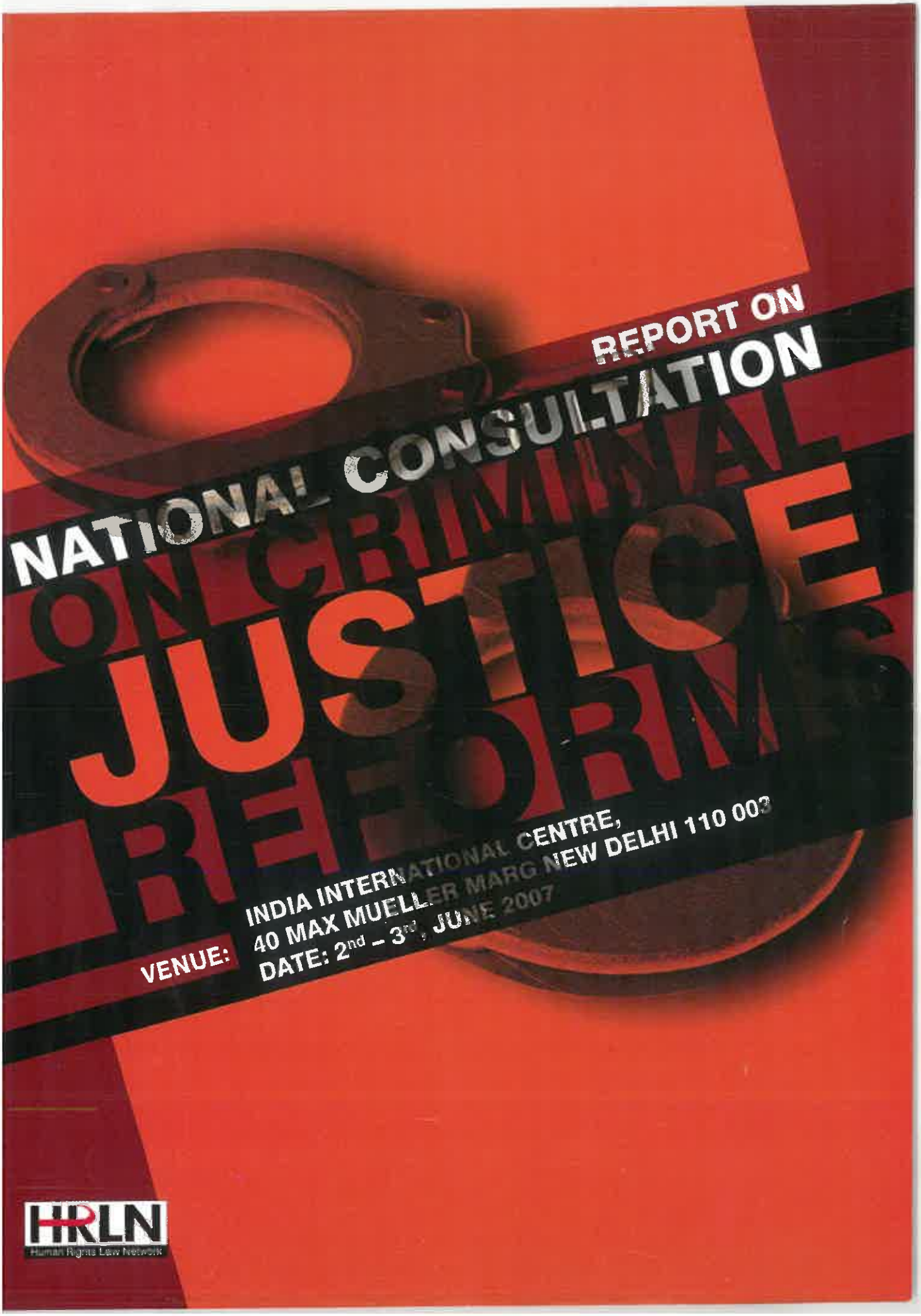

REPORT ON
NATIONAL CONSULTATION
ON CRIMINAL
JUSTICE
REFORMS
VENUE: INDIA INTERNATIONAL CENTRE,
40 MAX MUELLER MARG NEW DELHI 110 003
DATE: 2nd – 3rd, JUNE 2007
HRLN
Human Rights Law Network

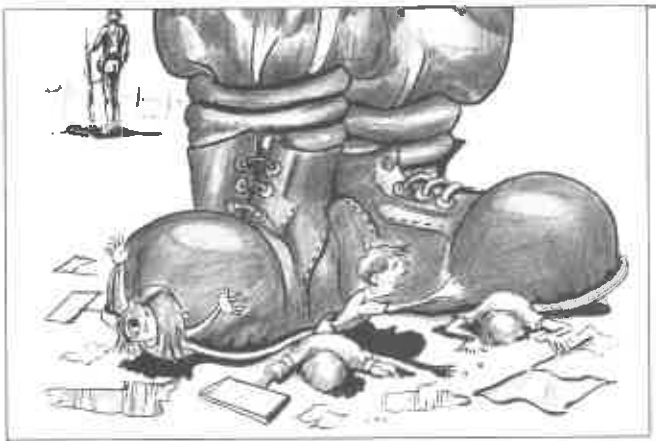
Report on

National Consultation

on Criminal Justice Reforms

HRLN

Human Rights Law Network



NATIONAL CONSULTATION ON CRIMINAL JUSTICE REFORMS

Venue: India International Centre, 40 Max Mueller Marg New Delhi 110 003
Date: 2 – 3, June 2007

DAY 1: Saturday - June 2, 2007

Conference Room: I

Time	Topic	Speaker
	Session 1: Judgments & Reform Committees	
9.00 – 9.15	Introduction	Colin Gonsalves
9.15 – 9.45	Recent judgments of the Supreme Court diluting criminal law protection of the accused.	Dhairyasheel Patil *Maharashtra*
9.45 - 10.15	*Discussion*	
10.15 – 10.45	Malimath Committee Report	Dr. Upendra Baxi New Delhi
10.45 – 11.15	Madhava Menon Committee on drafting criminal law policy.	Prof. B.B. Pande New Delhi
11.15 – 11.30	Comments	M. P. Krishnan Nair *President, Kerala High Court Bar Association*
11.30 – 12.00	Discussion	
	Session 2: Cr.P.C Amendments	
12.00 – 1.00	▪ The Code of Criminal Procedure (Amendment) Act, 2005 ▪ The Code of Criminal Procedure (Amendment) Bill, 2006	Adv. Rajvinder Singh Bains *Punjab* Kirity Roy *West Bengal* Adv. Geo Paul *Kerala* P.K. Ibrahim *Kerala* Dr. P Chandra Sekharan *Bangalore*
1.00 - 2.00	*Lunch*	
2.00 – 3.30	Session continues	
	Session 3: Human Rights Commissions & Human Rights Courts	
3:00 – 4:00	Functioning of the NHRC & SHRC'S. Recommendations for Reform	Adv. Navkiran Singh *Punjab* Adv. Abdul Salam *Kerala* Adv. D. Geetha *Tamilnadu* Adv. Anil Aikara *Kerala* Adv. Irfan Noor Srinagar
4:00 – 4:30	Human Rights Courts	Adv. P. Rathinam Tamilnadu
4.30 – 5.00	Critical issues in Criminal Justice Reform	Hon'ble Justice Ahmadi Former Chief Justice of India
5.00 – 5.45	Criminal Justice Reform in South Africa	Justice Zak Yacoob *Judge, Constitutional Court* *South Africa*
5.45 – 6.30	Discussion	

DAY 2: Sunday, June 3, 2007

Conference Room: II

Session 4: Impunity		
Time	**Topic**	**Speaker**
9.00 – 9.30	Impunity	Sr. Adv. K.G. Kannabiran *President, PUCL* *Andhra Pradesh*
9.30 – 10.00	Torture, Executions, Disappearances	Adv. Balagopal *Andhra Pradesh*
10.00 – 10.15	Comments	Adv. Surendra Gadling *Maharashtra*
10.00 – 11.00	*Discussion*	
Session 5: Police Reforms		
11.00 – 12.30	▪ Supreme Court on Prakash Singh's case. ▪ Soli Sorabjee report on Police Reforms. ▪ Police misconduct and civilian control. ▪ Use of disproportionate force. ▪ Torture, executions and disappearances ▪ Recommendations for reform.	Adv. Vrinda Grover *New Delhi* Prof. S.M. Afzal Qadri *Srinagar* V.N. Rai *DGP, Uttar Pradesh* Adv. Mahendra Pattnaik *Orissa* Shankar Sen *Former Director General (Investigations) NHRC*

More teeth to police, not victims

In a critique of "The Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005", **Colin Gonsalves** *opines that the Act simply relegates victims to a footnote. For instance, when it comes to sexual violence, it does not recognise the fact that the nature of atrocities committed against women during riots is radically different from those committed during 'normal' times*

The UPA government has done it again! The Communal Violence Bill is astonishingly poor, having been drafted in ignorance of the two draft Bills proposed by civil society groups after extensive consultations with NGOs. The focus is on increasing police power instead of empowering civil society to initiate and control prosecutions when communal crimes occur. Given that the government is the principal wrongdoer in many instances the thrust of the legislation is misplaced.

Fatal flaws

The Act is that it cannot come into force in a state unless the state government issues notification to that effect. Once notified, the Act cannot be invoked even when communal crimes take place unless the state or the central government decides to declare an area "communally disturbed." Therefore, if the state government refuses to issue a notification bringing the proposed statute into force or if the state government refuses to declare an area communally disturbed, the Act will not apply. All opposition governments could ignore this statute completely. Moreover, a state government may issue a notification bringing the statute into force in the state and yet render it sterile by not issuing notifications declaring certain areas to be "communally disturbed areas."

Law is often created in ignorance of existing power relations in a society, particularly between the sexes. Communal violence in the prevention, commission and rehabilitation stages is always framed in the power relation, and is especially cruel in its use of the woman's body as a battlefield

The Act fundamentally misunderstands what the term "communal riot" has come to signify in the Indian context, which is precisely why it cannot adequately provide for the prevention or alleviation of communal riots. Communal riots in India are not mutual violence between two communities analogous to a miniature civil war. They are the attack of one community by another with substantial collusion of the government at the local, district and state levels. If one understands a communal riot to be a mutual clash, then the natural response is to increase the discretion and power of the state government in order to control and mediate the conflict. However, if one understands communal riots to occur with the complicity of the state government, then the augmentation of State power simply puts more weapons into the hands of communal forces, creating the possibility for increasingly violent attacks and increasingly unjust State response. This Bill does exactly that, and as a result must be wholly rejected.

Law is often created in ignorance of existing power relations in a society, particularly between the sexes. Communal violence in the prevention, commission and rehabilitation stages is always framed in the power relation, and is especially cruel in its use of the woman's body as a battlefield. Women are particularly targeted and intimidated by the hate speech that precedes a riot, they are subject to most brutal violence during the riot, and they face the greatest difficulty in the rehabilitation stages. This Bill relegates their suffering to an afterthought, and even then is woefully inadequate in fulfilling its insufficient objectives.

In terms of flaw 1, Section 1 (4) is the culprit for the first flaw, which is as under:

> "The provisions of this Act, except Chapters II to VI (both inclusive) shall come into force in the states on such date as the central government may, by notification in the office gazette, appoint... and the provisions of chapters II to VI (both inclusive), shall come into force in a state as the state government may by notification, appoint..."

The principal issue is Parliament's legislative competence to make a law in respect of communal crimes, which according to some, is covered by Entry 1 (Public Order) of List II of the Seventh Schedule of the Constitution framed under Article 246. Only the state governments, it is contended, have the legislative competence to make laws in respect of communal crimes.

However, the "Public Order" question is confined to disorders of a lesser gravity than communal crimes and is necessarily restricted disorders whose impact is felt only at the state level. Article 245 (I) restricts the legislative power of state legislatures to laws having application within the territorial limits of the state.

Communal crimes have grown enormously in their nature and geographical spread. Apart from riots that have taken place on an ever increasing scale, often bordering on genocide; the spread of hate in educational institutions throughout the country, the social and economic boycotts, ghettoisation, stigmatisation and victimisation, all indicate that communal crimes have reached such a stage that they undermine the secular fabric of the Indian State.

A similar argument was used by the central government to justify the enactment of what was called "anti-terrorism legislation" - TADA and POTA. It may be recalled that even the possession of a weapon in a notified area, as in Sanjay Dutt's case, could attract charges under these statutes. Communal crimes are arguably as grave as "terrorist crimes" in today's situation. The same logic could, therefore, apply to the effect that the control of communal crimes falls within the legislative competence of the central government. If this is correct, the concurrence of the state government for the enactment of legislation and the punishment of communal crimes is not necessary.

In Kartar Singh vs state of Punjab - 1994 3 SCC 569 - the Supreme Court held: "Having regard to the limitation placed by Article 245 (I) on the legislative power of the legislature of the state in the matter of enactment of laws having application within the territorial limits of the state only, the ambit of the field of legislation with respect to 'public order' under Entry 1 in the State List has to be confined to disorders of lesser gravity having an impact within the boundaries of the state. Activities of a more serious nature which threaten the security and integrity of the country as a whole would not be within the legislative field assigned to the states under Entry 1 of the State List but would fall within the ambit of Entry 1 of the Union List relating to defence of India and in any event under the residuary power conferred on Parliament under Article 248 read with Entry 97 of the Union List." (Para 66)

There is a feeble attempt in Chapter XI to assert the primacy of the central government where a situation exists corresponding to section 3 above mentioned, i.e., where communal violence is taking place on such a large-scale that there is an imminent threat to the secular fabric, unity, integrity or internal security of India. Then and only then, is the central government empowered to direct the state government to take measures. If the state government does not take such measures the central government may issue a notification declaring any area within the state as a communally disturbed area. Even then the central government cannot deploy armed forces without the request of the state government! Section 55 (3) is critical:

"(3)Where the central government is of the opinion that the directions issued under sub-section (2) are not followed, it may take such action as is necessary including:
(b) the deployment of armed forces, to prevent and control communal violence, on a request having been received from the state government to do so."

Narrow definition

The proposed Act can only be invoked in the most extreme circumstances where there is criminal violence resulting in death or destruction of property and danger to the unity of India. There is a myriad of serious communal crimes which may not result in death, such as rape, and which are not considered to endanger to the unity of the country. All these crimes fall outside the ambit of the Bill. Even if such circumstances do exist the section only prescribes that the government 'may' act. On the

The proposed Act can only be invoked in the most extreme circumstances where there is criminal violence resulting in death or destruction of property and danger to the unity of India

face of it, the duty to act is not mandatory.

The offending part of the Bill is Chapter II, the relevant parts of which are set out below:

"3. (I) Whenever the state government is of the opinion that one or more scheduled offences are being committed in any area by-any person or group of persons-

a. in such manner and on such a scale which involves the use of criminal force or violence against any group, caste or community resulting in death or destruction of property and;
b. such use of criminal force or violence is committed with a view to create disharmony or feelings of enmity, hatred or ill-will between different groups, castes or communities; and
c. unless immediate steps are taken there will be danger to the secular fabric, integrity, unity or internal security of India

It may, by notification:
i) declare such area to be a communally disturbed area
(3) Where any area has been notified as communally disturbed area under sub-section (l), it shall be lawful for the state government to take all measures, which may be necessary to deal with the situation in such area...
(2) If the state government is of the opinion that assistance of the central government is required for controlling the communal violence, it may request the central government to deploy armed forces of the Union to control the communal violence.

Sexual violence

The Bill contains no special provision for the prosecution or rehabilitation of offenders and victims of sexual violence. The bill fails to be cognisant of the radically different nature of sexual assault during peacetime and during communal riots. The particularly brutal sexual violence committed en mass during communal riots testifies to the genocidal intent of the crime, and thus should be treated appropriately by any legislation seeking to address communal violence.

The bill must further recognise the specific types of sexual violence seen during communal violence, including genital or mammary mutilation, insertion of objects into the women's body, cutting out of the uterus etc., that are not covered under the existing IPC provisions for rape (Section 375). These offences must be held in equal standing with the other types of sexual violence already covered by the IPC.

Finally, there is no special provision for women in the rehabilitation section of the Bill, despite pervasive evidence of their continuous and abject suffering as a result of communal violence. There are no special provisions that allow survivors of sexual violence to more easily record FIRs, avail of counselling or medical treatment among other things. There are no specific standards of proof laid out by the Bill that take into account the unique obstacles women face in the aftermath of communal violence.

Communal crimes

Section 2(l) read with the Schedule indicates that crimes covered by this Bill are offences as set out in the Indian Penal Code, the Arms Act 1959, the Explosives Act, 1884, the Prevention of Damage to Public Property Act 1984, the Places of Worship (Special Provisions) Act, 1991, and the Religious Institutions (Prevention of Misuse) Act, 1988. The Bill does not propose to include any of the communal crimes so frequently noticed in riot after riot. Gender violence including the insertion of objects in the genitals, social and economic boycotts, forcible evictions, restraint on access to public spaces, residential segregation, deprivation of access to food and medicines, enforced disappearances, interference with the right to education, using religious weapons and ceremonies to intimidate, interference with police work, advocating the destruction of a religious structure, are woefully absent in the Bill. All that the Bill provides for in chapter IV, is for enhanced punishment for the commission of already defined offences under other statutes.

A special section on communal crimes against women and children is sorely needed to cover sexual violence, penetrative assault, sexual slavery, enforced prostitution, forced pregnancies, enforced sterilisation and other forms of sexual violence. The rules of evidence need to be modified so that the victim is not further victimised during the trial.

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Unnecessary sections

Chapter III deals with the prevention of communal violence. Chapter V deals with investigation of offences. Chapter VI deals with the setting up of special courts. Apart from minor changes, these provisions already exist in the Criminal Procedure Code and, in any case, it is doubtful whether it is necessary at all to include these provisions in this proposed special Act. Chapter III, for example, relates to the prevention of communal violence and appears to empower the district magistrate to prevent the breach of peace by, *inter*

dia, curbing processions, externing persons, regulating the use of loudspeakers, seizing arms, detaining persons and conducting searches. This is largely a cosmetic section because the police, in any case, have the powers to do all these things under the Criminal Procedure Code and various other criminal statutes in force today.

A chapter on preventive action to be taken by the authorities along the lines of the SC/ST Atrocities Act is certainly needed. Immediately on receiving information, the officials should visit the area, establish a police outpost, begin patrolling with special police forces and form vigilance committees.

Victims' rights

There are, of course, the wishy-washy Chapters VII and VIII requiring government to plan and coordinate relief and rehabilitation measures through the setting up of state and district communal disturbance relief and rehabilitation councils but these chapters fall far short of enunciating victim's rights enforceable in court. Chapter X of the Bill deals with compensation to be paid to the victims but restricts the compensation to the amount of fine payable under the Code, which is generally very small. In the Communal Crimes Bill, 2007, submitted by the Human Rights Law Network (HRLN) and ANHAD to the government, the suggested sections made it mandatory for the government to set up relief camps, pay subsistence allowance, pay substantial compensation and provide reasonable rehabilitation including alternative sites and housing and to reconstruct the destroyed places of worship at government's expense. All these victims' rights are missing in the present Bill.

When the state does not protect the lives and properties of the minorities during communal carnages, should the victim not have a right to compensation and alternative livelihoods at the cost of the State? An answer to this was expected in the statute. Is a relief camp to lie at the discretion of government and NGOs with shabby provisions being made on a temporary basis, or is it a right of the victim to be provided immediate relief according to well-established norms?

Once again, had government cared to look at the Atrocities Act, it would have noticed the provisions relating to the collective fine where the community harbouring the aggressors could be substantially fined and the money used for the payment of compensation.

There is no provision in the Bill relating to the duties of authorities after the riots take place. A section is necessary requiring the authorities to provide immediate relief and protection from further acts of violence, to prepare a list of victims and their losses, and to provide for legal aid, allowances, and facilities during legal proceedings. Likewise, provisions are required to enable the arrest and detention of people engaging in hate speech and to enable the court to shift the investigation to the CBI in cases of involvement of the local police in the communal crime.

The Supreme Court has recently held that social statutes must be accompanied by a financial memorandum. This is to ensure that government puts its money where its

mouth is. The Government of India is accustomed to enacting grand legislation without allocating resources for its implementation. In this regard the financial memorandum of the Bill makes for interesting reading:

> "As involvement of expenditure depends mainly on the occurrence of communal violence, **it is difficult to make an estimate of the expenditure,** both recurring and non - recurring, from the Consolidated Fund of India."

It is thus clear that the Government of India intends to make no financial provision whatsoever for the relief and rehabilitation of the victims of communal crimes.

Witness protection

The witness protection provision—Section 32—has been drafted without application of mind as to the Law Commission's recommendations. The usual pathetic provisions reappear, covering only the holding of proceedings at protected places and the shielding of the identity of the witnesses. The main aspects of modern day witness protection, which include the shielding of the witness from the accused, compensation of the witness for the trauma suffered during the crime and trial, creation of new identities and a new life for the witness, are all missing. Genuine witness protection includes a substantial financial commitment of the state to care for the witness and her family in secrecy, often for the rest of their lives.

Immunity for public servants

Section 17, which grants immunity to the police and the army, is particularly insensitive. Although the section provides for the punishment of public servants who break the law, two things must be noticed. Under the Indian Penal Code the punishment for such offences committed by public servants is more severe than the maximum sentence of one year with the alternative of a fine presecribed in the Bill. Secondly, Section 17(2) retains the requirement of sanction by state government for prosecution of public servants. The provision is as under:

> "(2) Notwithstanding anything contained in the Code, no court shall take cognisance of an offence under this section except with the previous section of the state government."

Politicians must come in for special mention in the legislation. Any minister interfering with police work by shielding the accused, misdirecting the police investigation or by preventing relief from reaching the victims should be treated as a common criminal

Various commissions of enquiries including the Justice Ranganath Mishra Commission (Delhi riots), the Justice Raghuvir Dayal Commission (Ahmednagar riots), the Justice Jagmohan Reddy Commission (Ahmedabad riots), the Justice DP Madan Commission (Bhiwandi riots), the Justice Joseph Vithyathil Commission (Tellicheri riots), the Justice, J. Narain, SK Ghosh and SQ Rizvi Commission (Jamshedpur riots), the Justice RCP Sinha and SS Hasan Commission (Bhagalpur riots), and the Justice Srikrishna Commission (Bombay riots), have found the police and civil authorities passive or partisan and conniving with communal elements.

A chapter is necessary to punish police persons, paramilitary forces and members of the armed forces for their involvement in communal crimes particularly when FIRs are not registered or registered improperly, when security is not provided to minorities under attack, when destruction of property is not prevented and when inadequate forces are deployed. Where the officers stand firm — and there were many such fine examples of bravery even in Gujarat — the rioters are quickly diffused and dispersed. No communal riot can take place without the support of the police and the security forces. They must be severely punished for not doing their duty.

The abject failure of the criminal justice system because of the insidious role of the police and the public prosecutors, who often side with the accused, needs special legislative attention. After the last racial riots in Britain, the McPhearson Committee recommended that complaints be registered at places other than police stations and suggested ways of overcoming 'institutionalised racism'. Sections are required for the punishment of policemen who fail to record complaints and conduct investigations properly. Complaints ought to be able to be registered electronically.

Recognising the role of the police in communal riots, it is critical that the immunity granted under sections 195, 196 and 197 of the Criminal Procedure Code be omitted in any statute on communal crimes. No junior officer should be allowed to take the defence that he was ordered by his superior to commit the crime. Nor should any commanding officer be allowed to take the defence that he was unaware of the crimes that were committed on his beat.

Similarly, public prosecutors who side with the accused persons and enable them to be released on bail or are instrumental in their acquittal ought to also come under legislative scrutiny. A section is necessary to make it mandatory for the trial judge who finds the performance of the prosecutor unsatisfactory to remove him from the case.

Politicians must come in for special mention in the legislation. Any minister interfering with police work by shielding the accused, misdirecting the police investigation or by preventing relief from reaching the victims should be treated as a common criminal. His ministerial status should afford him no protection in law.

All in all, this is a policeman's Bill oriented to increasing police power with no care for the victim.

Empower people, not the State

It is a proven fact that often the State machinery has a hand behind riots. If laws are not framed to give more power to the victims of communal frenzy, the police may continue to play havoc. **Abid Shah** *reports*

What has been touted to be an instrument worth curbing communal violence and ensure justice to its victims has, indeed, turned out to be a provision of the State for the State and by the State. Sadly, the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005, is set to become law in the forthcoming monsoon session of Parliament despite the fact that it holds little promise for the survivors of communal violence, gives a great deal of discretion to the state, bureaucracy and police that have mostly been biased in such events and can well ensure immunity for them.

Thus, a group of concerned citizens, including jurists, lawyers, educationists, voluntary workers, upright and conscientious former and present government servants and journalists have rejected this Bill. Instead, they want a new law to replace the present Bill so that instead of the state the victims of communal frenzy are empowered; for the State is already too powerful and has been playing a dubious role in so many communal riots.

At a day-long national consultation organised by ANHAD (Act Now for Harmony and Democracy) in New Delhi in June, this year, they offered to be involved in consultations with the government with the intent of helping in evolving a better law to deal with communal violence. Their revulsion with the present Bill is mainly because it gives the state government the right to issue notification in the face of a possible communal conflagration and subsequently declare an area as a disturbed area so that the provisions of the Bill can come into play.

