effectively cross-examined and exposed. This arrangement delivered reasonably good results.

8.3 The Law Commission of India in its 14th Report has observed that it was not possible for the public prosecutors if they are members of the police organization to exhibit that degree of 'detachment' which was necessary in prosecution and suggested that a separate prosecution department may be constituted and placed under a Director of Public Prosecutions. It appears that based on the recommendations of the Law Commission, sections 24 and 25 were incorporated in the Cr.P.C. As a consequence, the Prosecution wing was separated from the Police Department. Pursuant to these provisions, a Director of Prosecution, who is functioning independently of the Prosecution, is heading the Department of Prosecution, under whom, the encadred Assistant Public Prosecutors, and Public Prosecutors, (latter being promotees from the former cadre) have been functioning.

8.4 In this context, it is also apt to refer to the judgment of the Supreme Court in S.B. Shahane and Ors Vs State of Maharashtra (AIR 1995 Supreme Court 1628) wherein it directed the Govt. of Maharashtra to constitute a separate Prosecution department having a cadre of Assistant Public Prosecutors and making this department directly responsible to the State Govt. for administrative and functional purposes, thereby totally severing the relationship between the police department and the prosecution wing. The law laid down by the apex court is applicable to other States also. The Law Commission of India in its 154 Report has pointed out that the control of police department on prosecutions is not permissible in view of the Supreme Court's decision in S.B. Shahane's case.

8.5 It may be apt to refer to the British experience in this regard. Pursuant to the enactment of Prosecution of Offences Act, 1985, the Crown Prosecution Service (CPS) headed by the Director of Public Prosecutions was constituted in England. Before that, except in certain cases reserved to the Attorney General or the Director of Public Prosecutions, the conduct of the prosecution in cases instituted by the police was the responsibility of the police who either presented the prosecution case in the Magistrates' Courts themselves or instructed lawyers to do so. After the new law came into force, the prosecution is being conducted by the members of the CPS. In the Crown Courts, the Prosecution was and still remains in the hands of members the independent Bar. The prosecutors are now being briefed by the members of the CPS. The concept of 'Criminal Justice Unit' has been introduced in England to bring about greater coordination between the Police Department and the CPS. The members of the CPS have been given offices in the police stations falling in their jurisdiction and they are required to function from there.



8.6 Separate Directorates of Prosecution have been functioning for quite some time in several States. However, it is a common complaint of the Police, particularly, those in charge of investigation, that there is no proper co-ordination between the Police and the Prosecution. The Prosecutors, being no longer under the control of the Police Department, are not taking sufficient interest in their work. The ground position regarding the prosecution arrangement varies from State to State. Presently, most of the States have a separate Directorate of Prosecution. Some States like Bihar, Maharashtra, Kerala, MP, Tamil Nadu, AP, Orissa, Rajasthan and NCT of Delhi have placed this Directorate under the Home Department. In some other States like Haryana, Himachal Pradesh, Karnataka and Goa, the Directorate is under the administrative control of the Law Department. In some of the States, the Director of Prosecution is an officer belonging to the higher judicial service in the State. In Tamil Nadu and UP, the post of Director of Prosecution is held by IPS officers of the rank of DGP/IG. In Gujarat, there is no separate Directorate of Prosecutions.

8.7 A number of police officers represented to this Committee that the present system has led to a state of total lack of coordination resulting in the following consequences.

- i. The conviction rate is falling;
- ii. The disposal rate by the courts is falling;
- iii. Legal advice at investigation stage is totally missing thereby adversely affecting the quality of investigations;
- iv. There is no structured mechanism for Investigating Officers' to interact with the Prosecutors in bail related matters and overall trial management; and
- v. There is lack of review mechanism of the performance of the prosecution wing at the district level.

8.8 The issue was deliberated upon by the Committee on Police Reforms, headed Shri K. Padmnabhaiah, the former Union Home Secretary, which, inter alia, made the following two significant recommendations:

- (i) In those States where there is no separate Directorate of Prosecution, steps should be taken to constitute such Directorate under the State Home Department and in posting a suitable IPS officer as Director General.
- (ii) Home Departments of States must play a more active role in bringing about effective and continuous cooperation between the police and prosecution wings. We commend the orders issued by the Tamil Nadu Govt. constituting the Directorate of Prosecution for adoption by other States as a model.



8.9 The Administrative Reforms Commission, Rajasthan, headed by Shri Shiv Charan Mathur, former Chief Minister of Rajasthan, in its Eighth Report on the Police submitted in March, 2001, elaborately dealt with the issue and, *inter alia*, made the following observations:

- i. The post of Director of Prosecution may be occupied by an IPS officer of IG rank. This will further strengthen coordination between police and the prosecution.
- ii. The control, guidance and supervision of Director should extend to the prosecutors functioning at the Sessions Courts and Executive Magistrates Courts, Additional Public Prosecutors and Assistant Public Prosecutors Grade I and Grade II.
- iii. It would be still better if the control of prosecution at the district level is vested in the Superintendent of Police on the U.P. pattern.
- iv. If there is a legal hurdle in assigning this role to the SP, may be a new nomenclature could be coined for the SP; say SP cum Addl. Director (Prosecution), so as to facilitate transfer of the suggested role to him in his additional new capacity”.
- v. This would give the Superintendents of Police, a direct and regular institutionalized mechanism to supervise and monitor conviction in cases prepared by the police. Also the regular inter action would give the police officer a much better insight into the intricacies of laws and rules.

8.10 Several Police officers have suggested that on the above lines, a Senior Police Officer of the rank of DGP/IGP should head the Department as Director of Prosecution, who would be able to bring about proper co-ordination between the two wings, without in any manner, affecting the independence of the Prosecutors, which is essential for ensuring fairness in prosecution. The State Governments of UP and Orissa, have inserted the following proviso in sub-section (2) of section 25 Cr P C.

Provided that nothing in this sub-section shall be construed to prohibit the State Govt. from excising its control over assistant public prosecutor through police officers (UP Act No.16 of 1976).

8.11 It is pointed out that the above modifications have yielded good results, and have brought about better co-ordination between the two wings. There is no suggestion that these modifications have in any way eroded the independence of the Prosecution. However, the Committee feels that in order to ensure the independence of the Prosecution, the Director must function under the guidance of the Advocate General.

8.12 The Committee therefore suggests that a Police Officer of the rank of Director General may be appointed by the Govt. as the Director of Prosecution in consultation with the Advocate General. This should become a cadre post.

8.13 The duties of the Director inter alia, shall be to facilitate effective coordination among the investigating and prosecuting officers, to review the working of the Public Prosecutors, Additional Public Prosecutors and Assistant Public Prosecutors and the work of the investigators.

#### **8.14 PUBLIC PROSECUTORS AND ASSISTANT PUBLIC PROSECUTORS**

8.14.1 Though this arrangement may contribute to better co-ordination, it is not enough to improve the competence of the Prosecutors which needs special attention. In this connection, it may be pointed out that earlier, the Public Prosecutors appearing in serious cases before the Sessions Courts were being appointed from among very senior and competent Advocates on the recommendation of the District Judge and the District Magistrate, for a fixed term, say, 3 or 4 years.

8.14.2 According to Section 24(6) of the Code, if a regular cadre of 'Prosecuting Officer' exists in the State, the appointment of Public Prosecutors or Assistant Public Prosecutors (at District Level) can be made only among persons constituting that cadre. However, where, in the opinion of the State Govt. no suitable person is available in such a cadre, Govt. may appoint a person as a Public Prosecutors or Assistant Public Prosecutors from the panel of names prepared by the District Magistrate (in consultation with the District Judge) of persons who in his opinion are fit to be appointed as Public Prosecutors.

8.14.3 It is brought to the notice of the Committee that in several States there is no cadre of Prosecuting Officers. Secondly Section 25 dealing with the appointment of Assistant Public Prosecutors does not lay down any specific guidelines. There is no specific reference to promotional opportunities becoming available to APPs.

8.14.4 So far as Assistant Public Prosecutors who appear before the Courts of Magistrates are concerned, they should be given intensive training, both theoretical and practical to improve their professional skills as prosecutors. Those already in service should be given periodical in-service training to update their knowledge.

8.14.5 As already some States have their own Directorates of Prosecution, which are not headed by Police Officers, the present recommendations relating to the choice devolving on a Police Officer of the rank of DGP should be taken up when the term of office of the existing incumbents is coming to an end.

8.14.6 When any cadre is constituted opportunities for promotion to some higher positions

should be provided to give proper incentive. The experience of prosecutors would be useful in other positions as well, such as in providing Training for Prosecutors as well as Police Officers. Creation of such ex-cadre posts for promotion in those departments will help to sustain the interest in work.

8.14.7 To ensure accountability, the Director may call for reports in any case where the case ends in acquittal, from the Prosecutor who conducted the case and the Superintendent of Police of the District to review the work of the prosecutor and the investigation.

8.14.8 The Committee feels that the new set up would be able to overcome the existing deficiencies in the working of the Prosecution wing, and the Investigation Wing would be able to get legal advice from experienced prosecutors, whenever such advice is necessary. The object is that technical and procedural lapses should not lead to delays and other adverse consequences.

**PART - III**

**JUDICIARY**

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## **COURTS AND JUDGES**

9.1 Huge pendency of cases and poor rate of convictions are the twin problems of the judiciary. The major area that needs attention for improving the situation is providing adequate number of Judges who are proficient in dealing with criminal cases.

### 9.2 APPOINTMENT TO SUBORDINATE COURTS

The statistics reflect gross inadequacy of the Judge strength at all levels. The Supreme Court has recently examined this issue and given directions to increase the Judge strength from the existing Judge population ratio of 10.5 or 13 Judges per million of people to 50 Judges per million people in a phased manner within five years in its decision in (2002)4.S.C.247, All India Judges Association and others Vs. Union of India. Right to speedy trial, as held by the Supreme Court flows from Article 21 of the Constitution. Therefore it is expected that the directions of the Supreme Court would be implemented within a reasonable time. Once that happens, problem of inadequacy of Judge strength will be solved. Hence it is not necessary for the Committee to examine the question of inadequacy of Judge strength. However, the Committee would like to observe that within the standard set for determining the number of Judges required, it may be necessary for each State to make an estimate of the number of Judges required to be appointed having regard to pendency and the inflow of fresh cases and nature of litigation etc.

### 9.3 APPOINTMENT TO HIGH COURTS

It is unfortunate that large number of vacancies in the High Court remain unfilled for a long time inspite of the formula given by the “Arrears Committee” for determining the Judge strength and for expediting the appointment process. Now that the appointment process is mainly under the control of the judiciary the blame for this delay is largely on the judiciary. The Chief Justice of India and the Chief Justices of the High Courts must take immediate steps to curb this unconscionable delay in appointments.

## 9.4 QUALITY OF APPOINTMENT

Quality of appointment has suffered enormously. Complaints are heard everywhere that judicial arbitrariness has replaced executive arbitrariness. Quality of Judges appointed, it is the general impression was much better before the judgment of the Supreme Court in AIR 1994 S.C P.268, Supreme Court Advocates on Record Association Vs. Union of India. Now a national debate is going-on on constituting a National Judicial Commission for this purpose. The Committee is more concerned in ensuring quality in appointment rather than who makes the appointment. This can be achieved by laying down the objective criteria for selection and the material needed to satisfy those criteria. Honesty, integrity, good moral character are regarded as basic requirements to discharge judicial functions. Similarly for assessing professional competence several criteria may be identified, such as knowledge of substantive laws, procedural laws, specialization in any branch of law, sound knowledge of fundamental principles of law and jurisprudence. The candidate must have a keen and analytical mind. He should have patience and must not easily lose temper. He should not be vindictive. He should be patient and at the same time must know when to stop waste of time. He should be above narrow considerations, religious, regional, linguistic, political etc, so also experience in conducting different types of cases. Fairness to the opponent, ability to concede untenable propositions, good and pleasant manners, good command over the language and power of expression have to be ascertained with reference to credible evidence or material. A dossier has to be prepared in respect of each candidate to help making an objective assessment. This will reduce arbitrariness and helps making the process more transparent. The Committee therefore recommends that a set of guidelines should be evolved prescribing the relevant qualifications, qualities, attributes, character and integrity that are necessary to be a good Judge and indicate the evidence or material from which these can be inferred. This would eschew considerably irrelevant considerations and favoritism playing a key role in appointment. The procedure of selection must be so devised as to ensure the most competent persons of highest level of integrity and character are appointed. It is only when we have competent and upright Judges that the citizens is assured of quality justice. The problem needs immediate attention at the highest level. It is the judiciary that must take the initiative and come out with credible solutions.

## 9.5 NEED FOR IMPROVING THE QUALITY OF JUSTICE

9.5.1 Though induction of more Judges may help in reducing the arrears it is the competence and proficiency of the Judges that contributes to better quality of justice. Unfortunately adequate attention is not paid to look for competent persons proficient to handle criminal cases.



9.5.2 Anybody who sits and watches the proceedings in the Courts will not fail to note that the level of competence of the Judges of the Subordinate courts at different levels is not adequate possibly because the training did not give emphasis on professional skills and case/court management. If the Judge is not competent he will take longer time to understand the facts and the law and to decide the case. This is one of the reasons which has contributed to enormous delay and huge pendency of cases. Any lawyer with experience will be able to tell you which Judge is competent and which Judge is not, which Judge is quick and which Judge is slow, which Judge's decisions are by and large sound and which Judges decisions are not satisfactory. Even now there are many good Judges in the subordinate Courts but that number is declining. The quality of justice suffers when the Judge is not competent. People come to the Court complaining about the denial of rights by other individuals, institutions or the State itself. They expect the Judge to be experienced, knowing, competent, upright and possessing all the attributes required to render justice to the parties. It is a very onerous responsibility to sit in judgment over the conduct and affairs of other citizens. Deciding cases is a very complex exercise. It needs good knowledge of the substantive and procedural laws. It requires experience of men and matters, abundant commonsense, intelligence, logical and analytical mind. The Judge has to possess ability to do hard work and concentrate on the issues involved. Above all he must be a man of character having abiding faith in the values of life.

9.5.3 Two areas which need special attention for improving the quality of justice are prescribing required qualifications for the judges and the quality of training being imparted in the judicial academics.

- 1) Special attention should be paid in the matter of prescribing qualifications for recruitment of Judges at all levels and to improve the methodology for selecting the most competent persons with proven integrity, character, having regard to the nature of functions which a Judge is required to discharge. No other consideration other than merit and character should be taken into consideration in choosing the Judge for the Courts.
- 2) Those selected are promoted to different levels of subordinate judiciary should be given intensive training for reasonable period to improve their skills in hearing cases, taking decisions, writing judgments and in court management. There is a great need to improve the quality of training that is being imparted in different judicial academics.

Two areas which need special attention for improving the quality of justice are prescribing required qualifications for the judges and the quality of training being imparted in the judicial academics.

## 9.6 NEED FOR SPECIALISATION

9.6.1 Cases under various laws such as civil, criminal, constitutional law, tax law, labour law, company law and service law come up for adjudication before the High Courts and Supreme Court. So far as courts subordinate to the High Courts are concerned they mainly deal with civil and criminal cases. Courts of JMFC and courts of Sessions deal only with criminal cases. The normal practice followed is to assign to the same Judge civil and criminal cases. In the High Courts and the Supreme Court the same Judges deal with cases under different laws by rotation. A Judge who deals with criminal cases for one term may deal with Tax cases during the next term. The question for consideration is whether this practice should continue or whether a Judge should be assigned that type of work in which he has acquired expertise.

9.6.2 Over the years all the branches of law have grown enormously. The laws have multiplied, judicial precedents have grown, and lot of literature and information is available for study in each of these branches. It is not easy for every Judge to be able to master all the branches. That is why in the legal profession many leading lawyers specialize in one field of law or the other. There are lawyers who specialize in labour laws, administrative laws, tax laws, civil laws, criminal laws, company laws, or constitutional laws etc. Similarly in the medical profession, the Doctors are required to specialise in different branches such as Cardiology, Neurology, Nephrology, Ophthalmology, Oncology, Urology etc. Scientific advances have thrown new challenges in the field of law such as Environmental laws, Telecommunication laws, Cyber laws, Space laws etc. There is therefore growing need for the lawyers, Judges to specialise in these emerging fields of law. A citizen, who wants to avail the best service, chooses a specialist in the particular branch. It is only when one specializes that he can give the best possible service in that field. A generalist may know all the branches but would not have deep knowledge or expertise in any particular branch of law. Realizing the importance of specialization, specialized tribunals have been established for dealing with tax matters, service matters, labour matters etc. This is a growing trend. The future is of specialisation.

9.6.3 Criminal law has special features and is different from the civil law in many respects. Some of the special features of criminal law are presumption of innocence of the accused, burden of proof on the prosecution and higher standard of proof than in civil cases namely “proof beyond reasonable doubt”. There are also special rules of evidence governing criminal cases.

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evidence governing criminal cases. A Judge who deals with criminal cases consistently for a long time would acquire specialization in that branch. A Judge who has specialized in a particular branch of law will take less time to decide the case than a Judge who has not acquired such expertise. Specialization contributes to better quality of decisions, consistency and certainty. Speedy and quality justice being the need of the hour it is desirable to assign criminal cases to Judges who are specialized in that branch.

9.6.4 Judges who never did any criminal work before their elevation to the Supreme Court are often assigned criminal work. This does not contribute to efficient management of the work. Therefore, a separate criminal division should be constituted consisting of one or more criminal division benches as may be required depending upon the work load, to deal exclusively with criminal cases. Judges who have acquired good experience in criminal law and known for quick disposal should be assigned to sit on the criminal division. Once assigned to the criminal division they should sit in that division only. If among them there are any Judges, who in addition to expertise in criminal law, are proficient in any other branch of law may if necessary be assigned work in that branch of law. A vacancy in the criminal division should be filled up by appointing a High Court Judge or a lawyer who has specialized in criminal law.

9.6.5 On the same lines a criminal division should be constituted in the High Court. Judges who have specialized in criminal law should be assigned to sit on the criminal side till they demit office. Among them if there are any who have expertise in any other field may if necessary be assigned to do that work. Vacancies occurring in the criminal division should be filled up by appointing Session Judges or lawyers who are proficient in criminal law.

9.6.6 District and Session Judges on their elevation to the High Court often say that they have a right to sit on benches dealing with other branches of law as their appointment is to the High Court and not to any particular division like the criminal division. The practice now followed is to assign work in any branch of law irrespective of whether the Judge has expertise or experience in that branch of law or not. As District and Session Judges they would have normally acquired experience in civil and criminal law and not in other branches. They would not be very familiar with laws such as Constitutional, Tax and Company matters etc. If the Judges are assigned work in a branch of law in which they have enough experience they will be able to decide those case more efficiently and speedily. Besides the possibility of errors would be very low.

9.6.7 It must be remembered that the Supreme Court and the High Court have the power to lay down the law and their decisions are binding on all the subordinate courts.

Therefore, a higher level of proficiency and expertise is called for. When a Judge is elevated to the superior courts it is not to give him an opportunity to learn and acquire expertise in new branches of law but to make use of the

. When a Judge is elevated to the superior courts it is not to give him an opportunity to learn and acquire expertise in new branches of law but to make use of the experience and expertise he has already acquired before his elevation.

experience and expertise he has already acquired before his elevation. They are expected to come to the higher courts as experts and not as apprentices. Public time and money should be put to optimum use for providing speedy and quality justice. The Chief Justice who has the right to constitute benches and assign work among the Judges should constitute benches to deal with criminal cases consisting of Judges who have specialized in criminal law. A healthy convention should also be developed of making appointment of Judges specialized in criminal law that are required to sit on benches to deal with criminal matters.

9.6.8 So far as the subordinate courts are concerned in places where there is more than one Judge, as far as possible and subject to availability of work some Judges should be assigned only criminal work for a reasonable period. The practice of allocating to the same Judge both criminal and civil cases at the same time should be avoided. After a Judge sits continuously for a period of about one year on the criminal side he may be assigned to work on the civil side.

9.6.9 The above suggestions are not quite new or radical. Such practice is prevalent in other countries. In France even in the Supreme Court some Judges are assigned work only on the criminal side until their retirement.

## **9.7 VIEWS OF THE HIGH COURTS**

The High Courts of Allahabad, Bombay, Chattisgarh, Delhi, Kolkata, Madhya Pradesh, Madras, Punjab & Haryana, Gujarat, Himachal Pradesh and Jarkhand are in favour of the criminal courts being presided over by Judges who have specialized in criminal work and their working exclusively on the criminal side. It is their view that disposal of cases by specialized Judges can be better and faster. It is only the High Courts of Andhra Pradesh, Kerala, Orissa and Uttaranchal that are not in favour specialization. Karnataka High Court has not expressed any view in the matter. It is seen that majority of the High Courts are in favour of specialization.

## **9.8 VIEWS OF THE STATE GOVERNMENTS**

9.8.1 The State Governments of Arunachal Pradesh, Haryana, Jammu & Kashmir, Karnataka

and Madhya Pradesh are in favour of criminal courts being presided over by Judges who have specialized in criminal law. The State of Himachal Pradesh however says that Judges specialized in criminal law may be assigned criminal work only in bigger cities where the workload justifies. The State Government of Kerala is not in favour of Judges specialized in criminal law being posted to do criminal work. Other States have not responded. It is seen that majority of the State Governments are in favour of specialization.

## **9.9 ACCOUNTABILITY**

9.9.1 Judicial credibility is enhanced when it is transparent and accountable. Sturdy independence is the basic virtue of the Judiciary. The Judiciary is independent in the sense that it is not answerable to any one. This does not give it license to function arbitrarily. It has to function in accordance with the Constitution and the relevant laws. The Judiciary is as much subject to rule of law as any one else. It has to discharge the judicial functions assigned to it in accordance with the mandate of the Constitution. In that sense it is accountable to fulfill the constitutional mandate.

9.9.2 The High Court is given power of control over subordinate courts by Article 235 of the Constitution. By and large this power if properly exercised is sufficient to ensure accountability of the subordinate courts. What is needed is greater vigilance and effective exercise of this power.

9.9.3 So far as High Courts are concerned no similar power of control has been conferred on any one and not even the Supreme Court. The High Courts in that sense are independent though their judgments can be reviewed by the Supreme Court. Under our Constitution, a Judge of a High Court or of the Supreme Court of India can be removed from his office by the President only for 'proved misbehaviour' or 'incapacity' and only in the manner provided for in Article 124(4); that is by an affirmative vote of at least half the total membership of each House of Parliament and a majority vote of two thirds of the members of each House present and voting on the motion for the removal of the Judge.

9.9.4 It is well known that impeachment motion against Justice Ramaswami failed even though the Committee on enquiry had held that serious charges of misconduct were proved warranting his removal. This indicates that impeachment provisions cannot be easily pressed into service to discipline the erring Judge. The recent incidents alleging serious aberrations in the conduct of Judges of some of the High Courts have shaken the confidence of the people in the judiciary. Common people feel very bad that if the Judges are guilty of serious misconduct nothing can be done about it. The problem is serious and needs urgent attention



at the highest level. It is imperative that the judiciary itself takes the initiative to set its house in order and come forward with credible solutions without undermining the independence of the judiciary. Constitution of a National Judicial Commission and amending Article 124 to make impeachment less difficult are some of the alternatives which are being discussed at the national level.

9.9.5 The Committee however feels that the aberrations in the conduct of Judges can be checked or even corrected if the problem is noticed at the earliest and efforts made to correct them. In the High Court the Chief Justice is regarded as only first among the equals. Except constituting benches and assigning work he does not exercise any authority over his colleagues. This has considerably eroded discipline which is so necessary for any institution. Some Judges do not attend the court punctually; reserved judgments are not rendered for long time, sometimes for years; many cases are kept as part-heard for long period; complaints are received of some lawyers receiving favourable orders, there are complaints that some Judges act vindictively against some lawyers; there are complaints that lawyers are snubbed or insulted; sometimes complaints are also received about corruption and immoral conduct of Judges etc. The Chief Justices' have no power to look into these problems and feel helpless. If the Chief Justice has the power to look into these complaints and takes immediate corrective action the problem can well be nipped in the bud. There is therefore urgent need to confer power on the Chief Justice to look into such grievances and take suitable corrective measures short of impeachment or pending impeachment process such as:-

- i) Advising the Judge suitably.
- ii) Disabling the Judge from hearing particular class of cases or cases in which a particular lawyer appears.
- iii) Withdraw the judicial work from the Judge for a specified period.
- iv) Censure the Judge.
- v) Advise the Judge to seek transfer
- vi) Advise the Judge to seek voluntary retirement.

9.9.6 There are other measures that can be taken to ensure accountability so far as proper discharge of judicial functions is concerned.

## **9.10 DELAY IN PRONOUNCING/SIGNING JUDGMENT/ORDER**

9.10.1 Some Judges do not deliver Judgements for years. If there is delay the Judge may forget important aspects thereby contributing to failure of justice. There is also a complaint that the Judgements are not promptly signed after they are typed and read causing great hardship to the parties. To correct these aberrations the High Court should issue a circular to

enter immediately below the cause title of the judgment / order, the following:

- (i) The date when the arguments concluded;
- (ii) The date when the judgment was reserved;
- (iii) The date when the judgment was pronounced;
- (iv) At the bottom of the judgment / order, the stenographer should enter the date on which he received the dictation, the date when he completed the typing and placed before the Judge and the date when the Judge signed it.

This will bring about transparency and contribute to accountability.

## **9.11 PUNCTUALITY**

9.11.1 As regards punctuality, apart from the Chief Justice advising the concerned Judge about his duty to be punctual and the adverse affect on the image of the court and the rights of parties, the Chief Justice may issue a circular requiring the court officer attached to every court to make a record of the time when the Judge assembles and the time when he rises and send a copy of the same at the end of each day to the Chief Justice and put it on the notice board for information of the public.

9.11.2 There were similar problems in USA where also the Judge can be removed only through impeachment process which is not easy to enforce. Therefore Judicial Councils Reform and Judicial Conduct and Disability Act 1980 was enacted. Under the Act there is a judicial council for each circuit and a National Judicial Conference at the Apex. They have been given power to censure a Judge, request him to seek retirement or direct that no cases be assigned to the Judge for a limited period. The Committee is in favour of conferring similar power on the Chief Justice of the High Court. If these corrective measures prove ineffective, the Chief Justice should have the power to move the Chief Justice of India who should have the power to suitably advise the erring Judge or transfer him or move for impeachment. This will go a long way in bringing better discipline in the High Court.

9.11.3 These measures would bring about transparency and act as a deterrent against such improper conduct of Judges.

## **9.12 COURT MANAGEMENT AND PRETRIAL HEARINGS**

9.12.1 Public expects and deserves speedy trial and quick justice. Delay is a denial of justice. The courts must realize that it is their responsibility to take the initiative to eliminate delay. Delay is not inevitable and can be curtailed by adopting imaginative court management techniques. Unfortunately little attention has been paid to this.



## **9.13 COURT MANAGEMENT**

9.13.1 There are two problems about which every one complains. The first is posting large number of cases which everyone knows cannot be dealt with on that day for sheer want of time. This leads to the Court wasting considerable time in calling the cases. The second problem relates to frequent adjournments.

## **9.14 ADJOURNMENTS**

9.14.1 A notorious problem in the functioning of the courts, particularly in the trial courts is the granting of frequent adjournments, mostly on flimsy grounds. This malady has considerably eroded the confidence of the people in the judiciary. Adjournments contribute to delays in the disposal of cases. They also contribute to hardship, inconvenience and expense to the parties and the witnesses. The witness has no stake in the case and comes to assist the court to dispense justice. He sacrifices his time and convenience for this. If the case is adjourned he is required to go to the court repeatedly. He is bound to feel unhappy and frustrated. This also gives an opportunity to the opposite party to threaten or induce him not to speak the truth. The right to speedy trial is thwarted by repeated adjournments. Adjournment is a curse of the courts.

9.14.2 Section 309 of the Code which regulates adjournments provides that adjournment should be granted only when the court finds it necessary or advisable for reasons to be recorded. It also gives discretion to the court to grant adjournment subject to payment of costs. However these conditions are not strictly followed and the bad practice continues.

9.14.3 The Judges act with unfettered discretion. Some Judges believe that it is unreasonable and harsh to refuse an adjournment when the lawyers put forward some ground or the other for adjournment. Judges must realize that the arbitrary exercise of discretion causes delay and harms innocent persons like the witnesses. To regulate the discretion the High Court must lay down the exceptional circumstances when adjournment may be granted. Section 309 should be amended to make it obligatory toward costs against the party who obtains adjournment. The quantum of costs should include the expenses incurred by the opposite party as well as the Court, the expenses of the witnesses that have come for giving evidence. Costs may be awarded to the opposite party or to the State which may be credited to victim compensation fund if one exists. The number of cases should depend upon the time the cases are likely to take. Indiscriminate posting of a large number of cases should be avoided.

9.14.4 At the instance of the Supreme Court the Law Commission has produced a comprehensive consultation paper on case management, which appears to have been circulated to the High Courts for their response. This indeed is a welcome initiative and the Committee recommends its immediate implementation in its entirety. If this is done, the focus on key issues rather than every minor issue will save the court's time and costs. But at the same time, to ensure that judicial time is not frittered away, resources should be made available for the provision of IT/Management specialists – including the equipment they require - to assist the court. If this is combined with the restructuring of the court offices, creation of property management agencies and redeploying of staff, the court can concentrate on and resolve even complex and grave cases quickly.

9.14.5 The advantages of this initiative would be:-

- i. Reduction in trial time and quick disposal of cases
- ii. Optimal use of court time
- iii. Establishment of trial standards
- iv. Monitoring of case load which will help in future planning
- v. Enhanced accessibility to courts
- vi. Ensuring Public Accountability

9.14.6 With the introduction of case management and use of scheduling techniques, unnecessary posting of too many cases and frequent adjournments can be avoided.

## **9.15 PRE-TRIAL HEARING**

9.15.1 In our Country the concept of pretrial hearing has not taken deep roots. Sections 291 to 298 of Cr.P.C. provide for sorting out certain matters at the pre-trial hearing. S. 294 envisages that the particulars of every document filed by the prosecution or the accused shall be included in a list, and the other party or its pleader “shall” be called upon to admit or deny the genuineness of each such document. Where the genuineness of such document is not disputed, the document may be treated as ‘proved’. This provision, unfortunately, is rarely utilized.

9.15.2 Lord Auld in his “Review” has observed:

7....., where there is a need for a pre-trial hearing the court and the parties should take full advantage of it to resolve all outstanding issues as to the conduct of the trial and to deal with any preliminary issues of law or fact that will assist that resolution.

This calls for the court to adopt a more interventionist and authoritative role than has been traditional in identifying the issues for trial and in securing the proper preparation by both parties to deal efficiently with them. This in turn requires adequate preparation, not only by the parties and their advocates, but also by the Judge with the benefit of sufficient time out of court in which to do it.

9.15.3 Provisions for such pretrial sittings have been made in several countries. The Committee feels that express provisions should be made for holding pretrial sittings for dealing with, inter alia the following matters: -

- i. Exploring the scope for settlement without trial, such as compounding
- ii. Admission and denial of documents as provided in S.294;
- iii. Calling for production of documents, if any, but not already filed.
- iv. Scope for the use of affidavits (S.295 & 296)
- v. Issues relating to proof and admissibility of documents
- vi. Questions of law relating to maintainability and Jurisdiction.
- vii. Probable duration of the trial,
- viii. Issues relating to summoning and order of examination of witnesses
- ix. Outlining broadly the scope of evidence;
- x. Settlement of issues
- xi. Fixing the date/s for different stages, including examination of witnesses and hearing of arguments.
- xii. Such other matters that need to be attended to ensure speedy trial.

9.15.4 Once these issues are settled at the pretrial sitting the stage would be set for trial without any hindrance or scope for adjournment. Court Management and pre-trial can be regulated by the High Court by issuing suitable instructions and ensuring compliance with it. This too should be included in the training of Judges.

## **TRIAL PROCEDURES**

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10.1 Criminal cases are divided into two categories namely warrant cases and summons cases. A warrant case is a case relating to an offence punishable with death, imprisonment for life, or imprisonment for a term exceeding two years. Other offences come under the category of summons cases. By definition, a summons case is one where the upper limit of imprisonment that can be awarded is two years and/or fine. Cases punishable with death or imprisonment for life or imprisonment for 10 years and fine, are exclusively triable by the Court of Session. Other cases are triable by Magistrates.

10.2 In cases of conviction, the sentence that may be passed is limited by (a) the procedure adopted for purposes of trial: and (b) the limits placed by S.29 Cr.P.C. on different classes of Magistrates. If the case is tried by the Chief Judicial Magistrate (or the Chief Metropolitan Magistrate), the upper limit of sentencing would be any sentence authorized by law, “except a sentence of imprisonment for life or of imprisonment for a term exceeding seven years”. A Magistrate of the First Class (or a Metropolitan Magistrate) may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding Rs.5000 or of both.

10.3 All summons cases and a few enumerated warrant-cases are triable summarily, by all classes of Magistrates including Metropolitan Magistrates, (but not Magistrates of the First Class, unless they are duly empowered) as provided under Section 260 Cr.P.C. But the sentencing power is restricted under S.262 Cr.P.C to a term of imprisonment, not exceeding three months.

10.4 Section 355 which speaks of “Metropolitan Magistrate’s Judgment” substitutes almost the same proforma of the judgment prescribed under S.263 for summary trials, with the difference, that while under S.264, in cases tried summarily, the Magistrate is enjoined with the duty to “record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding,” whereas, S.355 (i) relating to regular trials by Metropolitan Magistrates provides that in all cases in which an appeal lies from the

final order under S.373 or 374(3), “a brief statement of the reasons for the decision” shall also be recorded. The procedure that Metropolitan Magistrates can follow under S.355 is akin to summary procedure.

10.5 Sub-Section (2) of S.260, provides that if in the course of the summary trial, it appears to the Magistrate that the nature of the case is such that it is undesirable to try it summarily, he shall recall any witnesses who may have been examined and proceed to re-hear the case in the manner provided by the Code.

10.6 The procedure for recording evidence varies according to the form of trial. Section 274 Cr.P.C., prescribes that in summons cases and inquiries, “the Magistrate shall, as the examination of each witness proceeds, make a memorandum of the substance of the evidence in the language of the Court”. The proviso enables the Magistrate to cause such memorandum to be made in writing or from his dictation in open Court” where the Magistrate is unable to make such memorandum himself and records reasons for his inability.