And once an area is declared so, the police and district authorities get sweeping powers that are to be exercised at their sole discretion. Given the experience in the past about the complicity of authorities and police with the rioters, this may make matters worse. This is what most participants felt. A former IPS officer, KS Subramanian, pointed out that the proposed law expects too much from a police force that follows the Irish colonial structure based on "command instead of demand" and to drive his point home he said, "in Gujarat the cops who aggravated riots were promoted and one of them was made director general of police for the entire state."

This shows the erroneous supposition made in the Bill that the State and police remain unbiased and neutral agents who control a communal flare up and bring warring parties at peace without acting to the detriment of the interests of any particular party. On the contrary, the police have often been becoming a party themselves either because of their own wont or through the instructions given by their superiors, or political masters. Giving an instance of the deep seated bias and prejudice among police personnel, VN Rai, another IPS officer, told how the members of the police force admitted before him of killing Muslim youth from Hashimpura locality in Meerut way back in the Eighties, saying "the town was becoming a mini-Pakistan and that is how they thought of teaching a lesson to Muslims."

The need for a law against communal violence was felt amid the horrors of Gujarat... the present UPA government talked of a law and this was included in their CMP. Yet the concern for riot victims soon gave way to an exercise that can please state and officials alone

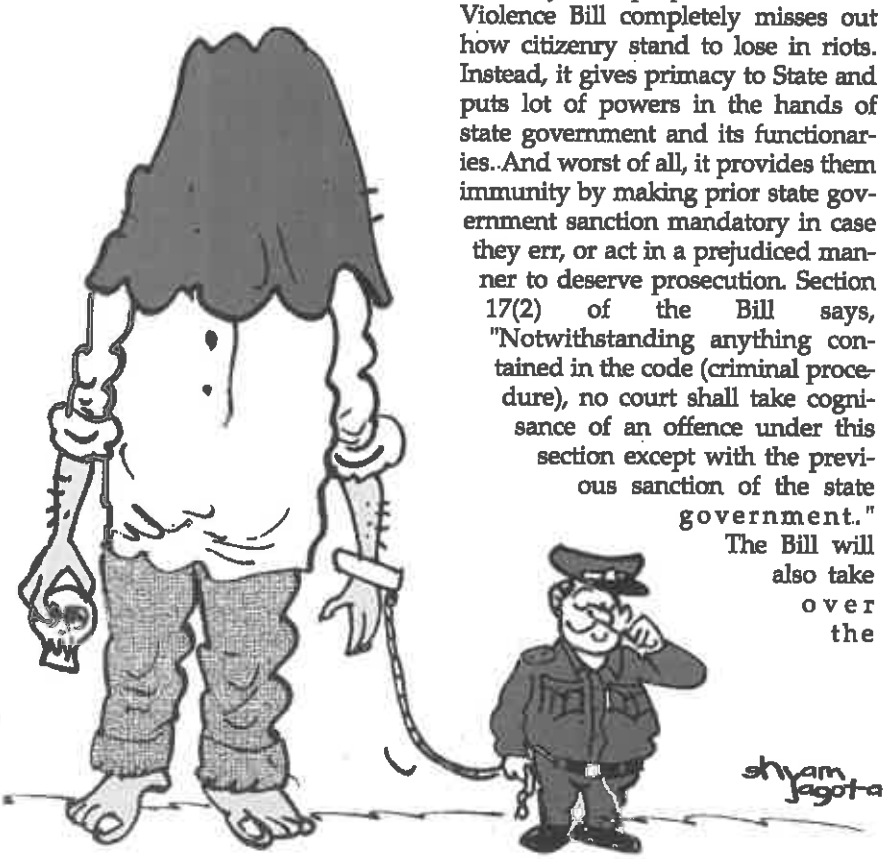
The chairman of the minority commission, Hamid Ansari, said that after the Gujarat riots he asked one of his friends in the army as to what would have been his response in case a politico, or a minister, overtaking the control room before him like Gujarat in 2002 where police gave in before their political boss. According to Ansari, the response of his officer friend was that he would have shot the minister. Such is the forces' training where biases are not to be bought even from the government of the day. As for the Constitution a single article - 355 -- deals in a single sentence with external aggression, internal disturbance and breakdown of law and order, putting them almost at par with each other, said Ansari, to enable the Centre to intervene in an appropriate manner, including the use of armed forces.

Such urgency while dealing with large-scale communal violence has been missing through successive riots as also from the provisions of the new law. Yet Justice AM Ahmadi stressed the role of the Centre so that it could act and intervene in case of communal outbreak rather than leav-

ing it to be tackled by the State alone. He stressed that the character of Indian Parliament was such where it was not easy for it to be carried by one dominant view as could happen with the state assembly, particularly when executive is answerable to elected representatives of the people. He suggested that the National Human Rights Commission (NHRC) could play the role of a designated central authority in case riots threaten to go out of hands.

Justice Rajindar Sachar pointed out that the credibility of such an authority from the point of view of victims should matter rather than whether it was central or provincial since the genocide of Sikhs in 1984 took place right in Delhi under the nose of the central government. Justice H Suresh pointed out that riots mostly signify either the collapse of authority of the State, or its abdication by the State itself so a separate and independent national authority has to be created to control communal violence or riots.

He said that communal violence should include all sectarian strife and the Bill should be re-christened as Sectarian Violence Prevention Bill.



Sadly, the proposed Communal Violence Bill completely misses out how citizenry stand to lose in riots. Instead, it gives primacy to State and puts lot of powers in the hands of state government and its functionaries

Journalist and social activist, John Dayal, pointed out that in 27 years of his journalistic career he covered dozens of riots. Nowadays riots have proliferated so as to daunt micro minorities like Christians whereas they mainly connote violence against Muslims alone.

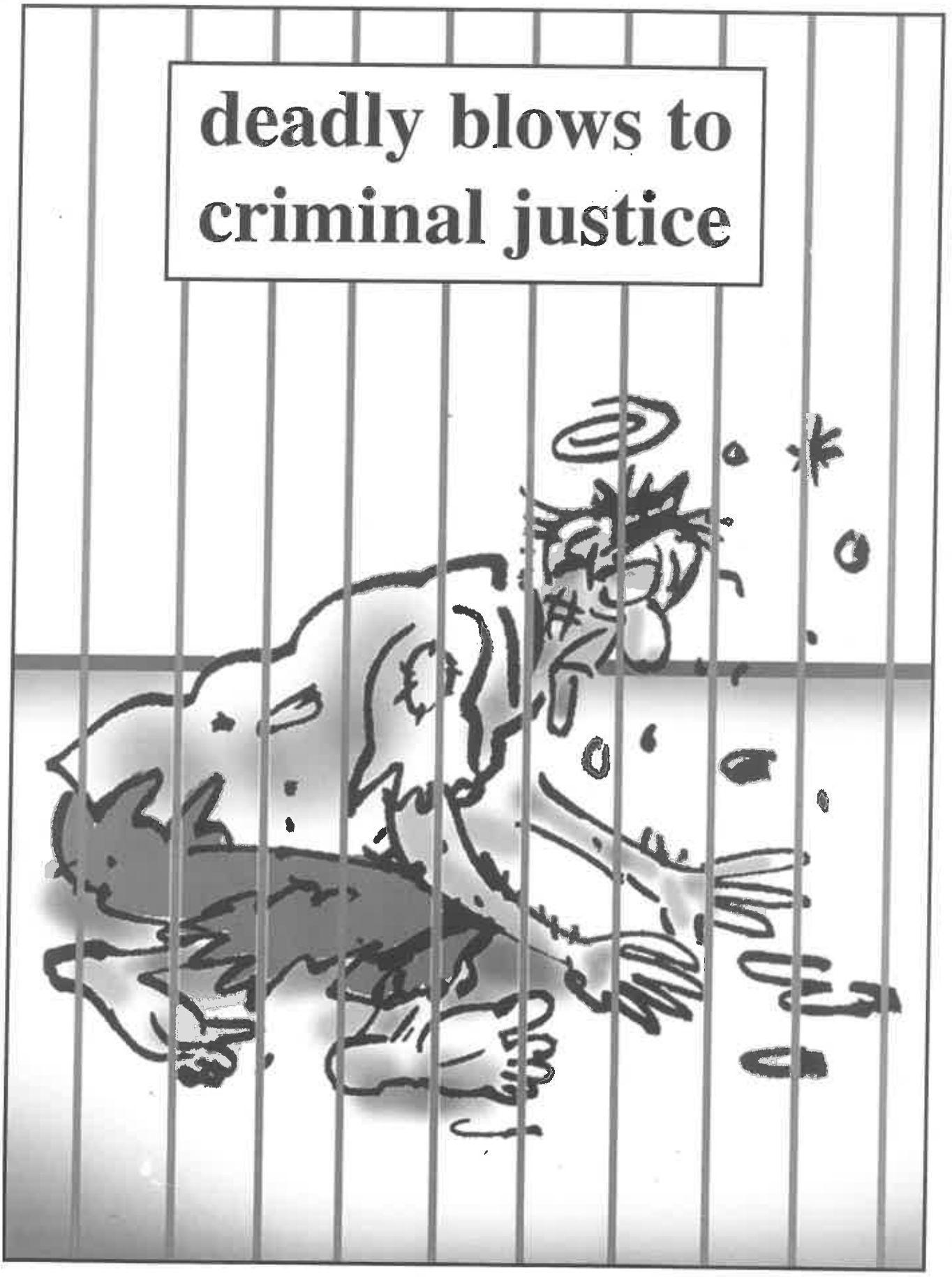
Sadly, the proposed Communal Violence Bill completely misses out how citizenry stand to lose in riots. Instead, it gives primacy to State and puts lot of powers in the hands of state government and its functionaries. And worst of all, it provides them immunity by making prior state government sanction mandatory in case they err, or act in a prejudiced manner to deserve prosecution. Section 17(2) of the Bill says, "Notwithstanding anything contained in the code (criminal procedure), no court shall take cognisance of an offence under this section except with the previous sanction of the state government." The Bill will also take over the rest of the laws in the sense that in case a public official is found guilty, it provides an imprisonment for a year only. This can also be substituted by fine as per the Bill. This is strange since similar offences under the IPC could bring more stringent action.

So this is going to be a law that will provide protection to officials rather than those who face the wrath of communalism. Disconcerting as the participants of ANHAD's national consultation found this to be, some of them noted its absolute lack of recognition of gender crimes since often women have been targeted in riots where they have to face insinuations, expletives, indignities, physical and sexual assaults of worst order whose trauma they have to carry through the rest of their lives. This may also include unwanted pregnancies, pointed out some of the women participants. They noted that women have been turned into virtual battlefields in the wake of rising tide of communalism.

They said this is true about Gujarat riots as well as there have been women victims' testimonies about rioters barbarity during 1984 riots in Delhi. It was also noted that communalism was not just an administrative or legal issue but a phenomenon that transgresses to a larger social sphere where the involvement of the civil society was important not just for drafting a law but also to tackle it at every stage. Lawyer Colin Gonsalves reminded how in Britain McPhearson Committee allowed FIRs to be registered by social organisations in cases of racialism when it found police to be institutionally racist. Similarly, in Australia crime against Aborigins are treated separately. At home, according to Gonsalves, SC/ST Atrocities Act is a much better law since it was made after talking to victims.

Indeed, the need for a law against communal violence was felt amid the horrors of Gujarat. Through the run up to the last general elections, the leading lights of the present UPA government talked of such a law and this was included in their common minimum programme (CMP). Yet the concern for riot victims soon gave way to an exercise that can please state and officials alone.

deadly blows to criminal justice



Tragic decline of criminal jurisprudence

Cops have been successful in cajoling the media to tout law as too lame to curb crime, or deal with hardened and tough criminals. Thus, the criminal justice system yielded, impatiently trying to achieve not only a higher rate of convictions but also negating past precedents set by the Supreme Court whereby persons accused by the police got a fair chance to prove their innocence. Now the legal protection of accused persons has all but disintegrated because of the higher judiciary's rulings that write off not only their own affirmations made in the past but also guarantees provided under the Constitution to protect an individual's life and liberty. Senior advocate **Dhairyasheel Patil** *cites cases where the highest judiciary has gone against its earlier rulings as, for an example, in one shocking decision which overlooks torture of women accused as "to remove the fear psychosis and to come out with truth" and makes evidence wrested so callously admissible*

The dismantling of the criminal law protection of the accused is said to have started about 15 years ago. It began with the perception within the judiciary at the highest levels that criminal law protection was too extensive and needed to be reviewed. It was fuelled in large part by the systematic campaign carried out by senior police officers who came on national television boldly berating the judiciary for taking a hyper technical human rights view, thus letting off criminals at the drop of the hat. The appearance of senior police officers on television right across the country was not accidental but part of a sinister conspiracy to destroy the criminal justice system by shaking the confidence of the higher judiciary in their own system. And to achieve this, policemen appealed to the public in prominent cases saying that while they have captured dreaded criminals and terrorists, the judiciary was letting them out on bail or acquitting them because of notions of fairness, ignoring the victims of theses crimes.

The police often referred to the

low rate of conviction in IPC cases presenting false information to the public on numerous TV programmes. The public was told that the rate of conviction was as low as 10 percent whereas in fact conviction in IPC cases was about 50 percent. It was often said that conviction in TADA cases was a mere five percent forgetting that the vast majority of TADA accused were kept as undertrials for five years or more before their trials began. Thus, even if they were ultimately acquitted, innocent persons spent at least five years incarcerated.

Judges, of course, cannot come on prime time television pointing out that it was due to the appalling level of investigation of crimes and corruption in the investigation process, that acquittals take place. Thus, the ideological campaign ultimately had its intended effect. Judges were apparently embarrassed at the low rate of convictions. The public perception, not criminal justice, was uppermost in their minds. At some stage, the judiciary decided that it was necessary to push up the rate of convictions, come what may. This is how we have come to live in the decade of the dismantling of the criminal law protection of the accused. What matters is not criminal justice or criminal jurisprudence. What is most important is that people perceived as being criminals should be put behind bars, denied bail and given the stiffest possible sentence, perhaps even the death sentence. That a judge should entertain reasonable doubt as to the guilt of the accused now plays second fiddle. An overarching objective was to be achieved and that was to change the public's view of the judiciary in criminal trials and to clearly show that the courts were tough on criminals. That this objective could be achieved in another manner which would be in tune with the Constitution as well as protect the rights of the accused persons was never discussed. The constitutional law protection for accused persons was undermined in case after case in a hasty rush to change the common man's perceived view of the judiciary. Nobody bothered to introspect and ask the question as to whether the view perceived was a general one or one relating to the upper middle classes. The vast majority of the poor in any case see the

criminal justice system as a great engine of oppression where torture is widespread and condoned by the judiciary and innocent people are roped in while rich get away scot-free. Ultimately, upper middle class opinion held sway and the agenda of the legal system was guided more by how the system would be portrayed in the media than by the desire to uphold constitutional values. It is often unpopular to uphold the Constitution particularly when it is implemented in respect of poor and working class people.

The dilution of criminal law

The dilution of the criminal law was brought about in strange ways. First of all, the principle that precedents must be adhered to and that decisions of larger benches must be followed by smaller benches even if they disagree was departed from. Decisions of larger benches, even constitutional bench decisions were departed from on the grounds that such a view was "technical" or that the ratio of the larger bench was "only a rule of prudence" or "merely a rule of caution". But criminal law is, at its core, a set of technical rules and procedures that require a judge to be prudent and cautious and which lay down the path by which a judge is able to determine what constitutes reasonable doubt. Once these technical rules are discarded and a judge becomes imprudent and rash, the "beyond reasonable doubt" standard is thrown to the winds and a judge basically does what he likes. He is then able to convict or acquit on the basis of what he may find to be true in a subjective manner or on some sort of gut feeling. When such a development takes place, the rule of law goes into a tailspin. We have, indeed, set out on such dangerous course.

Judges cannot come on prime time TV pointing out that it was due to the appalling level of investigation of crimes and corruption in the investigation process, that acquittals take place

The obliteration of decades of binding precedents of coordinate benches and even larger benches of the Supreme Court takes place when a coordinate bench or a smaller bench side steps a binding precedent of the Supreme Court without referring the issue for determination to a larger bench. That decision then is followed in a series of cases. On

being cited in case after case this effectively sets aside the earlier binding precedent.

This is not to argue that reforms were not necessary. They certainly were. But for reforms a certain degree of transparency, consultation and deliberation is absolutely necessary. It is not upto individuals to take it upon themselves to depart from decades of well established law and procedure and bring about change in an arbitrary and ad hoc fashion. Nor is it permissible to bring about reforms that have the effect of undermining criminal law jurisprudence itself.

Reform of the criminal justice system does not mean the dilution of standards and the lowering of the Bar. It means the raising of the standards of the police and the public prosecutors so that they are able to meet the high standards set by the Supreme Court through its earlier judgments. Sadly, things have proceeded in the opposite direction. It is assumed that the police and public prosecutors will continue to be inept and corrupt. The question then is posed of speeding up of the system and increasing the rate of convictions while assuming that the appallingly low level of investigations must necessarily remain the same. In doing so the judiciary has lost a marvellous opportunity to radically reform police investigations and has instead taken the high standards of criminal law jurisprudence down to the level of the police. And thereby a grave disservice is caused not only to accused persons but also to the public at large. They run the risk of facing indiscriminate arrests, prosecutions and convictions on ever increasing scale. Secondly, the police could read the clear signal to do business as usual. Whatever little desire there was, within the police force, to make the investigations of crimes a professional affair dissipated.

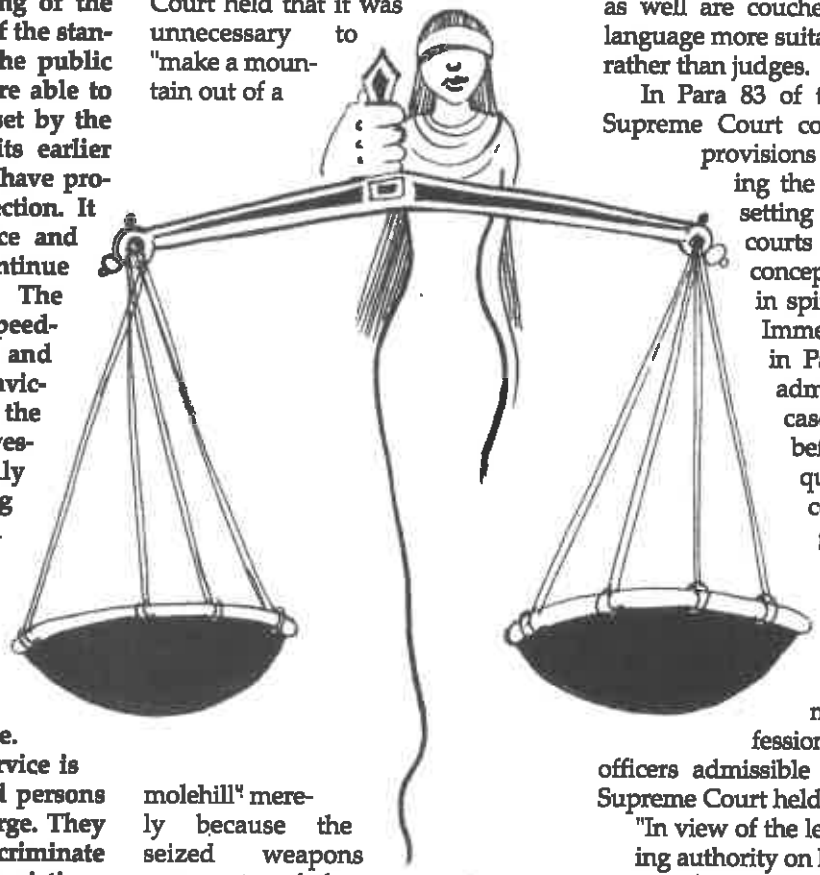
Yet the Malimath Report on criminal justice reforms in India suggested precisely such a change. It came in for widespread criticism. Government of India rejected its recommendations. To change criminal law standards requires substantial amendments in the Criminal Procedure Code and the Indian Penal Code. The executive chose not to make such changes. But the legal system went ahead nevertheless bringing about sweeping changes.

Policemen as *panchas*

In G Srinivas Goud vs State of AP 2005(8) SCC 183 a two-judge bench of the Supreme Court held that "there is no bar in law for a policeman to act as a panch witness".

Sealing not done on the spot

In State of Maharastra vs BC Raghani 2001(9) SCC 1 the Supreme Court held that it was unnecessary to "make a mountain out of a molehill" merely because the seized weapons were not sealed on the spot and were subsequently displayed at a press conference. "We are of the opinion that the trial court adopted a technical approach in appreciating the factum of recovery of weapons" and wrongly held that the evidence relating to the seizure will have to be totally kept aside, the Supreme Court held.



The Constitutional Bench decision in the case of Kartar Singh versus State of Punjab 1994(3) SCC 569, not followed by smaller Benches of the Supreme Court thereafter

In Kartar Singh's case, the Supreme Court abdicated doing its duty as a Constitutional Court and was more concerned with executive issues presented in an exaggerated and one-sided fashion. Whereas the executive is concerned with the issue of terrorism *per se* and is not concerned with balance between terrorist acts on the one hand and the protection of the human rights of accused persons on the other hand, the Supreme Court is concerned precisely with this balance. Para 21 to 23 of the decision and subsequent paragraphs as well are couched in intemperate language more suitable for politicians rather than judges.

In Para 83 of the judgment the Supreme Court concludes that the provisions of TADA including the provision for the setting up of designated courts "all postulate the concept of speedy trial in spirit under TADA". Immediately thereafter in Para 85 the Court admits, "In fact, lot of cases are coming before the courts for quashing of proceedings on the ground of inordinate and undue delay".

Referring to Section 15 of TADA which made certain confessions made to police officers admissible in evidence, the Supreme Court held in Para 254:

> "In view of the legal position vesting authority on higher police officer to record the confession hitherto enjoyed by the judicial officer in the normal procedure, we state that **there should be no breach of procedure and the accepted norms** of recording the confession which should reflect only the true and voluntary statement..."(Page 680)

The Court came to the conclusion even though the court was aware of the fact that torture was widespread

in India, the Court observed:

"... we cannot avoid but saying that we - with the years of experience both at the Bar and on the Bench - have frequently dealt with cases of atrocity and brutality practised by some overzealous police officers resorting to inhuman, barbaric, archaic and drastic methods of treating the suspects in their anxiety to collect evidence by hook or by crook and wrenching a decision in their favour. We remorsefully like to state that on a few occasions even custodial deaths caused during interrogation are brought to our notice. We are very much distressed and deeply concerned about the oppressive behaviour and the most degrading and despicable practice adopted by some of the police officers." (page 679)

"It is heart-rending to note that day in and day out we come across with the news of blood-curdling incidents of police brutality and atrocities, alleged to have been committed, in utter disregard and in all breaches of humanitarian law and universal human rights as well as in total negation of the constitutional guarantees and human decency." (Page 711)

Now if this is the situation in India, namely, that torture is the principle forensic tool of the police and is extensively used, and as a result confessions to a police officer have never been held to be admissible right through the British period and upto the enactment of TADA, what was the evidence before the Supreme Court on the basis of which they could conclude that it would be legitimate to repose faith in senior police officers because they would be less inclined to use torture? In fact, there was no such evidence. The Supreme Court concluded that confessions made to senior police officers were admissible based on no evidence at all to justify the departure from a rule of law and practice that govern criminal trials for over 100 years. There was also no evidence before Supreme Court that the police practice of torture had declined in any manner. In fact, a perusal of decisions of the Supreme Court could possibly indicate precisely the opposite i.e. an increasing use of torture by the police during investigation of crimes, as manifested in custodial violence cases.

The Supreme Court also concluded that a confession made by a person before a police officer is also admissible against the co-accused. Refer to Sukhmant Singh v/s State-2003 AllMR (CR) 2365.

Rule 15 of the Terrorists and Disruptive Activities (Prevention) Rules, 1987 lays down in detail how confessions are to be taken and recorded. In particular the rule requires the police officer to make a certificate in writing to the effect that the confession was taken in his presence and the record contains a full and true account of the confession and that it was voluntarily made. Referring to the Acts and Rules regarding confessions the Supreme Court held, "we strongly feel that there must be some severe safeguards which should be scrupulously observed while recording a confession". We will now show how, in the following cases smaller benches of the Supreme Court disregarded the directives of the Constitutional Bench and held that the safeguards and the guidelines are directory and not mandatory.