10.7 S.376 (d)., provides that no appeal from a convicted person shall lie when a sentence of fine only is passed not exceeding Rs.200/- in a case tried summarily by the Magistrate empowered under section 260.

10.8 But it is a matter of lament that in response to the Question No.10.21 in the Questionnaire issued by the Committee, it has been brought out that S.260 and 355 are either unutilized or under-utilized.

10.9 Only those Magistrates (Other than CJMs and MMs) who are duly empowered, either by name, or by virtue of office, or under the statute creating the offence can try the cases summarily. But most of the Magistrates are not empowered. This is one among the many reasons why summary procedures is not fully utilized. As the Judge of the same status can deal with the case summarily when he is posted as a metropolitan Judge without any empowerment there is no reason why such empowerment is needed for other magistrates to deal with the cases summarily under Section 262 of the Code

10.10 Under Section 262 the maximum punishment that can be imposed is 3 months. Under the negotiable instruments Act, Prevention of food adulteration Act, the offences can be tried summarily under S.262 for which imprisonment of one year can be imposed as a sentence. The Judge of the same status sitting as Metropolitan Magistrate following the procedures similar to summary procedure prescribed by S.355 can impose a sentence up to three years imprisonment. There is therefore clear justification to enhance the limit

prescribed by S.262 to three years, which is the same as the present limit of three years for the Metropolitan Magistrate.

10.11 The Law Commission has in its 154<sup>th</sup> report also recommended enhancement of the limit of Sentence prescribed in Section 262 of the Code to three years. It has also recommended some incidental amendments to Sections 2(x) and 2(w). The Committee is in favour of these recommendations. The Committee feels that Section 2(x) defining ‘warrant case’ be amended by substituting the word ‘**three**’ for the word ‘two’. Consequently all cases which are not warrant cases, relating to offences punishable with imprisonment lower than three years shall become Summons cases which shall be tried by following the summary procedure prescribed in Chapter XXI of the Code.

10.12 The ceiling of Rs.200/- fixed for the value of property under S. 262(1)(c)( i,ii,iii and iv) is also too low to and should be enhanced to Rs.5000/- having regard to declining value of the rupee. No prejudice would be caused to the accused by such enhancement.

10.13 Large number of cases which do not involve serious offences can be disposed of expeditiously. As the Magistrate has power under S. 260(2) to try the case regularly if he feels that it is desirable to do so in the interest of justice no prejudice would be caused.

10.14 However, the Committee is of the opinion that proper training should be given to all the Magistrates about trying the cases following the summary procedure. The training should include mock trials and writing of judgments in summary trials by the trainees.

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## **10.15 PETTY OFFENCES**

10.15.1 Section 206 of the Code which deals with “Petty Offence” reads as follows:

- (1) If, in the opinion of a Magistrate taking cognizance of a petty offence, the case may be summarily disposed of under Section 260, the Magistrate shall, except where he is, for reasons to be recorded in writing, of a contrary opinion, issue summons to the accused requiring him either to appear in person or by pleader before the Magistrate on a specified date, or if he



desires to plead guilty to the charge without appearing before the Magistrate, to transmit before the specified date, by post or by messenger to the Magistrate, the said plea in writing and the amount of fine specified in the summons or if he desires to appear by pleader and to plead guilty to the charge through such pleader, to authorize, in writing, the pleader to plead guilty to the charge on his behalf and to pay the fine through such pleader:

PROVIDED that the amount of the fine specified in such summons shall not exceed one hundred rupees.

- (2) For the purpose of this section “petty offence” means any offence punishable only with fine not exceeding one thousand rupees, but does not include any offence so punishable under the Motor Vehicles Act, 1939 (4 of 1939), or under any other law which provides for convicting the accused person in his absence on a plea of guilty.
- (3) The State Government, may, by notification, specially empower any Magistrate to exercise the powers conferred by sub-section (1) in relation to any offence which is compoundable under section 320 or any offence punishable with imprisonment for a term not exceeding three months, or with fine, or with both where the Magistrate is of opinion that, having regard to the facts and circumstances of the case, the imposition of fine only would meet the ends of justice.

10.15.2 This is an enabling provision for dealing with petty offences speedily and applies only to cases which can be tried summarily under Section 260 of the Code. ‘Petty Offence’ means offence punishable only with fine not exceeding one thousand rupees. However under sub-section (3) the State Government can specially empower the magistrate to exercise the power under sub-section (1) to any offence which is compoundable under Section 320 or any offence punishable with imprisonment not exceeding three months or with fine or with both where the magistrate is of opinion that imposition of fine only would meet the ends of justice.

10.15.3 In all such cases the magistrate can call upon the accused to exercise the option of pleading guilty and paying fine fixed by him within the specified time by money order or D.D or to appear before the court on the specified date if he chooses to contest the case. This is a very quick, convenient and speedy procedure prescribed for dealing with large number of petty offences. If the allegations against the accused are true he can plead guilty and pay the



fine through post. He need not engage a lawyer and incur expenditure. He can save the time, trouble and expense of attending the court. Therefore it is good to encourage the accused to avail of this facility. It is also necessary to enlarge the limit prescribed particularly in the light of the amendments to Section 260 and 262 that the Committee has recommended. It would be convenient if the reply which the accused has to give is also prescribed so that he can reply without seeking assistance of the lawyer. Form 30 prescribed needs to be simplified.

10.15.4 Summary trial procedure and procedure for trying petty cases should be adopted with great advantage in dealing with offences under special local laws.

#### 10.16 SERVICES OF SUMMONS

One of the causes for delay even in the commencement of trial of a criminal case is service of summons on the accused. The Code of Criminal Procedure provides for various modes of service. Section 62 of the Code provides that summons shall be served by a Police Officer, or subject to such rules being framed by the State Government, by any officer of the Court or other public servant. Unfortunately rules have not been framed by many State Govts. to enable service otherwise than through police officers. Since the Criminal Procedure Code itself provides for other means of service namely through registered post in the case of witnesses, Section 62 should be amended to provide for service on accused through registered post with acknowledgement due and wherever facilities of courier service are available, the same should also be adopted. If fax facilities are available the same should be used. Any endorsement made by the postman that the summons has been “refused” should be deemed as sufficient service and warrant can be issued. As in civil cases service through court official can also be provided and in case of summons to the accused who is absconding, the summons can be served on any adult member of the family or affixed on a prominent place at his residence and the same shall be treated as sufficient service and in case of non-appearance a warrant can be issued.

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## **WITNESSES AND PERJURY**

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11.1 Witness is an important constituent of the administration of justice. By giving evidence relating to the commission of the offence he performs a sacred duty of assisting the court to discover truth. That is why before giving evidence he either takes oath in the name of God or makes a solemn affirmation that he will speak truth, the whole of truth and nothing but truth. The witness has no stake in the decision of the criminal court when he is neither the accused nor the victim. The witness performs an important public duty of assisting the court in deciding on the guilt or otherwise of the accused in the case. He sacrifices his time and takes the trouble to travel all the way to the court to give evidence. He submits himself to cross-examination and can not refuse to answer questions on the ground that the answer will criminate him. He will incur the displeasure of persons against whom he gives evidence. He takes all this trouble and risk not for any personal benefit but to advance the cause of justice. The witness should be treated with great respect and consideration as a guest of honour. But unfortunately quite the reverse is happening in the courts. When the witness goes to the court for giving evidence there is hardly any officer of the court who will be there to receive him, provide a seat and tell him where the court he is to give evidence is located or to give him such other assistance as he may need. In most of the courts there is no designated place with proper arrangements for seating and resting while waiting for his turn to be examined as a witness in the court. Toilet facility, drinking water and other amenities like food and refreshment are not provided.

The witness should be treated with great respect and consideration as a guest of honour.

11.2 The witness is not adequately compensated for the amount of money he spends for his traveling and staying in the town where the court is located. Rates of allowance fixed long back are quite unrealistic and not adequate to meet the minimum needs of the witness. Steps should therefore be taken to review the scales of traveling and other allowances taking into account the prevailing cost in the area where the court is located. What is worse is that even the allowances fixed are not paid to the witness immediately on the ostensible ground

that funds are not available. There are also complaints of corrupt officials of the administration who draw the allowances and do not pay them to the witnesses. This is an un-pardonable crime against the witnesses. Therefore effective steps have to be taken to ensure that payment of the allowances to the witness is neither denied nor delayed. Fool proof arrangements should be made to see that the allowances are paid immediately. An official should be designated to attend to the witnesses and be responsible for paying the allowances promptly.

11.3 Another major problem is about safety of witnesses and their family members who face danger at different stages. They are often threatened and the seriousness of the threat depends upon the type of the case and the background of the accused and his family. Many times crucial witnesses are threatened or injured prior to their testifying in the court. If the witness is still not amenable he may even be murdered. In such situations the witness will not come forward to give evidence unless he is assured of protection or is guaranteed anonymity of some form of physical disguise. Some times holding of in-camera proceedings may be sufficient to protect the interest of the witness. If, however, the circumstances indicate that the life of any particular witness is in danger, the court must take such measures as are necessary to keep the identity of the witness secret and make arrangements to ensure protection to the witness without affecting the right of the accused to cross-examine him. The threat from the accused side may be before he gives his statement before the police officer or evidence before the court or after the conclusion of the trial. There is a growing tendency of subjecting the witness and his family members to serious threats to life, abduction or raping, or damaging the witnesses' property or harming his image and interest in other ways. The witness has no protection whatsoever. Many countries in the world have enacted laws for witnesses' protection. There is no such law in India. Time has come for a comprehensive law being enacted for protection of the witness and members of his family.

If, however, the circumstances indicate that the life of any particular witness is in danger, the court must take such measures as are necessary to keep the identity of the witness secret and make arrangements to ensure protection to the witness without affecting the right of the accused to cross-examine him.

11.4 The witness also suffers in the court in various other ways. When he comes to the court to give evidence he is often told that the case has been adjourned and is asked to come back on another day. When a case is adjourned, the witnesses in attendance are quite often not paid the allowances. The witnesses should not be punished by denying him reimbursement of the expenses for no fault of his. Steps should therefore be taken to ensure that the witnesses

are paid allowances on the same day if the case is adjourned. Quite often more than one witnesses is summoned to prove the same point, much of it being of a formal character. The prosecutor may pay attention to reduce duplication of evidence resulting in unnecessary waste of time of courts and expenses. The evidence of Medical witnesses, Government scientific experts and Officers of mint contemplated by Sections 291, 292 and 293 of the Code shall be tendered as evidence in the form of Affidavits and the challenge to the same by the opposite party shall be by means of a counter Affidavit. The Court may permit an Affidavit in reply being filed by these experts. If the Court is satisfied that in the interest of justice, examination of these witnesses is necessary, it shall as far as possible be done through Video Conferencing. It is only if it is practicable that the witnesses may be summoned for giving evidence before the Court. Evidence of such witnesses should be recorded on priority basis and summoning such experts again should be avoided. The DNA experts should be included in sub section 4 of section 293 of the Code. This repeats again and again. No concern is shown for the valuable time of the witness and the trouble he takes to come to the court again and again to give evidence. Therefore there is need to infuse sensitivity in the minds of the court and the lawyers about the hardship and inconvenience which the witness suffers when the case is adjourned. Therefore only such number of cases should be listed which can be taken on that particular day so that the witness is not required to return only to come again for giving evidence. The directions given from time to time that the trial should proceed on day to day basis are not being followed. Time has now come to hold the Judge accountable for such lapses. Appropriate remedial measures through training and supervision may have to be taken in this behalf by the respective High Courts.

11.5 The next aspect is about the way the witness is treated during trial. As already stated the witness is entitled to be treated with courtesy when he arrives for giving evidence. Similarly due courtesy should be shown to him when he enters the court hall for giving evidence. The present practice is to make the witness stand and give his evidence from the place designated for that purpose. Comfort, convenience and dignity of the witness should be the concern of the Judge. In the opinion of the Committee the present practice must be changed. A chair should be provided for the witness and requested to take his seat for giving evidence. The lawyer for the defence in order to demonstrate that the witness is not truthful or a reliable person would ask all sorts of questions to him. When the questions are likely to annoy, insult or threaten the witness, the Judge does not object and often sits as a mute spectator. It is high time the Judges are sensitised about the

It is high time the Judges are sensitised about the responsibility to regulate cross examination so as to ensure that the witness is not ill-treated affecting his dignity and honour.

responsibility to regulate cross examination so as to ensure that the witness is not ill-treated affecting his dignity and honour. Therefore the High Courts should take measure through training and supervision to sensitize the Judges of their responsibility to protect the rights of the witnesses.

11.6 So far as witness is concerned, it is his primary duty to give true evidence of what he knows. Unfortunately this is not happening and the problem of perjury is growing.

## **11.7 PROBLEM OF PERJURY**

11.7.1 One of the main reasons for the large percentage of acquittals in criminal cases is of witnesses' turning hostile and giving false testimony in criminal cases. Several reasons are attributed to this malady such as inordinate delay in the trial of cases, threats or inducement from the accused etc. As in criminal cases the prosecution relies mainly on oral evidence the problem assumes critical importance.

Witnesses give evidence in the Criminal Courts after they are administered oath or affirmation under the Oaths Act, 1969. Section 8 of the Oaths Act provides that the witness is legally bound to state the truth on the subject. The sanction behind the oath is supposed to be the fear of God and the fear of eventual punishment by God, the supernatural dispenser of justice. In practice however it is seen that the witnesses make false statements without any regard for the sanctity of the oath or affirmation that has been administered to them. One gets an impression that administration of oath or affirmation virtually gives license to the witness to make false statements before the Court with impunity.

11.7.2 There is no doubt there is a statutory sanction against the witnesses making false statements in the Court. Perjury is made a Penal offence under Sections 193 to 195 of the Indian Penal Code for which adequate punishment is prescribed.

11.7.3 Section 195 (1) (b) of the Code provides that no court shall take cognizance inter-alia of the offence of perjury under Sections 193 to 195 except on the complaint in writing of that court or of the court to which that court is subordinate. Section 340 prescribes the procedure to be followed for making a complaint contemplated by Section 195. It requires the Court to hold a preliminary enquiry to record a finding that it is expedient in the interest of justice that an enquiry should be made into any offence referred to in Section 195 (1) (b).

Thereafter it has to make a complaint in writing and send it to the Magistrate I Class having jurisdiction. The order under Section 340 is appealable under Section 341 of the Code. Section 343 prescribes the procedure to be followed in dealing with the Case.

11.7.4 Section 344 however prescribes an alternate summary procedure. It provides that if the Court of Session or Magistrate of first class if at any time of delivery of judgment in the case expresses an opinion that the witness appearing in such proceeding had knowingly or willfully given false evidence or fabricated false evidence for use in the proceeding, the Court may if satisfied that it is necessary and expedient in the interest of justice that the witness should be tried summarily, take cognizance after giving reasonable opportunity of showing cause, try such offender summarily and sentence him to imprisonment which may extend upto to 3 months or to fine upto Rs.500/- or with both. This provision is rarely resorted to. Thus it is seen that the courts response to the serious problem of perjury is rather one of utter indifference.

11.7.5 Unfortunately these provisions are rarely resorted to and perjury has become a routine feature in courts where truth and justice must prevail.

11.7.6 Sub-section (4) further provides that if, after such action is initiated it appears that an appeal or revision has been preferred against the judgment or order, further proceedings regarding perjury shall be stayed until the appeal or revision is decided.

11.7.7 Perjury can contribute to the wrong person being convicted while the true criminal and a perjurer walk on the streets in freedom. Offering false testimony in a criminal trial is a serious offence that undermines the integrity of the Criminal Justice System. For justice to be done truth must prevail. Witness must be made to take his oath or solemn affirmation seriously. The sentence prescribed for perjury is quite lenient. In the State of New York the sentence for perjury was recently enhanced to 15 years. As the menace of perjury is shaking the very foundation of the Criminal Justice System it is necessary to curb this menace and the sentence prescribed should be enhanced.



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## **VACATIONS FOR COURTS**

12.1 None of the governmental organizations in the country have vacations except the courts and the educational institutions. Educational institutions where the children are educated stand altogether on a different footing. Wherever the Committee has gone one question which the common people have asked is as to why the courts should have such long vacations when there is such huge pendency of cases in all the courts waiting for decades for disposal. There are cases where the accused have been waiting for years for their cases to reach the hearing stage. When we told them that the Judges work very hard, that their work involves great intellectual exercise, that they have to study and research a lot, that they do not get time to keep themselves well-informed about the new trends of law and jurisprudence in the world which they can do during vacations, none of them carried any conviction to their minds. They said that there are many persons discharging even more onerous responsibilities who work day and night without any holidays or vacations. There is a great sense of unease in the minds of the people why such great and learned people who are charged with the responsibility of deciding the fate of others, whether it is between man and man, between man or State, or between State and State are not sensitive to the needs of the time to make as much time of theirs, available for redressing the grievances of the suffering people? Whether it is the fear of the law of contempt or the tradition of holding the Judges in great awe and respect that has prevented the people from making a public issue, it is difficult to say. In this context it is necessary to know that in most of the countries in the world the courts do not have any vacations. The Judges from the courts in France and USA who interacted with the Committee told us that their courts have no vacations and that the Judges can take leave according to their convenience without affecting the smooth functioning of the courts. What is the special justification for the courts in India to have this unique privilege of vacations? Even in India the subordinate criminal courts do not have any vacation. But the subordinate civil courts, High Courts and the Supreme Court have vacations.

Why the courts should have such long vacations when there is such huge pendency of cases in all the courts?

12.2 It appears that vacation for the courts is a legacy of colonial rulers. Most of the higher courts were presided by Judges hailing from England. That was the time when the pressure of work in courts was not so great. Besides as rulers they were not very much concerned about the problem of delay in disposal of cases. English men coming from the cold country were finding summer in India unbearable. Therefore the vacation was evolved as an arrangement to enable them to go to England during summer and spend their time comfortably there. That was the time when travel was required to be made by sea which occupied several weeks. This appears to be the real reason for the introduction of vacations for courts in India. English men having gone we having become the masters of our own country, is there any justification to continue the legacy of vacations! Access to Justice and speedy trial being precious fundamental rights of the citizen, the courts ought to remain open round the year. The committee feels that the time has come for introspection and to respond to the just expectations of the litigant public who clamor for speedy justice and access to justice round the year.

The committee feels that the time has come for introspection and to respond to the just expectations of the litigant public who clamor for speedy justice and access to justice round the year.

12.3 The Committee would like to advert to the reasons given in the report by the Arrears Committee constituted by the Government of India on the recommendations of the Chief Justices' Conference recommending not abolition but reduction of the vacation for the High courts by 21 days:

When there is such tremendous pressure of work in all the High Courts and the problem has become so acute, we should explore every possible avenue of effectively tackling this problem. We are conscious of the fact that the Judges work very hard not only during court hours but outside the court hours, not only during working days of the High Court but also during holidays and vacations. We are also conscious of the fact that it is a highly taxing intellectual work which requires adequate time for relaxation. The Judges have to catch up with a lot of general reading, the progress and trends in law and jurisprudence in other countries in the world. They may be required to participate in seminars for updating their knowledge and for mutual exchange of views. These being the special requirements of the Judges, their working cannot be compared to the working of other administrative and executive branches. These special requirements of the Judges cannot be served without providing

vacations for reasonable periods. At the same time, the Judges, who should be vitally concerned with the problem of arrears, particularly when the problem has reached such critical levels, should come forward to make some sacrifice for achieving the larger goal at least for the next couple of years, until the problem is brought under control. It is against this background that we feel that we should come forward to make some sacrifice in the larger interest. ....This undoubtedly calls for hard work and sacrifice on the part of the Judges which we feel must be offered ungrudgingly and graciously for achieving the noble cause. We trust that the Bar will not be found wanting in making their own contribution by extending their full co-operation.

12.4 Unfortunately the recommendations of the Arrears Committee to reduce the vacations by 21 days have not been implemented so far.

12.5 Compared to the work load on courts in other countries in the world the Judges in India carry a much heavier load. So far as High Courts and Supreme Court are concerned apart from the large number of cases they have to dispose of, their responsibility is quite onerous as they have the power to strike down unconstitutional laws and to lay down the law that is binding on all subordinate courts. Some of the heavy and complicated cases require the Judges to do considerable research and reading. This, they may not be able to do during the week ends. They would be looking for the vacations to do this work. Besides they need time to participate in national and international seminars, workshops and conferences to interact with Judges, lawyers and scholars from other countries. They have also to catch up with lot of reading the latest books. Besides, the lawyers practicing in the courts at the higher levels need time for similar exercises. Therefore, the Committee feels that instead of abolishing the vacations altogether, they may be reduced by a reasonable period.

12.6 Sensitivity of the courts for the accused languishing in the jails for long period of time awaiting the decision of court is waning. There was a far greater sensitivity and concern about the accused who was affected by delay in disposal of criminal cases in the 50s and earlier. In the High Court of Bombay (may be in other High Courts also), there was a convention that before the court went on vacation all the criminal cases pending in the High Court where the accused were in custody should be disposed of. If all the cases were not disposed of the Judges could not take the vacation. Therefore when the vacation was approaching assessment of the criminal cases in which the accused were under custody would be made and additional benches constituted to ensure that all such cases are disposed before the commencement of

the vacation. Another convention was that in serious cases involving offence of murder etc, if the accused was not able to engage his own lawyer and a lawyer was provided to him at the cost of the State, the High Court would request an eminent senior lawyer to appear and argue the case for the accused assisted by the lawyer provided at the cost of the State. The senior lawyer who argues the case on the request of the High Court would not receive any payment. This shows the sensitivity of the Judges to dispose of criminal cases expeditiously and to provide quality legal assistance to indigent persons. That sensitivity in the course of the years has dried up. It is time for introspection and for restoring sensitivity towards the plight of the accused whose cases are pending in the courts.

12.7 There is no vacation for subordinate criminal courts. In the High Courts and the Supreme Court there is substantial criminal work. So far as vacations of the High Court are concerned they have been fixed by each High Court according to their own convenience, bearing in mind the order of the President issued under Section 23(a) of the High Court Judges Conditions of Service Act, which requires the High Court to work for 210 days a year. The President has power to increase the number of working days which would automatically lead to reduction of vacations. All the High Courts have summer vacations. Some High Courts have winter vacations or Deepavali vacations or Puja vacations or Christmas vacations or Dussera vacations or Onam vacations depending upon the customs prevailing in the respective states. The total period of vacation of each High Court varies from 48 to 63 days. However, during vacations some Judges sit on the vacations benches only to transact urgent work.

The total period of vacation of each High Court varies from 48 to 63 days. However, during vacations some Judges sit on the vacations benches only to transact urgent work.

12.8 There is a convention which enables the High Court Judges to take 14 days Casual Leave every year. In addition, there are more than two weeks of public holidays every year. High Court Judges do not sit on Saturdays and Sundays. Though the High Court is expected to work for 210 days, the Judges would be working for a much lesser number of days when they avail of different kinds of leave. The assessment of the reasonable period of reduction of period of vacation has to be made taking into consideration the work load on the Judges, pendency of cases for several years and the fresh inflow of cases everyday. Some amount of reasonable adjustment is called for. Bearing all these aspects in mind and the need to eradicate arrears and to provide speedy justice to the litigants, the Committee is of the opinion that the working days of the High Courts should be increased from 210 days to 231 days. This would result in reduction of the vacation by 21 days which is quite reasonable. This would contribute to substantial reduction of arrears.

12.9 The President has fixed 185 working days. The Supreme Court has summer vacation, Holi holidays, Daseera holidays, Deepavali holidays and New Year holidays. The working days of the Supreme Court are lesser than that of the High Courts by 25 days. The Registrar General of the Supreme Court has furnished the information to the Committee that the summer vacations for the Supreme Court is for 8 weeks and that the court is closed for Christmas and New Year holidays for 2 weeks. Few Judges sit during vacations to attend to urgent work. The reasons discussed earlier for increasing the working days of the High Courts by 3 weeks would apply equally to the Supreme Court. The same period of increase of 21 working days for the Supreme Court appears reasonable. In the circumstances the Committee recommends that the number of working days for the Supreme Court may be increased from 185 days to 206 days. Consequently, the vacation of the Supreme Court would be reduced by 3 weeks which is quite reasonable. This would contribute to substantial increase in disposal of cases and reduction of arrears.

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### **ARREARS ERADICATION SCHEME**

13.1 According to the *Report on Crime in India, 2000* published by the National Crime Record Bureau, Ministry of Home Affairs, 49,21,710 criminal cases under the IPC were pending at the end of the year 2000. During the Year 2000 the number of cases under the IPC which were tried and disposed of were 9,33,181. So far as criminal cases under special local laws are concerned, 36,49,230 cases were pending at the end of 2000. Total of 25,18,475 cases were disposed of after trial in the year 2000. It is thus seen that there is a huge backlog of criminal cases in the country. Criminal cases including sessions' cases have been pending in several States for more than 15 years. Many of the reforms suggested by the Committee in this report would help in reducing the arrears and improving the quality of justice. But so far as huge arrears of cases is concerned, unless concerted effort are made on a war-footing, the position will not improve and people will continue to suffer. Realizing the gravity of the problem Hon. Sri Arun Jaitley, Minister of Law and Justice, Govt. of India evolved Fast Track Courts scheme to deal with Sessions' cases. The scheme also made provision for providing funds. The scheme has worked very well in some States and not too well in others. This is not due to any defects or inadequacies in the scheme. The problem really was in the matter of implementing the scheme. Under the scheme additional courts termed "fast track courts" were established. Senior in-service Judges or retired Judges were appointed to man such courts for a term of two years. Some courts have performed very well where they were manned by experienced Judges known for their ability for quick disposal. In many places suitable persons were not available for appointment to these courts. In some places there were problems of lack of accommodation and other infrastructural facilities. There were also problems of securing public prosecutors etc. Lack of co-ordination was another problem. The major problem undoubtedly was in the matter of finding suitable persons to be appointed as Judges and securing accommodation for the courts. This means that we should find ways and means for better and effective implementation of the scheme.

13.2 In the opinion of the Committee a scheme like the Fast Track Courts scheme with certain modifications is the right answer to tackle the problem of arrears in all the criminal

courts. As the object of the proposed scheme is to eradicate arrears it would like to name the proposed scheme as “Arrears eradication scheme”.

13.3 The Arrears for the purpose of the scheme should mean cases which are pending for more than two years as on the date of coming into force of the new scheme. Cases pending for less than two years shall be current cases. This shall be a one time temporary scheme for clearing the existing arrears of criminal cases in all the courts.

In the opinion of the Committee a scheme like the Fast Track Courts scheme with certain modifications is the right answer to tackle the problem of arrears in all the criminal courts.

13.4 Some of the measures recommended by the Committee in this report would be useful in eradicating the back log of cases. The Committee has recommended increase in the number of offences that can be compounded. Benefit of this should be extended to the pending cases as well. Good many old cases can be disposed of by settlement.

13.5 The Committee has recommended that all the ‘Summons’ cases shall be tried summarily under section 262 of the Code. Pending cases falling under this category can also be disposed of expeditiously by following the summary procedure.

### **13.6 SCHEME FOR ERADICATING ARREARS**

13.6.1 For the purpose of eradicating arrears a separate scheme shall be prepared on the lines of the ‘Fast Track Courts Scheme’ on the following lines:-

1. The scheme shall be called the ‘Arrears Eradication Scheme’.
2. The object of the scheme shall be to eradicate the arrears pending on appointed day, in about five year’s time.
3. Appointed day shall be fixed by the Chief Justice of the High Court for the Arrears Eradicating Scheme to come into force. That is the day when the courts shall start hearing the cases under this Scheme. Therefore all arrangements for that purpose should be completed before that day.
4. Arrears for the purpose of this Scheme shall be the cases pending for more than two years on the appointed day.
5. The Scheme will lapse once ‘Arrears’ are disposed of.
6. Current criminal cases are those that are pending for less than two years on the appointed day. Responsibility of disposing of these current cases within two years shall be on the regular courts. This scheme is recommended so that from here on at least the current criminal cases can be disposed of within a maximum period of

two years. The High Court shall take steps to have enough regular courts for achieving this object.

7. Implementation of the Arrears eradication scheme requires co-ordination between the High Courts and the Government in the matter of finding suitable persons to be appointed as Judges and finding suitable accommodation and other infrastructure for the courts. The Committee recommends that a retired Judge of the High Court should be appointed for implementation of the Arrears eradication scheme. He should be appointed in consultation with the High Court. It is only persons with considerable experience in criminal cases who are known for quick disposal and ability to motivate others that should be selected for implementing the Scheme. The choice of the Judge for this purpose is of crucial importance. He should be given a free hand in the matter of suggesting the names of persons to be appointed to these courts, identifying accommodation and finding staff to do the work. The success of the scheme would depend upon the vision and dynamism of such person. Therefore great care should be taken in the matter of selecting and appointing a person for this important job.
8. His overall responsibility shall be to implement the scheme in the entire State. He shall co-ordinate with all the functionaries and take necessary steps in consultation with the Chief Justice to implement the Arrears Eradication Scheme. His services may also be utilized in the matter of compounding or settlement of cases.
9. Quick decisions and prompt action are the key for the success of this scheme. It is therefore suggested that at the State level there should be a coordination committee consisting of the Chief Justices, Chief Minister and Advocate General and at the Central level such Committee may consist of the Chief Justice of India, Minister for Law and Justice and the Attorney General of India.
10. The Judge appointed in each State for implementing the scheme should at the end of every year prepare a report about the implementation of the Scheme, giving all relevant information, about the problems if any that need to be solved and send it to the Co-ordination Committee for taking remedial measures. Copy of the report should be sent to the Chief Justice of India and the Minister for Law and Justice, Govt. of India. They may take such measures as are needed for smooth and effective operation of the Scheme.
11. Such number of additional courts of Magistrates First Class, Chief Judicial Magistrates and Session Judges as may be required to clear up arrear of cases pending for more than two years be established.
12. Adhoc or contractual appointment of Judges shall be made for these courts from among available retired Judges and members of the Bar.
13. Benefit of compounding of offences recommended by this Committee shall be

extended to pending cases as well. A concerted effort should be made to dispose of the cases by compounding or settlement wherever that is permissible in law.

14. To meet the problem of accommodation, timings of the court may be so modified so as to have two shifts of courts to be able to use the same accommodation, say, from 9 am to 2 pm and 2.30 pm to 7.30 p.m.
15. It may also be examined if court can function on part time basis with part time Judges at the same premises with some adjustment of timing of the regular courts. The part time courts may also sit on holidays. Part time courts can conveniently be assigned compoundable cases for settlement. The Judge should make effort to settle the cases failing which they may be sent to the court doing regular hearing work.
16. Where there are large numbers of petty cases they may be posted exclusively before one Judge so that they can be expeditiously disposed of.
17. This scheme may *mutatis mutandis* be extended to the High Courts and the Supreme Court. The Chief Justices of the respective courts shall classify the criminal cases into two categories. Those which are pending for more than two years shall be treated as arrears cases and assigned to specially constituted benches for clearing the arrears. If necessary ad hoc Judges should be appointed until the old cases are disposed of. So far as cases pending for less than two years are concerned they shall be disposed of by regular benches. Such number of regular benches should be constituted as may be necessary to dispose of current case within two years. It shall be the responsibility of the concerned Governments to extend such assistance as is necessary. It is advisable for the Chief Justices to constitute special cells to be responsible for assisting the Chief Justice in achieving these objectives.
18. The Committee urges the Governments concerned to provide the funds required for successful implementation of the scheme. The Government of India may extend the requisite financial support in a generous way as it has done in respect of Fast Track Court scheme.
19. Commitment and aggressive pursuit at all levels is the key to solving the problems. Requisite finance, manpower and infrastructure should be made available without cringing. This is a very small price to pay to mete out justice to the people. Time has come to act, here and now.

**PART – IV**

**CRIME AND PUNISHMENT**

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## **OFFENCES, SENTENCES, SENTENCING & COMPOUNDING**

14.1 Lord Denning appearing before the Royal Commission on 'Capital Punishment' expressed the following views:

Punishment is the way in which society expresses its denunciation of wrong doing and in order to maintain respect for law, it is essential that punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of the citizens. For them it is a mistake to consider the object of punishment as being deterrent or reformatory or preventive and nothing else. The truth is that some crimes are so outrageous that society insists on adequate punishment because wrong doer deserves it, irrespective of whether it is deterrent or not.

14.2 Punishment must be severe enough to act as a deterrent but not too severe to be brutal. Similarly punishments should be moderate enough to be human but cannot be too moderate to be ineffective.

### 14.3 SENTENCING CONSIDERATIONS

14.3.1 Sentencing aspects that are relevant for consideration by courts are more or less laid down by courts all over the world except where the statute provides a minimum mandatory sentence. Factors that influence sentencing process have been clearly settled by a series of court pronouncements. For imposing substantial punishment many aspects are taken into account. Similarly for reducing the quantum, factors which mitigate are also taken into account. Therefore in the sentencing process both these factors are taken together.

14.3.2 Emmins in his On Sentencing (Martin Vasik ed) lists out various factors under the head of seriousness of offence which is the key concept. Several sub-heads indicate when the



seriousness of the offence is aggravated, where the victim is specially vulnerable that is where the offender takes advantage of a helpless person; a very young or very old or handicapped person. He also speaks of breach of trust. This arises in a case where somebody takes advantage of a person who is interested in his career or a person who abuses his office. A premeditated crime executed with professionalism also is an aggravation. Excessive violence, offences by a group or an offence committed by a person on bail for a particular crime which is prevalent in an area and causes public concern are all cited as aggravating factors. He also lists factors which mitigate the seriousness of the offence. Offence committed under grave provocation, offender acting in circumstances though they may not amount to a defence to decide culpability. Other factors listed by him are young age of offender, old age of offender, offender's previous character, clean record, where the offender has performed meritorious service, where the offender shows remorse, offender pleading guilty. Serious illness of the offender, effect of sentence on the family, passage of time after he committed the offence and trial are also germane and are extenuating factors. These are some of the criteria or guidelines according to Emmins which will have to weigh with a Judge who passes the sentence.