> "... day in and day out we come across with the news of blood-curdling incidents of police brutality and atrocities, ... in all breaches of humanitarian law and universal human rights as well as in total negation of the constitutional guarantees and human decency"

A digression at this point is in order. Despite the binding decision of the Constitution Bench in Kartar Singh's case above mentioned, in Jameel Ahmed versus state of Rajasthan - 2003(9) SCC 673 - a two judge Bench of the Supreme Court without reference to the observations of the Constitutional Bench above mentioned held as under:

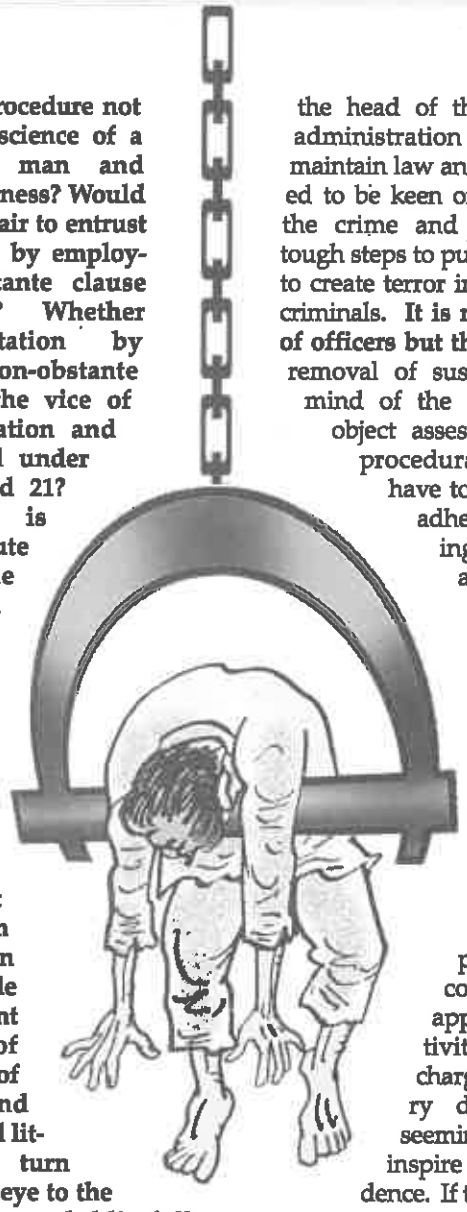
"Rule 15(5) does not ascribe any role to the CMM or the CJM of either perusing the said statement or making any endorsement or applying his mind to these statements. It merely converts the said courts into a post office for further transmission to the Designated Court concerned, therefore, the object of the rule is to see that the statement recorded under Section 15 of the Act leaves the custody of the recorder of the statement at the earliest so that the statement has a safer probative value. In our opinion, transmission of the recorded confessional statement under Section 15 of the Act to the CMM or the CJM under Rule 15(5) is only directory and not mandatory." (Page 688)

Going back to Kartar Singh's case, the Supreme Court then rejected the argument that it would be improper to empower the Executive Magistrates to record confessions under Section 15 of TADA, since they cannot be expected to have judicial integrity and independence.

Justice K Ramaswamy made an extraordinary dissent. Referring to section 25 of the Evidence Act which excluded confessions made to the police as evidence he said that it "rests upon the principle that it is dangerous to depend upon a confession made to a police officer which cannot extricate itself from the suspicion that it might have been produced by the exercise of coercion." (page 724).

Justice Ramaswamy held:

"While the Code and Evidence Act seek to avoid inherent suspicion of a police officer obtaining confession from the accused, does the same dust not cloud the vision of superior police officer?



Does such a procedure not shock the conscience of a conscientious man and smell of unfairness? Would it be just and fair to entrust the same duty by employing non obstante clause Section 15(1)? Whether mere incantation by employing non-obstante clause cures the vice of afore enumeration and becomes valid under Articles 14 and 21? My answer is "NO", "absolute no, no". The constitutional human rights perspectives projected hereinbefore; the history of working of the relevant provisions in the Evidence Act and the wisdom behind Section 164 of the Code ignites inherent invalidity of sub-section (1) of Section 15 and the court would little afford to turn Nelson's blind eye to the above scenario and blissfully bank on Section 114 III.(e) of the Evidence Act that official Acts are done according to law and put the seal that sub-section (1) of Section 15 of the Act passes off the test of fair procedure and is constitutionally valid". (page 731)... Conferment of judicial powers on the police will erode public confidence in the administration of justice... It not only sullies the stream of justice at its source but also chills the confidence of the general public and erodes the efficacy of the rule of law." (page 732).

Dealing with the argument that senior officers may be trusted to record confessions, he said:

"It would, therefore, be clear that any officer not below the rank of the superintendent of police, being the head of the district police administration responsible to maintain law and order is expected to be keen on cracking down the crime and would take all tough steps to put down the crime to create terror in the heart of the criminals. **It is not the hierarchy of officers but the source** and for removal of suspicion from the mind of the suspect and the object assessor that built-in procedural safeguards have to be scrupulously adhered to in recording the confession and trace of the taint must be absent. It is, therefore, obnoxious to confer power on police officer to record confession under Section 15(1). If he is entrusted with the solemn power to record a confession, the appearance of objectivity in the discharge of the statutory duty would be seemingly suspect and inspire no public confidence. If the exercise of the power is allowed to be done once, may be conferred with judicial powers in a lesser crisis and be normalised in grave crisis, such an erosion is anathema to rule of law, spirit of judicial review and a clear negation of Article 50 of the Constitution and the constitutional creases. It is, therefore, unfair, unjust and unconscionable, offending Articles 14 and 21 of the Constitution." (page 734).

Justice Sahai also dissented saying: "Killing of democracy by gun and bomb should not be permitted by a State **but in doing so the State has to be vigilant not to use methods which may be counter-productive. Care must be taken to distinguish between the terrorist and the innocent. If the State adopts indiscriminate measures of repression resulting in obliterating the distinction between the offender and the innocent and its measures are repressive to such an extent where it might not be easy to decipher one from the other, it would be totally incompatible with liberal values of humanity, equality, liberty and justice. ... Measures adopted by the State should be to create confidence and faith in the government and democratic accountability should be so maintained that every action of the government be weighed in the scale of rule of law."** (page 753)

"A police officer is trained to achieve the result irrespective of means and method which is employed to achieve it. So long the goal is achieved the means are irrelevant and this philosophy does not change by hierarchy of the officers. A sub-Inspector of the police may be uncouth in his approach and harsh in his behaviour as compared to a superintendent of police or additional superintendent of police or any higher officer. But the basic philosophy of the two remains the same. The Inspector of police is as much interested in achieving the result by securing confession of an accused person as the superintendent of police. By their training and approach they are different. Procedural fairness does not have much meaning for them. It may appear unfortunate that even after Independence a force which was created to implement harsh and Draconian laws of imperial regime, ruthlessly and mercilessly, has not changed much even in people regime. Dignity of the individual and liberty of person - the basic philosophy of Constitution - has still not percolated and reached the bottom of the hierarchy as the constabulary is still not accountable to public and unlike British police it is highly centralised administrative instrumentality meant to wield its stick and spread awe by harsh voice more for the executive than for the law and society."

"A confession made to a police officer is suspect even in England

and America. But it has been made admissible subject to the safeguards mentioned above. Why? Because what is provided by Section 26 of the Evidence Act stands **substituted by presence of lawyer or near relatives**". (Page 762).

"Further a confession made to a police officer for an offence committed irrespective of its nature in non-notified area is inadmissible. But the same police officer is beyond reproach when it comes to a notified area. An offence under TADA is considered to be more serious as compared to one under Indian Penal Code or any other Act. Normally graver the offence more strict the procedural interpretation. But here it is just otherwise. What is inadmissible for a murder under Section 302 is admissible even against a person who abets or is possessed of the arms under Section 5 of the Act. How the methods applied by police in extracting confession has been deprecated by this Court in series of decisions need not be reproduced. But all that changed overnight when TADA was enacted. Giving power to police officer to record confession may be in line with what is being done in England and America. But that requires a change in outlook by the police. Before doing so the police force by education and training has to be made aware of their duties and responsibilities, as observed by Police Commission. The defect lies not in the personnel but in the culture. In a country where few are under law and there is no accountability, the cultural climate was not conducive for such a drastic change. Even when there was no Article 21, Article 20(3) and Article 14 of the Constitution any confession to police officer was inadmissible. It has been the established procedure for more than a century and an essential part of criminal jurisprudence. It was, therefore, necessary to bring about change in outlook before making a provision the merits of which are attempted to be justified on law existing in other countries." (page 762) ... Section 15 of the TADA throws all established norms only because it is recorded by a high police officer. In my opinion our social environment was not mature for such a drastic change as has been effected by Section 15. It is destructive of basic values of the constitutional guarantees." (page 763)

Confessions recorded under TADA admissible even if accused acquitted of all TADA charges!

In State vs Nalini - JT 1999 (4) SC 106 - a three Judge of the Supreme Court held:

"The admissibility of the confessional statement would continue to hold good even if the accused is acquitted under TADA offences."

This is a shocking proposition of law. Confessions to a police officer were made admissible in evidence for the first time under TADA to meet the exigencies arising out of terrorist offences. Now, even if those offences were not made out the confessional statements would continue to be admissible in evidence for prosecution under normal criminal law where such evidence is not admissible had TADA not been applied. In this manner confessions before a police officer became admissible in evidence under normal criminal law, without the legislature making any amendment in the Code.

In Nalini's case the doubt expressed by the Supreme Court in Bilal Ahmed Kaloo vs state of AP - JT 1997 7 SC 272 - was overruled. In Bilal's case the Supreme Court held that the confessions made before a police officer under TADA were admissible in evidence even when the accused is acquitted of offences under TADA.

After Nalini's case, a three judge bench of the Supreme Court doubted the correctness of the decision in Nalini's case as under:

"We are, however, constrained to record our **doubt as regards the state of law as declared by the three-judge bench of this Court in Nalini (supra)**

The issue, therefore, is whether the confessional statement would continue to hold good even if the accused is acquitted under TADA offences and there is a clear finding that TADA Act has been wrongly taken recourse to or the confession loses its legal efficacy under the Act and thus rendering itself to an ordinary confessional statement before the police under the general law of the land. Nalini (supra), however, answers this as noticed above, in positive terms but we have some doubts pertaining thereto since the entire justice delivery system is dependent upon the concept of fairness. It is the interest of justice which has a pre-dominant role in the criminal jurisprudence of the country. The hallmark of justice is the requirement of the day and the need of the hour. **Once the court comes to a definite finding that invocation of TADA Act is wholly unjustified or there is utter frivolity to implicate under TADA, would it be justified that Section 15 be made applicable with equal force as in TADA cases to book the offenders even under the general law of the land. There is thus doubt as noticed above!!"**

A confession made to a police officer for an offence committed irrespective of its nature in non-notified area is inadmissible. But the same police officer is beyond reproach when it comes to a notified area

However, the five-judge Constitutional Bench in Prakash Kumar vs state of Gujarat - JT 2005 11 SC 209 - upheld the ratio of Nalini's case.

Recording of confessions

In the case of Nazir Ahmed vs King

Emperor AIR 1936 PC 253 the Privy Council held that confessions recorded by a magistrate acting under Section 164 had to be recorded in the manner prescribed under the Section and the Standing Orders and in no other way. In that case the magistrate had not recorded the confession as required by law and tendered his oral evidence of the confession made by the accused. It was held that the confession was inadmissible and the accused was acquitted. This was followed in state of UP v/s Singhara Singh reported in AIR 1964 SC 358.

Recent smaller benches of the Supreme Court have disregarded the precedent set in Nazir Ahmed's case as in 1998 (1) Bom Cr Cases 631.

Chance witness

In a long line of decisions starting from Puran vs State of Punjab - AIR 1953 SC 459 - the Supreme Court had rejected the evidence of what was called "nature's call witnesses" who allegedly appeared at the crime scene out of the blue with the explanation that they were at the crime scene by chance while attending the call of nature. In a startling reversal the Supreme Court has in state of UP versus Farid Khan 2005(9) SCC 103 taken the contrary view without any reference to the preceding case law to the contrary. The Supreme Court held:

> "However, the High Court disbelieved his evidence on two counts - firstly on the ground that he was previously convicted in a criminal case and was sentenced to four years' imprisonment. This, according to the High Court, was a valid ground to discard his evidence. Another ground to disbelieve the evidence of PW 2 Sharif was that he must have been a chance witness and his explanation that he was going to the shop of Safi may not have been true as there were several other "beedi" manufacturers in that locality nearest to his house. Of course, the evidence of a witness, who has got a criminal background, is to be viewed with caution. But if such an evidence gets sufficient corroboration from the evidence of other witnesses, there is nothing wrong in accepting such evidence." (Page 106)

In Puran vs state of Punjab, the abovementioned, the three-judge bench of the Supreme Court held:

> "In these circumstances it could not be said that the Sessions Judge was in error when he rejected the evidence of this witness and described him as a **chance witness. Such witnesses have the habit of appearing suddenly on the scene when something is happening and then of disappearing after noticing the occurrence about which they are called later on to give evidence.**" (Page 460)

The SC convicted an accused even though there was nothing to show that the blood stains on the *lungi* recovered belonged to the deceased. ... SC breached the right to silence of the accused persons ...

Blood test

In a long line of decisions the Supreme Court had acquitted the accused on account of deficiencies in the investigation, such as the failure of the police to show that the blood stains on the recovered articles corresponded with the blood of the deceased. In a shocking reversal, and once again without referring to the earlier case law, the Supreme Court convicted an accused person even though there was nothing to show that the blood stains on the *lungi* recovered belonged to the deceased. Not only that the Supreme Court breached the right to silence of the accused persons and in the face of a grossly incompetent investigation used an adverse inference drawn on account of the silence of the accused to convict him. The Supreme Court held as under:

> "As noted above and as seen from the mahazar, the deceased had suffered bleeding injuries and the *lungis* seized by the investigating agency from the accused contained bloodstains. The Serologist has opined that the bloodstains are of a human being but was not able to establish the blood group. **As noted above, learned counsel for the appellant had contended that in the absence of such identification of the blood group the stains found on the *lungi* would not in any manner inculpate the accused in the crime. We do not think this argument can be accepted.** The accused has admitted that the *lungis* belonged to him and were seized from him, for that matter he says he gave the *lungis* to the investigating officer but he has not explained how the bloodstains which are at least proved to be human blood came to be there on the *lungis*. The absence of any explanation in this regard would only strengthen the prosecution case that blood must have stained the *lungis* at the time of the attack on the deceased." (page 188)

In Kansa Behera vs state of Orissa - 1987 3 SCC 480 - the Supreme Court held:

> **"As regards the recovery of a shirt or a *dhoti* with bloodstains which according to the serologist's report were stained with human blood but there is no evidence in the report of the serologist about the group of the blood and, therefore, it could not positively be connected with the deceased. In the evidence of the investigating officer or in the report, it is not clearly mentioned as to what were the dimensions of stains of blood. Few small bloodstains on the clothes of a person may even be of his own blood especially if it is a villager putting on these clothes and living in village. The evidence about the blood group is only conclusive to connect the bloodstains with the deceased. That evidence is absent and in this view of the matter, in our opinion even this is not a circum-**

stance on the basis of which any interference could be drawn." (Page 484)

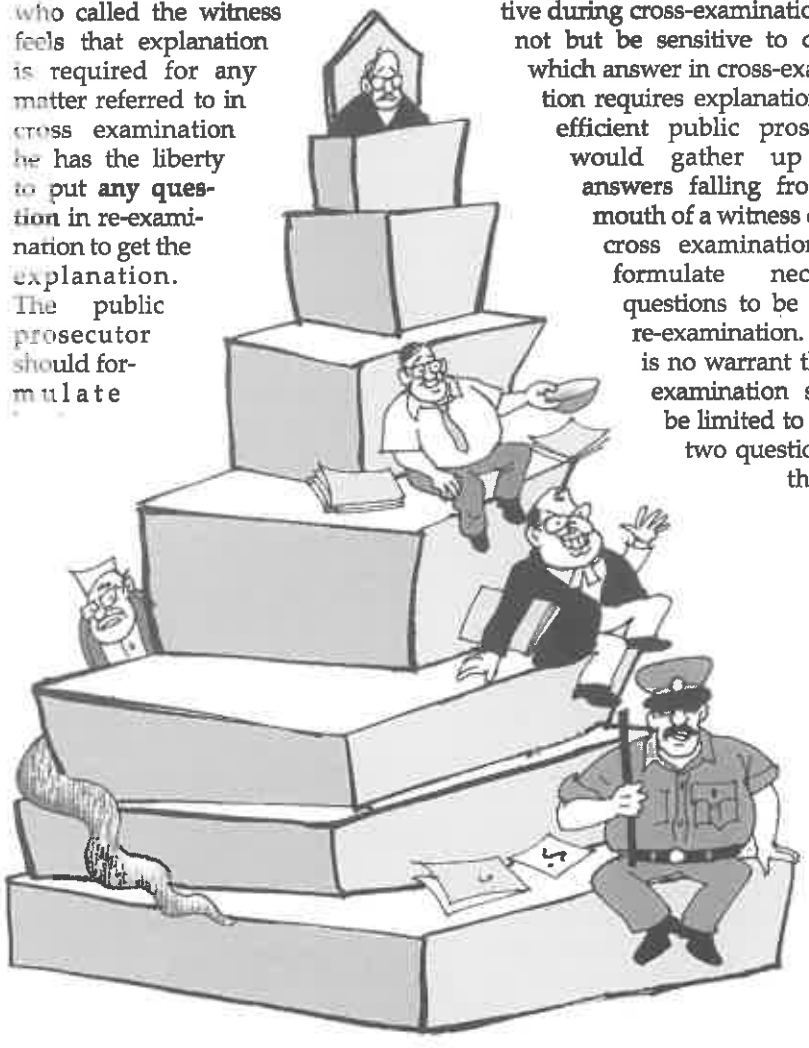
Re-examination

Despite a long line of decisions starting from Chanan Singh v/s state of Haryana 1971 SCC (Cr) 714 to the effect that re examination of witnesses in a criminal trial on behalf of the prosecution must be confined to clarification of ambiguities which may have emerged during the cross examination, the Supreme Court in the case of Rammi versus State of MP 1999(8) SCC 649 held without reference to the previous case law as under:

"There is an erroneous impression that re-examination should be confined to clarification of ambiguities which have been brought down in cross-examination. No doubt, ambiguities can be resolved through re-examination. But that is not the only function of the re-examiner. If the party who called the witness feels that explanation is required for any matter referred to in cross examination he has the liberty to put **any question** in re-examination to get the explanation. The public prosecutor should formulate that purpose. Explanation may be required either when the ambiguity remains regarding any answer elicited during cross-examination or even otherwise. If the public prosecutor feels that certain answers require more elucidation from the witness **he has the freedom and the right to put such questions as he deems necessary for that purpose,** subject of course to the control of the court in accordance with the other provisions. But **the court cannot direct him to confine his questions to ambiguities alone** which arose in cross-examination.

Even if the public prosecutor feels that **new matters should be elicited from the witness he can do so, in which case the only requirement is that he must secure permission of the court. If the court thinks that such new matters are necessary for proving any material fact, courts must be liberal** in granting permission to put necessary questions.

A public prosecutor who is attentive during cross-examination cannot but be sensitive to discern which answer in cross-examination requires explanation. An efficient public prosecutor would gather up such answers falling from the mouth of a witness during cross examination and formulate necessary questions to be put in re-examination. There is no warrant that re-examination should be limited to one or two questions. If the exigency requires **any number of questions can be asked in re-examination.**" (Page 655)



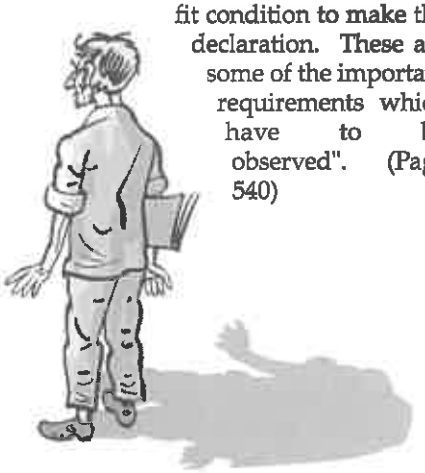
Dying declaration

In a number of decisions culminating in Paparambaka Rosamma versus state of AP 1999(7) SCC 695 Supreme Court repeatedly held that where a doctor was present, the magistrate may record a dying declaration but it is imperative that the doctor certify that the injured was in a fit state of mind at the time of making the declaration. In Paparambaka's case the Supreme Court held:

> "In our opinion, in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a magistrate who opined that the injured was in a fit state of mind at the time of making a declaration." (Page 701) ... In medical science two stages namely conscious and a fit state of mind are distinct and are not synonymous. One may be conscious but not necessary in a fit state of mind. This distinction was overlooked by the courts below". (page 702)

Earlier, in Mani Ram versus state of MP 1994 (Supp) 2 SCC 539 the Supreme Court similarly held:

> "... in a case of this nature, particularly when the declarant was in the hospital itself, it was the duty of the person who recorded the dying declaration to do so in the presence of the doctor after duly being certified by the doctor that the declarant was conscious and in senses and was in a fit condition to make the declaration. These are some of the important requirements which have to be observed". (Page 540)



In innumerable decisions culminating in Amarjeet Singh versus state of Punjab (a three-judge bench decision) 1995 (supp) 3 SCC 217 -- the Supreme Court repeatedly held that sealing has to be done on the spot

Both the three-judge Bench decisions in Paparambaka's case as well as the decision in Mani Ram's case was departed from by the Supreme Court in Koli Chunilal Savji versus state of Gujarat - 1999 (9) SCC 562 - in the following fashion:

> "In the case of Mani Ram versus state of MP, no doubt this Court has held that when the declarant was in the hospital itself, it was the duty of the person who recorded the dying declaration to do so in the presence of the doctor and after being duly certified by the doctor that the declarant was conscious and in his senses and was in a fit condition to make the declaration. In the said case the Court also thought it unsafe to rely upon the dying declaration on account of the aforesaid infirmity and interfered with the judgment of the High Court. But the aforesaid requirements **are a mere rule of prudence** and the ultimate test is whether the dying declaration can be held to be truthful one and voluntarily given." (page 566)

Ultimately, a Constitutional Bench of the Supreme Court was formed, and in Laxman versus state of Maharashtra - 2002(6) SCC 710 - the Constitutional Bench referring to its decision in Paparambaka's case held that the view that a doctor's certificate stating that the injured was in a fit state of mind to make a statement was necessary for a dying declaration to be relied upon, was a view **"too broadly stated and is not the correct enunciation of law"**. (Page 715)

Sealing

In innumerable decisions culminating in Amarjeet Singh versus state of Punjab (a three-judge bench decision) 1995 (supp) 3 SCC 217 -- the Supreme Court repeatedly held that sealing has to be done on the spot by the investigation officer and that non-sealing of the articles recovered or seized would be considered a serious infirmity. In Amarjeet Singh's case the Supreme Court held:

> "The non-sealing of the revolver on the spot is a serious infirmity because the possibility of tampering with the weapon cannot be ruled out." (page 218).

All this long line of precedents was discarded by the Supreme Court in 2002 Cr LJ 944, once again without noting judgments to the contrary, by criticising the approach as "a technical approach" and condemned the trial court for making "a mountain out of a mole hill on such a frivolous ground". (Page 34). The Supreme Court held as under:

> "Holding that the only seized weapons were shown to the press, the trial court committed a mistake and it has unnecessarily tried to make a mountain out of a molehill on such a frivolous ground."

Thereafter in Ganesh Lal versus state of Rajasthan - 2002(1) SCC 731- a similar observation on law is recorded:

> "In such a situation, **merely because the articles were not sealed at the places of seizure but were sealed at the police station, the recovery and seizure do not become doubtful.**" (Page 736)

Similarly in Rajendra Kumar vs state of Rajasthan - 2004 SCC (Cri) 713, where a submission was made by counsel for the accused to the effect that the bangles allegedly recovered were not sealed. The Court held:

> **"We do not think much importance can be attached to the fact that these bangles were not sealed at the time when recovery was made."** (Page 716)

Arrest of females

Departing from a long tradition of not arresting women at night and not arresting women in the absence of a female constable, the Supreme Court in state of Maharashtra versus Christian Community Welfare Council of India - 2003(8) SCC 546 - held:

> "Herein we notice that the mandate issued by the High Court prevents the police from arresting a lady without the presence of a lady constable. The said direction also prohibits the arrest of a lady after sunset and before sunrise under any circumstances. While we do agree with the object behind the direction issued by the High Court in sub-para (vii) of the operative part of its judgment, **we think a strict compliance with the said direction, in a given circumstance, would cause practical difficulties to the investigating agency** and might even give room for evading the process of law by unscrupulous accused. While it is necessary to protect the female sought to be arrested by the police from police misdeeds, it may not be always possible and practical to have the presence of a lady constable when the necessity for such arrest arises, therefore, we think this direction issued requires some modification without disturbing the object behind the same. We think the object will be served if a direction is issued to the arresting authority that while arresting a female person, all efforts should be made to keep a lady constable present but in the circumstances where the arresting officers are reasonably satisfied that such presence of a lady constable is not available or possible and/or the delay in arresting caused by securing the presence of a lady constable would impede the course of investigation, such arresting officer for reasons to be recorded either before the arrest or immediately after the arrest be permitted to arrest a female person for lawful reasons at any time of the day or night depending on the circumstances of the case even without the presence of a lady constable." (page 549)

Exaggeration by witnesses

In their desire to push up the rate of conviction lies, exaggeration, embroidery and emballishments have become intrinsically mixed up with admissible evidence against the accused in criminal trials. Normally, in any other jurisdiction, the evidence of witnesses who lie or exaggerate would never be the basis of a conviction. The evidence would be frowned upon. In most jurisdictions in America or Europe, the evidence would be discarded lock, stock and barrel. In India however, the Supreme Court has laid down a very low standard for accepting untruthful evidence against accused persons. In SA Gaffar Khan versus VR Dhoble - 2003(7) SCC 749 - the Supreme Court held as under:

> "The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liars... It is **merely a rule of caution...** The doctrine is a dangerous one especially in India for if a whole body of the testimony were to be rejected, because the witness was evidently **speaking an untruth** in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. **Witnesses just cannot help in giving embroidery to a story, however true in the main...** The aforesaid dictum is not a sound rule for the reason that **one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate an exaggeration, embroideries or embellishment.**" (Page 764).

In a subsequent case Gangadhar Behera & Ors vs state of Orissa - 2003 SCC (Cri) 32, the Supreme Court went even further holding:

> **"Even if a major portion of the evidence is found to be deficient,** in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained." (Page 42)

These observations of the two-judge Bench of the Supreme Court are directly contrary to coordinate benches and even larger benches. In case after case, the Supreme Court has held that if a witness is found lying then it would be very hazardous to rely on part of his evidence while rejecting the other part. The notion of separating chaff from the grain is alien to criminal law jurisprudence and cannot be used in the context of witnesses who are lying and exaggerating and certainly not in the case of witnesses whose testimony has been found substantially false.

In the case of RP Thakur versus state of Bihar - 1974 (3) SCC 664 - Supreme Court held:

> "If Nakuldeo could involve one person falsely, one has to find a strong reason for accepting his testimony implicating the others." (page 665)

In case after case, the Supreme Court has held that if a witness is found lying then it would be very hazardous to rely on part of his evidence while rejecting the other part. The notion of separating chaff from the grain is alien to criminal law jurisprudence and cannot be used in the context of witnesses ...

Similarly in Suraj Mal versus State - 1979(4) SCC 725 - the Supreme Court held:

> "It is well-settled that where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, **the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witnesses ...** In other words, the evidence of witnesses against Ram Narain and the appellant was **inseparable and indivisible.**" (page 726)

POTA

In Kartar Singh's case, the Supreme Court was called upon to decide a challenge to the constitutional validity of TADA. In the Peoples Union for Civil Liberties versus Union of India 2004(9) SCC 580, the Supreme Court decided the constitutional validity of the Prevention of Terrorism Act, 2002. By the time the case came to be decided on the December 16, 2003, there were widespread protests against the misuse of TADA and the roping in of innocent people. When this was brought to the notice of Supreme Court at the beginning of the hearing the Supreme Court held:

> "Another issue that the petitioners have raised at the threshold is the alleged **misuse of TADA and the large number of acquittals of the accused charged under TADA.** Here we would like to point out that this Court cannot go into and examine the "need" of POTA. It is a matter of policy. Once legislation is passed the government has an obligation to exercise all available options to prevent terrorism within the bounds of the Constitution. Moreover, we would like to point out that **this Court has repeatedly held that mere possibility of abuse cannot be counted as a ground for denying the vesting of powers or for declaring a statute unconstitutional**". (page 598)

As in Kartar Singh's case the Supreme Court missed the bus. **The issue was not "a mere possibility of abuse" but rather one of persistent and rampant abuse of a statute.** As stated earlier, while the Supreme Court was hearing the case, there were widespread allegations of misuse of POTA and there were numerous articles appearing in the newspapers on the misuse of POTA by the authorities. **In circumstances where the petitioners are in a position to demonstrate that the statute and the misuse of the statute are so intrinsi-**

cally interwoven that it is impossible for any court to deal with one without the other, was it permissible for the Supreme Court to dismiss the challenge and ignore widespread misuse of the statute in a summary manner? Ultimately, Government of India itself accepted that POTA was widely misused and that there was widespread public dissatisfaction with the Act. The Act was repealed. POTA was considered, as was TADA, as a black period of criminal law jurisprudence. Yet the Supreme Court in both the instances gave these repressive statutes a clean chit.

When it was argued that lawyers and journalists who are bound by their code of conduct and ethics to maintain confidentiality with respect to matters covered by lawyer - client and journalist - source privilege, the Supreme Court dismissed this offhand as under:

> "It is settled position of law that a journalist or lawyer does not have a sacrosanct right to withhold information regarding crime under the guise of professional ethics... **There is also no law that permits a newspaper or a journalist to withhold relevant information from courts** though they have been given such power by virtue of Section 15(2) of the Press Council Act, 1978 as against the Press Council... Of course the investigating officers will be circumspect and cautious in requiring them to disclose information. In the process of obtaining information, if any right of a citizen is violated, nothing prevents him from resorting to other legal remedies." (page 603)

Dealing with Section 32 of POTA which made it admissible confessions made to a police officer and also dealing with Section 32(4) and (5) which require the confession to be sent to magistrate, the Supreme Court held:

> "In our considered opinion the provision that requires producing such a person before the Magistrate is an additional safeguard. It gives that person an opportunity to rethink over his confession. Moreover, the Magistrate's responsibility to record the statement and the enquiry about the torture and provision for subsequent medical treatment makes the provision safer." (page 612)

In the earlier section dealing with TADA we had demonstrated how smaller benches of the Supreme Court disregarded the Constitutional Bench decision in Kartar Singh's case holding that the guidelines laid down by the Court in that case were to be scrupulously followed. Now in the POTA case we have set out the finding of the Supreme Court above mentioned only to demonstrate that subsequent smaller benches of the Supreme Court departed from this binding observation in the PUCL case to hold that the magistrate has virtually no role to play and almost acts only as a post office.

Medical vs ocular evidence

In a series of decisions starting with NB Mitra vs SC Roy - AIR 1960 SC 706 - the Supreme Court has acquitted accused persons when the medical evidence was explicit and the ocular evidence was clearly at variance with the medical evidence. There are no doubt cases where the two, despite apparent contradiction, can be reconciled. However in cases where there is a clear contradiction which cannot be explained reasonably, the Supreme Court has repeatedly held that the benefit of doubt will go to the accused persons. Now in a startling reversal, once again without reference to binding precedent, the Supreme Court has, in Gangadhar Behera & Ors vs state of Orissa - 2003 SCC (Cr) 32, held:

> **"At this juncture, it would be appropriate to deal with the plea that ocular evidence and medical evidence are at variance. It would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant."** (Page 44)

This two-judge bench decision is directly contrary to the three-judge bench decision in Mitra's case abovementioned where the magistrate made a direction to the Jury as under:

> "Now, gentlemen, when a medical witness is called as an expert he is not witness of fact. Medical evidence of an expert is evidence of opinion, not of fact. Where there are alleged eyewitnesses of physical violence which is said to have caused the hurt, the value of medical evidence by prosecution is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence, or any medical evidence which the defence might itself chose to bring is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Therefore, you must remember this particular point of view that if you believe the eyewitnesses, then there is no question of having it supported by medical evidence, unless the medical evidence again in its turn goes so far that it completely rules out all possibility that such injuries could take place in the manner alleged by the prosecution and that is a point which you should bear in mind, because **if you accept the evidence of the eye-witnesses, no question of further considering the medical evidence arises at all."** (Page 1034)

The three-judge bench of the Supreme Court disagreed:

> **"I do not think that the direction is either correct or complete. It is incorrect, because a medical witness who performs a post-mortem examination is a witness of fact, though he also gives an opinion on certain aspects of the case. Further, the value of a medical witness is not merely a check upon the testimony of eye-witnesses; it is also independent testimony, because it may establish certain facts quite apart from the other oral evidence. If a person is shot at close range, the marks of tattooing found by the medical witness would show that the range was small, quite apart from any other opinion of his. Similarly, fractures of bones, depth and size of the wounds, would show the nature of the weapon used. It is wrong to say that it is only opinion evidence; it**

is often direct evidence of the facts found upon the victim's person." (Page 1034)

Similarly in Mohar Singh vs state of Punjab - 1981 Supp. SCC 18 - the Supreme Court had held:

"In view of this glaring inconsistency between the ocular and medical evidence, it will be extremely unsafe and hazardous to maintain the conviction of the appellants on such evidence." (Page 20)

Report to the magistrate

Section 157 CrPC requires the Officer in charge of a police station to "forthwith" send a report to the magistrate on the police receiving information in respect of the commission of an offence. There is a long line of binding precedent of the Supreme Court (AIR 1976 SC 2423, AIR 1980 SC 638) to the effect that a late dispatch of the report to the magistrate could provide a basis for suspicion that the FIR was the result of consultation and deliberation and that it was recorded later than the date and time mentioned.

However, in state of J&K vs S Mohan Singh - 2006 9SCC 272, where the crime is said to have occurred on 23.7.85 at 6 pm, the FIR was lodged at 7.20 pm and a copy of the FIR was received by the magistrate on the next day at 12.45 pm the Supreme Court held:

"In our view, copy of the first information report **was sent to the magistrate at the earliest** on the next day in the court and **there was no delay,** much less inordinate one, in sending the same to the magistrate." (Page 275)

Similarly in Anil Rai versus state of Bihar - AIR 2001 SC 3713 - the Supreme Court introduced a new concept namely "extraordinary delay". Without reference to the previous case law, the law on the point is changed in the following manner:

"**Extraordinary delay** in sending the copy of the FIR to the magistrate can be a circumstance to provide a legitimate basis for suspecting that the first information report was recorded at much later day than the stated day affording sufficient time to the prosecution to introduce improvements and embellishment by setting up a distorted version of the occurrence. The delay contemplated under section 157 of the Code of Criminal Procedure for doubting the authenticity of the FIR is not every delay but only extraordinary and unexplained delay. However, in the absence of prejudice to the accused the omission by the police to submit the report does not vitiate the trial." (page 3174)

Names of witnesses omitted

The Supreme Court has held repeatedly that if the name of the witnesses are omitted in the FIR, unless a plausible explanation is given, the omission could be treated as a ground to doubt the evidence. In Marudanal Augusti versus state of Kerala - 1980(4) SCC 425 - the Supreme Court acquitted the accused persons because though it was stated in the Court evidence that they had witnessed the assault, they were not mentioned at all in the FIR. To the contrary, however, in Rajkishore Jha vs. state of Bihar - 2003 11 SCC 519, the Supreme Court held:

"The High Court has noted that the names of witnesses do not appear in the first information report. That by itself cannot be a ground to doubt their evidence." (Page 520)

Similarly in Anil Rai versus state of Bihar - AIR 2001 SC 3173 - the Supreme Court held that the non-inclusion of the names of the witnesses in the FIR could have been on account of the fact that the wife who had lodged the FIR was perturbed on the murder of her husband.

The case of the defence

In a striking unsettling of well settled criminal law procedure and jurisprudence, not referred to in the judgment, the Supreme Court has, in Tarun Bora vs state of Assam - 2002 SCC (CRI) 1568 - observed as under:

"In cross-examination the witness stated as under:

"Accused Tarun Bora did not blind my eyes nor he assaulted me."

This part of cross-examination is suggestive of the presence of accused Tarun Bora in the whole episode. This will clearly suggest the presence of the accused Tarun Bora as admitted. The only denial is that the accused did not participate in blindfolding the eyes of the witness nor assaulted him. (Page 1572)

In a series of decisions starting with NB Mitra vs SC Roy - AIR 1960 SC 706 - the Supreme Court has acquitted accused persons when the medical evidence was explicit and the ocular evidence was clearly at variance with the medical evidence

We have already noticed that in the cross-examination of PW 1, a suggestion was put to him that the appellant Tarun Bora had neither participated in blindfolding him nor assaulted him. This is clearly indicative of the presence of the appellant and participation in the kidnapping episode." (Page 1573) Similar is the case reported in 2002 SCC (Cr) 217.

Inadmissible evidence

In BS Panchal vs state of Gujarat - AIR 2001 Supreme Court 1158 - the Supreme Court began by remarking:

"We have reached the stage when no effort shall be spared to speed up trials in the Criminal Courts."

The Court then went on to observe:

"It is an archaic practice that during the evidence collecting stage, whenever any objection is raised

regarding admissibility of any material in evidence the Court does not proceed further without passing order on such objection." (Page 1158)

"Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item or oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the judge or magistrate can keep such evidence excluded from consideration. There is no illegality in adopting such a course." (Page 1159)

There are major problems with this approach. First, in all jurisdictions trial court judges are expected to deal with the objections on the spot in criminal trials. There was no evidence before the Supreme Court to indicate that the practice of deciding objections as to admissibility of evidence there and then, was "archaic". This observation is based more out of frustration than a serious attempt to deal with delays in criminal trials. Secondly, recording all objections and proceeding nevertheless in a criminal trial may cause grave prejudice to the accused and bias the mind of the judge as inadmissible evidence may come on record, albeit temporarily. Thirdly, it allows the judge to be mechanical in his approach and behave more as a recorder of evidence rather than an adjudicator. It is one thing to say that complex issues relating to admissibility of evidence may be temporarily postponed after recording the objections. It is an entirely different thing to lay down a rule of this sort for every objection.

Standard lowered

In a startling departure from the well established standard of proof for criminal cases of "beyond reasonable doubt" the Delhi High Court has, without reference to binding case law to the contrary now lowered the standard to "moral certainity". In Alamgir vs state - 2003 1 SCC 21 - a two-judge bench of the Supreme Court while noticing that a High Court had defined the standard thus chose to leave it alone:

> "Incidentally, the High Court did emphasise on the true and correct meaning of the phraseology "reasonable doubt" to be attributed thereon and it is on this score, the High Court records:.
>
> > 'Modern thinking is in favour of the view that proof beyond a reasonable doubt is the same as proof which affords moral certainty to the judge'."
>
> We are, however, not expressing any opinion with regard thereto." (Page 26)

This is directly contrary to the Constitutional Bench's decision in Haricharan Kurmi vs state of Bihar - AIR 1964 SC 1184 - where the constitutional bench categorically said:

> "In criminal trials, there is no scope for applying the principle of moral conviction." (Page 1184)

Accused do not figure

Once again contrary to a long line of binding precedent to the effect that if the names of the accused do not figure in the statements made to the police during investigation, then normally such an omission could possibly cast a doubt on the prosecution case. However, in Alamgir versus State - 2003(1) SCC 21 - the Supreme Court held:

> "Admittedly, this piece of evidence was not available in the statement of the witness under Section 161 CrPC, but does it take away the nature and character of the evidence in the event there is some omission on the part of the police official? Would that be taken recourse to as amounting to rejection of an otherwise creditworthy

and acceptable evidence - the answer, in our view cannot but be in the negative." (page 27)

Confessions against co-accused

We start with the three-judge Bench decision of the Supreme Court in Kashmira Singh versus state of Madhya Pradesh - AIR 1952 SC 159 - where it was held as under:

> "The confession of an accused person is not evidence in the ordinary sense of the term as defined in S. 3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshall the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept. (page 159)

As regards its use in the corroboration of accomplices and approvers, a co-accused who confesses is naturally an accomplice and the danger of using the testimony of one accomplice to corroborate another has repeatedly been pointed out. The danger is in no way lessened when the "evidence" is not on oath and cannot be tested by cross-examination. Prudence will dictate the same rule of caution in the case of a witness who though not an accomplice is regarded by the judge as having no greater probative value.

It follows that the testimony of an accomplice can in law be used to corroborate another though it ought not to be so used save in exceptional circumstances and for reasons disclosed. **The tendency to include the innocent with the guilty is peculiarly prevalent in India and it is very difficult for the court to guard against the danger. The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on independent evidence which in some measures implicates such accused.**" (page 159)

The three-judge bench decision in Nathu versus state of Uttar Pradesh - AIR 1956 SC 56 - where it was held therein:

> "**... that such statements were not evidence as defined in S. 3 of the Evidence Act, that no conviction could be founded thereon, but that if there was other evidence on which a conviction could be based, they could be referred to as lending assurance to that conclusion and for fortifying it.**" (Page 154)

This was followed by another three-judge Bench decision in Ram Chandra versus state of UP - AIR 1957 SC 381 - where the Court held:

> "Under S. 30 confession of a co-accused can only be taken into consideration but it not in itself substantive evidence." (Page 560)

Then we have the decision of the Constitutional Bench of the Supreme Court in the case of Haricharan Kurmi versus state of Bihar - AIR 1964 SC 1184 - where the Supreme Court held that:

> "... in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession **in order to receive assurance** to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. (para 12)

Thus, the confession of a co-accused person **cannot be treated as substantive evidence** and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence." (page 844)

Directly contrary to this line of binding precedent is a decision of the two-judge Bench in K Hashim versus state of TN - 2005(1) SCC 237 - where the Supreme Court held:

> "If it is found credible and cogent, the court can record a conviction even on the uncorroborated testimony of an accomplice." (Page 247)

... in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, ...

False defence as evidence

There is a plethora of binding precedents to the effect that a false defence can never be taken as substantive evidence. In the case of circumstantial evidence, it is only when the chain of circumstances is complete that a false defence can at best be considered an additional circumstance. In Shankerlal G Dixit versus state of Maharashtra - 1981(2) SCC 35 - it was held:

> "... falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused." (page 43)

Directly contrary to this is the two-judge Bench decision in state of Maharashtra versus Suresh - 2000(1) SCC 471 - where the Supreme Court held:

"A false answer offered by the accused when his attention was drawn to the aforesaid circumstance renders that circumstance capable of inculpating him. **In a situation like this such a false answer can also be counted as providing "a missing link" for completing the chain."** (page 480)

This was followed by another two-judge Bench in Mani Kumar Thapa versus state of Sikkim - 2002(7) SCC 157 - where the Supreme Court held:

"If the said principle in law is to be accepted, the statement of the appellant made under Section 313 CrPC being palpably false and there being cogent evidence adduced by the prosecution to show that the appellant had given two other versions as to the incident of 12.2.1988, we will have to proceed on the basis that the appellant has not explained the inculpating circumstances established by the prosecution against him which would form an additional link in the chain of circumstances." (page 167)

A study of the criminal law reports from 2001 onwards shows an increasing tendency of the superior courts to use extra-judicial confessions as substantive evidence in the conviction of the accused, on par with other forms of evidence

Condonation of torture

In Kamalanantha vs state of TN - 2005 5 SCC 194 - the women who had alleged that they were raped stated: "After the police beat us, myself and other girl informed that we were raped by Premanandha. " In a shocking condonation of torture making admissible evidence taken after beating of the witnesses by the police, the Supreme Court held:

"It is in that context the High Court held that the so-called beating could have meant to shake off their inhibition and fear, to make them free to say what they wanted to say. In the given facts and circumstances of this case, beating will mean to remove the fear psychosis and to come out with truth. We do not find any infirmity in the concurrent findings recorded by both the courts below on this court".

Extr-judicial confessions

A study of the criminal law reports from 2001 onwards shows an increasing tendency of the superior courts to use extra-judicial confessions as substantive evidence in the conviction of the accused, on par with other forms of evidence. The latest is Ram Singh vs Sonia - 2007 2 SCC (Crl.) 1. This is contrary to a long line of binding precedent holding, as in Rahim Beg vs state of UP - 1972 3 SCC 759 - that "the evidence of the extra judicial confession is a weak piece of evidence." (Page 765)

162 CrPC statements

The superior courts are increasingly inclined to brush aside objections relating to statements made in court which are improvements from the statements made to the police during investigation. In a long line of decisions, as in Yudhishtir vs state of MP - 1971 3 SCC 436 - the Supreme Court has originally held that crucial omissions in the statements to the police must be considered an improvement and may make the evidence before the court to be considered as "false and unacceptable". (Page 439)

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The injustice of ignorance

The Report of the Committee on Reforms of Criminal Justice System construes 'the demands of the times' in terms of what a handful and handpicked individuals conceive these to be! Ironically, these in turn, stand equated with 'the aspirations of the people of India'. Thereby, a great opportunity for law reform stands squandered. This has been the stand taken by **Professor Upendra Baxi** *in his critique of Malimath Committee report which was first published by Amnesty International and read out and dicussed at a national consultation on criminal justice in New Delhi. Excerpts:*

No one knows quite why the Government of India decided to establish the Committee on Reforms of Criminal Justice System (CJS) now. The report acknowledges this. Everyone knows that the CJS 'in India was about to collapse'. High rate of pendency and low rate of conviction have made crime a profitable business (Para 1.3). This form of rather ancient knowledge justifies now a comprehensive review by yet another expert committee!

Even so, given this precocious self-image, the committee would have served the historic role far better with a much greater measure of deliberation. The report nowhere shows any understanding of why the official and popular response rate was so indifferent, or to put the matter somewhat strongly so abysmally low. Had this something to do with the ways in which the questionnaire stood formulated and administered? Did the committee, with all its professed expertise, fail to command a measure of legitimacy with states and assorted respondents? How may we understand that only seven states,

Not understanding of Indian constitutionalism but poorly researched comparative jurisprudence guides this report. It relies primarily on two decisions of the European Court of Human Rights: Murray and Condron. Neither supports this sweeping recommendation

ruled by regimes often different from the ruling national coalition, responded to the questionnaire? Why was the follow-up for recalcitrant respondents so effete and counter-productive? Why did only 284, out of 3,164, individuals respond? Why did so many High Courts, despite directives from the Chief Justice of India, fail to furnish the information in the required format (Para 1.10)? Why, out of the many respondent legal luminaries (a peculiarly embarrassing Indian legal phrase) were most predictably Delhi-based (Para 1.15)? The Report dutifully mentions communicative failures but is silent on the causes for it, even when proceeding boldly with its far-reaching recommendations!

It is, indeed, unsurprising that the report is unabashedly elitist in the worst sense of that term. It construes 'the demands of the times' in terms of what a handful, and handpicked, individuals conceive these to be! These in turn stand equated with 'the aspirations of the people of India'!

Shoddy research

At most times, its 'findings' at best summon the depth of newspaper headlines and indifferently composed edit pages. At so many places, it is guilty of what lawyers name as *suppressio veri* (suppression of truth) and *suggestion falsi* (making manifestly false suggestions).

I take here just one major example concerning the way the report sculpts the constitutional demise of the right to silence. It summarily concludes that

...drawing of adverse inference against the accused on his silence 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 appropriate inferences from the silence of the accused. (Para 3.40)

The argument that such a provision may run afoul of Article 21 due process rights shrivels in the report to a pre - Maneka Gandhi interpretation that merely confined Article 21 rights to life and liberty to subjection by 'procedure established by law'. The Malimath Committee thus operates on an obsolete understanding of Indian constitutional jurisprudence. It is another matter that any law student in a good law school who made a similar argument would have failed to obtain pass marks!

This 'precious' recommendation stands accompanied by two caveats: first, only the court may frame and put questions; second, 'the accused will not be administered oath and he will not be liable for punishment for refusal to answer questions or for giving false answers'. What is new is not the prospect of the court putting the questions; what is new is the recommendation that the accused may now run risks of the adverse inference being drawn from the exercise of the right to silence. According to the committee, this does not amount to testimonial compulsion violative of rights to fair trial and to life and liberty!

Not understanding of Indian constitutionalism but poorly researched comparative jurisprudence guides this report. It relies primarily on two decisions of the European Court of Human Rights: Murray and Condron. Neither supports this sweeping recommendation. In Murray the accused did not testify on oath; in Condron the accused did so. The latter involved the issue of directions given by justices to the jury, a situation of little or no juristic relevance to the Indian situation. Indeed, the court observed in the latter case:

> *The government observed that the following safeguards must also not be overlooked in assessing whether it was appropriate to leave the jury with the possibility of drawing an adverse inference from the applicants' silence at the police station: the burden of proof rested with the prosecution throughout to prove the applicants' guilt beyond reasonable doubt; the jury were specifically directed that the applicants' silence could not on its own prove their guilt; the trial judge had to satisfy himself that there was a case to answer before directing the jury on the issue of the applicants' silence; the jury could only draw an adverse inference if they were sure beyond reasonable doubt that the applicants' silence during police interview could only sensibly be attributed to their having no answer or none that would stand up to cross-examination; finally, the jury were under no duty to draw an adverse inference.*

This necessarily long quote underscores that 'the burden of proof governed by the absolute standard of guilt beyond reasonable doubt, a standard that the report considers ripe for demolition in Indian criminal justice administration! Under the United Kingdom's own submissions, the trial judge 'had to satisfy himself that there was a case to answer', a much higher threshold than commended by the report which merely contents itself with the mere fact of charges being framed for trial. The jury may draw an adverse inference 'if they were sure beyond reasonable doubt' but the Malimath Report will give judges a much greater human rights adverse latitude. Besides, these cases insist on the impermissibility of drawing adverse inference because the accused exercises the right to silence; or when there is little evidence that justifies drawing such inference. Indeed, these decisions establish the

power to draw such inference only upon reasoned and justifiable conclusion in the full, considered weight of available evidence. This discretionary power becomes available primarily when the accused chooses to testify under oath and then too under the most stringent circumstances, eminently reviewable under the national and regional human rights monitoring systems.

The fifteenth hand, head note type reading of these cases that masquerades as comparative law research render the committee's comparative jurisprudence citations deeply suspect. It is improbable that the learned members of the committee had the slender most understanding of this jurisprudence. Its references to United Kingdom jurisprudence are deeply manifestly flawed. Indeed, its citation to Australian jurisprudence is stunning if only because it is bereft of a Bill of Rights. In addition, it offers scant evidence, even by way of citational support, of jurisprudence of the United States, Canada, France and Italy! In this arc of ignorance, it is too much to ask of the committee to have the slightest familiarity with comparative criminal and human rights jurisprudence . Indeed, the committee shows little regard for the text and interpretation of the right to fair trial in supranational and international human rights conventions.

The Malimath Committee, furthermore, ignores the differential access to legal services available to the Indian accused. The grudging departures from the right to silence in the more 'developed' Euro-American system remain secure in a residual welfare state, which still bears staggering financial burdens of providing effective and equitable defence counsel services to the accused. In contrast, even a perfunctory look at the Union and state budgets for legal services would have shown fully the human and human rights costs already borne by the disenfranchised Indian peoples caught in the web of CJS. The committee egregiously regards the meagre Indian legal state services as a functional equivalent to highly professional, and exorbitant, provision of right to counsel. It needed only a small reality check to realise fully the cruel imbalance between the Indian legal aid appointed counsel for the impoverished accused pitted against the might of public prosecution and the reign of torture and terror of custodial regimes.