#### 14.4 NEED FOR SENTENCING GUIDELINES

14.4.1 The Indian Penal Code prescribed offences and punishments for the same. For many offences only the maximum punishment is prescribed and for some offences the minimum may be prescribed. The Judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity. Some Judges are lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge that exercises the discretion. In some countries guidance regarding sentencing option is given in the penal code and sentencing guideline laws. There is need for such law in our country to minimise uncertainty to the matter of awarding sentence. There are several factors which are relevant in prescribing the alternative sentences. This requires a thorough examination by an expert statutory body.

14.4.2 Although many countries have abolished death penalty in view of the increasing violence and deterrence having failed organised crime, terrorism, bomb blasts resulting in killing of innocent people etc., compel the retention of death sentence. Law Commission also states that time is not ripe for abolition of death sentence. Section 354 (3) Cr.P.C makes imprisonment for life the normal punishment and the same section requires that in case a death sentence is imposed, special reasons are to be given and the Supreme Court in Bachaan Singh's case held that in the rarest

of the rare case the same can be given and enumerated circumstances in which it should be granted and further in Macchi Singh's case they laid down some more requirements namely the manner of the murder, the motive for the commission of offence, the anti-social nature of crime, the magnitude of the crime and the personality of the victim such as innocent child and helpless woman or a victim over whom the murderer is in a position to dominate or the victim is a public figure.

14.4.3 The Law Commission in its 47<sup>th</sup> report says that a proper sentence is a composite of many factors, the nature of offence, the circumstances extenuating or aggravating the offence, the prior criminal record if any of the offender, the age of the offender, the professional, social record of the offender, the background of the offender with reference to education, home life, the mental condition of the offender, the prospective rehabilitation of the offender, the possibility of treatment or training of the offender, the sentence by serving as a deterrent in the community for recurrence of the particular offence.

14.4.4 Offenders also have to be classified as a casual offender, an offender who casually commits a crime, an offender who is a habitual, a professional offender like gangsters, terrorist or one who belongs to Mafia. There should be different kinds of punishments so far as the offenders are concerned. Similarly in fixing a sentence many factors are relevant, the nature of offence, the mode of commission of the offence, the utter brutality of the same, depravity of the mind of the man. Sentences contemplated by Section 53 of IPC are death, imprisonment for life, and forfeiture of property or fine.

14.4.5 Some times the courts are unduly harsh, sometimes they are liberal and we have already adverted to aspects which Supreme Court said are relevant in deciding as to what are the rarest of the rare cases for imposing death sentence and even in such matters uniformity is lacking. In certain rape cases acquittals gave rise to public protests. Therefore in order to bring about certain regulation and predictability in the matter of sentencing, the Committee recommends a statutory committee to lay guidelines on sentencing guidelines under the Chairmanship of a former Judge of Supreme Court or a former Chief Justice of a High Court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative.

## **14.5 NEED FOR NEW KINDS OF OFFENCES AND NEW TYPES OF PUNISHMENTS**

14.5.1 Different kinds of punishments are the need of the hour. Disqualification from holding public office, removal from the community etc. are some of the measures that should be introduced and not punishment in a prison. These punishments are not custodial in nature. Far reaching reforms have taken place in England and the year 2000 is a watershed and

enactments like the Powers of the Criminal Court Sentencing Act, 2000 modifying earlier laws were enacted introducing a whole range of new and novel punishments, postponement of sentencing, suspended sentence of imprisonment, supervision during suspension, community sentences, community rehabilitation order, financial penalties and reparation orders, parenting orders for children, confiscation order, disqualification orders etc., are many of the changes that have been brought out. Even in India under the Motor Vehicle's Act a disqualification for holding a license can be a part of punishment. Dismissal of a public servant from service for criminal misappropriation and breach of trust is an additional measure of punishment. Under the Representation of the People's Act there is disqualification in the event of proved electoral mal practices or on account of conviction.

14.5.2 In other words instead of conventional punishments enumerated in Sec.53 of the Penal Code which was enacted in 1860 nothing has been done to reform the system of punishment. The U.K. Powers of Criminal Courts Sentencing Act of 2000 contains general provisions regarding a community orders and community sentences and a curfew order, community rehabilitation order, a community punishment order, a community punishment rehabilitation order, a drug treatment and testing order, attendance order, a supervision order, an action plan order are all covered by the definition of community order and community sentences and monitoring of orders. These orders have certain limitations. Curfew orders are those by which a person convicted of an offence is required to remain at a place specified or different places on different dates. It is not custodial in nature. In a community rehabilitation order a convicted person may be kept under the supervision of a named authority to secure his rehabilitation or protecting the public from such an individual or to prevent further crime. In respect of sexual offenders or persons who have a mental condition or those who are drug addicts or addicted to alcohol various provisions have been enacted with a view to rehabilitate the individual, take him off the drugs or alcohol and enable him to live as a decent human being. Supervision orders and sentence orders are also treated as forms of punishments in addition to fines. The Power of Criminal Courts Sentencing Act, 2000 provides for a compensation order.

14.5.3 In Indian law, so far as the custodial punishments are concerned there are certain offences for which maximum term is provided and also provisions for mandatory minimum punishment Section 397, 398 IPC, PC Act, NDPS Act, PFA Act provide for mandatory minimum punishments. Since some of these offences are offences against society as a whole, against public health, against the safety or well being of society at large, such punishment should be retained.

14.5.4 IPC Amendment Bill of 1978 was the first attempt made to bring about certain changes in sentencing which remained static from the time IPC was enacted. Prior to this a

bill had been enacted in 1972 which suggested 3 new forms of punishment: Section 17(A) compensation for victims-14(8) and Public Censure 74(C). However, in 1978 externment as a form of punishment was rejected. Community service [74(A)], compensation to victims [74(B)] and Public Censure [74(C)] and disqualification for holding office 74(D) were proposed. Community Service is in vogue in many countries UK., USSR, Zimbabwe uses it. Recently Government of Andhra Pradesh has initiated a move to introduce the same. However, in community sentences certain restrictions regarding age etc are suggested. The accused must be less than 18 years.

14.5.5 The offence must be one for which the punishment by way of imprisonment must be less than 3 years. It is an alternative to punishment and there should be an upper and lower limit regarding duration of community service. The court should be satisfied about the suitability of the accused for carrying out the work.

14.5.6 Public censure under Section 74 (C) was provided for white-collar crimes. This was suggested as being in addition to punishment. Disqualification for holding office was proposed under Section 74(B). This is also an additional punishment applicable to holders of office and it is limited with respect to the position and also the period. Unfortunately after the abortive attempt in 1978 no endeavour was made to re-introduce the same and the law since 1870 remains static.

14.5.7 To ensure uniformity and to avoid and uncertainties legislation such as Criminal Courts Sentencing Act of 2000 which is in force in UK can be thought of so that predictability and uniformity in so far as "Sentencing" is concerned is assured. Section 78 of the English Act imposes limits on imprisonment and detention in young offenders institutions. Sections 79 & 80 provide for general restrictions on description and custody of sentences and length of sentences. Presenter reports are also to be looked into. Section 83 imposes certain restrictions on persons who are not legally represented.

To ensure uniformity and to avoid and uncertainties legislation such as Criminal Courts Sentencing Act of 2000 which is in force in UK can be thought of so that predictability and uniformity in so far as "Sentencing" is concerned is assured.

14.5.8 Sections 89, 90, 91, 93 and 94 provide for restrictions, periods of detention for persons below the age of 18 to 21 years. Suspended sentences, suspension orders, special enactments like Sex Offenders Act of 1997, are the changes brought out even in regard to a class of offences. Community orders and community sentences are applicable where there is no sentence fixed by law. They cover a wide range

such as curfew order, community rehabilitation order, and community punishment order. A Drug treatment order, an attendance centre order, a suspension order are part of the statutory changes.

14.5.9 Financial penalties taking into account the offenders' financial circumstances, and fixing of fines, remission of fines, compensation orders are provided. A review of compensation orders limits of fine to be imposed on the young offender and a direction to the parent or guardian to pay fines, compensation etc., are all fixed and statutorily regulated. Power to confiscate the property used for Crime is covered by Section 143 of Criminal Courts Sentencing Act of 2000. Forfeiture is also provided. We have Shram-dan, or NSS work which can be usefully introduced as part of sentencing. 'Janman-Bhoomi concept in vogue in Andhra Pradesh can be converted into a convicts wage to the community for the crime committed. All these clearly show the changes and the emerging pattern in sentencing and several other facts the aim of all of which is to bring about a psychological change in the accused, to have an impact on the mind so that the same may bring about certain reformation of the individual. It is time that with the advancement of science, medicine and human psychology we try to find out the etiology of the Crime in our country and to bring about legislation which introduces a whole range of new and innovative punishments some of which are enumerated in the preceding paragraphs.

## 14.6 PREPARING FOR EMERGING CHALLENGES

14.6.1 The last century has seen amazing change in the pattern of crime and the intensity and impact of the same on society. Terrorism has become global in nature, and the consequences of the same in terms of loss of life are phenomenal. Organised crime and its ramifications are global. Economic offences are transnational in operations and cyber crimes have no geographical limitation. Sexual offences, child abuse, drug trafficking, trafficking in

Terrorism has become global in nature, and the consequences of the same in terms of loss of life are phenomenal. Organised crime and its ramifications are global. Economic offences are transnational in operations and cyber crimes have no geographical limitation. Sexual offences, child abuse, drug trafficking, trafficking in women and child, pornography, hijacking of aircrafts are all crimes which have no limitations either in terms of space or geographical boundaries and the impact of same affects the entire society and the nation itself. Therefore the need to combat these emerging crimes, which are bound to increase in number and in frequency, will have to be addressed and tackled.

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impact of same affects the entire society and the nation itself. Therefore the need to combat these emerging crimes, which are bound to increase in number and in frequency, will have to be addressed and tackled. The existing laws are inadequate and therefore legislation and new policies of sentencing are the desideratum. Man's depredation of nature resulting in ecological imbalance, the concern for preservation of forests, wild life, compassion for the other living beings which are part of the Constitutional obligations have all resulted in new legislations being enacted. The increasing importance towards the end of the last century of human rights requires that punishments and sentencing should be consistent with Human Rights Jurisprudence. Rights of disadvantaged sections, gender bias, and sexual harassment in work places are all great concerns and elimination of all forms of discriminations are getting statutory protection and recognition.

14.6.2 While these are the challenges and the tasks that we face, the sentencing criteria that in vogue till now requires to be remedied and rectified as they are inadequate sometimes ineffective and do not take into account the human rights angle and do not provide adequate preventive and deterrent sentences to the new forms of crimes that have exploded consequent on the advancement of science and technology and the use of the same by criminals having ramifications which have cross-border implications. Though some new legislations have been passed every endeavour should be made to tackle and punish perpetrators of such crimes adequately. These are serious matters involving policy considerations.

14.6.3 This Committee is not asked to undertake a general review of the Indian Penal Code. That is a gigantic and time consuming task. The Committee has therefore restricted its attention to suggesting a few amendments in the context of the general reforms of the Criminal Justice System. The Committee is convinced that a comprehensive review of the Indian Penal Code is long over due and should be undertaken on a priority basis by a high power Committee. This is not an exercise to be carried out by only lawyers and Judges. Public men and women representing different walks of life and different school of thought, social scientists, politicians etc should be on such a Committee to recommend to the Parliament a better and progressive Penal Law for the Country. Hence, it is recommended that a Committee should be appointed to review the Indian Penal Code and to suggest creation of new kinds of offences, prescribing new forms of punishments and reviewing the existing offences and punishments.

## **14.7 ALTERNATIVE TO DEATH PENALTY**

14.7.1 Section 53 of the IPC enumerates various kinds of punishments that can be awarded to the offenders, the highest being the death penalty and the second being the sentence of

imprisonment for life. At present there is no sentence that can be awarded higher than imprisonment for life and lower than death penalty. In USA a higher punishment called “Imprisonment for life without commutation or remission” is one of the punishments. As death penalty is harsh and irreversible the Supreme Court has held that death penalty should be awarded only in the rarest of rare cases, the Committee considers that it is desirable to prescribe a punishment higher than that of imprisonment for life and lower than death penalty. Section 53 be suitably amended to include “Imprisonment for life without commutation or remission” as one of the punishments.

14.7.2 Wherever imprisonment for life is one of the penalties prescribed under the IPC, the following alternative punishment be added namely “Imprisonment for life without commutation or remission”. Wherever punishment of imprisonment for life without commutation or remission is awarded, the State Governments cannot commute or remit the sentence. Therefore, suitable amendment may be made to make it clear that the State Governments cannot exercise power of remission or commutation when sentence of “Imprisonment for life without remission or commutation” is awarded. This however cannot affect the Power of Pardon etc of the President and the Governor under Articles 72 and 161 respectively.

## **14.8 CONCERN FOR MOTHER**

14.8.1 The concern for the mother and the child and social issues like female foeticide, domestic violence organs transplantation etc. needs a total new approach in the matter of punishment. Pregnant women or women with child less than seven years of age if incarcerated, the trauma and impact of the same will have both on the mother and the child in life after prison cannot be ignored. Hence such cases of convicted pregnant women or the mother having young child below 7 years require human and humane approach and therefore house detention with sufficient safe guards to prevent escape must be thought of. There are modern gadgets used in U.S.A to ensure that House arrest orders are not disobeyed. Any violation can be detected by means of such a gadget. They can be used in India to respect the rights of the child.

## **14.9 NEED FOR REFORMS AND REVISION OF FINES**

14.9.1 So far as sentences of fine are concerned, time has come to have a fresh look on the amounts of fine mentioned in the IPC and the mode of recovery. As the law stands we have two classes of offences for which only fine can be imposed. Then there are offences for which fine can be imposed in addition to imprisonment. Further for non-payment of fine, imprisonment is also provided. So far as imprisonment in case of default of payment of



fine is concerned it is time that the same is done away with. In view of the acceptance that custodial sentences are only to be imposed in grave crimes there are many areas where correctional approach or community sentences etc., will have the desired effect.

14.9.2 Section 64 of the IPC should be amended and Sec. 65 which says that where in addition to imprisonment, fine is imposed as also punishment in default of the payment of fine imprisonment shall not exceed  $1/4^{\text{th}}$  of the sentence that may be fixed should also be deleted. Sec. 66, 67 should also be deleted as also 68 and 69 of the IPC and in all these crimes community services for specified periods should be prescribed.

14.9.3 The amount of fine as fixed in 1860 has not at all been revised. We live in an age of galloping inflation. Money value has gone down. Incomes have increased and crime has become low risk and high return adventure particularly in matters relating to economic offences and offences like misappropriation breach of trust and cheating. For all matters involving in money or money related crimes new legislations have also created offences, a case in point is Section 138 of the Negotiable Instruments Act where huge sums of money are involved, fine extending to twice the cheque amount can be imposed / levied. In matters of sentence of fine it is not desirable that the paying capacity of the rich criminal and that of the poor is taken into account.

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14.9.4 Further it is universally accepted that victims rights should not be ignored for the victim, he or she, pays a heavy price. Therefore from out of the fine imposed victim, is also to be compensated. Another aspect is the cost of living has to be taken into account. The provisions of Minimum Wages Act are applicable to many wage earners. Therefore in the organised sector or even in un-organised sector wages have gone up and then even the earning capacity of individuals has increased. Hence time has come when attention should be focussed on increasing the amount of fine in many cases. There are certain sections where Penal Code authorises the imposition of fine but the amount of fine is not mentioned. In such cases Sec. 63 of the IPC says where the sum is not indicated then the amount of fine may be unlimited but should not be excessive. When a fine is imposed and is not paid the court can prescribe default sentence of imprisonment. This may act harshly in some cases of genuine incapacity to pay. Therefore the Committee suggests that community service may be prescribed as an alternative to default sentence. In view of the circumstances enumerated the fine amounts should be

revised. Time has come when the amount of fine statutorily fixed under the Penal Code also should be revised by 50 times.

#### **14.10 COMPOUNDING/SETTLEMENT WITHOUT TRIAL**

**14.10.1** Plea-bargaining which has been implemented with a great deal of success in USA has to be seriously considered. The Supreme Court of United States has upheld the Constitutional validity and also endorsed that plea-bargaining plays a significant role in the disposal of criminal cases. The United States experiment shows that plea-bargaining helps the disposal of the accumulated cases and expedites delivery of Criminal Justice and the Law Commission of India in its 154<sup>th</sup> and 142<sup>nd</sup> reports adverted to the same. The Law Commission also observed that when an accused feels contrite and wants to make amends or is honest and candid to plead guilty in the hope that the community will enable him to pay the fine for the crime with a degree of compassion, then he deserves to be treated differently from the accused who seeks trial involving considerable time, cost and money and cost of the community.

The Committee suggests that community service may be prescribed as an alternative to default sentence. In view of the circumstances enumerated the fine amounts should be revised. Time has come when the amount of fine statutorily fixed under the Penal Code also should be revised by 50 times.

**14.10.2** The Law Commission in its 142<sup>nd</sup> report stated that it is desirable to infuse life into reformatory provisions embodied in Sec.360 CrPC and the Probation of Offenders Act which according to the Law Commission remained unutilised. Law Commission noted the advantages of plea-bargaining which ensures speedy trial with benefits such as end of uncertainty, saving of cost of litigation, relieving of the anxiety that a prolonged trial might involve and avoiding legal expenses. The Law Commission also noted that it would enable the accused to start a fresh life after undergoing a lesser sentence. Law Commission noted that about 75% of total convictions are the result of plea-bargaining in USA and they contrasted it with 75% of the acquittals in India. Law Commission also observed that certainly plea-bargaining is a viable alternative to be explored to deal with huge arrears of criminal cases. The same might involve pre-trial negotiations, and whether it is “charge bargaining” or “sentence bargaining” it results in a reduced sentence and early disposal.

**14.10.3** The Law Commission adverted to the views of the Indian Supreme Court in this regard but however stated that plea-bargaining can be made one of the components of the administration of the criminal justice and the only caveat that they entered is that it should be properly administered and they recommend that in cases where the imprisonment is less

than seven years and / or fine may be brought into schemes of things where plea bargaining should be there and they also stated that in respect of nature and gravity of the punishment quantum of punishment could be brought down but unlike in the United States, where plea bargaining is available for all the crimes and offences plea-bargaining in India should not be extended to socio economic offences or the offences against women and children.

14.10.4 As recommended by the Law Commission when the accused makes a plea of guilty after hearing the public prosecutor or the de facto complainant the accused can be given a suspended sentence and he can be released on probation or the court may order him to pay compensation to the victim and impose a sentence taking into account the plea bargaining or convict him for an offence of lesser gravity may be considered. Taking into account the advantages of plea-bargaining, the recommendations of the Law Commission contained in the 142<sup>nd</sup> report and the 154<sup>th</sup> report may be incorporated so that a large number of cases can be resolved and early disposals can be achieved. By no stretch of imagination can the taint of legalising a crime will attach to it. It should not be forgotten that already the Probation of Offenders Act gives the court the power to pass a probation order. Further the power of executive pardon, power of re-mission of sentences have already an element of not condoning the crime but lessening the rigour or length of imprisonment. In imposing a sentence for a lesser offence or a lesser period the community interest is served and it will facilitate an earlier resolution of a criminal case, thus reducing the burden of the court. Perhaps it would even reduce the number of acquittals for after prolonged trial it is quite possible that the case may end in acquittal. If the compounding offences is there in the statute even under old Cr.P.C. there is no reason why, when the accused is not let off but he is sentenced for a lesser sentence plea bargaining should not be included in the Criminal Justice System, so that the object of securing conviction and also reducing the period of trial can be achieved and reduced pendency can also be achieved in “one go”.

14.10.5 The Law Commission after thorough examination of the subject of plea-bargaining/compounding/settlement without trial has in its 142<sup>nd</sup> and 154<sup>th</sup> reports made detailed recommendations to promote settlement of criminal cases without trial. As the Committee is substantially in agreement with the views and recommendations of the Law Commission in the said reports it considers unnecessary to examine this issue in detail.

14.10.6 However, the Committee is of the view that in addition to the offences prescribed in the Code as compoundable with or without the order of the court there are many other offences which deserve to be included in the list of compoundable offences. Where the offences are not of a serious character and the impact is mainly on the victim and not on the values of the society, it is desirable to encourage settlement without trial. The Committee

feels that many offences should be added to the table in 320(1) of the Code of Criminal Procedure. The Committee further recommends offences which are compoundable with the leave of the court, may be made compoundable without the leave of the court. These are matters which should be entrusted to the Committee.

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## **RECLASSIFICATION OF OFFENCES**

### **15.1 NEED FOR CLASSIFICATION**

15.1.1 India inherited the present system of classification of offences from its colonial rulers more than 140 years back, in which the police are the primary enforcers of the law. Considering the nature of the impact of colonial law making, suffice it to say that it is time to reexamine and reframe the laws as appropriate to the twenty first century Indian society and its emerging complexities.

15.1.2 Many countries in the world have started their own initiatives in improving their domestic Criminal Justice Systems. England, USA and Australia are all in the process of charting out reforms. As societies continue to change, crimes become complex and new crimes emerge, it is imperative for India to work out a comprehensive Criminal Justice System, suited to the ethos of this country.

15.1.3 As the aim of the Committee is to make the Criminal Justice System just, efficient, speedy and cost-efficient, time has come to re-examine and re-define crime under the various laws in the Criminal Justice System to ensure that appropriate procedures will be available for different infringement of penal laws so that cases will be dealt with at a speed commensurate to the gravity of the infringement, with certainty in terms of time and punishment. For, what were considered serious crimes yesterday may not be so considered today. The matter is all the more urgent as the Criminal Justice System has virtually broken down

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under the weight of case burden and a thorough overhaul is essential to make it speedy, efficient as well as cost-effective.

15.1.4 If the Criminal Justice System were to increase its efficiency in rendering justice and become as quick as it is fair, it would restore the confidence of the people in the system. Towards this, it is necessary to not only re-classify crimes but re-classify them in such a manner that many of the crimes- which today take up enormous time and expense- are dealt with speedily at different levels by providing viable and easily carried out alternatives to the present procedures and systems. In brief, many infractions of the law which are classified as crimes today - and some considered serious, may not be so considered tomorrow.

## **15.2 CLASSIFICATION OF CRIMES/OFFENCES**

15.2.1 The basis for the classification of crime is that contained in the Indian Penal Code (IPC) and the Criminal Procedure Code (Cr.P.C). But, over a period of time, various statutes have been added with different provisions about evidence, burden of proof etc., and often, the crimes themselves are not of the kind covered in the IPC; in fact, many of the special laws relate to social inequities. All these have only added to the burden of work on the Criminal Justice System. Further, with the changing views of what constitutes crime all over the world and not just in India, unless there is a re-look at the classification also, it will be difficult to work out appropriate prevention and detention strategies for different kinds of offences which are now clubbed together as crime. Under the Code, offences are broadly classified into four categories as indicated in the following paragraphs.

## **15.3 Cognizable Offences**

15.3.1 Cognizable offences are offences for which a police officer may arrest without warrant and without the orders of a magistrate. In non-cognizable offences, a police officer cannot, in general, arrest a suspect without warrant or without the orders of a magistrate. The police officer can entertain only cognizable offences and the victim of a non-cognizable offence has to move the court with a complaint. This distinction deserves to be done away with.

15.3.2 Offences are classified as bailable and non-bailable: A bailable offence is one in which the accused has a right to be released on bail. In a non-bailable offence, the court can refuse bail to the accused.

## **15.4 Summons and Warrant Cases**

15.4.1 Summons cases relate to offences punishable with either only a fine or with imprisonment not exceeding two years. All other cases are called warrant cases.

## **15.5 Compoundable and Non-compoundable offences**

15.5.1 Compoundable offences are offences that can be compounded with or without the permission of the court. Non-compoundable offences, naturally, are those that cannot be compounded.

15.5.2 The source for determining the category under which an offence falls is available in the First Schedule of the Code.

## **15.6 SENTENCING POWERS OF COURTS**

1. The High Court may pass any sentence authorised by law;
2. The Sessions Judge or the Addl. Sessions Judge may pass any sentence authorized by law but a death sentence passed by the Judge has to be confirmed by the High Court;
3. The Assistant Sessions Judge may pass any sentence except for death sentence or life imprisonment or imprisonment of over 10 years;
4. The Chief Judicial magistrate and Chief Metropolitan Magistrate can pass sentence under 7 years imprisonment;
5. Judicial Magistrates First Class and Metropolitan Magistrates can pass sentence upto 3 years or a fine upto Rs 5000/- or both;
6. Judicial Magistrates II Class can sentence upto 1 year and a fine of upto Rs 1000/- or both.

15.6.1 Thousands of cases are pending before different criminal courts. Once the process is set into motion, the difference between serious offences and petty offences is lost and undifferentiated. This in effect, is the problem. Reclassifying of offences makes no sense in isolation; it has to be accompanied by suitable change in procedures.

15.6.2 The concept or understanding of crime is changing with changes in our Society. Under our existing system, all crimes are treated alike. This is inadequate and



inappropriate for dealing with new emerging crimes like, for example, cyber crimes, financial crimes or crimes of terror;

15.6.3 Clubbing all existing crimes together procedurally is not sound nor does it work. Some crimes may be of a correctional nature, some petty and many may really form part of social welfare legislation. These need to be reclassified, put into separate categories so that the law enforcement systems can attend to the more serious crimes, which it is intended to handle;

Clubbing all existing crimes together procedurally is not sound nor does it work. Some crimes may be of a correctional nature, some petty and many may really form part of social welfare legislation.

15.6.4 The only agency, which bears the brunt of investigation of crimes, is the police force. The police is understaffed, overworked, ill equipped and certainly cannot meet the demands placed upon it. Reclassification and removal of legal infractions from them so that they can be dealt with by other agencies, will contribute to greater efficiency of the Criminal Justice System.

15.6.5 The nature of crimes and the way to deal with them calls for a multi-disciplinary approach. Social, psychological and economic causes contribute to the occurrence of crime and, therefore these causes must be borne in one's mind in dealing with crimes. The corrective/punitive measures required to deal with them will need to be worked out;

The nature of crimes and the way to deal with them calls for a multi-disciplinary approach. Social, psychological and economic causes contribute to the occurrence of crime and, therefore these causes must be borne in one's mind in dealing with crimes.

15.6.6 Cost is an important reason for re-classifying crime. Of course, there is an economic cost, borne by the State ultimately and in many cases, by the victim of the crime. There are also other costs – time, efficiency and lastly, social costs. An efficient

reclassification will automatically bring down all these costs.

15.6.7 In brief, reclassification will, to a large extent address and remedy the lacunae of the present Criminal Justice System.

15.6.8 Thus the need to reclassify crime today is both urgent and compelling. Offences range from the most heinous crime such as murders to a minor offence of appearing in a public place in drunken state. The result is that individuals once they are convicted for a

minor offence get labeled as criminals and this stigma makes it difficult for them to get jobs and even a chance to reform and become useful members of Society. Where such persons are sent to jail, they often come under the influence of hardened criminals and gravitate towards a life of crime. This is one of the reasons for suggesting fine and not imprisonment as the only punishment in respect of large number of minor offences. This logic equally applies to increasing the number of compoundable offences which while satisfying the victim do not affect societal interests.

15.6.9 Relevant factors are the following: -

- ?? Nature of the offence;
- ?? Degree of violence;
- ?? Extent of injury to the victim
- ?? Extent of damage to property;
- ?? Impact on the society;
- ?? Any discernible behaviour pattern in commission of the offence;
- ?? Whether alternative methods of dispute resolution like compounding or settlement would be adequate.
- ?? Whether the victim should be compensated monetarily;
- ?? The punishment prescribed by law for the offence and whether that is appropriate to the act.

15.6.10 Taking into consideration the above factors, it should be decided whether for each of the offences the accused should be inflicted punishment of fine or imprisonment, whether the accused should be arrested or not, whether the arrest should be with or without the order of the court, or whether the offence should be bailable or not and whether the offence should be compoundable or not and if compoundable, whether with or without the order of the court.

15.6.11 As is done in some countries it may be considered to classify the offences into three Codes namely (1) The Social Welfare Offence Code (2) The Correctional Offence Code, (3) The Criminal Offences Code and (4) The Economic and other Offences Code.

15.6.12 A Social welfare offences Code would include offences that are social in origin or nature and cover offences that might be prevented through awareness programmes. For such offences community service is preferred to jail sentence.

15.6.13 The Correctional offences Code would include non-cognizable offences that are punishable with less than 6 months imprisonment, which need not be considered as crimes.

They are considered as “correctional” offences for which fine is the only punishment to be paid to the victim or state as case may be, or through counseling. All these offences are not arrestable.

15.6.14 The Criminal Offences Code would include all major/grave offences involving violence. Basically, this would really be the “crime” part of the offences. The enforcement agency would be the police and punishment will be imprisonment and fine. All the offences that fall within this category will be arrestable and mostly non-compoundable.

15.6.15 The Economic and other Offences Code would include all economic offences, like tax fraud, money laundering, stock market scams and also offences like cyber crimes, intellectual property violations etc. Although these are all clubbed together here, they will still require specialized, separate agencies that are responsible for dealing with them. Punishment will again have to, perhaps, be a combination of punitive fines and jail and community service. As reclassification into four codes discussed above is an important policy matter that requires greater and in depth study.

15.6.16 The Committee has made several recommendations for modification of some of the fundamental principles governing the Criminal Justice System and for improving the performance of the functionaries of the Criminal Justice System, namely the investigation, prosecution and the judiciary. Over the years crime scenario has changed enormously. Terrorism, Organised crimes, Economic crimes and several other new kinds of crimes have thrown serious challenges to the system. The law breakers appear to be emerging stronger than the law enforcing agency. The Indian Penal Code was enacted in the year 1860, the Evidence Act was enacted in the year 1872 and the Code of Criminal Procedure which was enacted in the year 1898 was replaced by the new Code in the year 1973. These laws enacted long back are now found to be inadequate to meet the new challenges. People are losing faith and are rightly demanding stronger laws and greater functional efficiency of the System. Hence there is a need of review all these laws. This is not an exercise to be carried out only by lawyers

The Committee recommends a comprehensive review of the Indian Penal Code, the Evidence Act and the Criminal Procedure Code by a broad based Committee representing the functionaries of the Criminal Justice System, eminent men and women representing different schools of thought, social scientists and vulnerable sections of the society to make recommendations to the Parliament for stronger and progressive laws for the Country.

and judges. They involve important policy considerations such as Problems of National Security and interests of different sections of the society more particularly of Women, Children and other weaker sections of the Society. Hence the Committee recommends a comprehensive review of the Indian Penal Code, the Evidence Act and the Criminal Procedure Code by a broad based Committee representing the functionaries of the Criminal Justice System, eminent men and women representing different schools of thought, social scientists and vulnerable sections of the society to make recommendations to the Parliament for stronger and progressive laws for the country.

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## **OFFENCES AGAINST WOMEN**

### **16.1 MAINTENANCE OF WIVES, CHILDREN AND PARENTS: SECTION 125 CR.P.C**

16.1.1 Section 125 of the Code provides for giving maintenance to the neglected wife, child etc. The object is to prevent starvation and vagrancy by compelling the person to perform the obligation which he owes in respect of his wife, child, father or mother who are unable to support themselves.

16.1.2 A woman in a second marriage is not entitled to claim maintenance as in law a second marriage during the subsistence of the first marriage is not legal and valid. Such a woman though she is de facto the wife of the man in law she is not his wife. Quite often the man marries the second wife suppressing the earlier marriage. In such a situation the second wife can't claim the benefit of Section 125 for no fault of hers. The husband is absolved of his responsibility of maintaining his second wife. This is manifestly unfair and unreasonable. The man should not be allowed to take advantage of his own illegal acts. Law should not be insensitive to the suffering of such women. Therefore the Committee suggests that the definition of the word 'wife' in Section 125 should be amended so as to include a woman who was living with the man as his wife for a reasonably long period, during the subsistence of the first marriage.

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### **16.2 MARRYING AGAIN DURING LIFE TIME OF HUSBAND OR WIFE- SECTION 494 IPC**

16.2.1 Bigamy is made an offence under Section 494 IPC. The second marriage is void by reason of it taking place during the subsistence of the first marriage. In other words it would be bigamy only when the marriage is otherwise valid.

In AIR 1965 S.C. 1564 Bhan Rao

Shankar Lokhande vs. State of Maharashtra and AIR 1966 S.C. 619 Kunwal Ram Vs. State of Himachal Pradesh, the Supreme Court has held that in order to attract Section 494 IPC the prosecution has to prove that the second marriage was validly performed as per the customary rights of either party under their personal laws. If there is any lapse in following the customary rules, the second marriage would be regarded as void. It is not always easy to prove long after the marriage that all the rituals were duly performed. Thus the second wife will be denied the right to receive maintenance. To overcome these practical difficulties a suitable provision be incorporated to the effect that if the man and the wife were living as husband and wife for a reasonably long period they shall be deemed to have married in accordance with customary rites of either party thereto. This shall be rebuttable presumption and the finding shall not be binding in civil proceedings.

### 16.3 ADULTERY: SECTION 497 IPC

16.3.1 A man commits the offence of adultery if he has sexual intercourse with the wife of another man without the consent or connivance of the husband. The object of this Section is to preserve the sanctity of the marriage. The society abhors marital infidelity. Therefore there is no good reason for not meeting out similar treatment to wife who has sexual intercourse with a married man.

16.3.2 The Committee therefore suggests that Section 497 I.P.C should be suitably amended to the effect that “whosoever has sexual intercourse with the spouse of any other person is guilty of adultery.....”.

### 16.4 CRUELTY BY HUSBAND OR RELATIVE OF HUSBAND – SECTION 498 OF IPC

16.4.1 This provision is intended to protect the wife from being subjected by the husband or his relatives to cruelty. Cruelty for the purpose of this Section means willful conduct that is likely to drive the woman to commit suicide or cause grave injury or damage to life, limb or health, mental or physical. It also includes harassment by coercing to meet unlawful demands. This is a very welcome measure. But what has bothered the Committee are the provisions which make this offence non-bailable and non-compoundable.

16.4.2 The woman who lives with the husband and his family after marriage is expected to receive affection and caring and not cruelty and harassment. True to the Indian tradition the woman quietly suffers without complaining, many inconveniences, hardships and even insults with the sole object of making the marriage a success. She even tolerates a husband with bad habits. But then, when her suffering crosses the limit of tolerance she may even



commit suicide. For the Indian woman marriage is a sacred bond and she tries her best not to break it. As this offence is made non-bailable and not compoundable it make reconciliation and returning to marital home almost impossible.