Presumption of Innocence

The report insists that there is something flawed about the presumption of innocence and seeks to modify the standard of burden of proof. However, its analysis on either score remains inchoate, or put more sharply the learned committee does not give much evidence of what it is really talking about! It expresses a profound disquiet concerning the doctrine of presumption of innocence.

Armed with the authority of a contextual observations from Professor Glanville Williams (Para 5.14/5.15), the report speaks of 'unmerited acquittals' of 'the large percentage of acquittals of guilty persons' and blithely asserts that:

> *More the number of acquittals of the guilty, more are the criminals that are let loose on the society to commit more crimes. They would do this with greater daring for they know by their own experience that there is no chance of their being punished. (Para 5.16)*

As far as the committee's understanding of Professor Glanville Williams is correct, this is a most specious sort of reasoning, to say the least. How does one already know that *'criminals'* remain actually acquitted under the sway of presumption of innocence? Surely, such a view logically entails the notion that the epistemology of due process (that is requirements of knowledge inherent to determination of criminality) is wrong. To reach that result, one has to prejudge, outside any established legal process, the accused as necessarily guilty by their mere ascription of that status to them, a result that so astute a thinker would not have intended!

How may we come to know, further, that many accused/convicted persons regard the presumption of innocence as licence of committing more crimes with impunity? The report does not cite a single study (there is no question of course of its commissioning such a study), which verifies its conclusions. It does not conduct a stratified survey of acquittal and recidivist population that, for example, would have verified/ disverified the proposition. Such a study will have to verify the key assumption that the sample population actually holds the operational belief that the presumption of innocence will inexorably set them free every time they embark on criminal conduct.

Put another way, in thus ritually underscoring the presumption of innocence; courts do not, in fact, actually perform the task of acquitting ten guilty to save one innocent person. In each case, judges and courts have to decide on guilt or innocence of the accused on facts and arguments before them. To reiterate, the maxim does not actually describe the fact that 10 guilty persons actually stand acquitted lest one innocent person suffer; rather it reiterates that courts do not somehow presume that 10 out of 11 persons are actually guilty of crimes alleged. The report seeks to,

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subvert under the banner of its involuted invention of a new criminal justice commonsense, this precious rhetorical power of the maxim.

This new commonsense is further flavoured by populist rhetoric. The committee blandly asserts that 'criminals' acquitted under presumption of innocence

[M]ay occupy important and sensitive position in public life. If criminals start ruling the country one can imagine the consequences. (Para 5.16.

. This dire prospect, some may say, in agreement with the committee, has happened! The already, and unfortunately for the Malimath Committee, richly available, reports, such as the Vohra Committee (and electoral reforms under the auspices of the Election Commission) do not place, as does this report, the blame on the operation of the doctrine of presumption of innocence. They find approaches to solution of the problem in reforms of electoral system and greater insistence on accountability mechanisms for corruption in high places. Even when these make recommendations concerning CJS reform, they do not go so far as to advocate abolition, or fundamental modification, of the doctrine.

The more fundamental difficulty with the report is its *blithe* assumption that each accused may be guilty unless he/ she proves innocence. Haunted by the scepter of the ten *'guilty'* set free in order to save one innocent person, the committee here claims for itself an extraordinary epistemic privilege. It already knows that the 10 acquitted persons are actually 'guilty' persons, in advance of a due process based trial and appellate process! This is a staggeringly astonishing proposition, a gift of prophecy given to six members of a randomly constituted committee by an arbitrary regime!

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'GBRD'

The report is preeminently agonised by this heavy burden of the standard of proof. However, one looks in vain for the sources of this agonising!

A formidable obstacle to understanding its meandering discourse is the fact that committee is not quite sure of its target. On the one hand, it bemoans this standard necessarily stemming from the doctrine of the presumption of innocence; on the other hand, the committee itself acknowledges at several places that the standard is not absolute'. Legislative derogations and deviations, it notes, have been held constitutional when impugned at the bar of due process rights under Article 21 of the Constitution (Para. 5.6-5.8). Indeed, it asserts and demonstrates that the standard is 'becoming flexible' (Para 5.18). What then is the problematic that the committee seeks to address? To this question, the report provides no answer at all!

Something, we are asked to take in an act of *faith*, is *wrong* with the standard/burden of proof. That 'something' stands described with deep indifference. We are educated (without any detailed narration) that 'proof beyond reasonable doubt' is *not* a 'standard of universal application'; 'France has not adopted this Standard' (Para 5.22). What *follows* from this comparative jurisprudence tidbit? Going back to 1867, we are educated and entertained by the fact that section 4 of Public Gambling Act dispenses with this standard. What follows then from this colonial history gossip? The report says that times have changed.

Now there is a sea change ... People

now-a-days are better informed. The Press, the radio, the television, films, and various type of literature have enormous influence in educating and making people aware of the 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.

...It looks as though the criminals are emerging stronger than the law enforcing agency. (Para 5.28)

What follows from this set of platitudes is simply the *ipse dixit* (something is true merely because we say it is!) that the standard of proof needs modification. Law reform measures backed only by platitudes, gossip, and slogans constitute the gravest threat there is today to human rights in the administration of criminal justice. In any event, the report is determined even to change the existing 'flexible' standard of proof beyond reasonable doubt. In Para 5.30, it suggests that we adopt a different standard that of 'clear and convincing' proof. This, according to the committee, is the golden mean between the 'preponderance of probability' standard in civil adjudication and 'beyond the reasonable doubt' standard in criminal cases. The latter, the report maintains, is too 'subjective'; it is unclear how the proposed standard will be any the less so. It recommends (Para 5.13(iii) at page 270) that Section 3 of the Evidence Act be modified to read that:

> *In criminal cases, unless otherwise provided, a fact is said to be proved when, after considering the matters before it, the court is convinced that it is true.*

To ensure that proof beyond reasonable doubt standard does not surface ever again in the annals of Indian adjudication, the committee further recommends that the proposed amendment 'shall have effect notwithstanding anything contained to the contrary in any judgement order or decision of any court'. Lawyers term this as an 'ouster clause', a provision designed to eliminate judicial power. The Indian Supreme Court has often pronounced on the validity of such clauses; there is no doubt that were such a clause legislated, its validity will be impugned both under the ordinary jurisprudence and under the doctrine of the basic structure of the constitution, which frowns upon abridgement of judicial power. The Malimath Committee, which specialises in the genre of 'fly-now-pay-later' law reform, stands unperturbed by this prospect.

The committee notes that the system of judicial verification of truth is not precedent-based; 'earlier decisions' do not constitute precedents and are rarely cited. France seems to have a jury system even for criminal appeals. How may selective incorporation relate to the jury - free and precedent happy Indian CJS is not a question that at all interests the committee!

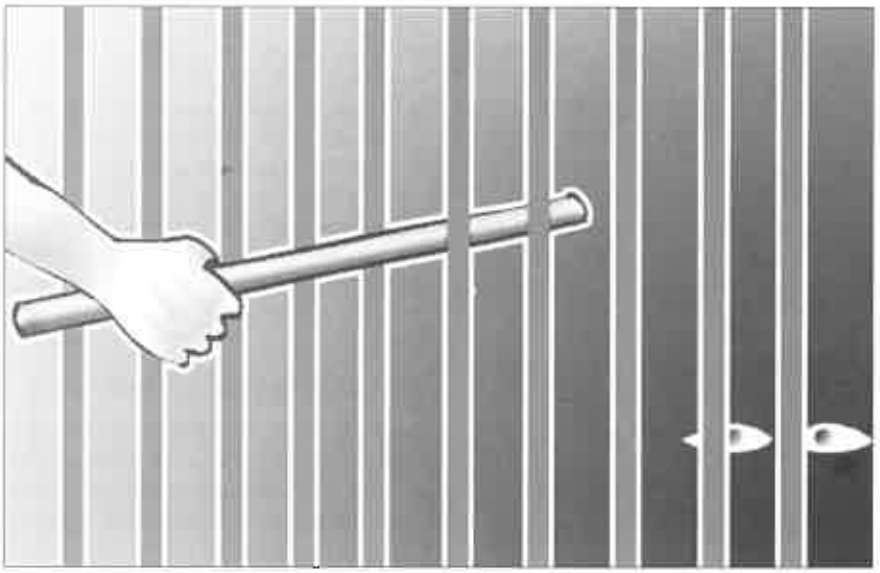
It is both conceivable and likely that the proposed amendment will operationally result in de facto judicial recourse to the disfavoured lesser standard of preponderance of probabilities. No careful Court will of course justify its decision by an overt recourse to this language; but it may indeed find that the fact is true precisely because it thinks that the preponderance of probability is sufficient to justify judicial conviction. The report does not attend to this probability; this default is fraught with danger to human rights in the administration of criminal justice, especially when the scope of the additional amendment ousting altogether judicial discourse concerning the earlier standard is borne fully in view. This tinkering with CJS postulates may only be grasped when we understand the logic of partial amendment of the adversary system that the report wholeheartedly enunciates.

Towards hybrid system of CJ

I believe that the actual text of the report disrupts the deceptive exercise of selective incorporation of 'good' features of the 'inquisitorial' system. Volume one provides us with a rather undifferentiated picture of the inquisitorial 'system'; the only evidence we have of the committee's direct understanding of inquisitorial system is contained in Appendix 10, volume 2 . Volume two focuses on only one jurisdiction: France. Even here, the narrative is somewhat sloppy. The committee was informed that the 'prosecution has to prove the case beyond reasonable doubt' (Volume 2, Page 378); if so, one fails to understand why it recommends dispensation from this standard and burden of proof.

The committee notes further that the system of judicial verification of truth is not precedent-based; 'earlier decisions' do not constitute precedents and are rarely cited. France seems to have a jury system even for criminal appeals. How may selective incorporation relate to the jury - free and precedent happy Indian CJS is not a question that at all interests the committee! What appeals to it is the fact (or rumour?) that in France cases are disposed off expeditiously 'within one day or two years depending upon the nature and complexity of the case'. Would selective incorporation deliver this desideratum for Indian CJS?

In France, the 'highest court will not go in the merits of the case'; how may we adopt this even selectively without fundamentally altering the code of judicial review powers under the actually existing Indian Constitution? In France, the offices of magistrates and prosecutors remain interchangeable; is this transformation desirable and feasible for India?



If so, the report owed us a fuller enunciation. The atmosphere in French courts is 'solemn' and brisk compared with 'the busy atmosphere of the court that we find in India'. What follows? The committee further finds on a flying visit further that that the '[p]eople in France seem to be happy and satisfied with the quality of justice administered in their country' (Page 378). It did not of course meet the French people. Upon this caricature of popular contentment is based the overall recommendation of selective incorporation ! So invigorating are the effects of the holiday in Paris that the committee simply refuses to listen to the disquiet expressed by several High Courts concerning the 'switchover' .

Given all this, it is difficult to grasp the notion of selective incorporation from 'inquisitorial' systems. What is really proposed is full-scale dilution of the adversarial system, as it now exists. Charged with the duty to find truth and invested with enormous new powers to direct the investigation, as well as the attenuation of right to silence and presumption of innocence, judges and courts may well begin to read their obligation to find the truth as their duty to increase the conviction rate.

In sum, the committee proposes fundamental renovation of the Indian criminal justice system both by stealth and by sloth. By stealth, because it seeks to smuggle inquisitorial system under the guise of improving the present adversarial one, by sloth, because it is simply not bothered to carefully and responsibly attend to the craft and task of transition this entailed. This furnishes a very sad and poignant symptom, after more than five decades of the Indian independence, of half-baked law reform processes, which can only aggravate the crises of the future of human rights in India. It is even more unfortunate than incumbent union law minister signals his advance commitment to the Malimath Committee that he will 'implement the reforms' that it may suggest! (See 'Acknowledgement' to the report). Veritably, this is law reform by way of carte blanche!

Offences, arrest, ... and bail

The 'terror stricken victims' stand here conceived as victims of routine, not politically animated, mayhem, murder, arson, and rape. There is, as far as I espy, *not a single recommendation* here that may take within its reach suspects or accused belonging to the political classes.

However, it nowhere stresses the need to combat (save the general endorsement of prior recommendation that India needs to revamp its colonially inherited Indian Police Act: Para 7.31) custodial violence, torture, and tyranny.

Exceptional laws

Indian political parties, irrespective of ideological hue and complexion cannot disclaim responsibility for induction of criminals into election processes. The criminals' (sic) support the political parties in all possible ways to either continue in or to assume power.Politicians not merely hire anti-social elements to assist them in elections...but also to eliminate their rivals.

Murder of political workers, activists, etc., by political rivals are assuming a serious proportion. The bonding between political parties and organised crimes complete.(Para 17.16.7)

The committee does not make a *single* specific or direct suggestion for weakening this bonding! Its focus on 'economic' crimes and crimes of terrorism also does not quite suggest ways that break this bonding.

In the circumstances, its lamentation concerning the nexus between politics and organised crime remains merely a cascade of crocodile tears.

The report does not fully recognise that much before 9/11, and almost since the Indian Independence, Indian peoples experienced a whole encyclopedia of violation of basic human rights in response to forms of political insurgency, often branded as terrorism.

The report does not concern itself with this institutionalised ambivalence . Rather, it veers towards juridical institutionalisation of regime/state paranoia. Put another way, its underlying message, extremely worrisome, is that a more than half a century old distinction between everyday criminal justice system and the exceptional measures stands ready for constitutional erasure.

Given the extraordinary developments of regime sponsored violence and xenophobia in Gujarat 2002, and since then, one knows what pernicious communalistic distinctions may be drawn between 'nationalist' (like the Vishwa Hindu Parishad) and 'anti-national' (necessarily Muslim) organisations receiving foreign funds. This stands even more aggravated by the report's purple prose concerning Indian Muslim 'underworld' (Para 18.10) and Pakistan aided terrorism (Para 19.4/ 19.5). The report grievously errs in its wholly one-eyed presentation, which unfortunately seems to suggest that anti-national activities remain an inherent proclivity of named and marked communities. To be sure, the committee did not intend this. But the text thus writ large unfortunately raises unintended, and politically

violent, implications in the current political milieu.

The missile 'anti-national' stands often hurled recklessly, and with impunity, against conscientious and decent citizens who seek to perform their constitutional obligations under Part IV-A of the Indian Constitution. Any constitutionally oriented CJS reform should accord some space and place for the protection of their fundamental rights in their performance of their fundamental duties. The report, sadly, misses a precious opportunity for redemocratising the Indian CJS .

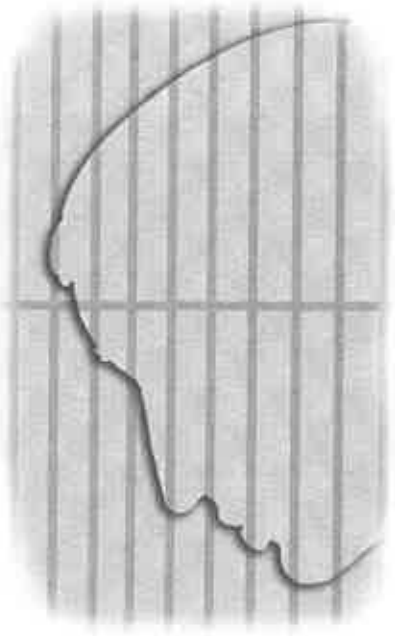
Miscelania

This essay does not attempt to dignify further a whole host of related recommendations made by the committee. Some recommendations have the quality of the Sermon on the Mount.

Some chapters are simply vacuous. The report remains perfunctory in its treatment of the problem of perjury, and leads nowhere (Pages 154-155). So remains the curious and inconclusive twaddle concerning arrears in courts (Chapter 13), which despite the appearance of solidity in the proposed scheme for eradicating arrears (Para 13.6.1) does not show any responsive understanding of causation of arrears, despite the analysis available in my *Crisis of the Indian Legal System* published as early as 1982! It commends 'commitment and aggressive pursuit at all levels' and suggests that requisite finance, manpower, and infrastructure should be made available without cringing' (Page 166). One can only say: Amen! Surely, this high-minded preaching is bereft of all pertinence when unaccompanied by a minuscule understanding of the histories of economics, and the political economy, of justicing in India!

Chapter 19 concerning policing in India does not add much to the wearisome stockpile of national reports concerning reform of the Indian police! Indeed, its prose raises serious doubts concerning the integrity of reading of past materials.

Some recommendations for the reform of Indian Penal Code stand made almost absent-mindedly. Para 16.4, for example, describes (without any data) Section 498A as a 'heartless provision' because it makes offences of cruelty against married women non-bailable and non-compoundable. Curiously, the report assumes that for 'the Indian woman marriage is a sacred tie' even in the context of matrimonial and domestic cruelty and violence and the creation of the offence makes her 'fall from the frying pan to fire' because she remains always economically dependant (Para 16.4.3). It goes so far as to aver that a 'less tolerant and impulsive woman may lodge an FIR even on a trivial act'! (Para 16.4.4). Further, the section 'helps neither the wife nor the husband' (Para 16.4.4). From such *ex cathedra* 'reasoning', the report recommends that the offence should be both bailable and compoundable to give 'a chance to the spouses to come together' (Para 16.4.5). This is indeed a crazy quilt!



The committee has not attempted to examine statistically and sociologically the problem of the social impact of the operation of this section; it recycles instead staid and offensive patriarchal assumptions

The committee has not attempted to examine statistically and sociologically the problem of the social impact of the operation of this section; it recycles instead staid and offensive patriarchal assumptions. Even as pleading of special patriarchal interests, it fails to make any case for the changes it mindlessly proposes. The same cavalier approach is manifest when it recommends that a 'suitable provision be incorporated in the (Criminal Procedure) Code for fixing a reasonable period for presenting FIR' in rape cases (Para 16.7). It is hard to believe that the committee makes this recommendation even after the experience of Gujarat 2002, where only three FIRs represent prosecutorial vigour amidst massive violation of women in the regime sponsored pogrom. The report adds insult to injury for the violated women.

In lieu of a conclusion

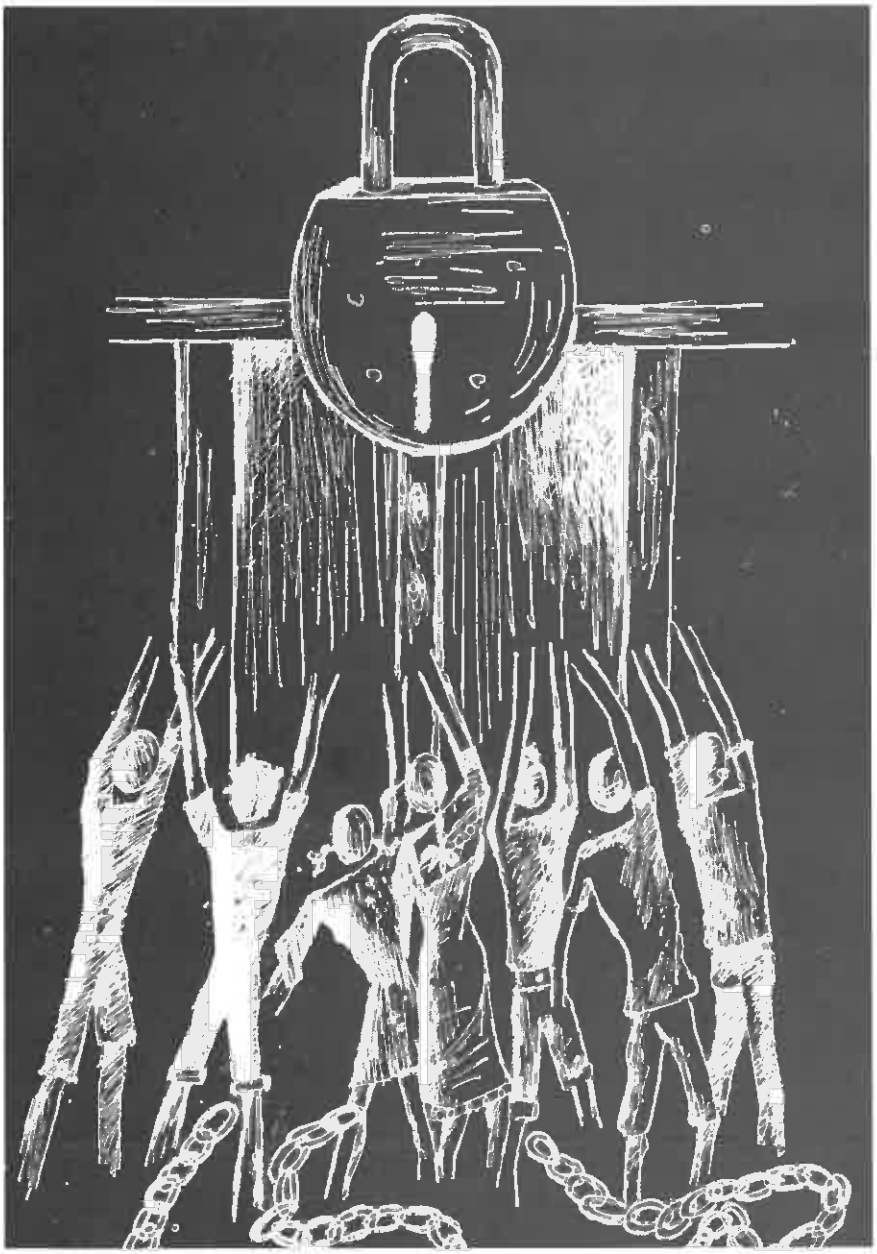
I had the privilege of knowing Justice Malimath and at least one member of the committee, vice chancellor Madhava Menon, for well over two decades. *Nothing* will please me more than a full-scale demonstration of *how* and *where* I may have actually misread, or *misconstrued*, the report.

However, this essay assails their performance in my role as a co-citizen animated entirely by Article 51-A obligation of all citizens to develop the sprit of scientific temper and excellence in all forms of public endeavour. The learned members of the committee, I believe, have done considerable disservice to their own public eminence and worse still to the cause of CJS reform by their cavalier and lackadaisical approach to grave issues of law reform. A great opportunity for law reform here stands thus extravagantly squandered. Even its more sensible suggestions stand encoded in an ideology of criminal justice system reformation ill suited, and dysfunctional, to the future of human rights in India.

—The author is former Vice-Chancellor of Delhi University

The right to humanity

It is not just the State machinery, but even rights organisations must take a more proactive stand against brazen violations like torture and third degree methods in custody, says **Justice AM Ahmadi**



It was in 1973 that the Criminal Procedure Code in India was amended. But that was not the end. Over the years, we have been experimenting with it. Earlier, we had a procedure called the Committal Procedure, a system borrowed from the British.

The Committal Procedure has evolved in Indian conditions. Some significant changes have happened. For instance, as soon as a crime is committed and a chargesheet is produced, crucial witnesses like the eyewitness, have to be immediately examined by the magistrate's court on oath. The eyewitness's statement is recorded that serves as a piece of evidence in case the witness turns hostile. The comparison is done on the basis of the two statements, one filed earlier and another filed later on. If they are contradictory, one can easily prove that the witness has turned hostile.

Now this system has changed. The Committal Procedure has been done away with and the early recording of a witnesses' statement hardly takes place. No action is taken against the officer who did not file the chargesheet on time. Neither is any explanation sought.

When I was a Session's Judge, one of the earliest trials that came up to me, was one of the most sensational trials I have faced so far. Some of my colleagues even said it was too early for me to handle such a case. A very senior police official was involved in the case. At the end of the trial, I came to the conclusion that out of 22 witnesses, eight or nine were absolutly innocent. There was documentary evidence that proved that they had been taken into custody at 8 a.m. whereas the offence had taken place at 10 a.m.

As a young judge it virtually shook me. I wrote a paragraph against the officer in question and in the High Court the Advocate-General raised the issue with the official. Fortunately, the High Court reinforced my remarks. I am mentioning this because in those days enquires were properly conducted. The officer was immediately questioned, a departmental enquiry was ordered and finally he was removed. Today, nothing like this happens because many among such senior

officials are protected by top-ranking politicians or others.

When I was working on the Pay Commission and fixing salaries for members of the police department, some of them came and talked to me about their problems. They clearly said, "what can we do sir, we are helpless. There is so much pressure on us. Otherwise, we will get transferred. Even if that happens then at a new place we will have to suffer another pressure group. It's like we are never free from all this." This is exactly what has happened over a period of time to the entire department. And, it has gone from bad to worse.

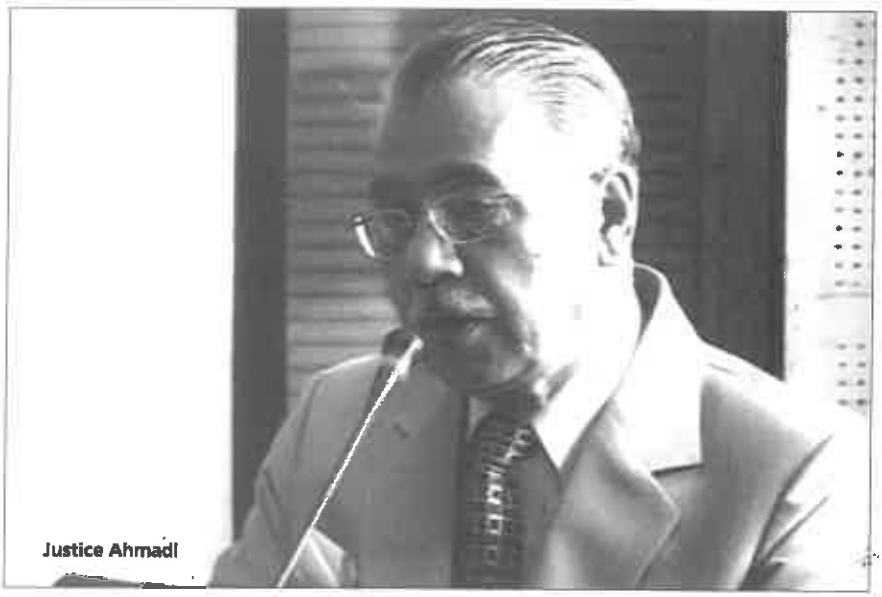
If we look at it from another point of view, the police force is also getting brutal by the day. The brutality is so alarming that someone once mentioned to me that if you walked into a police station as a complainant you came out as an accused. So the question is how much of discretionary power can we give to our police officers?