16.4.3 If the woman victim lodges an F.I.R alleging commission of offence under Section 498A, her husband, in-laws and other relatives of the husband would be arrested immediately. If she has no independent source of income she has to return to her natal family where also support may not be forthcoming. Her claim for maintenance would be honoured more in default than in payment especially if the husband has lost his job or suspended from his job due to the arrest. Where maintenance is given, it is often a paltry sum. (Thus the woman is neither here nor there. She has just fallen from the frying pan into the fire.) Even when there is a divorce, or reconciliation, the criminal case continues as Section 498A is non compoundable.

16.4.4 In less tolerant impulsive woman may lodge an FIR even on a trivial act. The result is that the husband and his family may be immediately arrested and there may be a suspension or loss of job. The offence alleged being non-bailable, innocent persons languish in custody. There may be a claim for maintenance adding fuel to fire, if the husband cannot pay. She may change her mind and get into the mood to forget and forgive. The husband may realize the mistakes committed and come forward to turn a new leaf for a loving and cordial relationship. The woman may like to seek reconciliation. But this may not be possible due to the legal obstacles. Even if she wishes to make amends by withdrawing the complaint, she can not do so as the offence is non compoundable. The doors for returning to family life stand closed. She is thus left at the mercy of her natal family.

16.4.5 This section, therefore, helps neither the wife nor the husband. The offence being non-bailable and non-compoundable makes an innocent person undergo stigmatization and hardship. Heartless provisions that make the offence non-bailable and non-compoundable operate against reconciliations. It is therefore necessary to make this offence (a) bailable and (b) compoundable to give a chance to the spouses to come together.

## 16.5 RAPE: SECTION 375 OF IPC

16.5.1 Offence of Rape is defined in Section 375 of the I.P.Code in the following terms:

A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: -

Firstly – Against her will.

- Secondly – Without her consent.
  - Thirdly – With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
  - Fourthly – With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
  - Fifthly – With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
  - Sixthly – With or without her consent, when she is under sixteen years of age’.
- Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
- Exception: Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

16.5.2 It is clear from this provision that it is sexual intercourse with a woman under circumstances falling under any of the six of the descriptions given in the Section that constitutes an offence of rape. Normal sexual intercourse with voluntary consent of the woman above sixteen years of age is not an offence. The explanation to the Section says that penetration is sufficient to constitute the sexual intercourse. There is no definition of rape or sexual intercourse. The explanation only indicates the point of time or stage in the sexual act that is sufficient to make the sexual act an offence of rape.

16.5.3 ‘Sakshi’ a leading women’s N.G.O. has filed W.P.Criminal 33 of 1997 against the Union of India praying that the offence of Rape defined under Section 375 of the I.P.Code should be interpreted to include all other forms of forcible penetration including penile/oral, object or finger/vaginal and object or finger/anal. On that question the Supreme Court has sought the views of this Committee. The considered opinion of the Committee to the Supreme Court is that such an interpretation is not reasonable. As the opinion has to be sent to the

Supreme Court the same is not discussed here. However the Committee is convinced that such acts constitute serious invasion of the precious rights of the woman and should be punishable with adequate sentence.

16.5.4 The Committee therefore recommends that other forms of forcible penetration including penile/oral, penile/anal, object or finger/vaginal and object or finger/anal should be made a separate offence prescribing punishment broadly on the lines of Section 376 of IPC.

## 16.6 RAPE AND DEATH PENALTY

16.6.1 There have been several shocking instances of rape that have given rise to the feeling that death penalty should be prescribed as a punishment for the offence of rape so that it acts as an effective deterrent. However international opinion is steadily emerging in favour of abolition of death penalty. The Supreme Court of India has ruled that in respect of serious offences of murder imprisonment for life should be the normal punishment and that it is only in rarest of rare cases that death penalty should be imposed. Those who are pleading for death penalty for the offence of rape feel that the punishment now prescribed has failed to have a deterrent effect. The view to the contrary is that the remedy should not be worse than the disease. Death penalty is irreversible. Any erroneous decision would lead to disastrous consequences. Judges are therefore likely to expect a much higher standard of proof. This may result in further lowering the rate of conviction. Besides if the rapist knows that rape carries death penalty he may be tempted to kill the victim so that she will not be available to give evidence against him. After giving its anxious consideration to all aspects and in particular the interest of the victim, the Committee is not persuaded to recommend death penalty for the offence of rape. Instead the Committee recommends sentence of imprisonment for life without commutation or remission.

16.6.2 What really acts as a deterrent is certainty of conviction and not the quantum of punishment that can be imposed. Unfortunately, large number of cases relating to offences of rape end in acquittals. Besides they take a long time for disposal. Therefore what is necessary is to expedite investigation and trial of cases involving offences of rape and other sexual offences against women. In Bangladesh, Prevention of Atrocities against women and Children Act 18 of 1995 has been enacted which provides that investigation and trial of rape cases should be completed within 90 days. The Committee therefore recommends that so far as offences of rape and other sexual offences against women are concerned, a suitable provision should be made requiring the investigation agency to complete the investigation within the prescribed time and for the court to dispose of such cases on priority basis within a period of four months.

16.6.3 Many rape victims do not take steps for prosecution of the victim because of the humiliating and agonizing treatment they are subject to when they give evidence in the court. Lawyers go on asking questions about the character, antecedents, behaviour and reputation of the victim and about sexual acts related to rape which is a dreadful and shameful experience to the woman. Many Judges do not regulate the cross-examination being utterly insensitive to the feelings, reputation and image of the victim. The Committee welcomes the recent amendment to section 146 of the Evidence Act by which cross-examination of the prosecutrix as to her general immoral character in a case for prosecution for rape or attempt to commit rape is prohibited. There is therefore need for specialized training of Judges trying rape cases and to instill in them sensitivity to the feelings of the victims.

#### 16.7 FIRST INFORMATION REPORT

16.7.1 It is a matter of common knowledge that women in India are quite reluctant to disclose even to their dear and near ones that they were victims of rape partly because of the shame, apprehension of being misunderstood and fear of consequences besides her deeply traumatized and confused state of mind. This often contributes to delay in lodging FIR. Unexplained delay in submitting the FIR often proves fatal to the prosecution. The Committee therefore suggests that a suitable provision be incorporated in the Code fixing a reasonable period for presenting FIR in such cases.

## **ORGANISED CRIME**

17.1 *The Encyclopaedic Law Dictionary* defines crime as "an act or omission which is prohibited by law as injurious to the public and punished by the State".? Certain kinds of wrongs are considered as of a public character because they possess elements of evil which affect the public as a whole and not merely the person whose rights of property or person have been invaded. Such a wrong is called a crime. It can best be defined as any act of omission which is forbidden by law, to which the punishment is annexed, and which the State prosecutes in its own name.

17.2 Crime, in social or non-legal terms, is that "it is behaviour or an activity that offends the social code"? . It has also been defined as an "anti-social act".?

17.3 Organised crime, in the backdrop of the legal and non-legal definitions, is far graver in nature as it is a "non-ideological enterprise"? which functions as a "continuing enterprise that rationally works to make a profit through illegal activities"? and is marked by a "distinguishing component" "within the term itself, mainly, organization"? . Alan Block suggests that "organised crime is part of a social system in which reciprocal services are performed by criminals, their clients and politicians."? Thus organised crime is not just a manifestation of deadly gangsterism but a "manifestation of criminals consolidated to commit several crimes in pursuance of conspiratorial deliberations".? The California Control of Profits of OC Act finds it of "conspiratorial nature and which seeks to supply illegal goods and services such as narcotics, prostitution, loan sharking, gambling and pornography, or that, through planning and coordination of individual efforts, seeks to conduct the illegal activities of arson from profit, hijacking, insurance fraud, smuggling, operating vehicle theft ring". It maximises profits by and through illegal services. It is also not to be equated with professional crime as it may encompass a series of inter-twined and inter-dependant professional crimes. The concept of organised crime as a myriad of mostly clandestine, diverse and complex activities, in the historical perspective focuses on "equating organised crime with ethnically homogenous" groups which was not accepted by the Federal Bureau of Investigation but, in contrast, the Federal Bureau of Narcotics stirred the American nation

by their testimony that led the Kefauver Committee to assert the existence of Mafia in the U.S.A.

17.4 On the perception of organised crime during the last 80 years, Klaus Von Lampe perceives that "organised crime has evolved from an integral facet of big-city life to an assortment of global criminal player who challenge even the most powerful countries like the United States".

17.5 The United Nations recognised the adverse effect of the organised crime as a serious social pathology and its impact on economy of any nation and resultantly on the global economy. It underscored the social pathologies flowing from it and, accordingly, deliberated on the issue of the Trans-Border organised crime and has concluded a convention under which strict measures have been suggested. The definition of organised crime in the convention is as follows:

Organised Criminal group shall mean a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established pursuant to this Convention, in order to obtain, directly, or indirectly, a financial or other material benefit.

17.6 By resolution 53/111, of 9th December 1998, the General Assembly established an Ad Hoc Committee open to all States, for the purpose of elaborating an international convention against transnational organised crime and three additional international legal protocols. The Convention was adopted after considerable debate in 1999 and 2000.

17.7 The Convention represents a major step forward in the fight against transnational organised crime, and signified the recognition of U.N. member states that this is a "serious and growing problem" which can only be solved through close international cooperation. The Convention, concluded at the 10th session of the Ad Hoc Committee established by the General Assembly to deal with this problem, is a legally-binding instrument committing States which ratify it to taking a series of measures against transnational organised crime. These include the creation of domestic criminal offences to combat the frameworks for mutual legal assistance, extradition, law-enforcement cooperation and technical assistance and training. In its fight against organised crime with international ramifications, the States rely on one another in investigating, prosecuting and punishing crimes committed by organised criminal groups. The Convention makes difficult for offenders and organised criminal groups to take advantage of gaps in national law, jurisdictional problems or a lack



of accurate information about the full scope of their activities.

17.8 The Convention deals with the fight against organised crime in general and some of the major activities that transnational organised crime is commonly involved in, such as money-laundering, corruption and the obstruction of investigations or prosecutors.

To supplement this, two Protocols also tackle specific areas of transnational organised crime which are of particular concern to U.N. member states.

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17.9 The Protocol against the Smuggling of Migrants deals with the growing problem of organised criminal groups which smuggle migrants, often at high risk to the migrants and at great profit for the offenders.

17.10 The Protocol against Trafficking in Persons deals with the problem of modern slavery, in which the desire of people to seek a better life is taken advantage of by organised criminal groups. Migrants are often confined or coerced into exploitative or oppressive forms of employment, often in the sex trade or dangerous occupations, with the illicit incomes generated going to organised crime. The Protocols also commit countries which ratify them to making the basic subject of the Protocol a criminal offence, and to adopting other specific measures, such as controls on travel documents, to combat the problem. These supplement the more general measures found in the Convention, and countries must become parties to the Convention itself before they can become parties to any of the Protocols. A third Protocol, dealing with the illicit manufacturing of and trafficking in firearms, parts and components, and ammunition, remains under discussion.

#### 17.11 UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME AND SUPPLEMENTARY PROTOCOLS

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime.

Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organised Crime.



Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organised Crime.

17.12 The Convention also aims to tackle the root cause of transnational crime-profit and includes strong measures that will allow law enforcers to confiscate criminal assets and hit money laundering network. Protection of witnesses will be the prime tool for dealing with organised crime promoters and beneficiaries.

17.13 India became a signatory to the U.N. Convention against Transnational Organised Crime and its three supplementary Protocols referred to above on December 12, 2002.

#### **17.14 BRITAIN**

17.14.1 In Britain, the law enforcement agencies are of the view that the battle against organised crime has been lost. For this, Sir David Phillips, Chief Constable of Kent and a leading member of the Association of Chief Police Officers blames Britain's archaic Criminal Justice System and "the culture of modern lawyers who do not fight cases on the evidence, but on legal technicalities." Radical changes in law have been demanded or crime would continue to rise. The Police in Britain have been advocating changes in law which would force the defence to reveal as much of its case before trial as the prosecution must reveal the other way. It has been acknowledged in Britain that the present law is wholly inadequate in dealing with organised crime. It takes massive Police resources to bring a case only to find that people escape not "on the balance of evidence, but on technicalities". There has been an apprehension that the British Government have no real response to organised crime.

#### **17.15 GERMANY**

17.15.1 Germany on account of its geographical location in the heart of Europe, was significantly affected by organised crime. The free movement of people across the border of Germany with France, Belgium, Luxembourg, Netherlands and Austria, organised crime presenting its own challenges to the German States and Society. The German Government responded by taking measures to combat organised crime at both national and international level.

17.15.2 They concluded that organised crime is most prevalent in areas of criminal activity

with a guarantee of large criminal profits and, at the same time, a lower risk of discovery due to two reasons:

- (i) there are no direct victims; and
- (ii) the victims are unwilling to testify in court.

17.15.3 For the resolute suppression of organised crime, Germany enacted legislations for suppression of drug, trafficking and other manifestations of organised crime Money Laundering Act, Aliens Act with telephone monitoring for the purposes of criminal proceedings and strengthened other criminal laws.

## 17.16 ORGANISED CRIME IN INDIA

17.16.1 Contrary to popular belief, Organised Crime as continuing illegal activity of the members of a highly organised, disciplined association, engaged in supplying illegal goods and services, is not a recent phenomenon in India. The private '*senas*' in some parts of the country are reminiscent of private army of *lathaits* and *paiks* maintained by the landlords of yore. With their help, revenue rents were collected and land of the poor grabbed. Untold atrocities were the order of the day and retribution visited upon those hapless have-nots of society who did not fall in line. Gangs of robbers and dacoits, some of whom acquired a Robinhood like image, have also existed for centuries. In the erstwhile Bombay, Governor Aungier raised a militia of local Bhandari youths to deal with organised street-level gangs that robbed sailors in 1669.

17.16.2 Thuggee as an organised illegal activity on the G.T. Road flourished in Central India till the 19th century with armed gangs of thugs, masquerading as pilgrims or wayfarers, winning the confidence of unsuspecting travellers, before looting and murdering them. The British Government deputed Sir William Sleeman to eradicate the menace. Sleeman launched his legendary campaign between 1831 and 1837 and crushed the thuggee forever.

17.16.3 Organised Crime in its present avatar began at Mumbai after independence with the introduction of prohibition, which gave rise to a

Organised Crime in its present avatar began at Mumbai after independence with the introduction of prohibition, which gave rise to a thriving and lucrative clandestine trade in illicit liquor. Bootlegging not only attracted the covetous attention of hitherto loosely organised street level gangs but also gave rise to syndicate type of illicit activity.

thriving and lucrative clandestine trade in illicit liquor. Bootlegging not only attracted the covetous attention of hitherto loosely organised street level gangs but also gave rise to syndicate type of illicit activity. Slums are generally regarded as the breeding ground of anti-social elements. These elements, in organization with like minded people, started drug related offences, grabbing of land in towns, cities and Government land in rural areas, boot-legging, immoral trafficking etc. With the passage of time, the anti-social elements could strike terror in an organised manner anywhere, any time, at their own sweet will. The problem was first felt by the Government of Maharashtra, particularly, in and around Mumbai. In order to tackle the feeling of insecurity created by them among the general public, the Government of Maharashtra, in 1981, enacted the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-offenders and Dangerous Persons Act, 1981 to deal with slumlords who have been taking illegal possession of public or private lands and constructing illegal structures, selling and leasing them out at exorbitant prices, rents, compensation and other charges. Criminal intimidation was the key to their activities and often evicted or threatened to evict the occupiers by force, without resorting to lawful means.

17.16.4 The bootleggers, directly or through their agents, illegally distil, manufacture, transport, sell or distribute liquor, intoxicating drugs and other intoxicants, which have injurious effect on public health and pose a grave danger to the Society. Bootlegging has become a lucrative business and an important source of acquiring tremendous money power, enabling them to hold the community to ransom.

17.16.5 The drug-offenders manufacture, import, export, sell or distribute drugs and cultivate plants for preparing intoxicants in contravention of the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985. These drug-offenders have been a serious threat to public health and a grave danger to life, as well as adversely affecting the public order.

17.16.6 Further, notorious criminals in illegal possession of arms, including fire arms, ammunitions, explosives and explosive substances, have formed into organised gangs and have been indulging in killings, arson, looting, extortion and other heinous crimes. These gangs have been creating serious problems of public disorder in the country through gangsterism and terrorism. These gangsters operate in nexus with anti-national elements and, with their money power, fund terrorism in the country. It was only a matter of time before the gangs, which took to bootlegging, became larger, more powerful and affluent, as well as influential. The seeds of organised criminal activity sown in Mumbai city, was emulated in different parts of the country. Today, Organised Crime is extensive in its network, often transcending national boundaries, and using the most high-tech communication systems, transport, arms and so on.

17.16.7 The fact that Organised Crime in India is rampant and is on the rise does not require much debate. Extortions, kidnappings for ransom, gun running, illicit trade in women and children, narcotic trade, money laundering, using the hawala network, every conceivable kind of cheating and fraud, bank scams and other forms of organised economic crime not only spreads a sense of insecurity in the mind of a common man but also drains the country of thousands of crores of rupees. What gets reported and investigated by the Law Enforcement Agencies is only

a minuscule percentage of the overall quantum of organised criminal activity. Though Organised Crime has originated at Mumbai, its tentacles have spread to other parts of the country. Their vice-like grip over illegal and evil activities of mafia in coal, timber, sandalwood, lottery, real estate, tender, have not received media attention they deserved. However, what has been most disturbing is the inroad Organised Crime has made into the political sphere in the country. Over a period

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of time, the political ambitions of persons with known criminal background started seeking public and elective offices where once they would hesitated to ask for a ticket for elections from any party. Indian political parties, irrespective of ideological hue and complexion cannot disclaim responsibility for induction of criminals into the election processes. The criminals' support the political parties in all possible ways to either continue in or to assume power. Politicians not only hire anti-social elements to assist them in elections by booth-capturing or any other subversive means but also to eliminate their rivals. Murders of political workers, activists etc. by political rivals are assuring serious propositions. The bonding between political parties and Organised Crime is complete.

17.16.8 The nexus between crime and politics has permeated so far and wide that the Government established a Committee "to take stock of all available information about the activities of crime syndicates/ Mafia organizations which had developed links with and were being protected by Government functionaries and political parties." (Vohra Committee Report). The concern by the country over the nexus between criminals, politicians and

bureaucrats, visible since 1986 in particular, was activated by the serial bomb blasts of Bombay. The Vohra Committee observed:

An organised crime Syndicate/Mafia generally commences its activities by indulging in petty crime at the local level, mostly relating to illicit distillation/gambling/organised satta prostitution in the larger towns. In port towns, their activities involve smuggling and sale of imported goods and progressively graduate to narcotics and drug trafficking. In the bigger cities, the main source of income relates to real estate – forcibly occupying lands/buildings, procuring such properties at cheap rates by forcing out the existing occupants/tenants etc. Over time, the money power thus acquired is used for building up contacts with bureaucrats and politicians and expansion of activities with impunity. The money power is used to develop a network of muscle-power which is also used by the politicians during elections.

CBI has reported that all over India crime Syndicates have become a law unto themselves. Even in the smaller towns and rural areas, muscle-men have become the order of the day. Hired assassins have become a part of these organizations. The nexus between the criminal gangs, police, bureaucracy and politicians has come out clearly in various parts of the country. The existing Criminal Justice System, which was essentially designed to deal with the individual offences/crimes, is unable to deal with the activities of the Mafia; the provisions of law in regard to economic offences are weak; there are insurmountable legal difficulties in attaching/confiscation of the property acquired through Mafia activities.

## **17.17      LEGISLATION TO COMBAT ORGANISED CRIME**

17.17.1      The National Security Act, 1980 was enacted by the Parliament to provide for preventive definition, *inter alia*, for preventing persons from acting in any manner prejudicial to the maintenance of public order. The provisions of the Act are so general in character that it is difficult to bring effectively mobsters engaged in organised crime and their activities within its purview. It is difficult to establish nexus between the activities of these elements and the public order within the meaning of the expression "activities prejudicial to the maintenance of public order". National Security Act uses the expression "public order" but does not define it.



17.17.2 The Government has referred the question of legislation for confiscation of properties and assets of criminal and mafia elements to the Committee. Affiliate to crime syndicate/mafia gangs grab a large number of properties of helpless individuals by not only deceitful and fraudulent means but also arm-twisting, extortion and threat to life. The uniform pattern is that a criminal, with enormous financial and political clout, intimidates old aged persons, single women and helpless individuals and makes them execute transfer documents of their properties, under duress, after grabbing their premises. Because of wrongful confinement, assault and criminal intimidation, fear and terror is created among victims by using underworld connections resulting in the genuine owners of properties feeling insecure in lodging complaints with law enforcing agencies.

17.17.3 While investigating the cases connected with the properties usurped by a gangster or underworld criminal, the investigation gets hamstrung as it is observed that the existing legal framework (i.e. procedural laws including section 102 of the Code of Criminal Procedure, 1973) is inadequate for seizing/ attaching properties gained under duress or intimidation or fraudulent means. There is no express legal provision akin to Criminal Law (Amendment) Ordinance, 1944 which provides for attachment of illegally acquired properties of public servants. The forfeiture of properties of the persons convicted of any offence under that TADA and/or POTA 2002 is provided while NDPS Act provides forfeiture of properties in certain cases. The Special Courts (Trial of Offence Relating to Transactions in Securities) Act, 1992 empowers the Central Government to appoint one or more "custodian" who is authorized to notify any person in the official gazette involved in any offences relating to transactions in securities and any property – movable or immovable or both – belonging to any person so notified stands attached simultaneously with the issue of the notification.

17.17.4 The existing provision in the Code of Criminal Procedure, 1973 empowers a police officer to seize any property which may be alleged or suspected to have been stolen or which may be found under circumstances which create suspicion of the commission of any offence. The expression "property" in the section is without any specificity of being either movable or immovable. Most of the State Governments who have gone in for legislation to deal with situations arising out of the organised crimes have provided for seizure of property thereunder for want of deficiencies in the procedural law. The scope of Sections 102 of the Cr.P.C. empowers a police officer to seize certain properties by taking of actual physical possession of some movable property. The Rajasthan High Court has observed:

On a careful reading of Section 102 of the Criminal Procedure Code, it is difficult to hold that this Section empowers a police officer to seize immovable property like plots of lands, residential houses, mountains, rivers, streets or similar properties.

17.17.5 The court arrived at this conclusion due to several reasons. One of the reasons being that no useful purpose was going to be served by the seizure of the immovable properties of the above so far as the pace of the investigation was concerned. It further said that so far as the title to the immovable property was concerned, it was a competent civil or revenue court which was empowered by the law to adjudicate the disputed questions relating to title and that the investigation by the police had nothing to do with the disputes relating to the title to any immovable properties.

17.17.6 The reasons given by the Rajasthan High Court for arriving at the above conclusions are clearly inconsistent with the ground reality in the maintenance of law & order in general. If the police is not competent to seize immovable property during an investigation, it may thwart a just and fair investigation in as much as the investigation may be subverted by the person (s) suspected to be involved in the crime.

17.17.7 Since the Code of Criminal Procedure, 1973 does not contain a specific provision prescribing the procedure for the restraint and confiscation of the proceeds of crime and instruments of crime, absence of law for attachment and confiscation of illegally acquired properties on the same lines as in the TADA, NDPS Act or Special Courts (Trial of Offences Relating to Securities Act), 1992 does hinder investigating agencies. A specific provision in the basic law would be more helpful and effective in dealing with criminals. Therefore, it is recommended that a section may be inserted after section 102 of the Cr.P.C., 1973 and numbered as section 102(A) be introduced in the Code of Criminal Procedure, 1973 broadly providing the following: (i) restraints and confiscation of the proceeds of crime: definition of instruments of crime, proceeds of crime, seizure/confiscation/attachment etc.); (ii) provision for prescribing powers and the procedures for restraint of the proceeds and instruments of crime; (iii) provision prescribing the procedure for confiscation/seizure/attachment of property; (iv) attachment / confiscation/ seizure of the property and all instruments used for the offence or the proceeds derived from the commission of offences; (v) an application being made to the Court clearly indicating as to why the property is sought to be seized/confiscated/attached. The Code may also provide that a property seized/attached/confiscated would be administered in such manner as a Court may decide pending completion of trial for this purpose and that the District Magistrate or Deputy Commissioner of the area in which the property is located or an officer authorized by him may be designated as Administrator.

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- 1 Dr. Ayyar, *Encyclopedic Law Dictionary*
  - 2 Ram Ahuja, *Criminology*



- 3 Ibid
- 4 Howard Abadinsky, *The Mafia in America: An Oral History* (NY).
- 5 Albanese Jay, *Organised Crime in America* (Ohio).
- 6 Albim Joseph, *The American Mafia : Genesis of Legend* (NY).
- 7 Block Alan, *East Side-West Side Story: Organising Crime in New York* (1930-50).
- 8 Nair P.M., *Combating Organised Crime*.

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## **FEDERAL LAW AND CRIMES**

18.1 One of the 'terms of reference' of this Committee is to examine the feasibility of introducing the concept of "federal crime" which can be put on List I in the Seventh Schedule to the Constitution. The suggestion to declare certain crimes as federal crimes to enable a Central Agency to undertake investigation, without any loss of time, was also referred to the Committee on Police Reforms under the chairmanship of Shri K. Padmanabhaiya. The Committee dealt with this matter in Chapter 17 of their Report.

18.2 The Committee on Police Reforms felt that there was a case for declaring a very few selected categories of cases as federal offences and cautioned that great care and restraint needed to be exercised in identifying those crimes. It suggested the following criteria for the selection of crimes:

1. They have international implications;
2. They relate to the security of the nation (Treason);
3. They relate to the activities of the Union Government;
4. They relate to corruption in All-India Services;
5. Protecting Government currency;
6. Controlling national borders

18.3 The Committee stated that the following categories of crime can be declared as federal crime:

- (i) Terrorism and organised crime having inter-State and international ramifications;
- (ii) Crimes in special maritime and territorial jurisdiction of India;
- (iii) Murder of Head of State, Central Government Minister, Judge of the Supreme Court and internationally-protected persons;
- (iv) Frauds, embezzlement and cheating in nationalized banks/Central PSUs; Financial institutions;
- (v) Tax offences involving Union taxes like Income Tax, Customs, Central Excise, etc;
- (vi) Counterfeit currency; money laundering;

- (vii) Offences relating to art, treasures and antiquities;
- (viii) Offences relating to hijacking of aircraft/ships;
- (ix) Piracy on the high seas;
- (x) Offences of the Central Government employees under the Prevention of Corruption Act and related sections of the IPC;
- (xi) Offences by officers of All-India Services under the Prevention of Corruption Act, and related sections of the IPC.

18.4 In examining the concept of Federal offences/crimes and establishment of a Federal Agency investigating those offences/crimes *suo moto* needs to be examined with reference to the Constitutional Scheme on Relations between the Union and the States. *In The Framing of India's Constitution*, it has been observed that "The federal concept in India was not the product of a gradual process of evolution but represented a decision which was somewhat abruptly taken in 1930, as a result of the necessity of including the Indian States within the Indian polity".

18.5 It also observed that till the commencement of the Government of India Act, 1935, the Government of India was "subject to general and detailed control by Secretary of State for India in responsibility to the British Government and Parliament" (ibid). The distribution of legislative powers and development of Seventh Schedule to the Constitution was discussed by the framers of the Constitution at considerable length. The Government of India Act, 1935 which was culmination of the discussions of the Round Table Conference set up a federal polity in India, with a Central Government and Provinces deriving their jurisdiction and powers by direct devolution for the Crown. However, because of section 126 of the Act the powers of the Central Government were circumscribed by the Governor General "acting in his discretion".

18.6 The founding fathers of the Constitution listed the various subjects for governance under three Lists, i.e. List I (Union List), List II (State List) and List III (Concurrent List). Under the Union List only the Union Government and under the State List only the State Governments have exclusive powers for legislation. Under the Concurrent List, both the Union as well as the State Governments have jurisdiction to legislate. The principle of Union supremacy in the legislative sphere which underlines articles 246(1) and 254(2) is recognized by most Constitutions which are admittedly "federal". The Constitution of India, which is *sue generis*, harnesses the federal principles to the needs of a strong Centre.

18.7 The National Commission to Review the Working of the Constitution examined the Constitutional provisions regarding Concurrent powers of legislation, analysing the

constitutional amendments enacted from time to time and judicial pronouncements on major issues arising from concurrency. The Commission observed that, on the whole, the framework of legislative relations between the Union and the States, contained in articles 245 to 254 of the Constitution of India has stood the test of time. In particular, the Commission felt that the Concurrent List, List III in the Seventh Schedule under article 246(2) of the Constitution of India has to be regarded as a valuable instrument for promoting creative federalism that has made a major contribution to nation building. It came to the conclusion that in the Commission's view there was no ground for change in the existing Constitutional provisions.

18.8 As public order and crime control are the responsibilities of the State Governments, they have to take action maintain tranquility in their respective State. It has been the experience that the local law enforcement agencies, quite often tend to look at the crimes from their own perception and with an objective of crime control in their jurisdiction. In the process, the linkages between ordinary-looking crimes and crimes against the State escape scrutiny or even attention. Further, in majority of cases a full picture is not available to the State law enforcement agencies. Even if the larger ramifications are understood, they are evidently not shared with the Central Government and other affected States.

18.9 It has now become necessary to deal with crimes that will undermine the national integrity within overall national security strategy.

18.10 In appreciation of the prevailing situation, suggestions have been made in various fora that the Central Government should play a larger role in internal security matters, particularly investigation of crimes against the State. At present there is no Central Agency which can take up the investigation of crimes having internal security dimensions. The Central Bureau of Investigation does take up important cases on the request of the concerned State Governments. The fact, however, remains that the primary charter of CBI is to deal with corruption cases involving Central Government employees. The CBI has, however, tried to manage criminal cases by creating a separate cell but the pointed attention that is required to be given to this aspect is not feasible in the present structure. Secondly, the CBI does not have original jurisdiction and cannot take up investigation of all cases due to organizational inadequacies. In appreciation of the situation that stares us in the face, there is an imperative need to have a Central Investigating Agency, empowered to take cognizance of crimes against the Indian State. Maharashtra did well to enact legislation exclusively to deal with Organised Crime, which has proved to be extremely effective during the last four years. Andhra Pradesh, Arunachal Pradesh and Karnataka adopted their own legislations on Organised Crime. However, the question remains whether the States be left to have their own legislation or a Central Act be promulgated on the subject. With a view to combating a transnational phenomenon where

the likes of Dawood Ibrahim, Tiger Menon, Iqbal Mirchi, all based in foreign countries or operating from international lane of high seas, have to be neutralized. They also quickly capitalize on estranged or hostile diplomatic relations between countries to their advantage to escape the dragnets of law. In this background, a unified framework to deal with Organised Crime, there should be a Central legislation. Also, if it is left to the States to enact their own laws, some of them would do it according to their time-frame and some others

To deal with organised crime effectively, investigation has to be conducted with Interpol, letters of request for extradition / deportation of criminals to India have to be processed by Ministry of External Affairs with Foreign Embassies. It would, therefore, be prudent to have a Central legislation, which should provide a uniform legal framework to deal with the problem on a national level keeping in view the national interest. The power of registration and investigation of cases under a Central Act should be conferred on the State Police.

may not do so at all. Even if they enact such a law, its efficiency could remain questionable because of the nature of crime being transnational or inter-state or both. To deal with organised crime effectively, investigation has to be conducted with Interpol, letters of request for extradition / deportation of criminals to India have to be processed by Ministry of External Affairs with Foreign Embassies. Barring some States, other States of the Union have yet to legislate upon such a sensitive matter. It would, therefore, be

prudent to have a Central legislation, which should provide a uniform legal framework to deal with the problem on a national level keeping in view the national interest. The power of registration and investigation of cases under a Central Act should be conferred on the State Police and follow the legislation only when the States desire will they transfer investigation of cases to Central Investigating Agencies, after due process of law, like giving formal consent u/s 6 of the Delhi Special Police Establishment Act by the State Government and obtaining consent of the Central Government u/s 5 of the Act. Central legislation should also provide adequate platform for international cooperation in consonance with international treaties and conventions.

18.11 Such a system exists in other countries where Federal Governments have a corresponding responsibility in prevention of crimes against the country. In the United States, the Federal Bureau of Investigation (FBI) is entrusted with the responsibility to take cognizance of offences affecting the security of that country and investigate them. The FBI is the Federal Law Enforcement Agency of the United States of America, authorized under law to investigate federal crimes. About 200 crimes are listed in the Charter of FBI. Such a system is not available in this country when the problems facing us are more complicated than those in the United States of America.

18.12 Time has come when the country has to give deep thought for a system of Federal Law and Federal Investigating Agency with an all-India Charter. It would have within its ambit crimes that affect national security and activities aimed at destabilising the country politically and economically. The creation of the Federal Agency would not preclude the State Enforcement Agencies from taking cognizance of such crimes. The State Enforcement Agencies and the Federal Agency can have concurrent jurisdiction. However, if the Federal Agency takes up the case for investigation, the State agencies' role in the investigation would automatically abate. The State agencies may also refer complicated cases to the proposed Federal Agency.

18.13 The Federal Agency may have concurrent jurisdiction over the following categories of crimes:

- i) Terrorist activities/war against the State
- ii) Arms and drug trafficking
- iii) Hijacking
- iv) Money laundering
- v) Crimes related to counterfeit currency
- vi) Espionage
- vii) Crimes targeting the national infrastructure.

18.14 It has been the experience that the cases relating to underworld crimes/criminals are complex and there have been serious problems in gathering evidence and getting witnesses. Further these criminals always hire the best legal defence available who exploit every available technical weakness and ploy to secure acquittal. Therefore, it is necessary that cases of terrorism are dealt with in specially constituted federal courts.

18.15 Having agreed on the need for a Central legislation, the next step is to emulate an available ready-made ideal model, like the Maharashtra Control of Organised Crime (MCOC) Act, 1999. It is the result of diligent comparative study of International legislations and has already been tried and tested with adequate success. Special features of the Act are speedy trial by constituting Special Courts and appointing special Public Prosecutors. The Act has adequate safeguards to prevent its misuse, which are as under:

- i. The Act can be applied only to criminals habitually committing unlawful activities on behalf of or being the members of Organised Crime syndicates, against whom minimum of 2 charge-sheets must have been filed during the preceding 10 years, for offences punishable with imprisonment for 3 years or more, and the courts should have taken cognizance of the said charge-sheets;
- ii. No offence can be registered, nor any information recorded without prior approval of an officer not below the rank of Deputy Inspector General of Police;



- iii. Officers not below the rank of Deputy Sp/ACP can only investigate such offences;
- iv. For filing charge-sheets, prior sanction of an officer not below the rank of Additional DG (Commissioner of Police in Mumbai) is essential
- v. Punishment is also prescribed for public servants failing to discharge their duties under the Act.

18.16 Since its enactment in 1999, 43 cases have been registered under MCOC Act, of which 33 have been charge-sheeted. Of these, 6 cases have already ended in conviction. The first, and one of the most important cases, which ended in conviction, related to an incident in which the gangsters of Chhota Shakeel gang made an unsuccessful attempt on the life of Shri Milind Vaidya, ex-Mayor of Mumbai and sitting Corporator of Shiv Sena, by indiscriminately firing from sophisticated fire arms, including AK-56 rifle. Of 9 gangsters arrested, 8 were chargesheeted and 1 was discharged for want of evidence. Trial of the case concluded within 1 1/2 year from the date of its registration and ended in conviction. Three accused were sentenced to death, 1 was imprisoned for life and 2 others sentenced to undergo 10 years' rigorous imprisonment. In addition, the accused were imposed a collective fine to the tune of Rs. 1.5 crore.

18.17 However, going by the experience of the Maharashtra Police in enforcing MCOC, 1999, the proposed Central Act could be made more effective by the amendments to section 2(1) (e) and 2(1)(d) to specify that those who commit offences like extortion, abduction and kidnapping for ransom, contract killing, smuggling of contraband goods, collection of protection money, hawala transactions, are liable to attract the provisions of the Act and in the case of acquittal for want of proof a lack of evidence in the charge sheet filed earlier, such a charge sheet should be taken into account to make a base under section 2(d). Section 3(4) needs amendment to define to identify a member of any gang to prove as to who is the member and who is not. Provisions relating to authorisation of interception of wire, electronic or oral communication needs to be re-examined in the light of the Bombay High Court judgment of 5 March 2003.

## **TERRORISM**

19.1 The genesis of terrorism, as a global problem, is attributed to development of political situation in the World in late 60s. However, it is not a modern phenomenon as it has been in existence since the days of ancient Greece, in medieval Italy and in the 20<sup>th</sup> Century. The origin of the present day terrorism can be traced to the Sinai War of June 1967 when in a few days Israel decimated the armed forces of some of the Middle East countries and occupied large tract of their land. The Arab world has since then been simmering with anger and rage leading to the beginning of "contemporary wave of terrorism" in the Middle East in 1968. The first manifestation of moving away from the conventional war and confrontation between the Israeli and the Arab was the seizure of an American Airline by a Palestinian sympathizer. Terrorism is no longer a technique of protest but has become a global apparatus to challenge the number one superpower in the unipolar world. What had not been reckoned earlier was the way in which religion was to become enmeshed with the political aspiration.

### 19.2 DEFINITION OF TERRORISM

19.2.1 It stands to reason that in order to combat an evil, its nature must be explained in an acceptable definition. It is extremely difficult to offer a precise and objective definition of terrorism which can be universally acceptable. There are several reasons for this, namely:

- (i) Terrorism takes different forms: although it is usually equated with political subversion;
- (ii) The criteria for defining the term 'terrorism' is generally subjective since it is mainly based on political considerations and is often employed by Governments;
- (iii) It is used as an instrument of syndicated crime;
- (iv) Above all, terrorism is prompted by a wide range of motives, depending on the point in time and the prevailing political ideology.

19.2.2 While discussing terrorism, it is difficult to define "terrorism", as, during the last 40 years the forms of terrorism have undergone metamorphose. However, one of the earliest

definitions in the 20<sup>th</sup> century which comes to mind is the one given in Article 1 of the League of Nations Convention on Terrorism, 1937 which defined it as "criminal acts" directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public. {UN Secretariat Study on Terrorism, UN Doc A/C.6/418, Annexe I }. This definition has also undergone a change as terrorism is seen to be about power – as a means to political power with full control of State authority. There has been a good deal of debate on the desirability of having a comprehensive definition as new trends and dangers have been revealed. This definition could be general or enumerative or mixed or whether it should be confined to individual and group terrorism or cover State terrorism as well and whether it should exempt the struggles for self-determination from its scope or embrace all situations alike

19.2.3 Dr. Justice A.S. Anand (as he was then) delivering the judgment in H.V. Thakur vs. State of Maharashtra has perceptively dealt with the definition of terrorism. He observed that:

Terrorism is one of the manifestations of increased lawlessness and cult of violence. Violence and crime constitute a threat to an established order and are a revolt against a civilized society. "Terrorism" has not been defined under TADA nor is it possible to give a precise definition of "terrorism" or lay down what constitutes "terrorism". It may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travel beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb harmony of the society or "terrorise" people and the society and not only those directly assaulted, with a view to disturb even tempo, peace and tranquility of the society and create a sense of fear and insecurity. A 'terrorist' activity does not merely arise by causing disturbance of law and order or of public order. The fall out of the intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to tackle

it under the ordinary penal law. Experience has shown us that "terrorism" is generally an attempt to acquire or maintain power or control by intimidation and causing fear and helplessness in the minds of the people at large or any section thereof and is a totally abnormal phenomenon. What distinguishes 'terrorism' from other forms of violence, therefore, appears to be the deliberate and systematic use of coercive intimidation. More often than not, a hardened criminal today takes advantage of the situation and by wearing the cloak of "terrorism", aims to achieve for himself acceptability and respectability in the society because unfortunately in the States affected by military, a 'terrorist' is projected as a hero by his group and often even by the misguided youth.

19.2.4 From the above, it is seen that the definition (of terrorism) has eluded and has haunted countries for decades. The first attempt to arrive at an acceptable definition under the League of Nations was stillborn.

19.2.5 If "terrorism" by nature is difficult to define, acts of terrorism conjure emotional responses in those affected by it or after its effects. The old adage, "one man's terrorist is another man's freedom fighter" is being practiced by Pakistan and other countries. The Federal Bureau of Investigation has been using several definitions of terrorism which have been quoted in Arijit Pasayat, J. in his judgement in *Devender Pal Singh vs. State of N.C.T. of Delhi & Anr.* The definitions quoted therein are road-maps to understanding "terrorism" and terrorist activities:

Terrorism is the use or threatened use of force designed to bring about political change.

Brian Jenkins

Terrorism constitutes the illegitimate use of force to achieve a political objective when innocent people are targeted.

Walter Laqueur.

Terrorism is the premeditated, deliberate, systematic murder, mayhem, and threatening of the innocent to create fear and intimidation in order to gain a political or tactical advantage, usually to influence an audience.

James M. Poland

Terrorism is the unlawful use or threat of violence against

persons or property to further political or social objectives. It is usually intended to intimidate or coerce a Government, individuals or groups or to modify their behaviour or politics.

Vice-President's Task Force

Terrorism is the unlawful use of force or violence against persons or property to intimidate or coerce a Government, the civilian population, or any segment thereof, in furtherance of political or social objectives.

**FBI**

19.2.6 Notwithstanding the difficulties which militate against providing a universally acceptable definition of the term, terrorism encompasses use of violence or threat for acts directed against a country or its inhabitants or violation of law and calculated to create a state of terror in the minds of the Government officials, an individual or a group of persons, or the general public at large. This process could be an individual-oriented but more than often it is organised groups which embark on a journey of violence and quite occasionally mayhem. The International Law Commission concluded that the following categories constitute terrorist acts:

- (i) Any act causing death or grievous bodily harm or loss of liberty to a Head of State, persons exercising the prerogatives of the Head of State, their hereditary or designated successors, the spouse of such persons, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity.
- (ii) Acts calculated to destroy or damage public property or property devoted to a public purpose.
- (iii) Any act likely to imperil human lives through the creation of a public danger, in particular the seizure of aircraft, the taking of hostages and any form of violence directed against persons who enjoy international protection or diplomatic immunity.
- (iv) The manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of a terrorist act.

19.2.7 The acceptability of violence in a society is key to whether terrorism is perceived to be a valid form of protest and thus closely linked to the level of support a group can hope to receive from their society at large. This does not necessarily suggest that, if support is lacking, terrorists will renounce violence because it is counter-productive. Part of their problem is that terrorist organisations often have difficulties in moving away from violence.

19.2.8 Terrorism, as an effective weapon, has since appeared as a serious challenge to the world order and cannot be overlooked or washed away. In the words of Dr. R. Venkatraman,

the former President of India, the response to this "spectrum of challenges" has to be "multi-dimensional". In his inaugural address at the 21<sup>st</sup> Annual Conference of the Indian Society of International Law, he underlined the "need to mobilize the processes of ratiocination that have taken the shape of legal enquiry". He said that "lego-philosophic minds can arrest the world in so arranging or ordering human affairs as to make them consistent with the evolution of collective human thought. What is involved in the process is not just the maintenance of the powers of the States or "order" but "order" with "law". Within the boundaries of a State the balance is not so difficult to maintain. But in trans-national affairs, the task becomes difficult".

19.2.9 The globalisation of terrorism, or organised violence, in contrast to conventional war, is the one which concerns the world. The acts of terrorism, whatever be the purpose, are aimed at creating an atmosphere of fear, apprehension and destabilize the security systems apart from disturbing the existing social order. The very fact that acts of terrorism are well orchestrated by motley group of persons because of their perceived grievances or their anger against "targets chosen for their power and importance aimed at paralysing Government concerns". Terrorism has also been described as a proxy war, both stealthy and clandestine.

Acts of terrorism are well orchestrated by motley group of persons because of their perceived grievances or their anger against "targets chosen for their power and importance aimed at paralysing Government concerns". Terrorism has also been described as a proxy war, both stealthy and clandestine.

### 19.3 PAKISTANI LINK WITH INTERNATIONAL TERRORISM

19.3.1 During the period post September 11, 2001 investigations by American authorities have unravelled the intricate network of terrorists. They have once again revealed, how Pakistan and its proxies, had emerged as a center for terrorist training for diverse groups and the inter-linkages between these groups facilitated by availability of Pakistani territory. The main revelations have come primarily from investigations into terrorist modules in South East Asia with direct or indirect links to Al Qaida and with the participation of Pakistanis or the use of the territory of Pakistan. One of the most dangerous "minds" and terrorists is Khalid Shaikh Mohammed, a Pakistani, a radical Jihadist on a mission to destroy America. He was as "architect" of the September 11 attacks [Newsweek: 22.9.02]. There was a colossal failure of intelligence agencies in the North America and Europe as the terrorists used resources and facilities to plan and execute acts of unprecedented violence by using airlines. Some key conspirators in the Al Qaida attacks are still missing. The long shadow war has just begun irrespective of whether Osama Bin Laden is alive or dead



while the powerful collaborator Saad Bin Laden [Osama's son] with Khalid Shaikh Mohammad is pursuing the family business of real estate.

#### **19.4 PAKISTAN'S PROXY WAR AGAINST INDIA**

19.4.1 Pakistan has always considered the partition of 1947 incomplete as, according to the Muslim League concept of two-nation theory, Jammu & Kashmir State was the main focus. It has made repeated attempts, though in vain, to annex the State – first by pushing in "Kabailis" with the active support of regulars, followed by three wars and an impudent intrusion in Kargil in 1999. Each time the Indian nation has given them a befitting response.

19.4.2 Pakistan has not given up on Kashmir because its very existence depends on keeping up a confrontation with India. It has, accordingly, continued with the dispute one way or the other. The late Zulfikar Ali Bhutto first led Indira Gandhi into signing the Shimla Agreement in the way he wanted it and reneged on it soon after the return to Pakistan. Not only he resiled from the bi-lateral Shimla Agreement but threatened "thousand year war" against India. From 1973 till the time he was deposed from political power, Bhutto encouraged ISI to foment trouble in India from Punjab to the North East.

19.4.3 Since Pakistan found that it was making no headway in military confrontation or cover war, it launched a proxy war against India. It was discovered when the first batch of Pak-trained youth was arrested in September 1986 and the first Pak-trained militant, Aijaz Dar, was killed in an encounter on 18 September of that year.

19.4.4 The sentiments of disgruntled youth in J&K have been exploited. As a consequence, Pakistan trained youth in subversive activities and equipped them with sophisticated weapons. They were infiltrated in J&K to foment trouble. With the fall in initial local support and pressure mounted by the security forces during the early nineties, a new feature was introduced. This was systematic induction of foreign mercenaries to prop-up the so-called 'jehad'. Pakistan embarked on a virtual war by pushing in Pakistani and foreign mercenaries into the State. Today what India facing in Jammu & Kashmir is not insurgency or indigenous militancy but a clandestine or proxy war by Pakistan which is the epicenter of terrorism. Pakistan was desperate to keep the military pressure on when it found number of incidents and civilian killings reducing and, therefore, the overall security scenario in 1999 assumed a new dimension when Pakistan attacked India across Kargil. It was, however, counter-productive as Pakistan's reverses in Kargil, made it more desperate. ISI through the pro-Pakistani terrorist outfits have since then been desperately trying to step up violence with a focus on demonstrative actions to destabilize the security forces and create communal



divide and by inducting more foreign mercenaries. Usages of suicide squads for stepping up violence were also resorted by the terrorists' outfits. The militants, aided and abetted by Pakistan ISI, have caused enormous damage to the Kashmiri people and its economy. The Kargil intrusion changed the complexion of the low intensity war by the Pakistan and its official agency ISI. They embarked upon a well-planned operation using a mix of hardened and well-trained foreign mercenaries.

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## **19.5 CROSS BORDER TERRORISM – INVOLVEMENT OF PAKISTAN**

19.5.1 It is estimated that a large number of foreign mercenaries has been operating in J&K, at any given point of time, who have been pushed in by Pakistan to sustain and retain control on the flagging militancy in the State. These mercenaries belong mainly to Pakistan, POK and Afghanistan. However, there are instances of terrorists from countries like Lebanon, Bahrain, Bangladesh, Sudan, Egypt, Algeria, Uzbekistan and Nigeria operating in J&K, which highlight the alarming role being played by Pakistan as an epicenter of global terrorism. They train them as terrorists not only for infiltration into Kashmir and other parts of the India but also for export of terrorism to other parts of the world in the name of "jihad".

19.5.2 The terrorists continue to attack vulnerable targets including members of minority Hindu community and political activists. Some reprehensible attacks by terrorists were witnessed during 2001-2002. They kidnapped, indulged in indiscriminate killing, bombed State Legislative Assembly in Srinagar, killing Army personnel, including women and children, and attacking at the Raghunath temple in Jammu city.

## **19.6 ANTI-TERRORISM LAW**

19.6.1 In the background of need to combat escalating and disruptive activities posing a serious threat to the integrity of the country, the Terrorist and Disruptive Activities (Prevention) Act, 1985 was enacted on 23 May 1985 initially for a period of two years applicable to Punjab only. However, in the context of continued terrorist violence and

disruption in the country, a fresh legislation was enacted with special provisions for prevention of, and for coping with, terrorist and disruptive activities and matters connected therewith and incidental threats. The Act was extended through amendments in 1989, 1991, 1993 and finally expired on May 23, 1995. In the overall view of security environment in the country, a replacement legislation was considered necessary. The spread of tentacles of terrorism to other parts of the country, on one hand, the acquisition of men and material [ranging from sophisticated weapons, remote central devices, rocket-launchers etc.] on the other, the new dimension called for a new legislation to deal with the situation. Before the expiry of the said Act, the Criminal Law Amendment Bill, 1995 was introduced in the Rajya Sabha on 18 May 1995.

19.6.2 Terrorist and Disruptive Activities (Prevention) Act, 1987 contained the following features:-

1. Section 3 (1) of the Act provides for definition of a terrorist act. This section provides that whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or fire-arms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any persons and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act.
2. Whoever commits a terrorist act if such act is resulted in death of any person be punishable with death or imprisonment for life and shall also be liable to fine. In any other case, the punishment is imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.
3. TADA provides for minimum punishment of five years and maximum of imprisonment of life for conspiring to commit or knowingly facilitating the commission of terrorist act.
4. Whoever harbours or conceals any terrorist was to be punished with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.
5. Punishment for disruptive activities was imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life.

6. Disruptive activities mean any action taken whether by act or by speech or through any other media which intent to disrupt sovereignty and territorial integrity in India.
7. TADA also provided for minimum punishment of five years and maximum of imprisonment for life for possession of certain unauthorized arms.
8. It provided for forfeiture of property persons convicted of any offence punishable under the Act. The Act enabled the Central Government or a State Government to constitute one or more designated court for particular area or for such cases or group of cases.
9. The Act also gave power to the designated court try any other offence with which the accused may be charged at the same trial if the offence is connected with such other offence.
10. Under the TADA a designated court was to take cognizance of any offence without the accused being committed to it for trial upon receiving the complaint for a police report.
11. There was a special provision for summary trial of offences punishable with imprisonment for a term not exceeding three years.
12. TADA provided that a confession made by a person before a police officer not lower in rank than a Superintendent of Police was to be admissible for the trial of such person for an offence under the Act.
13. It provided that trial of any offence by a designated court should have precedents over the trial of any other case against the accused in any other court.

19.6.3 There was considerable criticism against the misuse of the provisions of the Act by the National Human Rights Commission, Minorities Commission, International Human Rights Organisations like Amnesty International and International Natural of Jurists on basically the following charges:

- i. Innocent persons being proceeded against or arrested under the Act;
- ii. Confession to the Police being admissible under the Act which was odious to the established procedures of criminal justice;
- iii. Minorities being targeted under the Act;
- iv. Bail was not easily obtainable as the provisions of Bill in the Act were illusory; and
- v. Burden of proof was on the accused.

19.6.4 While deciding the constitutional validity of the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987, the Supreme Court has, in its judgment in Kartar Singh Vs. State of Punjab, Judgments Today 1994 (2) SC 423 at 494, laid down the following guidelines so as to ensure that the confession obtained in the pre-indictment interrogation

by a police officer not lower in rank than a Superintendent of Police is not tainted with any vice but is in strict conformity of the well recognised and accepted aesthetic principles and fundamental fairness-

- i. The confession should be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him;
- ii. The person from whom a confession has been recorded under section 15(1) of the Act, should be produced before the Chief Metropolitan Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sent under Rule 15(5) along with the original statement of confession, written or recorded on mechanical device without unreasonable delay;
- iii. The Chief Metropolitan Magistrate or the Chief Judicial Magistrate should scrupulously record the statement, if any, made by the accused so produced and get his signature and in case of any complaint of torture, the person should be directed to be produced for medical examination before a Medical Officer not lower in rank than of an Assistant Civil Surgeon;
- iv. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no police officer below the rank of an Assistant Commissioner of Police in the Metropolitan cities and elsewhere of a Deputy Superintendent of Police or a Police Officer of equivalent rank, should investigate any offence punishable under this Act of 1987;
- v. The Police Officer if he is seeking the custody of any person for pre-indictment or pre-trial interrogation from the judicial custody, must file an affidavit sworn by him explaining the reason not only for such custody but also for the delay, if any, in seeking the police custody;
- vi. In case, the person, taken for interrogation, on receipt of the statutory warning that he is not bound to make a confession and that if he does so, the said statement may be used against him as evidence, asserts his right to silence, the police must respect his right of assertion without making any compulsion to give a statement of disclosure.

19.6.5 Besides, while upholding the validity of sections 16, 19 and 20(3) of the Act, the Supreme Court made certain observations, emphasizing the desirability of supplementing the law by making provisions therein.

19.6.6 Section 16(2) and (3) empowering the Designated Court to take measures for keeping the identity and address of witnesses secret, was assailed on the ground that these provisions turn a trial under the provisions of TADA into a farce. In reply, it was contended that the Legislature merely regulated the right to fair trial and the right of the accused to

effectively defend himself keeping in view the requirements of the situation prevailing in terrorists affected areas where the witnesses were living in a reign of terror and were unwilling to depose against the terrorists in courts for fear of retribution or reprisal. While upholding these provisions in view of the extraordinary circumstances, the Supreme Court observed:-

Therefore, in order to ensure the purpose and object of the cross-examination, we feel that as suggested by the full Bench of the Punjab and Haryana High Court in *Bimal Kaur*, the identity, names and addresses of the commences; but we would like to qualify it exception that it should be subject to an exception that the Court for weighty reasons in identity and addresses of the witnesses especially of the potential witnesses whose life may be in danger.

19.6.7 As regards section 19 of the Act, the Supreme Court adverted to some of the practical difficulties based on which the validity of this section was assailed and how these could be removed so that the Parliament may take note of them and devise a suitable mode of redress by making the necessary amendments in the appeal provisions. In this regard, the following observation made by the Supreme Court can be referred to.

This predicament and practical difficulty, an aggrieved person has to suffer can be avoided if a person who is tried by the Designated Court for offences under the TADA but convicted only under other penal provisions, is given the right of preferring an appeal before the next appellate court as provided under the Code of Criminal Procedure and if the State prefers an appeal against the acquittal of the offence under the provisions of TADA than it may approach the Supreme Court for withdrawal of the appeal or revision, as the case may, preferred by such person to the Supreme Court so that both the cases may be heard together.

19.6.8 As regards section 20(3) and 4(a) empowering the Executive Magistrate and Special Executive Magistrate to record confessions or statements and authorizing the detention of accused, it was contended that it was against the very principle of separation of judiciary from the executive enunciated in article 50 of the Constitution and therefore bad under articles 14 and 21 of the Constitution. Negating this contention, the Supreme Court observed as follows:

Though we are holding that this Section is constitutionally valid, we, in order to remove the apprehension expressed by the learned Counsel that the Executive Magistrates and the Special

Magistrates who are under the control of the State may not be having judicial integrity and independence as possessed by the Judicial Magistrates and the recording of confessions and statements by those Executive Magistrates may not be free from any possible oblique motive, are of the opinion that it would be always desirable and appreciable that **a confession or statement of a person is recorded by the Judicial Magistrate whenever the Magistrate is available** in preference to the Executive Magistrates unless there is compelling and justifiable reason to get the confession or statement, recorded by the Executive or Special Executive Magistrates."

## **19.7 CHALLENGE TO TADA: SHAHEEN WELFARE ASSOCIATION VS. UNION OF INDIA**

19.7.1 In a Writ Petition on TADA - Shaheen Welfare Association vs. Union of India and others, the Supreme Court observed as follows :-

- (i) Deprivation of the personal liberty without ensuring speedy trial would not be in-consonance with the right guaranteed by article 21 of the Constitution. Of course, some amount of deprivation of personal liberty cannot be avoided in terrorist cases, but if the period of deprivation, pending trial, becomes unduly long, the fairness assured by article 21 would receive a jolt. The Court also observed that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualized by article 21.
- (ii) The Court observed that while it is essential that innocent people should be protected from terrorists, it is equally necessary that terrorists are speedily tried and punished. It also causes irreparable damage to innocent persons who may have been wrongly accused of the crime and are ultimately acquitted but to remain in jail for a long period pending trial because of the stringent provisions regarding bail under TADA.
- (iii) The proper course is, therefore, to identify from the nature of the role played by each accused person, the real hardcore terrorists or criminals from others who do not belong to that



category and apply the bail provision strictly in so far as the former class is concerned and liberally in respect of the later classes.

- (iv) When stringent provisions have been prescribed under an Act such as TADA for grant of bail and a conscious decision has been taken by the legislature to sacrifice to some extent the personal liberty of an under trial accused for the sake of protecting the community and the nation against terrorists and disruptive activities or other activities harmful to society. It is also necessary that investigation of such crimes is done efficiently and adequate number of designated courts are set up to book persons accused of such serious crimes. This is the only way in which society can be protected against harmful activities. This would also ensure that persons ultimately found innocent are not unnecessarily kept in jail for long periods.

## **19.8 PREVENTION OF TERRORISM ACT, 2002**

19.8.1 TADA lapsed on 23 May, 1995. However, taking into account the terrorist activities of various groups in several parts of the country and the fact that some of these groups are sponsored by foreign elements. The Government came to the conclusion that alternative law to effectively deal with terrorism is necessary. Pursuant to this, the Government enacted another Act namely, the Prevention of Terrorism Act (POTA).

19.8.2 The essential points of difference between TADA and POTA are:

- (i) Provisions allegedly misused / likely to be misused, are deleted from the new legislation;
- (ii) Section 5 of TADA Act, which had made unauthorized possession of arms in a notified area, an offence, is deleted. The Arms Act, amended already, provides for a deterrent punishment for possession of certain classes of unauthorized arms. Therefore, the need to repeat the provisions in the new legislation was not felt. Further, this section is the one which is alleged to have been most misused;
- (iii) Section 15 of the TADA Act, which had provided that confessions made to a Police Officer was admissible in evidence. This was against the grain of the normal provision of the Evidence Act where statements made to the police are not admissible as evidence. In the new Act certain safeguards have been incorporated;
- (iv) Section 21(1)(c) and (d) of the old TADA Act had laid down certain presumptions



relating to confessions. This section had provided that if it was proved that one of the accused had made a confession that the other had committed the offence, it was to be presumed that the other (accused) had committed the offence. It also provided that if it was proved that an accused had made a confession to any person even other than a police officer, it was to be presumed that he had committed such an offence. Since there were allegations that these provisions had been misused, these are not reflected in the new law.

- (v) Section 20(8)(b) had provided that a Court shall not grant bail unless it was satisfied that there are reasonable grounds for believing that the accused was not guilty of an offence under TADA. This provision had made it extremely difficult to obtain bail in TADA cases. No such provision has been made in the new law.

## **19.9 SAFEGUARDS**

19.10.1 Under TADA Act, an appeal from the designated court/lay to the Supreme Court. It was argued that under Indian conditions, with prevailing poverty, it is difficult for people to approach straightaway the Supreme Court. In the new legislation, an appeal is being provided to the High Court.

19.10.2 As suggested by the Supreme Court, a provision has been made that investigation in the cases relating to terrorism and disruptive activities should be done by an officer not lower in rank than that of an Assistant Superintendent of Police or equivalent officer. This would reduce the misuse substantially.

## **19.10 SALIENT FEATURES OF POTA**

- 19.10.1
- (i) Instead of being made a permanent feature under law, a time limit of 3 years has been prescribed for the proposed Bill.
  - (ii) To have a sharper focus, the word “disruptive activity” was substituted by “disruptive act”.
  - (iii) Keeping in view the possibility of misuse of the provisions even for petty communal disturbances” or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people” have been deleted.
  - (iv) The concept of knowledge was brought in for culpability relating to “Whoever harbours or conceals, or attempt to harbour or conceal any person knowingly that such person is a terrorist”.
  - (v) Similarly the concept of knowledge was brought in for offences relating to

disruptive activities and it was incorporated “Whoever harbours or conceals, or attempts to harbour or conceal any person knowingly that such person is disruptionist”. Further, clause 4(3)(b) relating to “Whoever predicts, prophesies or pronounces or otherwise expresses in such a manner as to incite, advise, suggest or prompt, the killing of” has been deleted as it was felt that the construction is much too wide, and, could be misused.

- (vi) The Review Committees both for the Centre as well as the States have been provided with a statutory base and it has been provided that a Judge of the High Court should be its Chairman.
- (vii) Apart from reviewing the cases pending under POTA these Review Committees will also review the cases under old TADA Act.

19.10.2 From a comparative analysis of POTA and the American Law, it is seen that POTA is in some way less stringent than the American Act. While the “Terrorist Act” defined under section 3 of POTA prescribes punishment for an over an act with a specific intention for a terrorist activity as a punishable offence where as American Act on terrorism act on counter terrorism provides punishment to a person even when he is likely to engage in terrorist activities.

19.10.3 The American definition of terrorism is far more comprehensive in as much as (i) hijacking or sabotage, (ii) seizing or detaining, (iii) threatening to kill or injure or to continue to detain another individual to compel a third person including the Government organizations to do or abstain from doing any act as conditions of release of the individual detained; and (iv) use of biological or nuclear agent, is expressly included in the definition of terrorism.

19.10.4 Information on potential targets is included as terrorist’s activity in American law. Transportation or communication of false documents or identification or of weapons is expressly included as terrorist activity.

19.10.5 Soliciting, funding for terrorism or even soliciting the membership of terrorist organizations is amongst terrorist’s activity regardless of its other legitimate activity.

19.10.6 Terrorists Organisation is defined as an organisation, which by itself or through a group engages in terrorist’s activity regardless of its other legitimate activity.

19.10.7 U.S. Statute makes it an offence to carry weapons or explosives on board on aircraft an offence punishable by 15 years. (section 104)

19.10.8 U.S. Statute makes the act of transfer of explosive material, knowing or having reason to believe that such explosive material will be used to commit a crime of violence punishable by 10 years.

19.10.9 The U.S. Act provides for removal of aliens on an application made before the Special Court designated with the certification of the Attorney General that the aliens would pose a risk to national security. The Special Court has been permitted under section 503(B) and (C) of Title (V) to consider the classified information submitted *in camera* and *ex parte* make the determination with regard to the release of the aliens pending hearing. The conditions for release are similar to section 20(8) of TADA Act 1987 which has been considerably diluted under POTA.

19.10.10 The U.S. Statute makes specific provision for funding for terrorist related cases for various agencies like the FBI, Customs Services, Drug Enforcement, Department of Justice, Department of Treasury (Sections 521-527). Such provision for additional funding for creation of additional infrastructure for investigation and trial of terrorist cases does not pose an unplanned additional burden on the over burdened judiciary and other related agencies, which have to deal with the problem of terrorism.

19.10.11 The U.S. Act makes comprehensive provision for assistance and compensation to the victims of terrorism and designates funds for the purpose. Such a provision in the Bill will standardize and streamline machinery for compensation of victims of terrorist crimes.

19.10.12 The penalties prescribed for various terrorists' offences are similar or more stringent in the American Law compared to the Indian Act.

19.10.13 Prior to 1990, India had had put in strong measures, in separate legislations to deal with smuggling, narcotics, foreign trade violation, foreign exchange manipulations, as also legal provisions for preventive detention and forfeiture of property to tackle such serious crimes. However, the draconian Foreign Exchange Regulation Act, 1973 (FERA), was repealed, the Government contemplated making a law to prevent money laundering but the Prevention of Money Laundering Bill, 1998 did not materialize with FEMA and there has been much laundering of money in the last 3 years. The new legislation defines the offence of money laundering, as underlines with international practices, as crime which in turn is considered to be in property or value of such property derived as a result of criminal activity relating to a schedule offence. The act has two parts and deals with sections 121 and 121A of the Indian Penal Code and several offences under the narcotics, drugs and

Psychotropic Substances Act, 1985. The monetary limit has been prescribed which was not provided for in the original 1998 money laundering Bill. This offence now include murder, extortion, kidnapping, robbery and dacoity, forgery of security, counterfeiting currency and bank notes, Prevention of Arms Act, Wild Life Protection Act, 1972, trafficking of women and offences under the Prevention of Corruption Act, 1988. The illegal practices in international trade are the first and foremost sources of illegal money which is manipulated through value, quantity and description of traded consignments. Though there has been criticism about the strength of the Prevention of Money Laundering Act, it still falls short of similar laws in the western world, particularly United States and the European Union.

The new legislation defines the offence of money laundering, as underlines with international practices, as crime which in turn is considered to be in property or value of such property derived as a result of criminal activity relating to a schedule offence. This offence now include murder, extortion, kidnapping, robbery and dacoity, forgery of security, counterfeiting currency and bank notes, Prevention of Arms Act, Wild Life Protection Act, 1972, trafficking of women and offences under the Prevention of Corruption Act, 1988. The illegal practices in international trade are the first and foremost sources of illegal money which is manipulated through value, quantity and description of traded consignments.

What is required is that the new law, in the present shape must be enforced with greater rigour. Clearly the prevention of money laundering is essential for safeguarding internal security. Given the close nexus between drug trafficking, organised crime and terrorism it is essential to improve the effectiveness of the law by providing sufficient resources on military and paramilitary forces and to create and to strengthen the existing cadre, or better create a new cadre of experts to deal with groups of crime which finance terrorism. An effective coordination agency with wide powers would be necessary on the lines suggested by the Vohra Committee in the Report on Criminalisation of Politics.

## **19.11 MONEY LAUNDERING, DRUG TRAFFICKING, NARCO-TERRORISM AND FLOW OF FOREIGN FUNDS**

19.11.1 The role of money laundering in promoting both terrorism and the organised crime was recognized in recent years but adequate attention to eliminate it was not given. While the western world has become wiser after several terrorist attacks, the developing countries have been the arena for the "game" for long time. The debilitating and far reaching effect of turning a Nelsons eye to it has acted as a multiplier effect for promoting fraud,

corruption, the seepage of organised crime and acts of terrorism which have taken their toll on economic development. The operators' vice-like grip on the system of money laundering has to be dealt with firmly with stringent and deterrent punishments.

19.11.2 The prevention of money laundering is essential for safeguarding internal security. Given the close nexus between drug trafficking, organised crime and terrorism, it is also necessary to improve the effectiveness of the Narcotics Control Bureau.

19.11.3 The funds generated through illegal means may sometimes find their way into the country through legal channels, for ostensibly supporting activities covered under the Foreign Contributions Regulation Act (FCRA). The end use of these funds be watched with diligence. Although it may be desirable to check the donee accounts under the FCRA thoroughly cent percent check of these accounts may be unmanageable and expensive exercise. A proposal has been mooted to replace the FCRA with a new Act, under which registration and monitoring of the recipients of foreign contributions would be done at the district level. It is also proposed to involve the banks as an independent channel of data collection and monitoring. Police on the receipt of foreign contribution in border and coastal areas, as well as by religious organizations be strengthened in such a way that funds are not misutilised for anti-national activities. The new law must arm the Government with power for control over the recipients of foreign contribution without compromising with human rights or civil liberties.

## **19.12 STRENGTHENING THE STATE POLICE**

19.12.1 It is also necessary to take steps, in consultation with the State Governments to identify factors responsible for weakening the functioning of the State police forces. The morale of the Police Forces must be raised by professional support in operational matters as also policies in regard to promotions, transfers and tenures of police officers. The existing Police Act must be replaced expeditiously by a new Police Act.