Of late, we even find that discretionary power is on the rise and the right to silence is being diluted. In fact, you can dilute it by raising a presumption in the Evidence Act Section 113. All this means that as a society we are caught in a jam. Now how do we extricate a civil society or the people of this country from such atrocities?

When Justice MN Venkatachaliah took over as the Chairman of National Human Rights Commission (NHRC), he invited me to inaugurate the first sitting. In my inaugural speech, I told the Chair to concentrate on spreading the culture of human rights in the democratic institutions of this country. Unless he did that he was only converting himself into a magistrate's court, or at the most a Sessions judge's court, because he was only taking up cases of what he called "violation".

But what are we doing to increase the culture of human rights across the board so that "violation" doesn't take place? We are not supposed to be creating a backlog of cases, but that's what is happening. And, the problem we are facing right now is that human rights commissions have stopped performing their duties.

The point I am trying to make is that the law is well-made, the statute



Justice Ahmadi

is well-made, procedural code is all right, but, the manner in which we implement is not correct. And, we are very good at diluting laws; so the moment a strong law is made the process of diluting begins the next day itself. In the end, we come to a situation where, out of frustration, we say, "you just can't do anything about it, so don't bother."

Look at Bombay. Have they prosecuted a single person? What about Gujarat? Have they prosecuted a single person from the majority community who were responsible for those riots? Certainly, an honest effort must be made to strengthen the Protection of the Human Rights Act

If one looks at the definition of human rights and Article 21, it is clear that human rights organisations only have recommendatory powers. But, organisations in this area that are enterprising can take initiatives and get things done. Unfortunately, most human rights organisations in India today confine themselves only to seminars and intellectual discussions.

Look at Bombay. Have they prosecuted a single person? What about Gujarat? Have they prosecuted a single person from the majority community who were responsible for those riots? So certainly an honest effort must be made to strengthen the Protection of Human Rights Act.

Justice AS Anand used Section 30 and made an application to the Supreme Court that resulted in the Best Bakery judgment. That means the possibility of doing something serious about human rights is definitely there. So instead of talking at seminars, let us see to it that those who have committed violence and killed people are prosecuted. Let us also ensure that gross human rights violations like application of third degree methods are completely eliminated. And, the State must ensure that whoever takes a lead in this direction gets full co-operation from the police.

So we are talking about a change in attitude at every level. Just like the State and the police need to change the way it handles crime, even rights organisations have to ensure that they start taking initiatives. Only then the improvements will show.

—The author is former CJI

Impunity impairs Indian Constitution

How can the blinding of prisoners in Bhagalpur, extra-judicial killings in Punjab and Jammu and Kashmir, or police encounters elsewhere have the tacit approval and complicity of the State even while the culprits escape the logic of punishment, asks **KG Kannabiran**

Impunity. Perhaps no word defines the experiences of Latin America so well as this one. Lack of punishment, of investigation, of justice. The possibility of committing crimes -- from common robberies to rape, torture, murders -- without having to face, much less suffer, any punishment. And therefore, the implicit approval of the morality of these crimes. Forgiving and forgetting without remembering -- or remembering too well, but not caring. What is forgotten can easily be repeated. And what is done without any punishment, can be repeated without fear.

Back home after the '75 Emergency we were all shocked by the Bhagalpur blinding of dacoits and we were told in somewhat Latin American fashion that it had social sanction. We were then confronted with long periods of imprisonment without trial. Then we had the Justice Bhargava Commission into deliberate liquidation of Naxalites in the name of encounters. Chaitanya Kalbagh, then with *India Today*, gave details of around 1,200 persons killed in fake encounters in UP and the justification offered was that they were all dacoits. Walter Thevaram shot into the news from Madras for brutally putting to end young persons, allegedly Naxalites. Chaitanya Kalbagh and SV Rajadurai, a well-known writer from Chennai, filed writ petitions in the Supreme Court. In Andhra Pradesh it has been a continuous campaign. Life and liberty, as constitutional values, appealed neither to the executive or the judiciary ever. Quite a few hundreds of Bengali youth were killed to put down the nascent movement and SS Ray, a central minister without portfolio then, is alleged to have played a leading role. In Punjab, quite a few hundreds were picked and shot and quite a few hundreds disappeared. An audit of bodies cremated by the police was undertaken by Jaswant Singh Kalra, who himself disappeared. The PIL pending in the Supreme Court was transmitted to the NHRC and is still pending there. There is no need to enquire into governmental impunity—the records are available. Quite a large number of human rights defenders were killed under the pretext that they were sup-

porters of militancy/terrorism.

Post-emergency there were several other commissions looking into several other misdeeds in the name of governance. Neither the governments nor the people learnt anything from these. The fractured Rule of Law of the Emergency days lingers even today. The institutional destruction that the Emergency inflicted was never repaired. No institution is functioning as the Constitution contemplated. Nobody is willing to do a political or a moral reading of the Constitution. Though I have borrowed the idea of a "moral reading of the Constitution" from Ronald Dworkin, I am not using it in the sense in which he used it. I am using this in the context of the Preamble, the Fundamental Rights, the Directives Principles and the Fundamental Duties laid down by our Constitution. Politicians do not relate their activities, or their programmes to the Constitution. Public servants do not think that the duties and tasks assigned to them are related to the Constitution. This failure to restructure institutions has led to all-round impunity we are witnessing today

Police, as the law-enforcing arm of governance, can, if intelligently used, inculcate the habit of legality among the people. As the democratic content in governance was diminishing, the sanction of impunity to the law-enforcing agency was on the rise. We have established that for the police to enjoy total impunity we need not have a dictatorship governing us. Under our Constitution blocking the limited scope for bringing about social transformation is fascism. In a pluralistic society like ours not allowing the minorities to grow and develop in equality, where every member of the minority community has a right to be treated as equal, would be fascism. The concept of fraternity and human dignity emphasises substantive and not formal equality. In a country teeming with obscurantist oppressive religious and caste practices, not allowing women, Dalits and backward castes to progress and develop into complete human beings with an equal and effective role in all decision—making processes despite Article 14, 15 and 16 would be fascism. Any effort to perpetuate the status quo would be fascism and the means to enforce fascism has always been sanction of impunity to the law enforcing agencies.

In India, the vulgarised caste structure, which repressed the backward and scheduled castes for centuries, has adopted a western liberal Constitution, has produced its own variety of distorted democracy that has transposed authority, not yet freed from its religious connotations and the impunity prevalent in a hierarchically dominant caste system and has produced what I would call

In India, the vulgarised caste structure, which repressed the backward and scheduled castes for centuries, has adopted a western liberal Constitution, has produced its own variety of distorted democracy that has transposed authority

"parliamentary fascism". Elections do not make any difference to the political party which inflicted brutalities. Delhi killed quite a few thousands of the Sikh community members and the killers were elected. Mumbai after Babri Masjid killed quite a few thousands of Muslims and Srikrishna Commission did not inflict even a dent either in Bal Thackeray's following or the BJP, the architect of the destruction of Babri Masjid. Gujarat is yet another example where impunity reigns.

Gujarat is a state where constructional democracy is incarcerated, where the chief minister's party peers and their supporters are praising his non-existent achievements. It is reminiscent of what we read in school -- the emperor's robes. Quite a few thousands were killed, cut into four and consigned to flames, causing disappearance of evidence of the genocide. Old religious places of worship were demolished and roads laid over them. The chief minister has his well organised mafia to swing into action and this is what silences the people and reading the Constitution legally we can always argue that the first three freedoms also would mean freedom not to speak, not join an association and not to be a party to any meeting or assembly! In all these areas Rule of Law is not allowed to operate but where it does it is all allowed to function by fits and starts.

In the State of Andhra Pradesh for over four decades killing people in custody or summary extra-judicial executions of extra parliamentary political dissent has become part of the administrative system. The police set-up rather than political leaders decides what is good politics for the people. Any debate about this is kept away from the national press and national debate. The State has been able to manage its murders beautifully. It is important to realise that impunity and democratic governance have an inverse relationship.

The armed forces and the paramilitary forces in Jammu and Kashmir have for over 50 years employed impunity. People's protests against impunity was never heard by the rest of the country and only when peace process emerged that we are hearing of extra-judicial killings and editorials are written about the recent outbursts against such killings. Impunity destroys living condition by spreading fear to even complain against visible injustices. Impunity has destroyed the beautiful landscape and its people and transformed Emperor Jehangir's couplet to 'if there is hell on earth, this is it"

north-eastern states have always been occupied territory coexisting with our brand democracy. We are so used to parliamentary fascism that recently a committee under a former

Supreme Court Judge was appointed to suggest some measures for improving the conditions in the north-eastern states. The committee recommended not only the repeal of the Special Armed Forces Act but also asked to incorporate the provisions of the Unlawful Activities Prevention Act as amended in 2004. I do not think that they looked into the Report of the Constitutional Review Committee on the north-east.

In this background of impunity the Malimath Committee was appointed by the BJP when it assumed the captaincy of the NDA and ruled for a full term. This committee was headed by Judge Malimath ably assisted by a known jurist and a pioneer in setting up of elite law institutions among others. In the report of the committee there is no reference to impunity. One major, almost path breaking recommendation they made, is that the major premise of criminal justice should be pursuit of truth. A justice system of this world cannot set itself the task of pursuit of truth. Whose truth is it anyway? Unable to answer the question posed by the Procurator of Judea after conviction of Jesus Christ, jurists never contemplated pursuit of truth as goal of any adjudicating tribunal. It has always been investigation of facts leading to an offence. It is a very haphazard treatment of criminal reform hurriedly brought together and presented to the then home minister and deputy prime minister. The elitist jurists and the police intellectuals are trying to push in these recommendations. And as for police reforms, instead of reforming the police, the government has set about the task of giving more powers to the police. If the police reforms do not address the question of impunity, they are not going to be reforms worth the name. What is needed is a complete check on impunity.

We are strengthened in our resolve by the Resolution of the parliamentary Assembly of the Council of Europe on 18 April 2007 at Strasbourg that calls for a "zero tolerance " of Human Rights violations. But that cannot be possible as long as there is no political will to tackle the culture of impunity. The clear outcome of impunity is denial of justice to the victims. The report was in the context of European countries. But it is timely. We made it clear in Response to Police Reforms Drafting Committee, which is as follows:

"Black's *Legal Dictionary* quotes just a Latin Maxim and translates it into English, which reads, "Impunity confirms the disposition to commit crimes." This disposition is not sanctioned by any Constitution, any law, or any international covenant either before the Universal Declaration of Human Rights or after it. Yet this "disposition to commit crimes" has become the unfailing habit of almost

all the governments in the world including Indian government.

"As we are concerned with the "disposition to commit crimes" by our government we wish to point out that we have still a live Constitution, despite some unsuccessful attempts to change it, which grants us only a limited government. The Constitution not only places limitations on governance but on all the instrumentalities of the State in so far as the peoples rights and the State's fundamental obligations are concerned. The governments' "Disposition to commit crimes" has become endemic and also unbounded. It ranges from a very covert act to the overt act of mauling and killing. Any Police Act should in our view eliminate this disposition to commit crime. In our view if you can liberate the police and paramilitary forces from this ugly (needless to say unconstitutional) disposition to commit crimes order will be restored and Rule of Law will run on Schedule. Special courts and special laws are necessary for governing a subject population which is always suspected to be in preparedness for a revolt, but not a democracy with a functioning Constitution. In fact, special laws and special courts are placebos, which governments offer despite knowing that they will be ineffective and are enacted only to enhance the content of impunity in themselves'"

As long as the government does not wean away the public servant from the disposition to commit crimes, the present state of disorder will continue in more aggravated forms. This will be more so if the government does not bring in a pluralistic egalitarian transformation provided for by the Constitution. The government should abide by the fundamental freedoms more particularly Article 14 and 21. The direct consequence of pig-headed governance is terrorism. There is no point in crying hoarse against terrorism for that will be the only answer to the State with a quasi-militaristic disposition. We also set out below the international efforts made to tackle this problem of impunity in governance, if only to understand the magnitude of the problem and possibly act to preserve the constitutional value system and democratic practices.

In the Malimath Committee report there is no reference to impunity. One major, almost path breaking recommendation they made, is that the major premise of criminal justice should be pursuit of truth

Impunity has become an endemic problem in several countries across the world and the Parliamentary Assembly of the Council of Europe adopted the Report recommending zero tolerance to human rights violations. The Human Rights Commission in October 1997 adopted Revised final report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119.

I am setting out the resolution in full so that we may realise the ugly distortions that were treated as governance and this can also provide guidelines for conduct for eliminating impunity and make governance constitutional.

In its forty-third session (August 1991), the sub-commission requested the author of this report to undertake a study on the impunity of perpetrators of human rights violations. Over the years, that study has revealed that the process by which the international community has become aware of the imperative need to combat impunity has passed through four stages.

First stage

During the 1970s, non-governmental organisations, human rights advocates and legal experts and, in some countries, the democratic opposition - when able to state its views - mobilised to argue for an amnesty for political prisoners. This was typical in Latin American countries then under dictatorial regimes. Among the pioneers were the Amnesty Committees in Brazil, the International Secretariat of Jurists for Amnesty in Uruguay (SIJAU) and the Secretariat for Amnesty and Democracy in Paraguay (SIJADEP). Amnesty, as a symbol of freedom, would prove to be a topic that could mobilise large sectors of public opinion, thus gradually making it easier to amalgamate the many moves made during the period to offer peaceful resistance to or resist dictatorial regimes.

Second stage

This stage occurred in the 1980s. Amnesty, the symbol of freedom, was more and more seen as a kind of "insurance on impunity" with the emergence, then proliferation, of "self-amnesty" laws proclaimed by declining military dictatorships anxious to arrange their own impunity while there was still time. This provoked a strong reaction from victims, who built up their organisational capacity to ensure that "justice was done", as would be shown in Latin America by the increasing prominence of the Mothers of the Plaza de Mayo, followed by the Latin American Federation of Associations of Relatives of Disappeared Detainees (FEDEFAM), which later fanned out onto other continents.

Third stage

With the end of the Cold War symbolised by the fall of the Berlin Wall, this period was marked by many processes of democratisation or return to democracy along with peace agreements putting an end to internal armed conflicts. Whether in the course of national dialogue or peace negotiations, the question of impunity constantly cropped up between parties seeking to strike an unattainable balance between the former oppressors' desire for everything to be forgotten and the victims' quest for justice.

Fourth stage

This was when the international community realised the importance of combating impunity. The Inter-American Court of Human Rights, for example, in a ground-breaking

ruling, found that amnesty for the perpetrators of serious human rights violations was incompatible with the right of every individual to a fair hearing before an impartial and independent court. The World Conference on Human Rights (June 1993) supported that line of thinking in its final document, entitled "Vienna Declaration and Programme of Action" (A/CONF.157/24, Part II, Para. 91).

This report therefore comes under the general heading of the Vienna Programme of Action. It recommends adoption by the United Nations General Assembly of a set of principles for the protection and promotion of human rights through action to combat impunity.

Set of principles

The following three sections summarize the overall presentation of the set of principles and their justification in reference to victims' legal rights:
(a) The victims' right to know
(b) The victims' right to justice and
(c) The victims' right to reparations

In addition, on a preventive basis, a series of measures aimed at guaranteeing the non-recurrence of violations.

The right to know

This is not simply the right of any individual victim or closely related persons to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a "duty to remember", which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negotionism; the knowledge of the oppression it has lived through is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right.

Two series of measures are proposed for this purpose. The first is to establish, preferably as soon as possible, extra-judicial commissions of inquiry, on the grounds that, unless they are handing down summary justice, which has too often been the case in history, the courts cannot mete out swift punishment to torturers and their masters. The second is aimed at preserving archives relating to human rights violations.

E-J commissions of inquiry

These have two main aims: first, to dismantle the machinery which has allowed criminal behaviour to become almost routine administrative practice, in order to ensure that such behaviour does not recur; second, to preserve evidence for the courts, but also to establish that what oppressors often denounced as lies as a means of discrediting human rights advocates all too often fell short of the truth, and thus to rehabilitate those advocates.

Extra-judicial commissions of inquiry should be established by law. They may be established by an act of general application or treaty clause in the event that the restoration of or transition to democracy and/or peace has begun. Their members may not be subject to dismissal during their terms of office, and they must be protected by immunity

Experience shows that care must be taken not to allow such commissions to be diverted from their purpose and to furnish a pretext for not going before the courts. Hence the idea of proposing basic principles, derived from a comparative analysis of past and present commissions' experience, without which commissions risk losing their credibility. These principles relate to the following four main areas.

Independence and impartiality

Extra-judicial commissions of inquiry should be established by law. They may be established by an act of general application or treaty clause in the event that the restoration of or transition to democracy and/or peace has begun. Their members may not be subject to dismissal during their terms of office, and they must be protected by immunity. If necessary, a commission should be able to seek police assistance, to call for testimony and to visit places involved in their investigations. A wide range of opinions among commission members also makes for independence. The terms of reference must clearly state that the commissions are not intended to supplant the judicial system but at most to help safeguard memory and evidence. Their credibility should also be ensured by adequate financial and staffing resources.

Safeguards

Testimony should be taken from victims and witnesses testifying on their behalf only on a voluntary basis. As a safety precaution, anonymity may be permitted subject to the following reservations: it must be exceptional (except in the case of sexual abuse); the chairman and a member of the commission must be entitled to examine the grounds for the request of anonymity and, confidentially, ascertain the witness' identity; and reference must be made in the report to the content of the testimony. Witnesses and victims must have psychological and social help available when they testify, especially if they have suffered torture or sexual abuse. They must be reimbursed the costs of giving testimony.

Guarantees

If the commission is permitted to divulge their names, the persons

implicated must either have been given a hearing or at least summoned to do so, or must be given the opportunity to exercise a right of reply in writing, the reply then being included in the file.

Publicity for the reports

While there may be reasons to keep the commissions' proceedings confidential, in part to avoid pressure on witnesses and ensure their safety, the commissions' reports should be published and publicised as widely as possible. Commission members must enjoy immunity from prosecution for defamation.

Preserving archives

The right to know implies that archives must be preserved, especially during a period of transition. The steps required for this purpose are:

(a) Protective and punitive measures against the removal, destruction or misuse of archives

(b) Establishment of an inventory of available archives, including those kept by third countries, in order to ensure that they may be transferred with those countries' consent and, where applicable, returned

(c) Adaptation to the new situation of regulations governing access to and consultation of archives, in particular by allowing anyone they implicate to add a right of reply to the file

The right to justice

This implies that all victims shall have the opportunity to assert their rights and receive a fair and effective remedy, ensuring that their oppressors stand trial and that they obtain reparations. As pointed out in the preamble and in the set of principles, there can be no just and lasting reconciliation without an effective response to the need for justice; as a factor of reconciliation, forgiveness, insofar as it is a private act, implies that the victim must know the perpetrator of the violations and that the latter has been in a position to show repentance. For forgiveness to be granted, it must first have been sought.

international human rights treaties should include a "universal jurisdiction" clause

The right to justice entails obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them. Although the decision to prosecute is initially a State responsibility, supplementary procedural rules should allow victims to be admitted as civil plaintiffs in criminal proceedings or, if the public authorities fail to do so, to institute proceedings themselves.

As a matter of principle, it should remain the rule that national courts have jurisdiction, because any lasting solution must come from the nation itself. But all too often national courts are not yet capable of handing down impartial justice or are physically unable to function. The delicate question then arises of the jurisdiction of an international court: should this be an ad hoc court, like those established to deal with violations in the former Yugoslavia or Rwanda, or a standing international court such as is proposed in a document currently before the United Nations General Assembly? Whichever solution is finally adopted, the rules of procedure must satisfy the criteria of the right to a fair trial. Those trying the perpetrators of violations must themselves respect human rights.

Lastly, international human rights treaties should include a "universal jurisdiction" clause requiring every State party either to try or to extradite perpetrators of violations. The necessary political will is still essential, of course, to enforce such clauses. For example, humanitarian provisions in the 1949 Geneva Conventions or the United Nations Convention against Torture have scarcely ever been applied.

Restrictions

Restrictions may be applied to certain rules of law in order to support

As a matter of principle, it should remain the rule that national courts have jurisdiction, because any lasting solution must come from the nation itself. But all too often national courts are not yet capable of handing down impartial justice or are physically unable to function

efforts to counter impunity. The aim is to prevent the rules concerned from being used to benefit impunity, thus obstructing the course of justice. The main restrictions are as follows.

Prescription

Prescription is without effect in the case of serious crimes under international law, such as crimes against humanity. It cannot run in respect of any violation while no effective remedy is available. Similarly, prescription cannot be invoked against civil, administrative or disciplinary actions brought by victims.

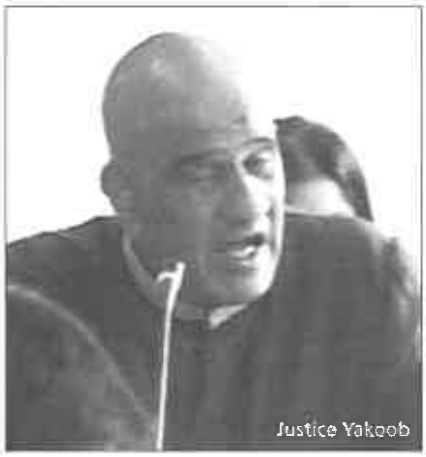
Amnesty

Amnesty cannot be accorded to perpetrators of violations before the victims have obtained justice by means of an effective remedy. It must have no legal effect on any proceedings brought by victims relating to the right to reparation.

This UN Human Rights Commission proceeding should strengthen the courts and the human rights activists and organisers resolve to fight against impunity. Courts may use the above as guidelines.

—The author is PUCL President

A just society through just laws


Justice Yakoob

Delving upon his experiences in the legal profession during the apartheid days in South Africa, **Justice Mohammed Zakeria Yakoob** *calls for a relentless pursuit to provide lawful guarantee to ward off encroachments upon citizen's rights in the wake of clamour for stringent provisions to ensure order in the society even in the event of doubts*

Once after becoming a lawyer, I was sitting outside a court in South Africa waiting for my case to be called. The applicant was to be brought to the court. He was virtually treated as nobody. Had a white applicant been called he would have been named as Mr-so-and-so with polite courtesy. I sat back seeing junior lawyers as they scurried around to cross-examine state witnesses who were like magistrates and judges only in the sense they were whites. White prosecutors cross examining the applicant and accused were often assisted by the court. It was a normal practice for judges and magistrates during the days of apartheid. In relation to black accused the assumption used to be that the person must be guilty and in relation to white accused the assumption was that the accused may not be guilty.

And that became a problem as the criminal justice system operated horribly in relation to the African people despite the fact that we had a principle which said that the State must prove its case beyond reasonable doubt. So the fundamental point I want to make is that the designation of the onus in a piece of legislation is not the end of the matter, it is only the beginning and a fair trial means much more than incorporating matters related to an offence into pieces of law.

Another important thing in those days were political trials. Political trials in Africa are highly complicated. They are held far away from the accused person's home so that there could be no one there to support and defend. They were held very quickly so that there is no opportunity given to the people to prepare their defence. They were held in consequence of evidence given by the people in detention and our apartheid style judges never took it particularly seriously. There were confessions taken which were alleged to have been freely and voluntarily made. All those confessions were admitted despite fairly strong evidence in many cases to the contrary. So political trials in the country represented a travesty of justice and the court system.

It was in this context that we had to draft our Constitution in relation to the fair trail provisions of our constitution. We came from a society where the justice system was manipulated to ensure segregation, discrimination, and to ensure that poor people continued to be treated as if they were animals. That is the context. And we have the context where the negotiators of the constitution themselves as a part of the African National Congress had been victims of political trials which had been badly handled and many of them had been political prisoners before. So they understood, better than anybody else, having been victims themselves how police's improper conduct can result in injustice and impropriety. And, therefore, we made it perfectly clear that, we in our country would never tolerate a system in which there would be any injustice at all not on the basis of constitutional provisions but on the basis of these other hidden things. So we regarded the achievements of a non-racial society as fundamentally important to the achievement of justice because unless the society itself was non-racial we could not have justice at all. So the reconstruction of our society and the reconstruction of our criminal system began with our Constitution, our Constitution which made it perfectly clear that all rights were interdependent and interrelated and therefore the fair criminal trial right, too, was not a right which was to be taken independently of all other rights. It had to be taken in conjunction with the right to equality.