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## ECONOMIC CRIMES

20.1 In the earlier centuries, economies were simple and so were economic crimes. In the last century, with the emergence and complexity of industry and modern capitalism, economic crimes have increased in number and complexity. More recently with the far-reaching recent changes in technology and the emergence and change in the institutions and in the organisation of the economic system, there has been a dramatic increase in the numbers and the cost of economic crime. There has always been a public tendency to focus on conventional crimes, especially violent ones, and except for occasional cases such as the Harshad Mehta, Ketan Parekh and the Indian Bank scam (of over Rs.800 crores), most economic crimes go insufficiently noticed, though their impact in terms of financial loss to the Society and in terms of eroding the credibility as well as the stability of the economic system is significant. With the fast pace of advances in technology (and the Internet), that are changing the way in which Government and Businesses operate and with quicker decision-making, the impact is increasing. Though reliable statistics are hard to come by, there have been major frauds, particularly in banking and the stock market (often together) and in a lesser way, in credit card and computer crime, as well as in some other areas. Apart from the well known ones, there have been others such as the forged Kissan Vikas Patras, Indira Vikas Patras and National Savings Certificates, the Gold scam case of Ahmedabad, Cyberspace case of Unit Trust of India and the Century Consultants Limited case of Lucknow. Further, the vast erosion in the value of Unit Trust of India (UTI) stocks which cannot be attributed just to changes in the market is yet another example. There was also the case of the failure of Non-Banking Financial Companies (NBFC), but, that was partly the creation of regulatory agencies, which did not handle the matter properly. The list is illustrative and is not exhaustive.

Though reliable statistics are hard to come by, there have been major frauds, particularly in banking and the stock market (often together) and in a lesser way, in credit card and computer crime, as well as in some other areas.

## 20.2 DEFINITION

20.2.1 Earlier definitions of economic crimes would be inaccurate today as generally, economic crimes are seen as newer versions (more technology driven) of conventional crimes. The result is, the lack of accurate information

An economic crime could possibly be defined in a broad way keeping in mind that it will need to be an 'umbrella' to cover future offences too. Thus an economic crime is an illegal act (or set of acts) generally committed through misrepresentation or outright deception by an individual or a group with specialised skills, whether professional or technical with a view to achieve illegal, financial gain, individually or collectively.

on these crimes, especially as there is no definition or proper classification. An economic crime could possibly be defined in a broad way keeping in mind that it will need to be an 'umbrella' to cover future offences too. Thus an economic crime is an illegal act (or set of acts) generally committed through misrepresentation or outright deception by an individual or a group with specialised skills, whether

professional or technical with a view to achieve illegal, financial gain, individually or collectively. A transaction of the value exceeding Rupees five crores involving an illegal act or acts could be deemed to be a serious economic offence.

20.2.2 Such a definition would include all contemporary economic crimes, would cover persons who are outside an organisation and would not be confined to just non-violent white-collar crimes. This would also include Corporations and members of professions such as the Law, Accounting, Management etc., and would cover both Banking, non-Banking financial frauds, violations of the Stock Market, Smuggling, Money Laundering, Intellectual Property Rights (IPR) related offences, Insurance and Health frauds, IT related offences (cyber-crimes), Telecommunication, Theft and misuse of Credit card & identity and Corruption.

20.2.3 There are over seventy Central Laws covering many offences apart from those in the Indian Penal Code. To prevent and punish violations under economic offences, there are large numbers of agencies with investigative and quasi-judicial powers. As the magnitude of economic offences is enormous, it is essential to make rigorous laws and strengthen the regulatory, investigation and enforcement systems adequately.

## 20.3 THE LAWS

20.3.1 In the past few decades, attempts have been made to change both the laws and procedures, which included:

- i. Definition of new economic offences with enactment of special laws and appropriate authorities with powers to prevent, investigate and prosecute;
- ii. The elimination or modification of *mens rea* in defining economic offences;
- iii. The shifting of the burden of proof or the power to Courts to make presumptions under certain conditions;
- iv. The extension of offences to preparation and attempt to commit offences; and
- v. Introduction of stringent measures such as Special Courts, denial of bail/probation/privileges and civil rights, summary trial, confiscation/forfeiture of property and even preventive detention.

20.3.2 The Legislature has responded by making new laws to tackle economic crimes and the Courts have not been far behind. Yet, the Courts have – being somewhat conservative in nature – stuck to the Constitutional guarantees of fair trial though somewhat expansively. This combined with the delay inherent in our judicial processes has assisted economic criminals immeasurably. This has been worsened by judicial interpretation, which has distorted the legislative intention of the special criminal laws. Interventions of the Court even at an early stage of investigation have also thwarted administrative action and enforcement.

20.3.3 Recently there have been some encouraging judicial decisions of the Apex Court reversing the earlier interpretations and tightening the system making it more difficult for economic criminals to escape justice. It began with the decision in Vineet Narain V. Union of India (1988 | SCC 266) where in the Court attempted to save the investigating agency from unjustified political interference by invoking what is called “continuing mandamus”. This action of the Supreme Court resulted in giving some degree of professionalism and independence to CBI and the central Vigilance Commission. It brought out the corruption and unfairness involved in the so-called “single line directive” protecting corrupt senior officers which the Court struck down. Deterrent punishment for economic offender is now canvassed by the Supreme Court itself. It is difficult to predict whether these decisions on economic crime will have the desired impact on the mindset and practices prevailing in the Criminal Courts; even if it does, major problems still remain, as will be seen later. However, public perception is that in the economic sphere the enforcement of the laws is lax. In spite of several agencies, there is an impression that the State and its agencies are incompetent to deal with those who commit major economic crimes.

## 20.4 VOHRA COMMITTEE REPORT, 1993:

20.4.1 In 1993, Government of India appointed a Committee under the Union Home Secretary, which reported on the activities of organized crime and the links between organised

crime and politics. The report revealed – not that it was unknown – the powerful nexus between those who broke the laws especially economic laws, the politicians and some of the functionaries of the Government especially in the police, customs and direct and indirect taxes, all of which resulted in protection of large scale economic crime and in those cases which became public, nominal action was taken against the offenders which bore no relationship to the benefits from crime.

## **20.5 THE MITRA COMMITTEE REPORT, 2001**

**20.5.1** The Report given to the Reserve Bank of India prefaced its report by admitting the fact that criminal jurisprudence in the country based on “proof beyond doubt” was too weak an instrument to control bank frauds. The Committee contended that “Financial fraud is not an offence in spite of the fact that the banks and financial institutions suffer heavily in frauds committed by the borrowers, more often than not, in collusion with the employees of the banks and financial institutions.... the situation is becoming explosive and can lead to anarchy at any time unless the scams are legally contained.”.

**20.5.2** The Committee recommended a two-fold approach to tackle bank and financial frauds. It suggested a preventive strategy by system reform through strict implementation of Regulator’s Guidelines and insisting on obtaining compliance certificates. Secondly, a punitive approach by defining “Scams” (financial frauds) as a serious offence with burden of proof shifting to the accused and with a separate investigating authority for serious frauds, and special Courts and prosecutors for trying such cases and with increased powers to the investigating agency of search, seizure and attachment of illegally obtained funds and properties. The Committee suggested a Statutory Fraud Committee under the Reserve Bank of India.

**20.5.3** As it stands, the Criminal Justice System is ineffective in handling major economic crimes. UK set up a Serious Frauds Office under the Criminal Justice Act 1987 to deal with investigation and prosecution of serious economic crimes with extensive powers including search and seizure. Similar arrangements have been made in the European Union and in the U.S. In our Country too, we need to put in place better legislation, improved Criminal Justice System and a strong Regulatory enforcement system to prevent, investigate and prosecute major economic crimes.

**20.5.4** It will be useful to have a quick look at the various types of major economic crimes (including cyber crimes), that have to be tackled so that we can appreciate the extent and complexity of these crimes. This does not include the conventional and organised crimes, which have been dealt with in the Penal Code.

20.6 **Banking and financial crimes:** The traditional crimes in this area are taking loans from banks with fraudulent project documents combined with under invoicing and over invoicing to benefit the loanee, sometimes with the collusion of bank officials. Some of the non-banking financial institutions have taken deposits under false pretences promising all kinds of returns and cheating the depositors, including the plantation type offers. There are also various types of cheques' frauds. With the growth of online banking, traditional methods of embezzlement of funds have fallen by the wayside as funds can be embezzled through wire transfer or by taking over the accounts or loans can be taken with fraudulent applications online, new accounts can be taken over by taking over the identity of the account holder or one could hack into a bank's payment system and take money. This is often combined with bank fraud and includes stock manipulations, fraudulent offering. The traditional pyramid schemes, which are not uncommon in our Country, can now be done through the Internet. There is also the increasingly common Internet fraud with on and off websites, fraudulent recommendations on securities with several variations of these. The problems of insider trading, price rigging, floating companies by fly-by-night operators with false prospectus etc., are also yet to be seriously tackled; with the Internet the matter becomes somewhat more complicated. It is interesting to note that in 1997 forging of cheques in the U.S was well over \$ 512 million. It was using by over 20% per year. Securities the world over also runs to billions of dollars.

20.7 **Money laundering:** Another major problem, which is proposed to be solved through a bill, is Money laundering. In 1998, the world wide money laundering was estimated to be about \$ 2.85 trillion. While legislation would certainly help in prosecution, it will not be of much value unless proper preventive arrangements are put in place. As filing of charge and prosecution takes time, there should be scope for interim attachment of all properties including bank accounts with the Court getting into investigating the nexus between crime and property. There should be a lower monetary ceiling and insisting on all transactions through cheques (unless in the case of banks, there should be arrangements for reporting such deposits, when they are suspect), prohibition of 3<sup>rd</sup> party endorsements unless the details in the transactions are made available and reporting by banks of all transactions above a certain limit as well as other transactions which are suspect, with suitable modification of banking secrecy clauses.

20.8 **Insurance crimes:** Insurance fraud which runs billions of dollars, the world over, can be expected to be a growth sector and these can be committed internally by Company officials and externally by applicants, policy holders, false claimants etc., the fraud being in terms of inflated/false claims, fraudulent policies or using misinformation for gain.

20.9 **Credit card crimes:** Fraud loss in the credit card industry, is over \$ 1.5 billion annually.

These are gradually increasing in our Country too and include counterfeit, stolen as well as cards which were not received, taking over of credit card accounts, mail order and transactions on the internet.

20.10 **Health care frauds:** The frauds in this area include inflated bills, false claims and frauds in the purchase and use of pharmaceuticals and equipment. These would be both in government and the private sector.

20.11 **Telecommunications:** Fraud in this sector is well over four billion dollars an year. The main fraud here is in subscription or identity fraud as stolen Ids or credit cards can be used for free service in anonymity and with impunity. This includes telemarketing frauds. This kind of fraud is endemic and will increase.

20.12 **Identity theft:** This new type of offence consists of stealing of identity nformatin and using it to obtain credit, hide from the law or live as a local resident, without being entitled to. Fraud may be perpetrated against financial institutions, government departments or other private companies or individuals, using identity theft.

20.13 **Intellectual Property and cyber crime:** IP theft (copyright, trademark) industrial/commercial secrets, cyber squatting etc., the cost of which runs to a few hundred billion dollars every year in the US alone.

20.14 **Computer Crime:** Yet another new type of offence which covers illegal access to information contained in a computer – whether privately or publicly owned in which either fraud is committed using computers or used for sending threatening messages. These could be used for activities threatening a Country's security.

20.15 **Technology and crime:** With increasing e-commerce, there is increase in cyber economic crime. For every economic crime, there is a cyber version with much more potential, larger profits and lesser risks. While the e-commerce, as a system is speedy and efficient, its very speed and efficiency are creating problems. The Internet has made all borders and legal jurisdictions obsolete. Criminals can remain in one jurisdiction and commit crimes elsewhere and avoid prosecution. Therefore, a high degree of co-ordination to prevent crime and co-operation to prosecute and punish crime become essential especially as the proceeds of these crime go into further crimes including drugs and arms.

20.16 **Pornography (including child pornography):** These offences involve violence against women and children. These offences would cover manufacture, possession and commercial



use of pornography including child pornography, violence against women or children and the enforcement of women/child support.

20.17 ***Crimes against the environment:*** Offences under any of the various environment protection laws, which pose serious hazards to public health.

20.18 ***Serious Frauds:*** It is true that while on and off, economic crimes do come to the fore in press and parliament, they have not received the importance they deserve in spite of their seriousness. Terrorism-both internal and cross-border had taken the central stage in the last few years. The links between terrorism and certain types of economic crimes gradually emerged while at the same time unconnected scams and frauds also occurred. Therefore, there is a crying need to deal with economic offences (including some cyber offence) as a special category of offences and they have to be dealt with not only in a manner different from other crimes but would also require a group of highly trained experts with sufficient powers and resources to handle them. Clearly, the existing laws and procedures are not equal to the task of handling the more complex economic crimes; hence the need for the newly suggested approach.

20.18.1 One possible option could be an Economic Offences Code on the lines of the Criminal Justice Act, 1987 of the UK and the more recent Economic Crimes and Anti-Money Laundering Act 2000 of Mauritius. The UK Act of 1987 which provides for special procedures for the investigation and trial of serious frauds creates a Serious Fraud Office with an independent Director under the Attorney General, with powers to investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex frauds. The offences under this Act are punishable up-to seven years imprisonment for not testifying or giving false evidence or concealing evidence about serious frauds. Further, under this Act, cases involving serious frauds can be transferred to Crown Courts and these cannot be questioned in any Court. There are restrictions on the reporting of the proceedings of such trials or hearings. Under this Act, charges for conspiracy can also be brought. In brief, this is an extra-ordinary legislation creating a single authority with high powers for the investigation of offences involving serious frauds by-passing normal criminal procedures.

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20.18.2 The Mauritius Act of 2000 is much more comprehensive. It lists out all economic



The Mauritius Act of 2000 is much more comprehensive. It lists out all economic offences (including those created by other laws such as insurance, securities, stock exchange etc.,) under one umbrella and authorise the Director of Economic Crimes to include similar crimes. The Act brings under the jurisdiction of the Director professions such as Lawyers, Accountants, Notaries etc. The Director has powers to draw the help of civil as well as police authorities, to gather information and carryout investigation, to co-ordinate for this purpose law enforcement agencies, government departments, private institutions, professions etc., and to devise other measures against money laundering and other economic offences. The Director must declare his assets and liabilities both while taking over and demitting office.

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money laundering and other economic offences. The Director must declare his assets and liabilities both while taking over and demitting office. The Director has high powers to enforce compliance with the Provisions Act by institutions as well as individuals including power to search to attach property etc., On every investigation, he has to report to the Director of Public Prosecution. All banks, financial institutions and professionals are obliged to report all suspicious transactions to him. The Act gives the Director to apply for freezing of the assets of a suspect. He could seek assistance from abroad both for getting evidence and extradition of suspects. Similar laws are being enacted in other countries too. In a slightly different context, the US Government has adopted a Patriot Act 2001, which gives staggering powers to the US Government.

20.18.3 Many other offences listed in the earlier pages including money laundering have been made crimes in India already. Some might not have been covered adequately. Considering the limited capabilities of the present day investigative agencies and the jurisdictional issues, it is being recommended that a Serious Fraud Office be created for handling such crimes.

20.18.4 The Serious Fraud Office should be an autonomous body run by a Board consisting of 3-5 members who will be selected in a manner which will clearly proclaim to the public their independence, autonomy and objectivity so that public will have confidence in the institution. The Serious Fraud Office will deal with serious economic offences, which have

been defined earlier. The Serious Fraud Office will have a core staff drawn from different departments such as the Police, specialists in economic administration, customs and income tax, Forensic Science on the one hand and computer specialist, accountants, lawyers and such. They should also have freedom to hire in the short-term specialists of any kind to augment investigating units depending on needs. This way, the essential staff will be kept at a reasonable level and specialists can be had temporarily as and when needed.

## 20.19 PROCEEDS OF CRIME

20.19.1 A serious problem in investigating these frauds is the identification and attachment of the properties whether movable or immovable accused individual (or company) including relations, associates and benamy holders. A way out could be to adopt something similar to the Mauritius Law or adopt the Maharashtra Investor Code system (created under the Investor Protection Act of Maharashtra or MIPA) which will allow the earlier attachment of such property. Once this is done, the accused themselves approach the Court and assist in the investigation as they would like to get the property released. Such a system will shift the burden on the accused to show that the property was indeed obtained through legitimate methods.

20.19.2 The rules of evidence including presumptions and burden of proof have to be suitably modified and streamlined to tackle these new crimes. All public documents including bank documents should be presumed to be correct. If the accused has benefited from the fraud, the principle of *res ipsa loquitur* should be applied to draw the adverse inference. Similar adverse inference can be drawn in internal rule of procedure have been violated. It is incumbent on the defence to disclose its version once prima facie evidence is available and the charge is framed. Similarly, all authorised signatories of suspect companies and associates must answer truthfully to interrogatories sent or are prosecuted for perjury. As in laws in Singapore, where the accused is either silent in examination or in his reply, adverse inference can be drawn.

The rules of evidence including presumptions and burden of proof have to be suitably modified and streamlined to tackle these new crimes. All public documents including bank documents should be presumed to be correct.

20.19.3 The proliferation in recent times of large-scale crimes, which relate to finance, drugs and such involve large amounts of money; at the same time, they affect adversely increasingly larger sections of the population. Some of this money- especially from drugs- is used for financing terror-related crimes. There are large interstate and even international

gangs which are controlled by leading criminals who do not get directly involved in these crimes, but manage the system sitting away from the scene of the crime and take the large profits from the crime. Governments find it difficult under the present legal system, especially because of the laws and rules relating to extradition as well as the relationship between States and Countries, to lay their hands on these criminals who therefore remain untouched by the Criminal Justice System, for often, they live in countries other than the ones in which the unit of their criminal empires run. The activities of these organised criminal groups in some cases affects people in their everyday lives too, as the crimes relate to property, kidnapping, financial fraud, and prostitution among other things.

20.19.4 Thus, we have a situation where there are major criminals who are untouchable under the law, but lead very comfortable lives from their substantial profits from crime. As the present Criminal Justice System has failed to apprehend or proceed against such criminals, the one powerful way of dealing with such crimes will be to confiscate the proceeds of their crime and send a message that crime will not pay, thereby restoring people's faith in the Criminal Justice System. This will also ensure that the money will not be used to finance further criminal activities. Further, the proceeds recovered could be used to finance crime reduction and criminal rehabilitation projects. In the circumstances, what is needed is a law, which will seize the assets of crime and assist in dismantling and disrupting the criminal organisations. This legislation will introduce in a single scheme the powers of confiscation, which Courts have- in a limited fashion - currently against those convicted of offences. There are broadly two ways of looking at the issue of whether a defendant in such cases has benefited directly or indirectly from crime. The more obvious case is where there could be a list of offences, which will help determine when there is a nexus between defendant, the offence and its benefit. In such cases, the Court can assume that all the defendant's assets are derived from crime, shifting the burden of proof to the defendant unless the defendant proves to the contrary and adduces sufficient ground to prove injustice.

20.19.5 In brief where it is difficult to show a direct nexus, but there is no known source of legitimate income, it should be possible by applying tests of evidence and public interest to investigate and again proceed against the defendant until he proves to the satisfaction of the authorities that the source of his income are indeed legitimate.

20.19.6 In any event, in all such matters, Courts should have the power not only to restrain the assets at the start of the investigation-to ensure that the assets are not disposed of when the Court is seized of the matter- and set in motion detailed investigation with specialists trained in taxation and finance to look at the sources as well as the routes by which the money had come to decide on the further course of action. In those cases where confiscation is not

possible, the Court should have the taxation aspect looked at to ensure that such income is taxed suitably. It is important that this legislation covers all income from dubious sources, which includes not just ordinary crime but also drug and terror-related income as well as laundered money. Wherever the prosecutor can prove that the money is fully or in part the proceeds of criminal conduct, then the defendant can be proceeded against the particular offence or class of offences. It is important that with such special legislation, special courts are established to handle such cases and special investigators are appointed, including forensic accountants as in all these cases as it will be difficult to get witnesses and therefore the paper trail has to be discovered. Further, there should be an agency to handle the property for the Courts.

20.19.7 As there is a possibility of official abuse of these powers and there is a need for building in sufficient safeguards against it. The Committee notes that legislation in this regard has been recently introduced in the UK and it would be useful to look at their experience in the matter.

## 20.20 **ASSETS RECOVERY AGENCY**

20.20.1 In the UK, under the Proceeds of Crime Act, 2002, Assets Recovery Agency has been setup which supports the police, customs, revenue and other agencies in financial investigation leading to conviction, confiscation and recovery of the property. Keeping this in mind, the Committee is of the view that in place of the present system in which the Judges order attachment/seizure, forfeiture or confiscation, a new agency be created called the Assets Recovery Agency to reduce the work of the Judges and the courts by taking over the responsibility of recovery of assets.

20.20.2 The Agency's objectives will be to reduce crime by:

- ?? Supporting investigative agencies such as the Police, in financial investigations, by providing specialist training and advice.
- ?? Investigating cases leading to post-conviction confiscation order and/or applying for such orders.
- ?? Using a new power of 'civil recovery' – suing in the High Court for the recovery of the proceeds of unlawful conduct.
- ?? Using powers of taxation where the Director has reasonable grounds to suspect that there is income, gains or profits that is chargeable to the relevant tax and which results from criminal conduct. The Director will carry out the tax functions that the Inland Revenue would ordinarily carry out, not limited to the proceeds of unlawful conduct but all the defendant's property. The only difference between

the Director and the Inland Revenue will be that when the Director carries out his taxation functions, the source of income need not be identified.

?? Seeking and executing requests for international assistance in obtaining restraints and confiscation and the use of powers of investigation.

20.20.3 The Agency will take on cases only on the basis of referral from the Police, Customs and law enforcement authorities based on agreed criteria.

20.20.4 It may be noted that ARA has functioned only for a short period, and therefore it is too early to assess its success.

## 20.21 **THE REGULATORS AND THE SERIOUS FRAUD OFFICE**

20.21.1 Disclosure has been a long accepted in principle in Corporate Law to prevent fraud and to protect investors' interest. But with a large bureaucracy both Government and quazi-Government, such disclosure has been partial, delayed and often misleading and has served little purpose. The line between near crime and crime is so fine (as for example between tax avoidance and tax evasion) that criminal liability is not something, which could be pinned upon a suspect easily. Even the quite useful standard procedures of accounting as well as independent auditing have ceased to ensure corporate responsibility or even basic accountability. Bankruptcies, fly-by-night operations, sudden and repeated mergers, de-mergers and acquisitions, stock market failures, money laundering etc., have raised serious doubts about accounting and auditing processes not to mention good business practices in corporate governance itself. When corporate governance fails, particularly in the financial sector, the impact is felt by the rich and the somewhat poor indiscriminately and often substantially. There is also the need to define the roles of regulators and demarcate the fine line between the regulators and the criminal investigation machinery. This is of course not common to our country alone but with increasing liberalisation and opening up of the economy, there is a need to improve monitoring, ensure proper disclosures, keep track of major and suspicious transactions, simplification of procedures and greater co-ordination between regulators, enforcement agencies and the police.

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## 20.22 **SELF-REGULATION, REPORTING SYSTEM AND LAW**

20.22.1 There has always been a tendency to allow self-regulation, to a large extent to professional as well as companies. This has also happened in the cyber area, especially the Internet. The failure of the accounting, auditing and other professionals have thrown up the weaknesses in the system. It is necessary to intervene where such self-regulation has failed. At the same time Government, to reduce the burden on itself, should work closely and continuously with business by cleaning up regulations, enacting new laws and help in prosecutions. This is particularly true of cyber crime. This is important as fraudsters are clever and are ahead of Government and most companies in the sophistication of their technical knowledge. There is of course the balance between privacy protection, legitimate business use of private data and prevention of cyber fraud. Here, we have to sacrifice some of our individual interest in the interest of fraud prevention in Society. If this initiative is not taken by the Parliament, there will be plethora on conflicting decisions by different courts at different levels – now a new phenomenon- that will inhibit the development of cyber commerce not to mention reduce the effectiveness law enforcement investigations and international co-operation to reduce such crimes.

## 20.23 **CONFUSION IN REGULATION**

20.23.1 The various frauds and scandals in the past but over the past two decades in particular, have made it abundantly clear that we need for a clear demarcation of responsibilities for and accountability of both the regulators and regulated. For example, Banks come under regulation by both RBI and the Banking department of Govt., of India and in a smaller way SEBI as well as other company law regulators. When the RBI intervened to control the NBFC's it was both heavy handed and indiscriminate. RBI regulates banks and has its representatives sitting as Directors on the board of banks, which is somewhat anomalous. The regulation of National Bank for Agriculture and Rural Bank (NABARD), National Housing Bank (NHB) and such are not clear. Security Exchange Board of India (SEBI) regulates the mutual funds but not the UTI which has got into serious difficulties, in a sense victimising its customers. The co-operative banks and chit funds are not under any kind of acceptable supervision. In brief, the regulatory system, if it can be called that, has ensured neither compliance nor accountability. In the last decade or so the unanswered question which has emerged is how to make the regulators themselves accountable. Hence the need for looking at the regulatory systems to ensure that there is no confusion in regulation, participation by the regulators in the regulated institutions; applicability of similar rules to those similarly placed and no over-lapping or the issue of conflicting orders etc. This is necessary not only to promote good governance but also to avoid conflict of interest.

20.23.2 It will be useful to have these matters examined to clearly demarcate where regulation ends and control of criminal activities begin. It has become clear the adhoc responses to these serious problems will not be of help, especially as the autonomy of the regulators has become open to doubt and the way the court system operates makes it easy for the criminal to escape.

20.23.3 It is time to bring in close and seamless coordination between the RBI, SEBI, Department of Company affairs, the Company Law Board, the regulatory authorities for telecom, insurance and power, the various departments of tax such as income, excise and customs, and all the other agencies appointed as regulators. Their reporting and regulation systems, data gathering mechanisms be reviewed and their monitoring and supervision improved and track of suspicious activities of especially those treading on the border line of the lawful and criminal activity be kept. These agencies should have, unlike now, a limited but highly effective compliance system, which should be, enforced strictly both on employees of institutions and professionals, failing which they will face heavy penalties, making non-compliance economically non-viable. Environmental laws are violated all over the country with near total impunity. These violations have serious economic consequences in terms of damaging the quality of environment, which affects future generations as well. They also have serious public health consequences as their adverse effect is on the health of the people and reduces economic/financial productivity of the country.

## **20.24 INFORMERS**

In its 179<sup>th</sup> report on the Public Interest Disclosure and Protection of Informers, the Law Commission of India has recommended certain measures to check corruption in Government by enacting a Law titled “The Public Interest Disclosure (Protection of Informers) Bill”. This bill is intended to encourage disclosure of information about the conduct of a public servant involving the commission of an offence under the Prevention of Corruption Act or any other Law; it is designed also to check abuse of one’s official position or mal-administration and protect the person making such disclosure. While this is commendable what we need is an Act which will cover such persons making disclosure (informers) applying to all Economic Crimes, Organised Crimes, Federal Crimes as well as Terrorism. This is a matter of great importance and it is recommended that Government takes steps to enact a general bill to cover all such cases and not just those who “blow the whistle” on corruption.



## **PART-IV**

### **LOOKING AHEAD**

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## **EMERGING ROLE OF THE LEGAL PROFESSION**

21.1 No system of justice in modern society can function without the active support and participation of members of the Bar. India has the proud record of not only having the second largest number of practicing lawyers in the world but also one which has been in the forefront of freedom movement and constitutional development. Unfortunately after independence, due to a variety of factors for which the Bar alone is not responsible, public perception about the profession is not very flattering. In the field of criminal justice, this change in public perception has done a lot of damage not only to the profession but also to the quality and efficiency of criminal justice administration. This is not the place to explore the causes and consequences of this development. However, if criminal justice administration has to improve and society is to be protected from crime, lawyers practicing on the criminal side whether for defence or prosecution have to appreciate the nature of the malady and equip themselves with the knowledge and skills necessary to act as officers of the court in its search for truth. This aspect is incomplete without projecting the important role of the lawyer as a facilitator of change in criminal justice reform.

If criminal justice administration has to improve and society is to be protected from crime, lawyers practicing on the criminal side whether for defence or prosecution have to appreciate the nature of the malady and equip themselves with the knowledge and skills necessary to act as officers of the court in its search for truth.

21.2 This report seeks to make some necessary changes in the system of criminal justice delivery. Naturally the role and responsibilities of prosecutors and defence lawyers will have to undergo changes in the process. Being an independent and autonomous profession, it is not for the Government to force change on their part, rather the Government should provide opportunities for professional development, facilitate their role as agents of reform and accommodate their legitimate aspirations in judicial administration. In this regard it is necessary for the profession to appreciate why the Committee has great expectations from the criminal law practitioners without whose willing support, the reform process may even not take off. For example delay and arrears are serious problems

which should be eradicated as fast as possible. Courts alone cannot accomplish it and lawyers will have to extend full support in minimising adjournments respecting the rights of the victims and witnesses, attempting to settle compoundable offences early etc. As officers of the court, these are their duties and professional responsibilities. There cannot be compromises in the search for truth excepting those laid down by the law itself. Keeping this in mind if the defence and prosecution lend full support and cooperation to the court, one would expect criminal trials to be completed expeditiously and faith of the public in the Criminal Justice System restored.

21.3 Today every profession is seeking to specialize and acquire new skills and expertise to be able to do its job efficiently. The Bar has to realize the importance of specialization and learn, for example the nature and scope of forensic science in detection and proof. Again, information and communication technology is changing the way we think, act and do things. Through video-conferencing and multi-media application recording of evidence or examination can be conducted effectively without invading the rights of parties to the dispute. Lawyers should be receptive to change and the benefits of technology should be fully utilised. Continuing education for lawyers is as much necessary as it is for Judges. Government should assist the Bar councils and Bar associations to enable its members to acquire new knowledge and skills as quickly and efficiently as possible.

21.4 The law of arrest, search, bail, interrogation, detention, identification, etc. has transformed a great deal in the light of constitutional demands and international obligations. It is a welcome development and the contribution of the Bar is significant. At the same time organised crime, economic crime, terrorism and similar developments are threatening the very foundation of democracy and rule of law. Response to the same is changing, rights are being re-written and procedure is being modified. Lawyers have an important role to bring about a balance between individual rights and public good in investigation, prosecution and trial.

21.5 In an era where violence is increasing and security of life, liberty and property are under grave threat and crime is increasing and ensuring peaceful life is one of the functions of the civil society, every player in the Criminal Justice System has a responsible, pro-active and meaningful role to play. It should also not be forgotten that the defence lawyer also is an important player in the scheme of Criminal Justice System along with the prosecutor and the investigator. Therefore apart from assisting in the time bound and quick disposal of criminal trial the defence lawyer also has to be sensitive to his commitment to societal values of protection of the individuals' life and liberty. Moreover to secure that end he should also rise to higher levels of responsibility because the only aim of a defence counsel is not to secure the acquittal

by any manner or means but by adopting just, fair and legally acceptable methods. This kind of sensitivity to the social cause is more important in grave crimes that threaten the security of the State. Where child abuse and victims of sexual assault are concerned both the rules of professional conduct and also provisions in the Evidence Act do provide the limits of fairness in so far as cross examination is concerned. These considerations and objects are prime concern of the defence lawyer as a person who is a key player in the system and therefore he has a higher responsibility to adhere to fair and just means for securing justice to the accused and that way while doing adequate justice to the cause of the accused he should also be fulfilling a commitment which he owes to the society as a responsible citizen ensuring that justice is rendered.

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21.6 Assistance of Criminal law practitioners should be available to citizens at all times as what are at stake are life, liberty and right to speedy trial which is a precious fundamental right. Without any detriment to the duties and responsibilities of the Bar, their grievances if any should be resolved by peaceful and constitutional means. Bar should voluntarily extend free legal aid in criminal cases to prevent the indigent accused being made the exclusive responsibility of the Government. Every Bar association should have a cell for this purpose. It is hoped that the legal profession will not fail the system and rise to new heights of responsibility in the quest for truth and justice and social commitment towards a sound criminal justice delivery system in which the accused, the victim and the society all get a fair deal.

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## **TRAINING – A STRATEGY FOR REFORM**

22.1 Training is the acknowledged route to efficiency in any profession. In a society, which is getting more complex and specialized, the need for the Criminal Justice System to adopt itself to the changes through continuing education and training is critical. It is the view of the Committee that regular well organised, though not quite adequate training programmes (this has been addressed by the report of the National Commission on Police Training) the others in the Criminal Justice System, especially at the lowest levels is not satisfactory and there is much variation in the application of the laws and the inexperience of the all-too-burdened Judges. The general inefficiency of the system could be addressed by some of the other recommendations of the Committee, but, the dilatory proceedings, the ever increasing backlog and the poor quality of justice cannot be resolved by just adding more Courts, when the System itself is inefficient. The approach recommended through the Committee to make Criminal Justice System function more efficiently with less resources is simplified and alternative procedures and penalties and by promoting settlements. This requires extensive training, both at the time of induction as well as at regular intervals while in service.

The approach recommended through the Committee to make Criminal Justice System function more efficiently with less resources is simplified and alternative procedures and penalties and by promoting settlements. This requires extensive training, both at the time of induction as well as at regular intervals while in service.

22.2 A substantial way to improve the quality of justice would be to raise the level of competence of Judges and Prosecutors as a long-term strategy to be implemented. Such a strategy must have a clear idea of target groups to be trained; training objectives and topics, identifications of institutions to organize the training, financing the training and finally its monitoring and evaluation.

22.3 If we expect the Judges and Prosecutors to do high quality work, we should expect them to have a profound knowledge of substantive criminal laws. Secondly, to make Court procedures both fast (and cost-efficient), they have to know the rules and procedures and how to enforce them as well as to use the Case method (recommended by the Committee) efficiently. Further, they will need communication and management skills and some degree of knowledge of non-legal areas such as sociology and psychology. For those who are likely to deal with economic laws, specialized knowledge of economics, finance and accounting and for those specializing in environment cases, special knowledge of environmental laws will be necessary. Above all this there is a need for attitude training to facilitate their everyday work, to help handle critical situations and to avoid stress.