But before I get to the fair trial right, there were certain values entrenched in section 1 of our Constitution that made it perfectly clear that this Constitution stands for the dignity of human being, the achievement of equality and advancement of all human rights and freedoms. It made it clear that it stood for the abolition of sexism and racism and made it quite clear that our Constitution stood for the supremacy of the Constitution and the rule of law. So in our country it is not only the Constitution that is supreme but also the rule of law. And these principles have been entrenched in our Constitution to a

greater degree than all others. The rest of the bill of rights can be amended with a 2/3rd majority subject to certain conditions but these values, these principles, this particular section can amended only with a 75% majority. So these principles are fairly important because we believe that the fair trial provisions are in fact concerned with the dignity, equality and freedom of all human beings.

And now we come to the fair trial provision which has been in our Constitution. There are many people in our society who have commented on the fair trial provisions of our Constitution, saying said that this has been taken rather too far. Police have claimed that it is the fair trial provision which has been the cause of absence of convictions and so on. People have said that the fair trial provision means that our Constitution caters more to the people who are accused than people who are victims. This is an argument advanced all over the world.

The first problem is, how do you view the accused people. If you view accused people as people who are guilty as the Malimath report in the Indian case does then obviously you have adopted a different approach. You would say that these people are guilty and they must not go free. It is a difficult assumption to make as it is an assumption which is against the presumption of innocence. You assume that there is no smoke without fire. You assume that there must be something and therefore there is something essentially wrong with acquittals.

Yet, I want to say something about proving a case beyond a reasonable doubt and what it means. The Malimath report regarded this with some circumspection and came to the conclusion that what is required is that once the court is convinced it is alright. Now the ridiculousness of this proposition can only be understood if we introspect just a little bit about what proof beyond a reasonable doubt means. What it means is this; it doesn't mean that the judge doesn't arrive at the truth, it doesn't mean that the judge is God and decides whether something happened or did not happen. It is absolutely impossible for a human being listening to the witnesses to decide whether something that has been said is true or not. Chasing after the truth and trying to discover the truth is an impossible thing. Only God knows the truth and nobody else does. How can a judge ever presume what is the truth. All a judge can ever decide is to say whether the case brought before him has proof beyond reasonable doubt from the point of view of the evidence he has heard. Therefore the search for the truth to me is something, which is utterly unachievable and nonsensical. In the end you are a human being, you hear the evidence brought before you and decide whether the case has been proved beyond reasonable doubt or not. But again what does that mean? That simply means that if a judge has reasonable doubt after hearing all the evidence about whether the person committed the offence, the person must be acquitted. What is required for an acquittal is that the judge must have not just a mere simple doubt, a vague doubt but the judge must experience a reasonable doubt in relation to whether the accused is guilty before the judge acquits the accused.

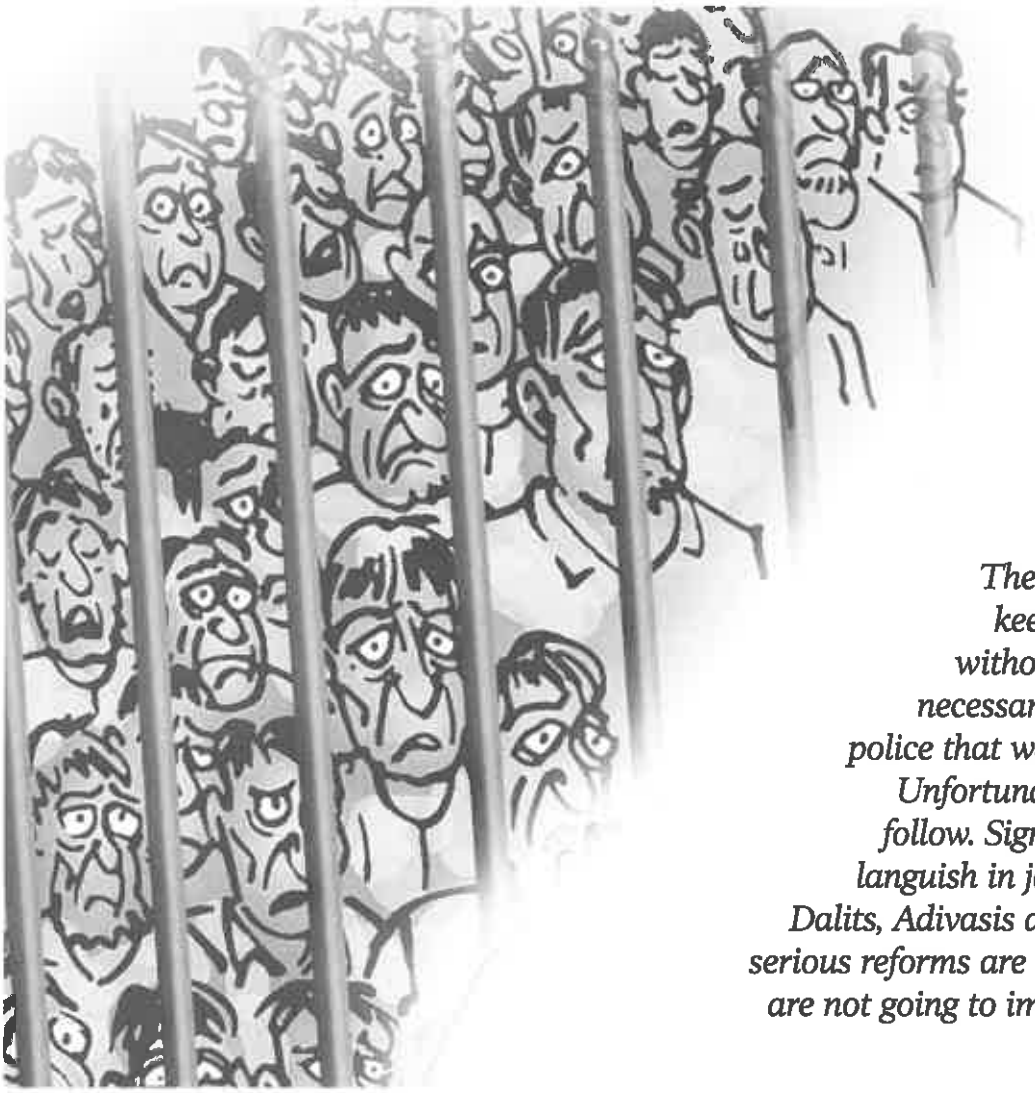
The real question that we have to answer is whether we want a society, for our sake and not for the sake of the accused, or in India where we want to say to our judges that please convict these people even though you have a reasonable doubt as to the guilt of the accused

What are the government, the judiciary and Malimath saying? Are they saying here that the judges and magistrates must convict accused persons even if they have a reasonable doubt in relation to whether the conviction is proper or not? That is what truth beyond a reasonable doubt means and we must not get caught up with expressions like balance of probability and reasonable doubt. Let us take the Malimath proposition. He says that if there is proof beyond reasonable doubt then the judge must be convinced. He doesn't understand the onus. How can a judge be convinced that the accused did it on the one hand and have reasonable doubt on the other. You cannot be convinced if you have a reasonable doubt. So anybody who says that you must replace reasonable doubt with another onus that the judge must be convinced is talking nonsense because a judge cannot be convinced if a he has a reasonable doubt.

So the real question that we have to answer is whether we want a society, for our sake and not for the sake of the accused, or in India where we want to say to our judges that please convict these people even though you have a reasonable doubt as to the guilt of the accused. I don't know about all of you but I don't want to live in this kind of a society, I don't think even the judges want to live in that society.

If you abandon this principle and say that judges must convict even if they have reasonable doubt, what you are saying is that the police allegation and the police suspicion that they are guilty is worth more than the reasonable doubt of the judge having heard all the evidence. What you are saying is that the judgement of the police officer is more important than the judgement of the court. And if that is so, why are there courts anyway? Then why have courts if they are going to work on the basis of the judgement of the police that is more important. So let the police decide whether the person is guilty or not. In the end giving this sort of a power to the police, convicting people even where a judge has a reasonable doubt as to the guilt of the accused is a thin edge of the wedge. What we then start doing is compromising the judicial system. What I think is that you need to have an independent judiciary that can stand against the government in case this is needed to uphold justice.

—The author is Judge, Constitutional Court, South Africa



The arbitrary powers to keep a person confined without a guilty verdict is necessary for a State and its police that want to rule by terror. Unfortunately, that's what we follow. Significantly, those who languish in jails are poor people, Dalits, Adivasis and Muslims. Unless serious reforms are implemented, things are not going to improve, argues **Colin Gonsalves**

Clear the jails first

The Code of Criminal Procedure (Amendment) Act, 2005 has been welcomed in the national media as heralding the release of 50,000 undertrials many of whom have been languishing in jails for years without their trials even beginning. Nothing could be farther from the truth. The amendment is, in fact, a reversal of the Supreme Court decisions from 1996 onwards in the Common Cause and the Raj Deo Sharma cases.

In the Common Cause cases in 1996, the Supreme Court found that in many cases where the persons were accused of minor offences, proceedings were kept pending for years. The poor languished in jail for long periods because there was no one to bail them out. The criminal justice system operated as an engine of "oppression". The Supreme Court then directed that, depending on the seriousness of the alleged crime, those in jail for a period of six months to one year would be released either on bail or personal bond, provided their trials were pending for one to two years.

A better way out for the State is to declare an amnesty and to clear the jails of 100,000 poor prisoners on Independence Day

The Supreme Court then issued directions for the closure of cases and the discharge of the accused. Cases where trials had not commenced for specific periods of time were to be closed. Cases relating to corruption, smuggling, terrorism and the like were exempted. It was clarified that the accused would not be permitted to deliberately delay the criminal

proceedings and then take advantage of the time limits fixed.

In the Raj Deo Sharma cases in 1998 the Supreme Court referred to its 1980 decision in the Hussainara Khatoon case where the Supreme Court held that "financial constraints and priorities in expenditure would not enable the government to avoid its duty to ensure speedy trial to the accused". The Court thereafter proceeded to issue guidelines for the closure of prosecution evidence and the release of the accused on bail after a certain period of time. It was clarified that "no trial could be allowed to prolong indefinitely due to the lethargy of the prosecuting agency".

Despite these directions given by the Supreme Court ten years ago, the criminal courts failed to release persons on bail and close trials.

The law was reviewed by a Constitutional Bench of the Supreme Court in P Ramachandra Rao's case in 2004 where the directions relating to the closure of cases and the fixing of time limits for trials were set aside saying that it was "neither advisable nor practicable" to do so. As a result, the rot in the criminal justice system deepened and from time to time pathetic stories emerged in the national media on undertrials languishing in jails for decades, but nothing was done.

The present criminal amendment is a reversal of the guidelines laid down in the Common Cause and the Raj Deo Sharma cases, first of all because they do not lay down any time limit for a criminal trial to end. Secondly, whereas in the earlier decision an accused was entitled to be released on bail or personal bond after being in jail for six months to a year depending upon the seriousness of the crime alleged, now that has been enhanced to half the period of possible incarceration i.e. one-and-a-half to three-and-a-half years. If under the earlier decisions of the Supreme Court undertrials were not released there is no reason for us to believe that under a more stringent regime, justice will be done.

There are over 250,000 undertrials languishing in jails even though the law presumes them innocent unless convicted. In many cases despite years going by the trials have not begun. Seven out of every ten persons in jail are in this situation. Overcrowding in jails is routine, in some jails as high as 300 percent. Inmates sleep in shifts. Possibly no country in the democratic world keeps its people behind bars in the manner India does. The overwhelming majority of those incarcerated are poor, Dalits, Adivasis and Muslims. That the system operates harshly against these sections is an understatement. It operates only against these people.

The reluctance of the State to clear the jails of the poor is more by design rather than accident. The arbitrary powers to keep a person confined without a guilty verdict is necessary for a State and its police that rules by terror. The Criminal justice system is not really interested in the determination of truth ensconced in the final verdict, rather it is a massive arbitrary system of preventive detention where the ultimate verdict is of no concern as long as the accused picked up by the police languish many years in jail prior to acquittal. Those who criticise the State for the low rate of conviction miss this point; that conviction was never the intention of the police in the first place. This accounts for the sloppy state of forensic investigation and the reliance placed on the *lathi* over the law.

The other changes brought about by the criminal amendment are also equally vague or dangerous. The amendment in 50-A of the CrPC introduces the Supreme Court's guidelines in DK Basu's case but leaves out the crucial element of giving notice to the family of the person being arrested in writing. This was important because the police routinely lie about giving notice verbally. The amendment to Section 53 is positively dangerous because it seeks to introduce in a sly manner lie detector and narco-analysis tests as admissible in evidence.

In most democratic countries these tests are deemed to be of dubious merit and are not admissible. The amendment to Section 122 seeks to strengthen police power in chapter cases by incarcerating people purely on the basis of suspicion. As the law stands today such persons are to be released on them signing a bond for good behaviour. Now the magistrate will be empowered to ask for sureties which is complicated and difficult for the accused to obtain.

Thousands of poor people are languishing in jail under this Section. Section 291-A is designed to prevent the magistrate who supervises the test identification parade, the cornerstone of a criminal trial, from being summoned to give evidence in court. These are the negative changes sought to be introduced by the criminal amendment.

A better way out for the State is to declare an amnesty and to clear the jails of 100,000 poor prisoners on Independence Day.

Rot in the prisons

Applying even the most retrogressive standards, Indian prisoners are the pits — a level of perversity matched only by our pious, moralistic and sanctimonious preachings abroad. In the land of Gandhiji and non-violence, prisons remain depraved and brutish. Internally the prisoners rot, writes **Colin Gonsalves**

The level of barbarism in respect of a nation's treatment of its prisoners is perhaps more uniform than we Indians expect. Developed and developing countries alike treat their convicts with a kind of depravity, which speaks volumes for the nature of contemporary civilisation and their attitudes towards the human person.

Applying even the most retrogressive standards, Indian prisoners are the pits — a level of perversity matched only by our pious, moralistic and sanctimonious preachings abroad. In the land of Gandhi and non-violence, prisons remain depraved and brutish. Internally the prisoners rot.

Rape, buggery, torture, custody without legal sanction, bars and fetters, detention far in excess of the sentence, solitary confinement, lunacy, the brutalising of children, women and casuals, drug trafficking and prostitution rackets run by the superintendents are but the daily routine of prison life. Pulling out eyes as in the Bhagalpur blinding case or the pushing of batons up the anus of prisoners as in Batra's case is perhaps Sunday's schedule.

If the complete absence of human rights moorings in India has escaped notice, it is only because the State has through law and *lathi* shrouded the prison system with an iron curtain through which only those may pass who have no hope of returning. And while the press, the public and social activists are debarred, the Courts turn a blind eye. While crores of rupees are spent in esoteric research of dubious standards with manuscripts thrown into the dustbin after the degrees are awarded, not a thing is done about prison research. As a consequence, the criminalisation of the prison administration proceeds apace and is the main factor contributing to the hardening of the offender and to the inmates' physical and psychological breakdown.

Apart from the human rights issue, the Indian State has so little intelligence that it cannot comprehend that in purely bourgeois terms it is neither economically feasible

nor practical to have such a large part of the population fettered and decapacitated.

Judicial reforms have been slow - too slow. In the 1980's it merged with the forenso-personal history of one man whom all associated with the struggle for civil liberties and human rights must stand up and applaud - Krishna Iyer, a former Justice of the Supreme Court who even after retirement championed the cause with renewed fervour. His decisions describe his struggle against the tide of foul precedent, colonial prison regulations and a defiant lower judiciary not only unwilling to accept his views but also uniformly subservient to the prison administration and the police. In the Seventies and early Eighties he transformed Indian prison jurisprudence and a few other judges inspired by him contributed to this change. By the time of his retirement in the mid eighties, he had led India through a decade of forensic change. But he left a sad man noticing in powerless retirement the flouting of his decisions by the decision of the criminals in uniform. The passage of time settles all things and India returned to its normal state - the eccentric has passed on.

The ebb tide set in. Whereas in the cases of Hussainara Khatoon and Motiram, the Court had spoken against high bail amounts for poverty stricken accused and had recommended their enlargement on bail on personal bond and even without sureties, today millions of people are jailed pending trial because they are either too illiterate to apply for bail or too poor to furnish the bail amount. Notwithstanding Hoskot's case legal aid remains on paper with more money spent on committees, reports and seminars than on legal aid itself. Sheela Barse's case likewise indicates the flagging interest in public interest matters. Now the right of the press to interview prisoners has been couched in a language as vague as to practically operate against the press. Despite Khan's case, prisoners are often denied access to newspapers and books. Despite Walcott's case the awarding of prison punishments is like the emperor's fiat. Despite Mallik's case children are brutalised on par with adults. The International Year of the Child saw seminars organised and films made but no children released.

All the recommendations laid down in Batra's case and Kaushik's case are ignored. Overcrowding has increased many times over. The Board of Visitors is a bloody farce. The Prison Manual and other regulations are kept top secret and even defending advocates find it impossible to lay their hands on one. Liberal visits by family members depend on bribe money. The ombudsmanic task of policing the police that Krishna Iyer advocated is now an impossibility. The standard minimum rules for treatment of prisoners are not only not followed but the rules cannot be found, Section 235(2) 248(2) of the Criminal Procedure Code in respect of more humane sentences is overlooked despite Giasuddin's case and Santa Singh's case. Despite Varghese's case poverty stricken, indigent debtors are jailed. Notwithstanding the Prison reforms enhancement of wages case convicts perform slave labour on notional or illusory wages.

The level of barbarism in respect of a nation's treatment of its prisoners is perhaps more uniform than we Indians expect

If, as in Nandini Satpathy's case, the methods, manners and morals of the police force were a measure of a government's real refinement, ours would be a tyranny. Censorship of correspondence contrary to the directions in Madhukar Jambhale's case, the solitary confinement contrary to the directions in Sunil Batra's case thrive. Likewise, bar fetters are commonly used. And the accused are tied together like cattle and paraded to Court through the streets in defiance of the decision in Shukla's case. The little Hitler found lingering around Tihar Jail in Batra's case is now fully grown and well fed. Despite Sah's and Hongray's case compensation is rarely awarded. In the face of Veena Sethi's case, mentally disturbed persons are maltreated and rendered insane. The 'hope and trust' placed in the prison administration and the police by the Supreme Court have turned out to be a joke. Even after Barse's case women's rights are not implemented. Despite Nabachandra's case remand is done as a matter of rote. Nothing changes in India - ever.

As we age, Krishna Iyer's passions recede in the memory of bench and bar. A new conservatism has taken over. Once again judicial apathy and unconcern fuel prison sadness.

His decisions are largely, therefore, of academic interest, perhaps the only merit of the decisions being, as Justice Hughes once said, that they are, "an appeal to the brooding spirit of the law (and) to the intelligence of a future day."

They display overall certain common trends and characteristics. Firstly, that judicial standards in human rights are uniformly pathetic and secondly that judges in India are universally unwilling to punish prison officials and policemen even in the face of cast iron evidence of major offences committed by them.

Judicial reluctance, administrative callousness and the absence of any State recognition of white collar crime, takes India rapidly towards the precipice where the working class find themselves brutalised and isolated and the justice system is seen by all - as it essentially is - as a class weapon perpetually perpetrating injustice.

As this happens the story foretold by Krishna Iyer in Veena Sethi's case may well come true; "One day the cry and despair of large number of people would shake the very foundation of our society and imperil the entire democratic structure. When that happens we shall have only ourselves to blame.

Untruth serum

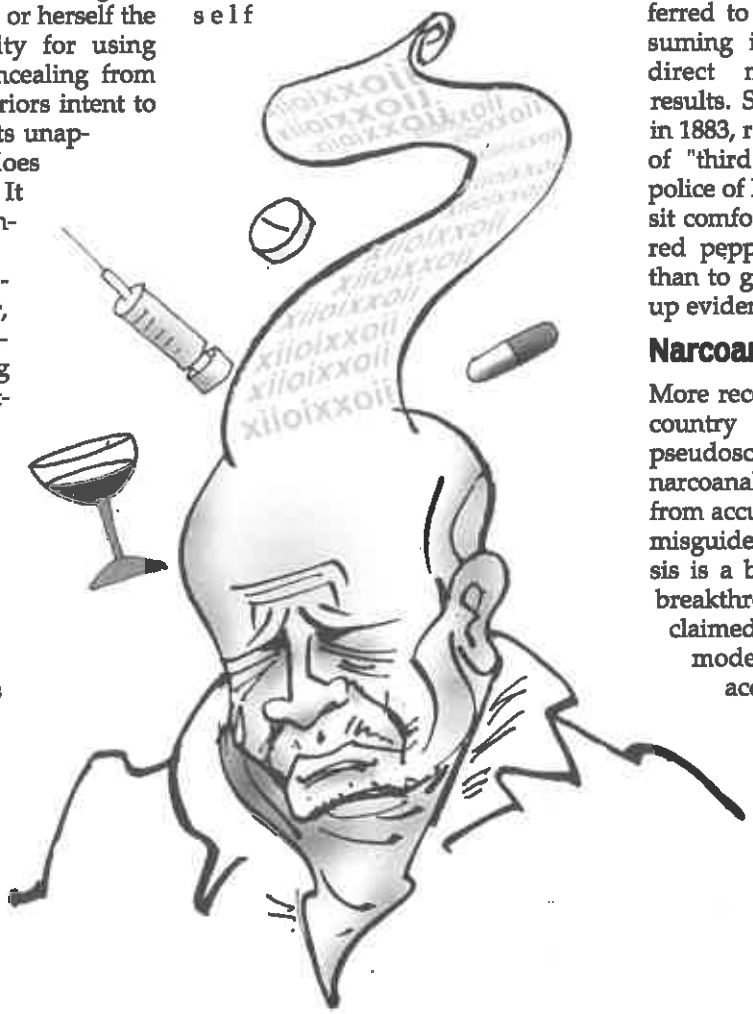
Forensic science experts have pointed out that drugging doesn't necessarily extract truth out of one's system. Hence, when police use coercive methods of interrogation like narcoanalysis they might be violating human right, writes. **P Chandra Sekharan**

Interrogation is an important aspect of criminal investigation. It is an art to be mastered through study and experience. It plays major role in investigation whenever there is little or no physical evidence. Police and other investigators depend on interrogation as a principal means of determining facts and resolving issues. It is a well-accepted norm in civilized nations that for both ethical and pragmatic reasons no interrogator may take upon himself or herself the unilateral responsibility for using coercive methods. Concealing from the interrogator's superiors intent to resort to coercion, or its unapproved employment, does not protect them. It places them, in unconsidered jeopardy.

Reliance on interrogation, however, involves certain problems: ascertaining when a suspect or witness is telling the truth, evaluating memory, allowing for the physical and mental condition of a witness or suspect, and understanding the problems created by an individual's perspective. Interrogation methods and equipment have evolved in response to these problem areas. It is true that the psychological, psychophysical, and physical sciences have played vital roles in police interrogation techniques. But unfortunately this eventually led to many pseudoscientific truth-detecting techniques as well.

Coercive techniques

But we should know basic information about coercive techniques' available for use in the interrogation situation. Coercive procedures are designed not only to exploit the resistant source's internal conflicts and induce him to wrestle with himself but also to bring a superior outside force to bear upon the subject's resistance. The following are the principal coercive techniques of interrogation: arrest, detention, deprivation of sensory stimuli through solitary confinement or similar methods, threats and fear, debility, pain, heightened suggestibility and hypnosis, narcosis, and induced regression.



If we look at the history of police investigation, physical coercion (third degree practice) has been preferred to painstaking and time-consuming inquiry in the belief that direct methods produce quick results. Sir James Stephens, writing in 1883, rationalizes a grisly example of "third degree" practices by the police of India: "It is far pleasanter to sit comfortably in the shade rubbing red pepper, in a poor devil's eyes than to go about in the sun hunting up evidence."

Narcoanalysis

More recently, police officials in our country are lured by one or two pseudoscientists to the practice of narcoanalysis to extract confessions from accused persons. The police are misguided to think that narcoanalysis is a boon to the police to make breakthroughs. This technique, as claimed by the police, is neither modern nor an internationally accepted one having its origin in the early 1920s. Drugs are supposed to relax the individual's defenses to the extent that he unknowingly reveals truths he has been trying to conceal. This investigative technique cannot be considered as humanitarian and as an alterna-

tive to physical torture, but could be dubbed as "psychological third degree", raising serious questions of individual rights and liberties. The civilized nations abhor the use of chemical agents in the guise of truth serum "to make people do things against their will".

Truth serum

What is truth serum? "In vino veritas" ("in wine there is truth") observed Gaius Plinius Secundus, (better known as Pliny the Elder), the Roman nobleman, scientist, natural philosopher and historian during the first century. In fact, alcohol given as intravenous ethanol, was an early form of truth serum. But the fascination for truth-eliciting drugs began in 1916 when an obstetrician named Robert Ernest House, practicing in a town outside Dallas named Ferris, saw a strange event during a home delivery.

The woman in labour was in a state of "twilight sleep" induced by scopolamine, a compound derived from the henbane plant that blocks the action of the neurotransmitter acetylcholine. House had asked her husband for a scale to weigh the newborn. The man looked for it and returned to the bedroom saying he could not find it – whereupon his wife, still under the anesthetic, told him exactly where it was. House became convinced that scopolamine could make anyone answer a question truthfully, and he went on to promote its forensic use.