22.4 Although there is already a report on police training, the Committee feels that the training needs of the police at the lowest level needs much strengthening especially in terms of protection of human rights. It would be useful to have a look at what are the best practices and promote them especially in friendly/community policing, modern investigation techniques, accountability and attitudinal changes especially towards the poor and vulnerable. The second aspect is to have combined training for senior police officers and Prosecutors as well as Judges. A system of joint programmes, professional exchanges and research needs to be developed for the long-term.

22.5 There are several courses at the Institute of Criminology and Forensic Science, the Bureau of Police Research and Development, the Indian Institute of Public Administration and a few modules on criminal justice and are both ad hoc and short-term and therefore, neither satisfy the training needs nor will it improve the performance of Prosecutors and Judges. The training being recommended here, will be in terms of improving trials in terms of speed and efficiency of trials and the quality of judgements, including better sentencing and settlement among other things.

22.6 The Committee's recommendation to reform the Criminal Justice System include:

- i. the need for the Courts to focus on finding the truth;
- ii. a strong victim orientation;
- iii. use of forensic as well as modern methods of investigation;
- iv. reclassification of crimes with a large number of offences to be "settles";
- v. an emphasis on the accountability of all those in the System including the judge, the prosecution as well as the defense;
- vi. much enhanced managerial and technical skills in the personnel.

22.7 The training programme must comprise all these elements. This is a stupendous

training agenda and will require, training academics to design training courses, study materials, train the trainers, develop the best pedagogic techniques and a system of monitoring and evaluation.

22.8 The Committee endorses in general, the reports of the Law Commission of India (54<sup>th</sup> & 117<sup>th</sup>), the various reports of the Committee on judicial reform including the first National Judicial Pay Commission, on training, through criminal justice has not been, we feel adequately covered.

22.9 On-the-job training through attachment has been an important part of induction training in the country. The Committee recommends an year long induction training programme for newly recruited Prosecutors and Judges, a part of which should be with the police, forensic laboratories, courts and prisons on which the recommendations of the first National Judicial Pay Commission are available. While this can take care of the future entrants, there is a need to retain and reorient the existing cadre of more than 15,000 trial court Judges and an equal number of Prosecutors. The judicial academy, which has little infrastructure and meager resources, may not be able to handle this. That the training has not been perceived by Government as critical could be reflection of the relevance of training programmes. But, training programmes redrawn as recommended by the Committee will surely contribute to improving the system.

22.10 A small high level training council is required. This will include in it representatives of the Judiciary, Prosecution, the concerned ministry and academic and a couple of non-legal public persons. This training council should meet at least three or four times in a year to assess the standards of Judges and Prosecutors, the training needs, the improvements in training and the effectiveness of the training methods. The training council should work out a training policy paper, which could be revise once in five years. It could take the help of the National Judicial Academy (NJA) for this purpose. The training policy paper should address the training needs of the Judges as well as the prosecution and defense, attorneys, not to mention other court officials. The training should cover substantive law, rules and procedures, court and case management as well as the use of management techniques to improve the efficiency of the system.

22.11 The Committee has recommended the need for specialization in the Judiciary including the superior court judges. Towards this, there is a need to train judges whenever they are promoted to a higher position so that they have a better appreciation of what is demanded of them and they also become better equipped to do their job well. Considering the new and complex types of cases coming up especially those relating to Information

Technology (IT), Environment or Economics and Finance, judges who will specialize in these areas need to have refresher courses irrespective of their status in the hierarchy. With introduction of in-service training as recommended with emphasis on much greater efficiency in court and case management, the use of IT applications and management techniques and the instilling of better professional attitudes and motivation, it can be reasonably expected that the Criminal Justice System could improve in efficiency.

22.12 It is important to have a highly selected group of trainers who will look after the highest level training as well as to train the other trainers. This is a critical area where the highest quality must be ensured. Here, the training needs at the national level and at the state level have to be worked out in detail considering that the demands at each level could vary depending on the region and level. The NJA with other institutions could play the role of a coordinator in developing the training programmes and various types of study materials. Given the variations from State to State, the NJA could work through regional academies to upgrade the development programmes.

It is important to have a highly selected group of trainers who will look after the highest level training as well as to train the other trainers. This is a critical area where the highest quality must be ensured. Here, the training needs at the national level and at the state level have to be worked out in detail considering that the demands at each level could vary depending on the region and level.

22.13 Similarly, there is a need for good quality study materials and audio visual aids for generalized training in all aspects of the Criminal Justice System not only to improve the quality of the work of the players, but, also for specialised study materials and aids in areas such as economic and environmental regulations, public laws, Intellectual Property Rights, IT & other commercial laws, sentencing, settlement & alternative dispute resolution; and an awareness of the need for transparency, fairness and empathy and to protect human rights in dealing with the accused and more so, the victims and a sensitivity to the needs of women and those who are vulnerable. Distance education has also the potential to be utilized for training. Here again, the NJA could play a vital role.

22.14 An independent and strong system to monitor and evaluate the work of judicial training is essential. This can be done by a broad based-committee constituted for that purpose once in three years. As it is recommended that the training should go beyond conventional teaching of law to many innovative things, there is the need to develop objective evaluation methods to judge whether the training programmes indeed result in the improvements

aimed at. The training results could also be usefully linked to service benefits as it is done in the defense services.

22.15 It is not enough to recognise that vast changes are taking place and the Criminal Justice System should be prepared to meet it. The Committee recommends that research should be given importance in the new scheme things. Research should be done amount other things to study the changes in society, the changes in laws and justice systems and to identify a way of meeting new needs and finding new solutions as well as help in preparing training methods and materials. Therefore, there is a need to build sufficient capacity in this area and give adequate technical infrastructure, libraries for this purpose.

22.16 Financing training programmes requires a commitment to provide adequate finance for effective training. Some financing can also be arranged from external sources in terms of human resources or collaborations of various kinds.

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## **VISION FOR BETTER CRIMINAL JUSTICE SYSTEM**

### **THE VISION FOR THE FUTURE**

23.1 The pursuit of life, liberty and peace includes freedom from crime. The State's foremost duty is to provide these basic rights to each citizen. The success of a Criminal Justice System can only be measured by how successful it is in ensuring these rights in word and spirit. The extent to which these are successfully guaranteed, will be reflected in the confidence of the public in the system.

23.2 Except for some modifications in the Code of Criminal Procedure 1973 (Cr.P.C), there has been no serious attempt to look at the various aspects of the Criminal Justice System. On the one hand particularly with improving information technologies, the availability of information on the incidence of crime is increasing; as is the rise in the expectations of the people from the

The men and women who run the System also need to be trained, motivated and finally made accountable. This is essential in a democracy, which requires both transparency and accountability from such public servants. It is difficult to expect the laws and procedures to make up for the deficiencies of the human element and vice-versa. There is also the problem of the earlier perceptions of crimes having given way to newer and more humane perceptions which demand that crimes be re-classified in the light of the new perceptions.

State. Whether it is the laws, rules or procedures, or whether it is men and women who run the System that are to be blamed, the fact remains that the System has become quite inefficient. The Committee is aware that the laws, rules and procedures which were good for the bygone era have not quite stood the test of time. The men and women who run the System also need to be trained, motivated and finally made accountable. This is essential in a democracy, which requires both transparency and accountability from

such public servants. It is difficult to expect the laws and procedures to make up for the deficiencies of the human element and vice-versa. There is also the



problem of the earlier perceptions of crimes having given way to newer and more humane perceptions which demand that crimes be re-classified in the light of the new perceptions. What has been suggested in our re-classification system is the beginning of a long-term exercise, but the Committee has no doubt that one has to go much beyond this, based on the experience of how re-classification works. The Committee is also aware that this reclassification is only a part of the solution. Similarly the Committee being aware of the need for changes in criminal laws especially in the Evidence Act and the IPC has made certain recommendations on those too. It is not only necessary to have a fresh look at the juridical principles which are the basis of the Criminal Justice System, but also look at how these have been translated in various laws and regulations. This should particularly apply strongly to our pre-Independence legislation. Ours are hoary laws and procedures based on certain unexceptionable principles, but it cannot be denied that it may be necessary to reinterpret the same principles taking into account the values of modern society and the perception of the society on what is crime and what is not; and in crimes, what is grave and what is petty.

23.3 This is for the first time, after several decades that an attempt is made to reform the Criminal Justice System. We are aware that the problems are innumerable and not capable of easy solutions but we believe we have made a beginning. This first step is towards a big new beginning. We do not subscribe to the view that every one charged by the Police is necessarily guilty of a crime; nor would we seek to change the system only to ensure that the conviction rate goes up. We do not subscribe to the view that the legal adjudication is the only answer to the ills of our society and that the inexorable rise in crime can only be tackled by more and more repressive justice. We do believe that truth is central to the system, that victims must be protected and justice must be done to them. Eventually we hope that the system will lean towards more restorative justice. We believe that to break the cycle of re-offending we need to work out measures including rehabilitation programmes and support to the offenders and even their families. We believe that economic crimes should be handled to ensure that the profits and proceeds of crime do not accrue to the criminals and as a general rule no offenders should get away with crime. It believes that organised crime and terrorism should be tackled with due consideration to their roots and the motivation of the criminals and terrorists. The Committee strongly believe that the prison is a place only for the worst offenders but it is no place for children or even women and that our laws and regulations should be changed to ensure this. It believes that not only the rights of suspects must be protected, but also all human rights. Court trials should be totally just, fair and transparent. If the reforms are carried out in this spirit, we hope it would help regain much of the lost public confidence. Incidentally we also feel that it is time the public realize that it too has a duty to report on crimes

and cooperate with the police. Our recommendations may appear not entirely in consonance with the above; to some it may appear radical and far reaching. We have only charted out the direction, set the agenda and we believe, we have been quite moderate in our recommendations. We are aware of the strength of the fiercely guarded turfs of the different sections of the system; yet we hope that it will not come in the way of effective reforms to the system. The success of reforms would ultimately depend upon how they are carried out in their details and to what extent they reflect the spirit of our recommendations.

Organised crime and terrorism should be tackled with due consideration to their roots and the motivation of the criminals and terrorists. The prison is a place only for the worst offenders but it is no place for children or even women and that our laws and regulations should be changed to ensure this. Not only the rights of suspects must be protected, but also all human rights. Court trials should be totally just, fair and transparent. Reforms carried out in this spirit would help regain much of the lost public confidence.

23.4 There is an urgent necessity in the light of our recommendations to have a detailed look at the way our criminal justice institutions have been functioning. Though a few suggestions have been made in this regard in terms of recruitment, training and such, a good overhaul of the system applying modern management principles, strengthening them with new information technologies and finding sufficient resources for these are also matters of great urgency. Equally urgent is the matter of programs and measures to improve and keep up-to-date their training and keep high the motivation of those who run the systems. This applies to all parts of the Criminal Justice System.

23.5 There has been much patchy and piecemeal legislation and much more ad hoc policy making relating to terrorism or organised crime or different types of victims such as women, children and dalits for one reason or the other. Yet, things have improved little for the various kinds of victims and in the handling of organised crimes or terrorism. Success has been elusive. The Committee also feels- with the greatest respect - that many of the orders of the various Courts on different issues, constituting Judge-made law has also hindered the criminal justice administration. It is therefore necessary for Government to come out with a clear and coherent policy statement on all major issues of criminal justice. It is further recommended that Government appoint a Presidential Commission on the lines of the Finance Commission under the Constitution to review the functioning of the Criminal Justice System. This should be done under the Constitution at least once in 15 years.

**23.6** Society changes, and so do its values. A system so vital and critical to the society as the Criminal Justice System, cannot be static. Reforms ought to be a continuous process, keeping pace with the emerging challenges. No worthwhile reform is possible without deep study and intensive research.

**23.7** The vision demonstrated by the Government in constituting this Committee, will, it is hoped, become the harbinger for setting up a Presidential Commission under the Constitution, to periodically review and reform the health of the System.

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**PART – VI**

**RECOMMENDATIONS**

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## **RECOMMENDATIONS**

### **1. NEED FOR REFORMS**

It is the duty of the State to protect fundamental rights of the citizens as well as the right to property. The State has constituted the Criminal Justice System to protect the rights of the innocent and punish the guilty. The system devised more than a century back, has become ineffective; a large number of guilty go unpunished in a large number of cases; the system takes years to bring the guilty to justice; and has ceased to deter criminals. Crime is increasing rapidly everyday and types of crimes are proliferating. The citizens live in constant fear. It is therefore that the Govt. of India, Ministry of Home Affairs constituted the Committee on reforms of Criminal Justice System to make a comprehensive examination of all the functionaries of the Criminal Justice System, the fundamental principles and the relevant laws. The Committee, having given its utmost consideration to the grave problems facing the country, has made its recommendations in its final report, the salient features of which are given below:-

### **2. ADVERSARIAL SYSTEM**

The Committee has given its anxious consideration to the question as to whether this system is satisfactory or whether we should consider recommending any other system. The Committee examined in particular the Inquisitorial System followed in France, Germany and other Continental countries. The Inquisitorial System is certainly efficient in the sense that the investigation is supervised by the Judicial Magistrate which results in a high rate of conviction. The Committee on balance felt that, a fair trial and in particular, fairness to the accused, are better protected in the adversarial system. However, the Committee felt that some of the good features of the Inquisitorial system can be adopted to strengthen the Adversarial System and to make it more effective. This includes the duty of the Court to search for truth, to assign a pro-active role to the Judges, to give directions to the investigating officers and prosecution agencies in the matter of investigation and leading evidence with the object of

seeking the truth and focusing on justice to victims. Accordingly the Committee has made the following recommendations:-

- (1) A preamble shall be added to the Code on the following lines: -  
 “Whereas it is expedient to constitute a Criminal Justice System, for punishing the guilty and protecting the innocent.  
 “Whereas it is expedient to prescribe the procedure to be followed by it,  
 “Whereas quest for truth shall be the foundation of the Criminal Justice System,  
 “Whereas it shall be the duty of every functionary of the Criminal Justice System and everyone associated with it in the administration of justice, to actively pursue the quest for truth.

It is enacted as follows:

- (2) A provision on the following lines be made and placed immediately above Section 311 of the Code  
 “Quest for truth shall be the fundamental duty of every court”.
- (3) Section 311 of the Code be substituted on the following lines: -  
 “Any Court shall at any stage of any inquiry, trial or other proceeding under the Code, summon any person as a witness or examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined as it appears necessary for discovering truth in the case”.
- (4) Provision similar to Section 255 of the Code relating to summons trial procedure be made in respect of trial by warrant and sessions procedures, empowering such court to take into consideration, the evidence received under Section 311 (new) of the Code in addition to the evidence produced by the Prosecution
- (5) Section 482 of the Code be substituted by a provision on the following lines:  
 “Every Court shall have inherent power to make such orders as may be necessary to discover truth or to give effect to any order under this Code or to prevent abuse of the process of court or otherwise to secure the ends of justice”.
- (6) A provision on the following lines be added immediately below Section 311 of the Code.  
 Power to issue directions regarding investigation  
 “Any court shall, at any stage of inquiry or trial under this Code, shall have such power to



issue directions to the investigating officer to make further investigation or to direct the Supervisory Officer to take appropriate action for proper or adequate investigation so as to assist the Court in search for truth.

- (7) Section 54 of the Evidence Act be substituted by a provision on the following lines:

“In criminal proceeding the fact that the accused has a bad character is relevant”.

Explanation: A previous conviction is relevant as evidence of bad character.

### 3. RIGHT TO SILENCE

The Right to silence is a fundamental right guaranteed to the citizen under Article 20(3) of the Constitution which says that no person accused of any offence shall be compelled to be a witness against himself. As the accused is in most cases the best source of information, the Committee felt that while respecting the right of the accused a way must be found to tap this critical source of information. The Committee feels that without subjecting the accused to any duress, the court should have the freedom to question the accused to elicit the relevant information and if he refuses to answer, to draw adverse inference against the accused.

At present the participation of the accused in the trial is minimal. He is not even required to disclose his stand and the benefit of special exception to any which he claims. This results in great prejudice to the prosecution and impedes the search for truth. The Committee has therefore felt that the accused should be required to file a statement to the prosecution disclosing his stand. For achieving this, the following recommendations are made:

- (8) Section 313 of the Code may be substituted by Section 313-A, 313-B and 313-C on the following lines: -

- i) 313-A In every trial, the Court shall, immediately after the witnesses for the prosecution have been examined, question the accused generally, to explain personally any circumstances appearing in the evidence against him.
- ii) 313-B(1): Without previously warning the accused, the Court may at any stage of trial and shall, after the examination under Section 313-A and before he is called on his defence put such questions to him as the court considers necessary with the object of discovering the truth in the case.  
If the accused remains silent or refuses to answer any question put to him by the court which he is not compelled by law to answer, the court may draw such appropriate inference including adverse inference as it considers proper in the circumstances.

iii) 313-C(1): No oath shall be administered when the accused is examined under Section 313-A or Section 313-B and the accused shall not be liable to punishment for refusing to answer any question or by giving false answer to them.

The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, or any other offence which such answers may tend to show he has committed.

(9) Suitable provisions shall be incorporated in the Code on the following lines: -

- (i) Requiring the Prosecution to prepare a 'Statement of Prosecution' containing all relevant particulars including, date, time, place of the offence, part played by the accused, motive for the offence, the nature of the evidence oral and documentary, names of witnesses, names and similar particulars of others involved in the commission of the crime, the offence alleged to have been committed and such other particulars as are necessary to fully disclose the prosecution case.
- (ii) 'Prosecution statement' shall be served on the accused.
- (iii) On the charge being framed the accused shall submit the 'Defence Statement', within two weeks. The Court may on sufficient cause being shown extend the time not beyond 4 weeks.
- (iv) In the defence statement the accused shall give specific reply to every material allegation made in the prosecution statement.
- (v) If the accused pleads guilty he need not file the defence statement.
- (vi) If any reply is general, vague or devoid of material particulars, the Court may call upon the accused to rectify the same within 2 weeks, failing which it shall be deemed that the allegation is not denied.
- (vii) If the accused is claiming the benefit of any general or special exceptions or the benefit of any exception or proviso, or claims alibi, he shall specifically plead the same, failing which he shall be precluded from claiming benefit of the same.
- (viii) Form and particulars to be furnished in the prosecution statement and defence statement shall be prescribed.
- (ix) If in the light of the plea taken by the accused, it becomes necessary for the prosecution to investigate the case further, such investigation may be made with the leave of the court.

(10) (i) On considering the prosecution statement and the defence statement the court shall formulate the points of determination that arise for consideration.

- (ii) The points for determination shall indicate on whom the burden of proof lies.
- (iii) Allegations which are admitted or are not denied need not be proved and the court shall make a record of the same.

#### 4. RIGHTS OF ACCUSED

The accused has several rights guaranteed to him under the Constitution and relevant laws. They have been liberally extended by the decisions of the Supreme Court. The accused has the right to know about all the rights he has, how to enforce them and whom to approach when there is a denial of those rights. The Committee therefore felt that all the rights of the accused flowing from the laws and judicial decisions should be collected and put in a Schedule to the Code. The Committee also felt that they should be translated by each State in the respective regional language and published in a form of a pamphlet for free distribution to the accused and to the general public. The following recommendations are made in regard to the rights of the accused:-

- (11) The rights of the accused recognised by the Supreme Court may subject to the clarification in chapter 4 and the manner of their protection be made statutory, incorporating the same in a schedule to the Criminal Procedure Code.
- (12) Specific provision in the Code be made prescribing reasonable conditions to regulate handcuffing including provision for taking action for misuse of the power by the Police Officers.

#### 5. PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

There is no provision in the Indian Evidence Act prescribing a particular or a different standard of proof for criminal cases. However the standard of proof laid down by our courts following the English precedents is proof beyond reasonable doubt in criminal cases. In several countries in the world including the countries following the inquisitorial system, the standard is proof on 'preponderance of probabilities'. There is a third standard of proof which is higher than 'proof on preponderance of probabilities' and lower than 'proof beyond reasonable doubt' described in different ways, one of them being 'clear and convincing' standard. The Committee after careful assessment of the standards of proof came to the conclusion that the standard of proof beyond reasonable doubt presently followed in criminal cases should be done away with and recommended in its place a standard of proof lower than that of 'proof beyond reasonable doubt' and higher than the standard of 'proof on preponderance of probabilities'. The Committee therefore favours a mid level standard of proof of "courts

conviction that it is true”. Accordingly, the Committee has made the following recommendations:

- (13) i) The Committee recommends that the standard of ‘proof beyond reasonable doubt’ presently followed in criminal cases shall be done away with.
- ii) The Committee recommends that the standard of proof in criminal cases should be higher than the one prescribed in Section 3 of the Evidence Act and lower than ‘proof beyond reasonable doubt’.
- iii) Accordingly the Committee recommends that a clause be added in Section 3 on the following lines:  
 “In criminal cases, unless otherwise provided, a fact is said to be proved when, after considering the matter before it, the court is convinced that it is true”.  
*(The clause may be worded in any other way to incorporate the concept in para 2 above)*
- iv) The amendments shall have effect notwithstanding anything contained to the contrary in any judgment order or decision of any court.

## 6. JUSTICE TO VICTIMS OF CRIME

An important object of the Criminal Justice System is to ensure justice to the victims, yet he has not been given any substantial right, not even to participate in the criminal proceedings. Therefore, the Committee feels that the system must focus on justice to victims and has thus, made the following recommendations which include the right of the victim to participate in cases involving serious crimes and to adequate compensation.

- (14) i) The victim, and if he is dead, his legal representative shall have the right to be impleaded as a party in every criminal proceeding where the charge is punishable with 7 years imprisonment or more.
- ii) In select cases notified by the appropriate government, with the permission of the court an approved voluntary organization shall also have the right to implead in court proceedings.
- iii) The victim has a right to be represented by an advocate of his choice; provided that an advocate shall be provided at the cost of the State if the victim is not in a position to afford a lawyer.
- iv) The victim’s right to participate in criminal trial shall, *inter alia*, include:
  - a) To produce evidence, oral or documentary, with leave of the Court and/or to seek directions for production of such evidence
  - b) To ask questions to the witnesses or to suggest to the court questions which may be put to witnesses

- c) To know the status of investigation and to move the court to issue directions for further to the investigation on certain matters or to a supervisory officer to ensure effective and proper investigation to assist in the search for truth.
  - d) To be heard in respect of the grant or cancellation of bail
  - e) To be heard whenever prosecution seeks to withdraw and to offer to continue the prosecution
  - f) To advance arguments after the prosecutor has submitted arguments
  - g) To participate in negotiations leading to settlement of compoundable offences
- v) The victim shall have a right to prefer an appeal against any adverse order passed by the court acquitting the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation. Such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court.
- vi) Legal services to victims in select crimes may be extended to include psychiatric and medical help, interim compensation and protection against secondary victimization.
- vii) Victim compensation is a State obligation in all serious crimes, whether the offender is apprehended or not, convicted or acquitted. This is to be organised in a separate legislation by Parliament. The draft bill on the subject submitted to Government in 1995 by the Indian Society of Victimology provides a tentative framework for consideration.
- viii) The Victim Compensation law will provide for the creation of a Victim Compensation Fund to be administered possibly by the Legal Services Authority. The law should provide for the scale of compensation in different offences for the guidance of the Court. It may specify offences in which compensation may not be granted and conditions under which it may be awarded or withdrawn.

It is the considered view of the Committee that criminal justice administration will assume a new direction towards better and quicker justice once the rights of victims are recognized by law and restitution for loss of life, limb and property are provided for in the system. The cost for providing it is not exorbitant as sometimes made out to be. With increase in quantum of fine recovered, diversion of funds generated by the justice system and soliciting public contribution, the proposed victim compensation fund can be mobilized at least to meet the cost of compensating victims of violent crimes. Even if part of the assets confiscated and forfeited in organised crimes and financial frauds is also made part in the Fund and if it is managed efficiently, there will be no paucity of resources for this well conceived reform. In any case,

dispensing justice to victims of crime cannot any longer be ignored on grounds of scarcity of resources.

## 7. INVESTIGATION

The machinery of Criminal Justice System is put into gear when an offence is registered and then investigated. A prompt and quality investigation is therefore the foundation of the effective Criminal Justice System. Police are employed to perform multifarious duties and quite often the important work of expeditious investigation gets relegated in priority. A separate wing of investigation with clear mandate that it is accountable only to Rule of Law is the need of the day.

Most of the Laws, both substantive as well as procedural were enacted more than 100 years back. Criminality has undergone a tremendous change qualitatively as well as quantitatively. Therefore the apparatus designed for investigation has to be equipped with laws and procedures to make it functional in the present context. If the existing challenges of crime are to be met effectively, not only the mindset of investigators needs a change but they have to be trained in advanced technology, knowledge of changing economy, new dynamics of social engineering, efficacy and use of modern forensics etc. Investigation Agency is understaffed, ill equipped and therefore the gross inadequacies in basic facilities and infrastructure also need attention on priority.

There is need for the Law and the society to trust the police and the police leadership to ensure improvement in their credibility.

In the above back drop following recommendations are made:

- (15) The Investigation Wing should be separated from the Law and Order Wing.
- (16) National Security Commission and the State Security Commissions at the State level should be constituted, as recommended by the National Police Commission.
- (17) To improve quality of investigation the following measures shall be taken:
  - i. The post of an Additional SP may be created exclusively for supervision of crime.
  - ii. Another Additional SP in each Dist. should be made responsible for collection, collation and dissemination of criminal intelligence; maintenance and analysis of crime data and investigation of important cases .
  - iii. Each State should have an officer of the IGP rank in the State Crime Branch exclusively to supervise the functioning of the Crime Police. The Crime Branch should have specialised squads for organised crime and other major crimes.



- iv. Grave and sensational crimes having inter-State and transnational ramifications should be investigated by a team of officers and not by a single IO.
- v. The Sessions cases must be investigated by the senior-most police officer posted at the police station.
- vi. Fair and transparent mechanisms shall be set up in place where they do not exist and strengthened where they exist, at the District Police Range and State level for redressal of public grievances.
- vii. Police Establishment Boards should be set up at the police headquarters for posting, transfer and promotion etc of the District. Level officers.
- viii. The existing system of Police Commissioner's office which is found to be more efficient in the matter of crime control and management shall be introduced in the urban cities and towns.
- ix. Dy.SP level officers to investigate crimes need to be reviewed for reducing the burden of the Circle Officers so as to enable them to devote more time to supervisory work.
- x. Criminal cases should be registered promptly with utmost promptitude by the SHOs .
- xi. Stringent punishment should be provided for false registration of cases and false complaints. Section 182/211 of IPC be suitably amended
- xii. Specialised Units/Squads should be set up at the State and District. level for investigating specified category crimes.
- xiii. A panel of experts be drawn from various disciplines such as auditing, computer science, banking, engineering and revenue matters etc. at the State level from whom assistance can be sought by the investigating officers .
- xiv. With emphasis on compulsory registration of crime and removal of difference between non-cognizable and cognizable offences, the work load of investigation agencies would increase considerably. Additionally, some investigations would be required to be done by a team of investigators. For liquidating the existing pendency, and, for prompt and quality investigation including increase in the number of Investigating Officers is of utmost importance. It is recommended that such number be increased at least two-fold during the next three years.
- xv. Similarly for ensuring effective and better quality of supervision of investigation, the number of supervisory officers (additional SPs/Dy.SP) should be doubled in next three years.
- xvi. Infrastructural facilities available to the Investigating Officers specially in regard to accommodation, mobility, connectivity, use of technology, training facilities etc. are grossly inadequate and they need to be improved on top priority. It is recommended a five year rolling plan be prepared and adequate funds are



made available to meet the basic requirements of personnel and infrastructure of the police.

- (18) The training infrastructure, both at the level of Central Govt. and State Govts., should be strengthened for imparting *state-of-the-art* training to the fresh recruits as also to the in-service personnel. *Hand-picked* officers must be posted in the training institutions and they should be given adequate monetary incentive
- (19) Law should be amended to the effect that the literate witness signs the statement and illiterate one puts his thumb impression thereon. A copy of the statement should mandatorily be given to the witness.
- (20) Audio/video recording of statements of witnesses, dying declarations and confessions should be authorized by law.
- (21) Interrogation Centres should be set up at the District. Hqrs. in each District., where they do not exist, and strengthened where they exist, with facilities like tape recording and or videography and photography etc.
- (22)
  - (i) Forensic Science and modern technology must be used in investigations right from the commencement of investigations. A cadre of Scene of Crime Officers should be created for preservation of scene of crime and collection of physical evidence there-from.
  - (ii) The network of CFSs and FSLs in the country needs to be strengthened for providing optimal forensic cover to the investigating officers. Mini FSLs and Mobile Forensic Units should be set up at the District./Range level. The Finger Print Bureaux and the FSLs should be equipped with well trained manpower in adequate numbers and adequate financial resources.
- (23) Forensic Medico Legal Services should be strengthened at the District. and the State /Central level, with adequate training facilities at the State/Central level for the experts doing medico legal work. The State Govts. must prescribe time frame for submission of medico legal reports.
- (24) A mechanism for coordination amongst investigators, forensic experts and prosecutors at the State and Dist. level for effective investigations and prosecutions should be devised.

- (25) Preparation of Police Briefs in all grave crimes must be made mandatory. A certain number of experienced public prosecutors must be set apart in each District. to act as Legal Advisors to the District. police for this purpose.
- (26) An apex Criminal intelligence bureau should be set up at the national level for collection, collation and dissemination of criminal intelligence. A similar mechanism may be devised at the State, District. and Police Station level.
- (27) As the Indian Police Act, 1861, has become outdated, a new Police Act must be enacted on the pattern of the draft 'prepared by the National Police Commission.
- (28) Section 167 (2) of the Code be amended to increase the maximum period of Police custody to 30 days in respect of offences punishable with sentence more than seven years.
- (29) Section 167 of the Code which fixes 90 days for filing charge sheet failing which the accused is entitled to be released on bail be amended empowering the Court to extend the same by a further period up to 90 days if the Court is satisfied that there was sufficient cause, in cases where the offence is punishable with imprisonment above seven years.
- (30) A suitable provision be made to enable the police take the accused in police custody remand even after the expiry of the first 15 days from the date of arrest subject to the condition that the total period of police custody of the accused does not exceed 15 days.
- (31) A suitable provision be made to exclude the period during which the accused is not available for investigation on grounds of health etc., for computing the permissible period of police custody.
- (32) Section 438 of the code regarding anticipatory bail be amended to the effect that such power should be exercised only by the Court of competent jurisdiction only after giving the public prosecutor an opportunity of being heard.
- (33) Section 161 of the Code be amended to provide that the statements by any person to a police officer should be recorded in the narrative or question and answer form.

- (34) In cases of offences where sentence is more than seven years it may also be tape / video recorded.
- (35) Section 162 be amended to require that it should then be read over and got signed by the maker of the statement and a copy furnished to him.
- (36) Section 162 of the Code should also be amended to provide that such statements can be used for contradicting and corroborating the maker of the statement.
- (37) Section 25 of the Evidence Act may be suitably amended on the lines of Section 32 of POTA 2002 that a confession recorded by the Supdt. of Police or Officer above him and simultaneously audio / video recorded is admissible in evidence subject to the condition the accused was informed of his right to consult a lawyer.
- (38) Identification of Prisoners Act 1920 be suitably amended to empower the Magistrate to authorize taking from the accused finger prints, foot prints, photographs, blood sample for DNA, finger printing, hair, saliva or semen etc., on the lines of Section 27 of POTA 2002.
- (39) A suitable provision be made on the lines of sections 36 to 48 of POTA 2002 for interception of wire, electric or oral communication for prevention or detection of crime.
- (40) Suitable amendments be made to remove the distinction between cognizable and non-cognizable offences in relation to the power of the police to investigate offences and to make it obligatory on the police officer to entertain complaints regarding commission of all offences and to investigate them.
- (41) Refusal to entertain complaints regarding commission of any offence shall be made punishable.
- (42) Similar amendments shall be made in respect of offences under special laws.
- (43) A provision in the Code be made to provide that no arrest shall be made in respect of offences punishable only with fine, offences punishable with fine as an alternative to sentence of imprisonment.
- (44) In the schedule to the Code for the expression “cognizable”, the expression “arrestable

without warrant” and for the expression “non-cognizable” the expression “arrestable with warrant or order” shall be substituted.

- (45) The Committee recommended for the review and re-enactment of the IPC, Cr.PC and Evidence Act may take a holistic view in respect to punishment, arrestability and bailability.
- (46) Consequential amendments shall be made to the first schedule in the column relating to bailability in respect of offences for which the Committee has recommended that no arrest shall be made.
- (47) Even in respect of offences which are not arrestable, the police should have power to arrest the person when he fails to give his name and address and other particulars to enable the police to ascertain the same. Section 42 of the Code be amended by substituting the word “any” for the words “of non-cognizable”
- (48) As the Committee has recommended removal of distinction between cognizable and non-cognizable offences, consequential amendments shall be made.
- (49) The first schedule to the Code be amended to provide only the following particulars.
  - i. Section
  - ii. Offence
  - iii. Punishment
  - iv. No arrest / arrestable with warrant or order / arrestable without warrant or order.
  - v. Bailable or non-bailable
  - vi. Compoundable or non-compoundable
  - vii. Triable by what court.

Consequential amendments shall be made to part-II of the first Schedule in respect of offences against other laws.
- (50) Rights and duties of the complainant/informant, the victim, the accused, the witnesses and the authorities to whom they can approach with their grievances should be incorporated in separate Schedules to the Code. They should be translated in the respective regional languages and made available free of cost to the citizens in the form of easily understandable pamphlets.
- (51) Presence of witnesses of the locality or other locality or neighbourhood is required under different provisions of the existing laws. The Committee recommends that

such provisions be deleted and substituted by the words “the police should secure the presence of two independent witnesses”.

## 8. PROSECUTION

Prosecutors are the Officers of the Court whose duty is to assist the court in the search of truth which is the objective of the Criminal Justice System. Any amount of good investigation would not result in success unless the institution of prosecution has persons who are of merit and who are committed with foundation of a well structured professional training.

This important institution of the Criminal Justice System has been weak and somewhat neglected. Its recruitment, training and professionalism need special attention so as to make it synergetic with other institutions and effective in delivering good results.

The following recommendations are made in this regard:

- (52) (i) In every State, the post of the Director of Prosecution should be created, if not already created, and should be filled up from among suitable police officers of the rank of DGP in consultation with the Advocate General of the State.
- (ii) In States where the term of the existing incumbents comes to an end, such appointments shall be made, after the expiry of the term.
- (53) The Assistant Public Prosecutors and Prosecutors (other than the State Public Prosecutor in the High Court) shall be subject to the administrative and disciplinary control of the Director of Prosecutions.
- (54) The duties of the Director, *inter alia*, are to facilitate effective coordination between the investigating and prosecuting officers and to review their work and meeting with the Public Prosecutors, Additional Public Prosecutors and Assistant Public Prosecutors from time to time for that purpose.
- (55) The Director must function under the guidance of the Advocate General.
- (56) i) All appointments to APPs shall be through competitive examination held by the Public Service Commission having jurisdiction.
- ii) 50% of the vacancies in the posts of Public Prosecutors or Additional Public Prosecutors at District level in each State shall be filled up by selection and promotion on seniority-cum-merit from the APPs.

- iii) Remaining 50% of the posts of Public Prosecutors or Additional Public Prosecutor shall be filled by selection from a panel prepared in consultation with District Magistrates and District Judges.
  - iv) No person appointed as APP or promoted as Public Prosecutor shall be posted in the Home district to which he belongs or where he was practicing.
  - v) Public Prosecutors appointed directly from the Bar shall hold office for a period of three years. However, the State may appoint as Special public prosecutor any member of the Bar for any class of cases for a specified period.
  - vi) In appointing to various offices of Public Prosecutors and Assistant Public Prosecutors sufficient representation shall be given to women.
- (57) Assistant Public Prosecutors should be given intensive training, both theoretical and practical. Persons in service should be given periodical in-service training.
- (58) To provide promotional avenues and to use their expertise. Posts be created in institutions for Training for Prosecutors and Police Officers.
- (59) To ensure accountability, the Director must call for reports in all cases that end in acquittal, from the Prosecutor who conducted the case and the Superintendent of Police of the District.
- (60) All Prosecutors should work in close co-operation with the police department, and assist in the speedy and efficient prosecution of criminal cases and render advice and assistance from time to time for efficient performance of their duties.
- (61) The Commissioner of Police / Dist. Supdt of Police may be empowered to hold monthly review meetings of P.Ps / Additional PPs and APPs for ensuring proper co-ordination and satisfactory functioning.
- (62) Provision may be made for posting Public Prosecutor / Senior Asst. Public Prosecutors at the Commissionerate / Dist. Supdt. offices for rendering legal advice.

## 9. COURTS AND JUDGES

There is gross inadequacy of Judges to cope up the enormous pendency and new inflow of cases. The existing Judge population ratio in India is 10.5:13 per million population as against 50 Judges per million population in the many parts of the world. The Supreme Court has



given directions to all the States to increase the Judge strength by five times in a phased manner within the next five years. The vacancies in the High Courts have remained unfilled for years. This must be remedied quickly.

The Committee is deeply concerned about the deterioration in the quality of Judges appointed to the courts at all levels. The Constitution of a National Judicial Commission is being considered at the national level to deal with appointment of the Judges to the High Courts and the Supreme Court and to deal with the complaints of misconduct against them. The mere entrustment of the power of appointment to the National Judicial Commission will not ensure appointment of competent and upright Judges. We need a process to ensure objectivity and transparency in this behalf. This requires laying down the precise qualifications, experience, qualities and attributes that are needed to in a good Judge and also the prescription of objective criteria to apply to the overall background of the candidate. The analysis and discussions preceding their recommendations should be recorded so as to ensure objectivity and transparency in the matter of selecting the candidates.

There are also complaints of serious aberrations in the conduct of the Judges. Under Article 235 of the Constitution, the High Court can exercise supervision and control over the subordinate courts. There is no such power conferred either on the Chief Justice of the High Court or the Chief Justice of India, or the Supreme Court of India. The provisions for impeachment are quite difficult to implement. It is felt that the Chief Justice should be conferred certain powers to enforce discipline and to take some corrective or advisory measures against his colleagues whenever aberrations in their conduct come to notice.

The Committee also feels that criminal work is highly specialized and to improve the quality of justice only those who have expertise in criminal work should be appointed and posted to benches to deal exclusively with criminal work. As the available expertise at all levels is found to be woefully inadequate the Committee feels that suitably tailored intensive training including practical programme should be devised and all the Judges given training not only at the induction time but also in service at frequent intervals. To achieve these objectives, the following recommendations are made:

- (63) (i) Qualifications prescribed for appointment of Judges at different levels should be reviewed to ensure that highly competent Judges are inducted at different levels.
- (ii) Special attention should be paid to enquire into the background and antecedents of the persons appointed to Judicial Offices to ensure that persons of proven integrity and character are appointed.
- (64) Intensive training should be imparted in theoretical, practical and in court management to all the Judges.



- (65) (i) In the Supreme Court and High Courts, the respective Chief Justices should constitute a separate criminal division consisting of such number of criminal benches as may be required consisting of Judges who have specialized in criminal law.
- (ii) Such Judges should normally be continued to deal with criminal cases until they demit office.
- (iii) Vacancies in the criminal divisions should be filled up by appointing those who have specialized knowledge in criminal law.
- (66) In the subordinate courts where there are more Judges of the same cadre at the same place, as far as possible assigning of civil and criminal cases to the same Judge every day should be avoided.
- (67) In urban areas where there are several trial courts some courts should have lady Judges who should be assigned as far as possible criminal cases relating to women.
- (68) A high power committee should be constituted to lay down the qualifications, qualities and attributes regarding character and integrity that the candidate for the High Court Judgeship should possess and specify the evidence or material necessary to satisfy these requirements. Reasons should be recorded with reference to these criteria by the selecting authority.
- (69) The Chief Justice of the High Court may be empowered on the lines of U.S. Judicial Councils Reform and Judicial Conduct and Disabilities Act 1980 to do the following:
- i. Advise the Judge suitably
  - ii. Disable the Judge from hearing a particular class of cases.
  - iii. Withdrawing judicial work for a specified period.
  - iv. Censure the Judge.
  - v. Advise the Judge to seek voluntary retirement.
  - vi. Move the Chief Justice of India to advise the Judge or initiate action for impeachment.
- (70) The Chief Justice of the High Court may issue circulars:
- A) That immediately below the cause title of the judgment order the following particulars shall be entered:
    - i) Date of conclusion of arguments.
    - ii) Date of reserving the judgment.
    - iii) Date of pronouncement of the judgment.

iv) At the bottom of the judgment the following particulars shall be entered: -

- a) Date when the dictation was completed.
- b) Date when typing was completed and placed before the Judge.
- c) The date when the Judge signed.

B) The Court Officer shall enter in a separate register: -

- (i) The time when the Judge assembled.
- (ii) The time when the Judge rose.
- (iii) Copy of this record shall be sent to the Chief Justice on the same day and put up on the notice board.

(71) The Committee recommends that the Law Commission's consultation paper on case management be accepted and the proposals carried out without any delay.

## 10. TRIAL PROCEDURE

The Committee is concerned with enormous delay in decision making particularly in trial courts. At present, a large number of cases in which punishment is two years and less are tried as summons cases. The summary procedure prescribed by Section 262 to 264 of the Code, if exercised properly, would quicken the pace of justice considerably. However, the number of cases which are presently tried summarily is quite small and maximum punishment that can be given after a summary trial is three months. In order to speed up the process, the Committee feels that all cases in which punishment is three years and below should be tried summarily and punishment that can be awarded in summary trials should be increased to three years. At present only specially empowered magistrate can exercise summary powers which the Committee feels should be given to all the Judicial Magistrates First Class.

Section 206 of the Code prescribes the procedure for dealing with 'petty offences'. This provision empowers the Magistrates to specify in the summons the fine which the accused should pay if he pleads guilty and to send the fine amount along with his reply to the court. This procedure is simple and convenient to the accused, as he need not engage a lawyer nor appear before the court if he is not interested in contesting the case. However, the definition of the expression 'petty offences' restricts it to those offences punishable only with fine not exceeding Rs.1000/-. In order to give benefit of this provision to large number of accused, the Committee has favoured suitable modification of the expression 'petty offences'. Hence the following recommendations are made:

- (72) (i) Section 260 of the Code be amended by substituting the word "shall" for the words "may if he think fit."
- (ii) Section 260 (1) (c) of the Code be amended empowering any Magistrate of

First Class to exercise the power to try the cases summarily without any special empowerment in this behalf by the High Court.

- (iii) The limit of Rs.200/- fixed for the value of property under Section 260(1) (c) (ii, iii, iv) be enhanced to Rs. 5000/-.
- (73) (i) Section 262(2) be amended to enhance the power of sentence of imprisonment from three months to three years.
- (ii) Section 2(x) be amended by substituting the word “three” for the word “two”.
- (74) That all Magistrates shall be given intensive practical training to try cases following the summary procedure.
- (75) Section 206 be amended to make it mandatory to deal with all petty cases in the manner prescribed in sub-section (1).
- (76) (i) In the proviso to sub-section(1) the fine amount to be specified in the summons shall be raised to Rs. 2000/-.
- (ii) Notice to the accused under Section 206 shall be in form No.30-A and the reply of the accused shall be in form No. 30-B as per annexures.
- (77) In Sub-section (2) of Section 206 the limit relating to fine be raised to Rs.5000/-.
- (78) (i) Sub-section (3) shall be suitably amended to empower every Magistrate to deal with cases under Sub-section (1). Offences which are compoundable under Section 320 or any offence punishable with imprisonment for a term not exceeding one year or with fine or with both.
- (ii) (a) Section 62 of the Code be amended by deleting reference to the need for rules by State Government for alternate modes of service.
- (b) In Section 69 before the word “witness” the words “accused or” be added wherever the word “witness” occurs.

## 11. WITNESSES AND PERJURY

The prosecution mainly relies on the oral evidence of the witnesses for proving the case against the accused. Unfortunately there is no dearth of witnesses who come to the courts and give false evidence with impunity. This is a major cause of the failure of the system. The procedure prescribed for taking action against perjury is as cumbersome and as it is unsatisfactory. Many witnesses give false evidence either because of inducement or because

of the threats to him or his family members. There is no law to give protection to the witnesses subject to such threats, similar to witness protection laws available in other countries.

Unfortunately the witnesses are treated very shabbily by the system. There are no facilities for the witnesses when they come to the court and have to wait for long periods, often their cross-examination is unreasonable and occasionally rude. They are not given their TA/DA promptly. The witnesses are not treated with due courtesy and consideration; nor are they protected. Witnesses are required to come to the court unnecessarily and repeatedly as a large number of cases are posted and adjourned on frivolous grounds. To overcome these problems, the Committee has made the following recommendations:

- (79) (i) Witness who comes to assist the court should be treated with dignity and shown due courtesy. An official should be assigned to provide assistance to him.
- (ii) Separate place should be provided with proper facilities such as seating, resting, toilet, drinking water etc. for the convenience of the witnesses in the court premises.
- (80) Rates of traveling and other allowance to the witness should be reviewed so as to compensate him for the expenses that he incurs. Proper arrangements should be made for payment of the allowances due to the witness on the same day when the case is adjourned without examining the witness he should be paid T.A and D.A. the same day.
- (81) A law should be enacted for giving protection to the witnesses and their family members on the lines of the laws in USA and other countries.
- (82) Courts should list the cases in such a manner as to avoid the witnesses being required to come again and again for giving evidence. The trial should proceed on day to day basis and granting of adjournments should be avoided. The Judge should be held accountable for any lapse in this behalf. High Court should ensure due compliance through training and supervision.
- (83) Evidence of Experts falling under Sections 291, 292 and 293 of the Court may as far as possible received under Affidavit.
- (84) DNA experts should be included in Subsection 4 of Section 293 of the Code.
- (85) The witness should be provided a seat for him to sit down and give evidence in the court.

- (86) The Judge should be vigilant and regulate cross-examination to prevent the witness being subjected to harassment, annoyance or indignity. This should be ensured through training and proper supervision by the High Courts.
- (87) (i) Section 344 of the Code may be suitably amended to require the court to try the case summarily once it forms the opinion that the witness has knowingly or willfully given false evidence or fabricated false evidence with the intention that such evidence should be used in such proceeding. The expression occurring in 344 (1) to the effect “if satisfied that it is necessary and expedient in the interest of justice that the witnesses should be tried summarily for giving or fabricating as the case may be, false evidence” shall be deleted.
- (ii) The Committee recommends that the punishment of three months or fine up to Rs. 500/- or both should be enhanced to imprisonment of two years or fine up to Rs. 10000/- or both.
- (iii) Sub-section 3 may be suitably amended to the effect that if the Court of Session or Magistrate of first class disposing the judicial proceeding is however satisfied that it is necessary and expedient in the interest of justice that the witness should be tried and punished following the procedure prescribed under Section 340 of the Code, it shall record a finding to that effect and proceed to take further action under the said provision. Section 341 providing for appeal is unnecessary and shall be deleted.
- (88) As the oath or affirmation administration to the witnesses has become an empty formality and does not act as a deterrent against making false statements by the witnesses, it is recommended that a provision should be incorporated requiring the Judge administering the oath or affirmation to caution the witness that he is in duty bound under Section 8 of the Oaths Act to speak the truth and that if he makes a false statement in violation of the oath or affirmation that has been administered to him, the court has the power to punish him for the offence of perjury and also to inform him of the punishment prescribed for the said offence.
- (89) It is further recommended that the High Court may impress upon the subordinate courts of their duty to resort to these provisions to curb the menace of perjury, through training and calling for periodic reports.

## 12. VACATIONS FOR COURT

In view of the large pendency and mounting arrears of criminal cases, the long vacations for

the High Courts and Supreme Courts in the larger public interest, the Committee feels that there should be a reduction of the vacations. Hence, the following recommendations are made:

- (90) (i) The working days of the Supreme Court be raised to 206 days.
- (ii) The working days of the High Courts be raised to 231 days.
- (iii) Consequently, the Supreme Court and the High Courts shall reduce their vacations by 21 days on the increase in their working days.

### 13. ARREARS ERADICATION SCHEME

The recommendations made by the Committee in this report would help in reducing the arrears and speeding up the trials; but to tackle the huge arrears a complementary strategy is recommended. Govt. of India, Ministry of Law and Justice has created a 'fast track courts' scheme for dealing with the sessions cases. Though the scheme is good it is beset with many practical problems besides being limited to dealing with sessions cases. The Committee is in favour of working out an 'Arrears Eradication Scheme' for the purpose of tackling all the cases that are pending for more than 2 years on the appointed day.

To carry out the scheme, the Committee feels that a retired Judge of a High Court who is known for effective and expeditious disposal of criminal cases should be put in charge of the Arrears Eradication Scheme as the sitting Judges may not find the time for it. Hence the following recommendations.

- (91) Arrears Eradication scheme should be framed on lines suggested in the Section "Arrears Eradication Scheme".
- (92) There should be a cell in the High Court whose duty shall be to collect and collate information and particulars from all the Subordinate courts in regard to cases pending in the respective courts for more than two years, to identify the cases among them which can be disposed of summarily under Section 262 of the Code or as petty cases under Section 206 of the Code and cases which can be compounded with or without the leave of the court.
- (93) On the coming into the force of the scheme, arrangements shall be made for sending all the compoundable cases to the Legal Service Authority for settling those cases through Lok Adalats on priority basis.
- (94) The courts constituted under the Arrears Eradication scheme shall dispose of cases



on priority basis. The arrears of cases triable under Section 262 and under Section 206 shall be disposed of expeditiously.

- (95) The Courts constituted under the Arrears Eradication Scheme shall dispose of the cases expeditiously.
- (96) A case taken up for hearing should be heard on a day to day basis until conclusion. Only such number of cases as can be conveniently disposed of shall be posted for hearing every day as far as possible in consultation with the concerned lawyers.
- (97) Once the case is posted for hearing it shall not be adjourned. If under special circumstances a case is required to be adjourned, it should be done for reasons to be recorded in writing subject to payment of costs and also the amount of expenses of the witnesses. The court in its discretion shall award costs to the other party or direct that the same shall be credited to the victim compensation fund if one is constituted.
- (98) The (retired) Judge incharge of the Arrears Eradication scheme shall make an estimate of the number of additional courts required to be constituted for eradication of the arrears at each place including the requirement of staff, number of Public Prosecutors and other infrastructure required and move the concerned authorities to appoint them.
- (99) The High Court shall take effective measures to ensure that the current cases are disposed of expeditiously and that no current cases would be pending for more than two years. Additional Courts if needed for this purpose should be sanctioned expeditiously.

#### 14. OFFENCES, SENTENCES, SENTENCING & COMPOUNDING

Since the IPC was enacted in the year 1860, many developments have taken place, new forms of crimes have come into existence, punishments for some crimes are proving grossly inadequate and the need for imposing only fine as a sentence for smaller offences is felt. Variety of the punishments prescribed is limited. Thus there is need to have new forms of punishments such as community service, disqualification from holding public offices, confiscation orders, imprisonment for life without commutation or remission etc. Hence the Committee is in favour to review the IPC.

The IPC prescribes only the maximum punishments for the offences and in some cases minimum punishment is also prescribed. The Judge exercises wide discretion within



the statutory limits. There are no statutory guidelines to regulate his discretion. Therefore in practice there is much variance in the matter of sentencing. There is no clear indication as to what are all factors that should be taken into account in the matter of assessing the sentences to be imposed. In many countries there are laws prescribing sentencing guidelines. The Committee is therefore in favour of a permanent Statutory Committee being constituted for the purpose of prescribing sentencing guidelines.

As the fines were prescribed more than a century ago and value of the rupee has since gone down considerably, the Committee feels that it should be suitably enhanced.

The practice of jailing women who are pregnant or having young child, the Committee feels this is cruel and most unreasonable to virtually to put the innocent child in prison for no fault of the child which will also affect his future life. Therefore pregnant women or women with child (below 7 years) should, instead of being sent to prison, be ordered to be under house arrest. This, the Committee feels is not a charity but the legitimate right of the unborn and young children.

The Committee feels that the law should lean in favour of settlement of cases without trial, where the interest of the society is not involved. The Law Commission has already made its recommendations on this. The implementation of the Law Commission recommendations with the inclusion of more offences in the category of cases that can be compounded is recommended.

- (100) The Committee recommends that wherever fine is prescribed as one of the punishments, suitable amendment shall be made to increase the fine amount by fifty times.
- (101) In respect of offences for which death is a punishment, the sentence for “imprisonment for life without commutation or remission” be prescribed as an alternative sentence. Suitable amendments shall be made to make it clear that when such punishment is imposed, the Government is precluded from commuting or remitting the sentence.
- (102) When a woman who is pregnant or has a child below 7 years is sentenced to any term of imprisonment, a provision shall be made to give effect to that sentence by directing that she shall remain under house arrest during that period. Similar provisions shall be made in respect of such women who are remanded to judicial custody.
- (103) IPC empowers the court to prescribe the sentence of imprisonment when the accused commits default in payment of fine. The Committee recommends that a suitable provision should be made empowering the court to prescribe as an alternative to default sentence, community service for a specified time.

- (104) The Committee recommends that a statutory Committee be constituted to lay down sentencing guidelines to regulate the discretion of the court in imposing sentences for various offences under the IPC and Special Local Laws under the Chairmanship of a former Judge of the Supreme Court or a retired Chief Justice of a High Court who has experience in Criminal Law, and with members representing the Police department, the legal profession, the Prosecution, Women and a social activist.
- (105) The Committee recommends review of the Indian Penal Code to consider enhancement, reduction or prescribing alternative modes of punishments, creating new offences in respect of new and emerging crimes and prescribing new forms of punishments wherever appropriate and including more offences in the category of compoundable offences and without leave of the court.
- (106) The Committee recommends implementation of 142nd and 154th reports of the Law Commission of India in regard to settlement of cases without trial.

## 15. RECLASSIFICATION OF OFFENCES

It is recommended that non-cognizable offences should be registered and investigated and arrestability shall not depend on cognizability, the present classification has further lost its relevance.

However the Committee feels that when reviewing the Indian Penal Code it may be examined whether it would be helpful to make a new classification into i) The Social Welfare Code, ii) The Correctional Code, iii) The Criminal Code and iv) Economic and other Offences Code. Hence the following recommendations:-

- (107) To remove the distinction between cognizable and non-cognizable offences and making it obligatory on the Police Officer to investigate all offences in respect of which a complaint is made. This is discussed in the chapter on 'Investigation'.
- (108) Increasing the number of cases falling within the category of cases triable by following the summary procedure prescribed by Sections 262 to 264 of the code in respect of which recommendations have been made in the Section dealing with "Trial Procedure".
- (109) Increasing the number of offences falling in the category of 'Petty Offences' which can be dealt with by following the procedure prescribed by Section 206 of the Code which has been discussed in the Section dealing with "Trial Procedure".

- (110) Increasing the number of offences for which no arrest shall be made, which has been discussed in the Section dealing with “ Investigation”.
- (111) Increasing the number of offences where arrest can be made only with the order of the court and reducing the number of cases where arrest can be made without an order or warrant from the Magistrate, which has been discussed in the Section dealing with “Investigation”.
- (112) Increasing the number of offences which are bailable and reducing the number of offences which are not bailable discussed in the Section dealing with “Police Investigation”.
- (113) Increasing the number of offences that can be brought within the category of compoundable / settlement category discussed in Section dealing with “Sentences and Sentencing”.
- (114) The Committee recommends a comprehensive review of the Indian Penal Code, the Evidence Act and the Criminal Procedure Code by a broad based Committee representing the functionaries of the Criminal Justice System, eminent men and women representing different schools of thoughts, social scientists and vulnerable sections of the society and to make recommendations to the Parliament for stronger and progressive loss for the Country.

## 16. OFFENCES AGAINST WOMEN

There are several shortcomings or aberrations in dealing with the offences against women which need to be addressed. The Committee feels that a man who marries a second wife during the subsistence of the first wife should not escape his liability to maintain his second wife under Section 125 of the Code on the grounds that the second marriage is neither lawful nor valid.

The Supreme Court has held that, for proving bigamy, it is to be established that the second marriage was performed in accordance with the customary rites of either parties under the personal laws which is not easy to prove. Therefore the Committee feels that evidence regarding a man and woman living together for a reasonably long period should be sufficient to draw the presumption that the marriage was performed according to the customary rites of the parties.

As a man can be punished under Section 497 of IPC for adultery, for having sexual intercourse with a wife of another man it stands to reason that wife should likewise be punished if she has sexual intercourse with another married man.

There is a general complaint that section 498A of the IPC regarding cruelty by the husband or his relatives is subjected to gross misuse and many times

operates against the interest of the wife herself. This offence is non-bailable and non-compoundable. Hence husband and other members of the family are arrested and can be behind the bars which may result in husband losing his job. Even if the wife is willing to condone and forgive the lapse of the husband and live in matrimony, this provision comes in the way of spouses returning to the matrimonial home. This hardship can be avoided by making the offence bailable and compoundable.

As instances of non-penal penetration are on the increase and they do not fall in the definition under the offence of rape under Section 375 of the IPC, the Committee feels that such non-penal penetration should be made an offence prescribing a heavier punishment.

The Committee is not in favour of imposing death penalty for the offence of rape, for in its opinion the rapists may kill the victim. Instead the Committee recommends sentence of imprisonment for life without commutation or remission.

The Committee however feels that investigation and trial of rape cases should be done with most expedition and with a high degree of sensitivity. The Committee therefore, makes the following recommendations:

- (115) Definition of the word 'wife' in Section 125 of the Code be amended to include a woman who was living with the man like his wife for reasonable long period.
- (116) Section 494 of the I.P.C be suitably amended to the effect that if the man and woman were living together as husband and wife for a reasonable long period the man shall be deemed to have married the woman according to the customary rites of either party.
- (117) Section 497 of the Indian Penal Code regarding offence of Adultery be amended to include wife who has sexual intercourse with a married man, by substituting the words "whosoever has sexual intercourse with the spouse of any other person is guilty of adultery".
- (118) The Code may be suitably amended to make the offence under Section 498 A of the I.P.Code, bailable and compoundable.
- (119) Forcible penetration, penile/oral, penile/anal, object or finger/vaginal and object or finger/anal should be made a separate offence under the IPC prescribing appropriate punishment on the lines of Section 376 of I.P.Code.
- (120) The Committee is not in favour of prescribing death penalty for the offence of rape.

Instead the Committee recommends sentence of imprisonment for life without commutation or remission.

- (121) A suitable provision should be made requiring the officer investigating to complete investigation of cases of rape and other sexual offences on priority basis and requiring the court to dispose of such cases expeditiously within a period of four months.
- (122) Specialised training should be imparted to the Magistrates in regard to trial of cases of rape and other sexual offences to instill in them sensitivity to the feelings, image, dignity and reputation etc of the victim.
- (123) Provision should be made in the Code permitting filing of F.I.Rs in respect of offences under Sections 376, 376-A, 376-B, 376-C, 376-D and 377 of IPC within a reasonable time.

#### 17. 18.& 19. ORGANISED CRIME, FEDERAL CRIME AND TERRORISM

Organised Crime and Terrorism have been growing globally and India has not escaped their pernicious effect. The nexus between organised crime and terrorism has also been a cause of serious concern to the Country. The Committee has given deep consideration to inter-twined and inter-dependent professional crimes in Indian as well as international background. The task of dealing with the organised crime and the terrorism becomes more complicated as structured group in organised crime is enmeshed with its counter-part (of structured group) in terrorism. The former is actuated by financial/commercial propositions whereas the latter is prompted by a wide range of motives and depending on the point in time and the prevailing political ideology. The Committee has given deep consideration to the growth of organised crime, terrorism and their invisible co-relationship with the avowed objective to destroy secular and democratic fabric of the country. The Committee feels that time has come to sink political differences for better governance of the country and address the task of dealing with these menaces. In the backdrop of the States' reluctance to share political power, through legislatures, for enactment of federal law to deal with certain crimes, the Committee has made recommendations to deal with (a) organised crime (b) enactment of central law to tackle federal crimes and (c) terrorism

The Committee recommends that:

#### ORGANISED CRIME

- (124) The Government release a paper delineating the genesis of organised crime in India, its international ramifications and its hold over the society, politics and the economy of the country.
- (125) Enabling legislative proposals be undertaken speedily to amend domestic laws to conform to the provisions of the UN Convention on Transnational Organised Crime.
- (126) An inter-Ministerial Standing Committee be constituted to oversee the implementation of the Convention.
- (127) The Nodal Group recommended by the Vohra Committee may be given the status of a National Authority with a legal frame-work with appropriate composition.
- i. This Authority may be mandated to change the orientation and perception of law enforcement agencies, sensitise the country to the dimensions of the problem and ensure that investigations of cases falling within the ambit of the Authority are completed within a specified time-frame;
  - ii. The Authority should be empowered to obtain full information on any case from any agency of the Central or the State Governments;
  - iii. It should also have the power to freeze bank accounts and any other financial accounts of suspects/accused involved in cases under its scrutiny.
  - iv. The power to attach the property of any accused.
- (128) Suitable amendments to provisions of the Code of Criminal Procedure, the Indian Penal Code, the Indian Evidence Act and such other relevant laws as required may be made to deal with the dangerous nexus between politicians, bureaucrats and criminals.
- (129) A special mechanism be put in place to deal with the cases involving a Central Minister or a State Minister, Members of Parliament and State Assemblies to proceed against them for their involvement.



- (130) That the Code of Criminal Procedure provide for attachment, seizure and confiscation of immovable properties on the same lines as available in special laws.
- (131) A Central, special legislation be enacted to fight Organised Crime for a uniform and unified legal statute for the entire country.

#### FEDERAL LAW

- (132) That in view of legal complexity of such cases, underworld criminals / crimes should be tried by federal courts (to be established), as distinguished from the courts set up by the State Governments.
- (133) That Government must ensure that End User Certificate for international sales of arms is not misused (as happened in the Purulia Arms Drop).
- (134) The banking laws should be so liberalized as to make transparency the corner-stone of transactions which would help in preventing money laundering since India has become a signatory to the U.N. Convention against Transnational Organised Crime.
- (135) That a Federal Law to deal with crimes of inter-state and / or international / trans-national ramification be included in List I (Union List) of the Seventh Schedule to the Constitution of India.

#### TERRORISM

- (136) A Department of Criminal Justice be established to not only carry out the recommendations of the Committee but also set up a Committee, preferably under an Act of Parliament, to appraise procedural and criminal laws with a view to amend them as and when necessary.
- (137) Crime Units comprising dedicated investigators and prosecutors and Special Courts by way of Federal Courts be set up to expeditiously deal with the challenges of 'terrorist and organised' crimes.
- (138) A comprehensive and inclusive definition of terrorists acts, disruptive activities and organised crimes be provided in the Indian Penal Code 1860 so that there is no legal vacuum in dealing with terrorists, underworld criminals and their activities after special laws are permitted to lapse as in the case of TADA 1987.



- (139) The sunset provision of POTA 2002 must be examined in the light of experiences gained since its enactment and necessary amendments carried out to maintain human rights and civil liberties;
- (140) Possession of prohibited automatic or semi-automatic weapons like AK-47, AK-56 Rifles, Machine Guns, etc.) and lethal explosives and devices such as RDX, Landmines detonators, time devices and such other components should be made punishable with a punishment of upto 10 years.
- (141) Power of search and seizure be vested in the Intelligence agencies in the areas declared as Disturbed Areas under the relevant laws.

## 20. ECONOMIC CRIMES

In spite of well over 70 laws, apart from earlier laws in the Penal Code, the magnitude and variety of Economic Crimes is going at a fast rate. The number of agencies for regulation and investigation have also increased. Yet, the need for rigorous laws and strong regulatory enforcement and investigation agencies can not be more obvious. The attempts made in the last few decades to legislate in the matter have not been quite successful. Our judicial processes have not been helpful either. It is essential that these crimes are tackled urgently through legislative and other measures and it is for this purpose that the following recommendations are made:

- (142) Sunset provisions should be continued in statutes and these provisions be examined keeping in view the continuing changes in economy and technology. Such statutes should not be allowed to become out-of-date which can be ensured by comprehensive drafting of those statutes to cover future crimes.
- (143)
  - i) The procedural laws regarding presumption of burden of proof in the case of economic crimes should not be limited to explanation of an accused who must rebut charges conclusively.
  - ii) Adverse inference should be drawn if violation of accounting procedures are prima facie established and public documents, including bank documents, should be deemed to be correct (AIR 1957 SC 211: 1957 Cr.LJ 328)
- (144) Sentences in economic offences should not run concurrently, but consecutively. Fines in these cases should be partly based on seriousness of offence, partly on the ability of the individual/corporation to pay, but ensuring that its deterrence is not lost.

- (145) Legislation on proceeds of crime be enacted on the lines of similar legislation in the U.K and Ireland. An Asset Recovery Agency at the Federal level and similar agency at the State Levels may be created.
- (146) In the past, non-compliance with procedures, healthy norms, institutional rules has led to financial frauds of enormous proportion. The abdication of responsibility by Regulatory Bodies has also contributed to the perpetuity of frauds. Keeping this in view, it is recommended that Regulatory agencies should at all times be vigilant and launch timely investigation and punish offenders expeditiously.
- (147) While *bona fide* or inadvertent irregularities should normally be ignored with appropriate advice for remedial action, the failure of the Regulatory bodies in serious lapses should be viewed adversely by the Central Government.
- (148) Most economic crimes are amenable to investigation and prosecution by the existing law and institutions, there are still some economic offenders of such magnitude and complexity that could call for investigation by a group of different kind of specialists. Therefore, it is recommended that a mechanism by name 'Serious Fraud Office' be established by an Act of Parliament with strong provisions to enable them to investigate and launch prosecution promptly.
- i. To inspire the confidence of the people and ensure autonomy, the Chairman and Members of Serious Fraud Office be appointed for a term of not more than five years following a procedure that itself should inspire confidence, integrity, objectivity and independence.
  - ii. In a similar manner, State Government must set up Serious Fraud Office, but appointment be made in consultation with the Chairman of the Central Fraud Office to eliminate political influence.
- (149) The Committee recommends that the existing Economic Intelligence Units under Ministry of Finance be not only strengthened suitably by induction of specialists, state-of-the-art technology and specialised training. To achieve a common preventive strategy for tackling serious economic crimes, it is necessary that a closer co-ordination be maintained between the National Authority, the SFO, the Intelligence Units and the regulatory authorities as also private agencies. They should develop and share intelligence tools and database, which would help investigation and prosecution of cases.

- (150) For tackling serious economic offences, it is necessary that our domestic laws are made compatible with laws of other Countries. Mutual legal assistance, under appropriate Conventions/Treaties/Protocols of the United Nations should be developed for exchange of information of a continuous basis.
- (151) It is recommended that to reduce the work of Judges, the responsibility of recovery of assets be given to a newly created Assets Recovery Agency which will deal with not only forfeiture of confiscation on behalf of courts and government departments but also support in certain other type of work.
- (152) The practice of appointing serving representatives of regulators on the Board of Directors of financial institutions be discontinued immediately to avoid conflict of interests. To ensure compliance with guidelines of Regulators, the Government may consider appointing independent professionals to represent regulators.
- (153) An effective co-ordination mechanism must be introduced between the Government and Regulators to detect suspicious activities in time and take prompt action.
- (154) Violations of environmental laws having serious economic and public health consequences must be dealt with effectively and expeditiously.
- (155) The Committee recommends the enactment of a law to protect Informers, covering major crimes.

## 22. TRAINING – A STRATEGY FOR REFORM

- (156) “Government and Judiciary will be well advised to invest in training according to the eight point agenda (set out in the section on ‘Training strategy for Reform’) for reaping the benefits of criminal justice reforms in reasonable time.”

## 23. VISION FOR THE FUTURE

Society changes, so do its values. Crimes are increasing especially with changes in technology. Ad hoc policy making and piecemeal legislation is not the answer. The Committee therefore recommends the following:

- (157) That the Government may come out with a policy statement on criminal justice.
- (158) That a provision be incorporated in the Constitution to provide for a Presidential Commission for periodical review of the functioning of the Criminal Justice System.

**Dr. Justice V.S. Malimath**  
**Chairman**

**S. Varadachary, IAS (Retd)**  
Member

**Amitabh Gupta, IPS (Retd)**  
Member

**Prof(Dr.)N.R. Madhava Menon**  
Member

**D.V. Subba Rao**  
Member

**Durgadas Gupta**  
Member-Secretary

**BANGALORE : 28.03.2003**