The phrase "truth serum" appeared first in a news report of the experiments conducted on prisoners by Robert House, in the Los Angeles Record, sometime in 1922. Robert House himself resisted the usage of the term for a while but eventually came to employ it regularly himself. Since then police departments used it -- and in a few cases judges permitted it -- through the 1920s and 1930s. Other drugs were also tried, most famously the barbiturates and Pentothal Sodium had become the drug of choice in interrogations. But by the 1950s, most scientists had declared the very notion of truth serums invalid, and most courts had ruled testimony gained through their use inadmissible.

The terminology "truth serum" is itself a twofold misnomer. Neither the drugs used in this technique are sera nor do they necessarily bring forth the probative truth. It is the media which continues to exploit the appeal of the term as it provides an exceedingly durable theme for the press and popular literature.

Practice of narcoanalysis

The use of so-called "truth" drugs in interrogation is similar to the accepted psychiatric practice of narcoanalysis, which is nothing but psychotherapy conducted while the patient is in a 'sleep-like state' induced by barbiturates or other drugs, especially as a means of releasing repressed feelings, thoughts, or memories. Its use in psychiatric practice is restricted to circumstances when there is a compelling, immediate need for a patient's responses. But the difference in the procedures adopted by the investigator lies in a totally different objective. The police investigator is concerned with empirical truth that may be used against the suspect, and therefore almost solely with probative truth: the usefulness of the suspect's revelations depends ultimately on their acceptance in evidence by a court of law.

The psychiatrist, on the other hand, using the same 'truth-drugs' in diagnosis and treatment of the mentally ill, is primarily concerned with psychological truth or psychological reality rather than empirical fact. A patient's aberrations are reality for him at the time they occur, and an accurate account of these fantasies and delusions, can be the key to recovery. According to psychiatrists 'they cannot be considered as reliable recollection of past events.

Experimental studies

The clinical and experimental studies conducted by many researchers have concluded that there is no such magic brew as the popular notion of truth serum. The barbiturates, by disrupting defensive patterns, may sometimes be helpful in interrogation, but even under the best conditions they will elicit an output contaminated by deception, fantasy, garbled speech, etc. A major vulnerability they produce in the subject is a tendency to believe he has revealed more than he has. Studies and reports dealing with the validity of material extracted from reluctant informants indicate that there is no drug which can force every informant to report all the information he has. Not only may the inveterate criminal psychopath lie under the influence of drugs which have been tested, but the relatively normal and well-adjusted individual may also successfully disguise factual data.

Several patients revealed fantasies, fears, and delusions approaching delirium, much of which could readily be distinguished from reality. But sometimes there was no way for the examiner to distinguish truth from fantasy except by reference to other sources. One subject claimed to have a child that did not exist, another threatened to kill on sight a stepfather who had been dead a year, and yet another confessed to participating in a robbery when in fact he had only purchased goods from the participants. Recently a Bangalore jour-

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nalist, who was voluntarily undergoing a narco test, revealed that he loved Shah Rukh Khan's mum the most while his recorded answer before he took the test was he loved his mother.

Testimony concerning dates and specific places was untrustworthy and often contradictory because of the patient's loss of time-sense. His veracity in citing names and events proved questionable. Because of his confusion about actual events and what he thought or feared had happened, the patient at times managed to conceal the truth unintentionally. As the subject revived, he would become aware that he was being questioned about his secrets and, depending upon his personality, his fear of discovery, or the degree of his disillusionment with the doctor, grow negativistic, hostile, or physically aggressive. Drugs disrupt established thought patterns, including the will to resist, but they do so indiscriminately and thus also interfere with the patterns of substantive information the interrogator seeks. Even under the conditions most favourable for the interrogator, output will be contaminated by fantasy, distortion, and untruth. Because of these world-wide opinions, narcoanalysis for interrogation has been dispensed with long back.

As cited by Aniruth K Kala, Inbau, the then professor of law at Northwestern University, who had had considerable experience in observing or participating in 'truth serum' tests, is of the opinion that such tests are occasionally effective on persons who, if they had been properly interrogated, would have disclosed the truth anyway. The person who is determined to lie will usually be able to continue the deception even under the effects of the drug. On the other hand, the person who is likely to confess will probably do so as a result of skillful police interrogation and it will not be necessary to use drugs.

Side effects of Pentothal

The life-threatening adverse side effects of Pentothal are circulatory depression, respiratory depression with apnoea and anaphylaxis. Its effects on CNS may produce head ache, retrograde amnesia, emergence delirium, prolonged somnolence and recovery, besides several other side effects.

Sodium thiopental is a depressant and is sometimes used during interrogations not to cause pain (in fact, it may have just the opposite effect) but to get the person being interrogated to talk. It is not true that sodium pentothal does not cause pain. It can be irritating and painful if accidentally injected into tissues. Extravascular or intra-arterial injection would indeed cause pain4.(Please refer Stephen Raftery, Bristol Royal Infirmary, UK., Pharmacology Issue 2 (1992) Article 8: Page 1 of 1) .

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The Indian scenario

It was sometime during the year 2000, narcoanalysis was given a rebirth in India when the Bangalore Forensic Science Laboratory announced the availability of a four-in-one package tests for the investigating police officers. From then on the Indian police were lured to these tests and they began considering 'Pentothal Sodium' as the cornucopia for all their unsolved crimes. They believe in the fits and starts of the drug rather than their wits to intelligently interrogate. The Indian judiciary, barring the Supreme Court, appears to have given its tacit approval to adopt pseudoscientific techniques in crime investigation. The Fourth Estate looks at the truth drug with the same excitement it created in 1922 when the Texas obstetrician, Robert House first termed the drug as 'truth serum'. The Indian psychiatry is watching the fun with caution. The Indian Neuroscientists (medicos) are amused to see the misuse of Brain Sciences by the non-medicos.

The four-in-one package

The package includes the following four tests in that order a) psychological profile b) polygraph test c) brain fingerprinting test and d) narcoanalysis. All the four tests are conducted by the same expert (social psychologist) one after the other on the pretext that the earlier test suggests confirmation by the next. The tragedy is that the final confirmation is made by Narcoanalysis, the earliest to be thrown out. The intention is clear. The report on narcoanalysis will only be in the form of verbal statements by the accused while the reports on the other tests are simply based on electrical responses. The architect of these tests is also not bothered about the possibility of the result of one test prejudicing the findings in the next which is again against principles of scientific investigation and ethics.

The other tests

A. Polygraph Test : The most dramatic gains in interrogation technology, when once narco test was discarded, have come through the polygraph, or so-called lie detector. The polygraph monitors and records selected body changes that are affected by a person's emotional condition. The recorded changes are then studied, analyzed, and correlated in respect to specific questions or other stimuli.

Again, the name "polygraph test" is itself misleading. The word "test" indicates an 'objective process of evaluation' based on facts; similar to a DNA or a blood test. Results obtained from a polygraph test are much less credible, since the device measures the body's reaction to two different types of questions. The two different types of questions are known as relevant and control questions. The examiner must compare responses from relevant questions to those of control questions in order to form an opinion. The dirty little secret behind the polygraph is that the "test" depends on trickery, not science.

Perversely, the "test" is inherently biased against the truthful

'Absolutely there is no difference between a polygraphist who manipulates examinations, and a law enforcement officer who plants contraband on a suspect. In both cases, evidence is being manufactured. The only difference is the law enforcement officer has committed a crime, and the polygraphist just made money'.

B. Brain Fingerprinting : The technique developed in the early nineteen nineties by Lawrence A. Farewell, a former research associate in psychology in the Department of Psychiatry of Harvard Medical School, is claimed to be an alternative to polygraph test. In using the technology, a suspect is shown carefully selected words, phrases or images on a computer screen. They are things like a photo of a murder weapon or the model of car used in a crime. It is claimed that these things would only be recognized by the person who committed the crime.

Sensors on a headband register the subject's EEG, or brain wave responses to the computer images. The EEG is fed through an amplifier and into a computer that uses proprietary software to display and interpret the brain waves. Unlike polygraph testing, it does not attempt to determine whether or not a subject is telling the truth. Rather, it attempts to determine whether the subject's brain has a record of relevant words, phrases, or pictures.

> "The physician shall not aid or abet torture nor shall he be a party to either infliction of mental or physical trauma or concealment of torture inflicted by some other person or agency in clear violation of human rights"

Farwell's visit to India

I had an opportunity to expose the fallacy behind Farwell's brain fingerprinting technique when Lawrence Farwell visited Hyderabad on March 27, 2004 whence the Andhra Pradesh Forensic Science Laboratory had organized a symposium on 'Truth detecting techniques'. After Farwell made his presentation I confronted him with the comment that his technique would not differentiate the brain wave response exhibited by the perpetrator of a crime from that exhibited by the others who have knowledge about the crime. Farwell concurred with my observation. Farwell's team brought with them more than a dozen equipment to be marketed in India. The Director General of Police, Andhra Pradesh, Mr. Sukumaran had on the spot cancelled the orders earlier placed for the purchase of a unit for Andhra Pradesh Forensic Science Laboratory from Farwell and Farwell has to go back to America taking back all the units he brought to India for sale.

Farwell's Brain Fingerprinting

The Des Moines Register, a newspaper dated September 06, 2004 has published a very interesting story about Farwell's company having swindled the taxpayers of Iowa out of over $100,000 on the pretext of Brain Fingerprinting research. On the outskirts of Fairfield, alongside a gravel- driveway marked with a sign that reads "Hermit Haven," sits the National Data Center and Regional Operations Center for Brain Fingerprinting Laboratories Inc. The centers consist of a small, rented office and an empty laboratory. A few computers with archived experiment data are stashed in the basement behind steel doors, but no workers are there to use them. "They moved to Seattle," explains a businessman in a neighboring office.

In the months before that move, Brain Fingerprinting Laboratories collected $125,000 in grants and loans from the Iowa Department of Economic Development. However, a lawyer in the Iowa attorney general's office has said Farwell's so-called brain fingerprinter is no more effective than "a pasta strainer with a chin strap." Another lawyer in the attorney general's office called the state's investment a waste of taxpayer money. A third has said the company's claims are "nonsense." There are no takers for brain fingerprinting in America itself.

> Results obtained from a polygraph test are much less credible, since the device measures the body's reaction to two different types of questions. The two different types of questions are known as relevant and control questions

Brain fingerprinting in India

When such is the real position of brain fingerprinting, two forensic science laboratories in India (The Gujarat lab also joined the bandwagon now) moved fast to apply this technique in actual cases. (Bangalore Lab claims that they have already completed 700 cases of brain mapping and 300 cases of narcoanalysis.) Our psychologists claim that they have brought out the hidden secrets of the brain of the accused.

The P300 brain wave response is just a waveform with a single spike which is very similar in the suspect as well as the other witnesses. Unless our experts find out a distinct characteristic in the brainwave response of the perpetrator which is totally different from the responses of other witnesses, the information derived from brainwave response of an accused will have no meaning. I am

yet to find any publication about original research, if any carried out in this direction by our brain wave specialists in peer-reviewed scientific journals. There is a wild rumour that these people are simply copying Farwell's patented technique without paying royalty to him and they will certainly get into problems. First they must come out with their own findings, if any, which are different from that of Farwell, and satisfy the 'falsifiability criterion', before applying the technique in actual cases. 'Brain fingerprinting' as it is today, is little supported by forensic evidence or experience and it is no better than its cousin 'lie-detector'. If narcoanalysis is a primitive technique, brain wave test is a premature one.

Strong support from DFS, MHA

Meanwhile, the Directorate of Forensic Sciences functioning under the Ministry of Home Affairs (DFS, MHA) had officially released a manual, prescribing the procedure for the conduct of narcoanalysis. Yes! A manual was released in 2005 by the DFS, which proclaims "Promoting Good Practices and Standards" for a technique not practiced until this day in any of the three Central Forensic Science Laboratories directly under its own control; a technique considered to be a barbaric practice and abandoned by all civilized countries; a technique not practiced by any Forensic Science Laboratory any where in the world; a technique, since its inception in 1922 was practiced only in hospitals with the help of medical men, psychiatrist and anesthetist until it was abandoned a few decades ago.

It is only the State Forensic Science Laboratory Bangalore that had suddenly found a fancy for this test during the past few years. But the "Laboratory Procedure Manual-Forensic Narcoanalysis issued under the banner of Ministry of Home Affairs, Government of India, carries disinformation as if many laboratories in India are doing this test. It is said in the preface of the manual that "Forensic Science Laboratories now have started playing active role in providing scientific aids to investigators by examining suspects under the "state of trance" achieved by employing Narcoanalysis technique",. The fact is that no laboratory other than the Bangalore one in India conducts this test. No big procedure or technology is involved in this test. The write-up, resembling the advocacy of a private company to promote its product, makes tall claims ignoring all negative aspects and risk factors involved in the test. The manual also advises that the revelations during narcoanalysis can be verified by polygraphy and brain fingerprinting, the two pseudoscientific techniques. Incidentally, the DFS has also released a manual for brain fingerprinting.

Plea before Indian Government

It is in such a scenario, calling narcoanalysis a "psychological third degree" method of investigation, I had written to the Prime Minister in July 2006, asking the government to make a policy decision on whether the police may use narcoanalysis, and to clarify what role, if any, forensic scientists should have in such tests. I had also suggested to form a committee of experts to tackle the issue and to refer the matter to the Supreme Court. My letter was subsequently forwarded to the Home Ministry. The Ministry is responsible for the Directorate of Forensic Sciences, the Centre's forensic sciences department.

I had again addressed the MHA in August 2006 criticizing the Ministry for trying to mainstream a technique that has been discredited in most "civilized" countries and not practiced by any forensic science lab anywhere in the world. I have also called for the withdrawal of the manual on narcoanalysis. I am yet to get a response.

Ethical considerations

For ethical reasons the psychiatrist is advised against performing narcoanalysis when the examination is requested as an aid to criminal investigation. World Medical Association recently revised its Tokyo declaration on this subject and now states inter-alia:

1. The physician shall not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman or degrading procedures, whatever the offence of which the victim of such procedures is suspected, accused or guilty and whatever the victim's beliefs or motives and in all situations including armed conflict and civil strife.
2. The physician shall not provide any premises, instruments, substance or knowledge to facilitate the practice of torture or

other forms or cruel, inhuman or degrading treatment or to diminish the ability of the victim to resist such treatment.

Medical Council of India has recently amended its official code of medical ethics by adding, "The physician shall not aid or abet torture nor shall he be a party to either infliction of mental or physical trauma or concealment of torture inflicted by some other person or agency in clear violation of human rights".

Anirudh Kala says, "It is shocking that such a gigantic fraud with so many important ramifications is being perpetrated on the nation. I suggest that a group of scientists and intelligentsia be formed so that a concerted effort can be made to expose the absurdity going on".

Conclusion

The police are a disciplined force trained to uphold the law and to enable democratic institutions to function lawfully. Police powers are confined by the provisions of the Constitution, the Police Act, the Criminal Procedure Code the Evidence Act and many other local and special laws which impose restrictions on the scope and method of exercise of that power. Forensic scientists should inspire the police with their scientific methods not to violate the norms. They will be accused of conspiring with them if they are a party in using the above psychological coercive methods.

All the more it is necessary that the media, the Lok Ayuktas, the human rights commissions, the superiors within the police organisations should take a serious view about the use of these techniques in the guise of interrogation and guide the home ministries to evolve a common code in this regard

Courts have powers to extract accountability from the police in case of violations of human rights in exercising their functions. Courts should therefore be posted with a detailed knowledge about these techniques. The recent decision of the Bombay High Court in a case that employing certain physical tests involving minimum bodily harm such as narcoanalysis, lie detector tests and brain fingerprinting did not violate the rights of the accused persons guaranteed by Article 20(3) of the Constitution has come probably due to the fact that they have not been posted with full information about these techniques. Certainly this will lead to a systematic violation of human rights through the use of coercive pseudo scientific practices under the label of proven and recognized forensic scientific techniques.

All the more it is necessary that the media, the Lok Ayuktas, the Human Rights Commissions, the superiors within the police organizations should take a serious view about the use of these techniques in the guise of interrogation and guide the Home Ministries to evolve a common code in this regard.

In the case of Daubert v. Merrell-Dow Pharmaceutical, the Supreme Court of America unanimously decided on June 28, 1993, that 'falsifiability criterion' should be the arbiter of what kind of scientific evidence will be admissible. According to this criterion Freudian psychoanalyst concept is clearly unscientific. Many psychologists themselves have little or no understanding of 'falsifiability criterion' and this may be even truer of psychiatrist and social workers.

The expert witness of psychologists using hypnosis, narcoanalysis, theories of repression, recovered memories, deviant behaviour, dissociation and multiple personality disorder, as well as others is no longer acceptable. And such expert witness can be questioned on the grounds of lack of reliability and testability. In my opinion, narcoanalysis is yesteryear's barbarism and today's truth detecting terrorism marketed by some self-centered pseudoscientists

Forensic scientists should inspire the police with their scientific methods not to violate the norms. They will be accused of conspiring with them if they are a party in using the above psychological coercive methods

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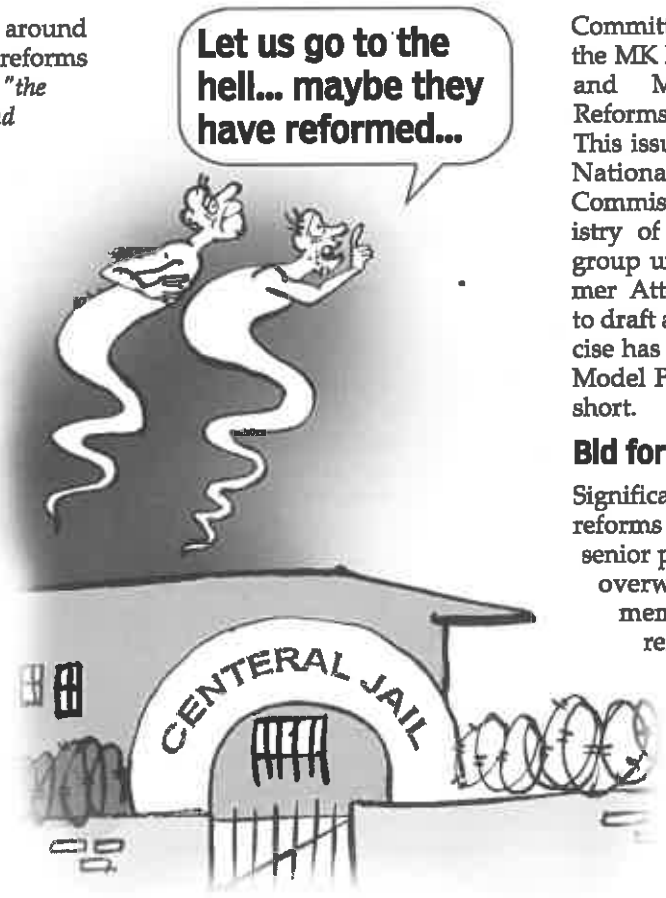
Recipe for impunity

With the police force caught in a credibility crisis, the Supreme Court suggested a new Police Act to replace the 1861 law. Sadly, the Model Police Act brings no hope. Under the garb of reform, the police has staked its claim for a bigger share of State power. Free from executive control, shielded from the ordinary law of the land with virtual unaccountability, the force can pose a serious threat to democratic practices and institutions. We, the people of India, have little reason to celebrate these police reforms, writes **Vrinda Grover**

The official discourse around the issue of police reforms seems to suggest that *"the present distortions and aberrations in the functioning of the police have their roots in the Police Act of 1861"* for two salient reasons. Firstly, because it makes the police subordinate to executive control and secondly, the mere vintage of the police legislation is cited as a *raison d'etre* for its repeal and substitution. The Police Act, 1861 indisputably deserves to be abandoned but for entirely different reasons.



Firstly, it must be unequivocally stated that police brutality, custodial violence and arbitrariness, which form the staple experience of ordinary citizens, can only be partly attributed to the colonial statute. Secondly, antiquity by itself need not be a ground for repeal, rather the principles underlying the statute deserve scrutiny and the impetus for change driven by the desire to bring it in harmony with the letter and spirit of the Indian Constitution. For instance even today the rules of the Indian Evidence Act, 1872, are useful for purposes of fair trial whereas the Land Acquisition Act, 1894, should have no place in a constitutional democratic framework.

Almost three decades of deliberations on police reforms have culminated in The Model Police Act, 2006 and directives of the Supreme Court in September 2006. A comprehensive examination of all aspects of police functioning was presented to the government in eight volumes by the National Police Commission (NPC), 1979-1981. This was followed by a series of government appointed committees including the Ribeiro Committee Reports 1988-1999 and the MK Padmanabhaiah Report-2000 and Malimath Committee on Reforms of Criminal Justice System. This issue was also examined by the National Human Rights Commission. In 2005, the union ministry of home affairs constituted a group under the stewardship of former Attorney-General Soli Sorabjee to draft a model statute and this exercise has led to the formulation of the Model Police Act, 2006 - or MPA for short.

Bid for power

Significantly, this campaign for police reforms has been spearheaded by senior police officers themselves. An overwhelming majority of the members of the committees referred to above were retired or serving police officers followed by bureaucrats. Although credible and substantial human rights documentation and writings on the issue of police functioning is available, the police reform process has paid marginal and superficial attention to this analysis. A perusal of the MPA reveals that this process is informed more by the grievances of high ranking police officers rather that the concerns and experiences of the common citizen.

In 1996, a PIL was filed by two – former director- general of police and an NGO — seeking directions from the Supreme Court to the government to implement the recommendations of the National Police Commission.

Championing the cause of police reform they have mainly emphasised on the need to insulate the police from political/executive control and interference. They usually cite personal anecdotes of reprisals, harassment, repeated transfers and humiliation suffered at the hands of corrupt and whimsical political masters, as providing the rationale for change. Their major concern is to end the uncertainty of tenure and arbitrary transfers and secure autonomy for the police force. After 10 years the Supreme Court in September 2006 issued a directive to the government to implement the police reforms and the central government has accordingly initiated a process with the state governments for adoption of new police legislation.

Not surprisingly, the issue of autonomy for the police dominates the police reform exercise today. Addressing this grievance of the police, both the MPA and the Supreme Court judgment stress on the urgent need to establish a state police board for the selection and appointment of certain senior officers and stipulate a fixed minimum tenure for various ranks right from the director-general of police down to the SHO. From the people's perspective, there is an apprehension that statutory tenure may help the SHO become a petty despot in his jurisdiction. The *proviso* to Section 13 of the MPA may be insufficient to remove an SHO enmeshed in crime and corruption.

Undeniably, the issue of security of tenure and non- interference in police functioning are important for fair and impartial discharge of duty. But the moot point, is will this reform in any measure halt the torture, brutality, custodial violence, and corruption and prejudice that is routine in all police-citizen interface. Exposes of fake encounters, court verdicts on custodial deaths, sting operations of rampant corruption and evidence of communal bias notwithstanding the MPA and the Supreme Court have sanctioned autonomy for the police with few checks in place to curb the impunity they enjoy. Autonomy for the legally sanctioned coercive arm of the State can have very dangerous consequences for a democracy with a stratified populace.


Vrinda Grover Making a point

Weak accountability

While the MPA devotes an entire chapter to the subject of police accountability, the institutional mechanisms envisaged here are too weak and superficial to rein in a force that has tasted blood for too long. The police in a democracy must be accountable to the rule of law, human rights principles and to the people. As discussed below, these much touted police reforms miserably fail on this score.

The MPA and the Supreme Court's directive envisage the establishment of a state level police accountability commission with a counterpart at the district level. The MPA provides that *this commission shall have five members with a credible record of integrity and commitment to human rights* and headed by a High Court Judge, a retired senior police officer and some members from the public. Despite the membership of the commission being inclusive, pessimism over its efficacy remains, for similar experiments with other commissions have not rendered them necessarily more vigilant towards human rights nor sensitive towards the vulnerable segments whose rights they are mandated to uphold, occasional exceptions excluded. Divorced from the ground reality of the power wielded by the police force over the life and liberty of the people, and the rampant operation of a class, caste and community nexus in law enforcement, these mechanisms will be ineffective in challenging impunity. In any case all that the state accountability commission is empowered to do is to enquire into allegations of 'serious misconduct' and monitor that departmental enquiries/actions into complaints of misconduct are expeditiously disposed off. In dealing with these grave crimes, the commission can exercise the powers of a civil court. After the enquiry, the commission may direct that an FIR be registered or departmental action be initiated. The directions of the commission would be binding upon the police.

Grave crimes viz murder and rape in custody or deprivation of liberty and grievous hurt to the human body are flippantly categorised as 'serious misconduct'. It is worth recalling that under the Indian Penal Code, some of these offences attract death penalty. The use of the term 'misconduct' here is very objectionable and betrays the intent of the drafters to shield the police from the rigours of law and punishment. It reveals an obstinate insistence to describe crimes by the police as aberrations despite overwhelming evidence to the contrary.

Even otherwise all that this state accountability commission can do after conducting an enquiry-for which of course no time frame has been specified—is to have a FIR registered against the delinquent police officer. The question that arises is why should the ordinary law of the land not apply to the police force? Why should the commission of a cognisable offence such as death or rape in police custody or extra-judicial killing not mandatorily lead to the registration of an FIR and investigation? In a constitutional democracy, the police cannot be privileged and placed beyond the reach of the ordinary law of the land.

Moreover without any investigative wing how will the commission determine whether the complaint deserves registration? Also by the time the registration of an FIR is ordered, much forensic evidence may well have been destroyed or lost. Is it desirable to divert complaints presently submitted to the NHRC and the SHRC, which incidentally are equipped with an investigative wing, to a weaker parallel track?

The role envisaged for the District Accountability Authority is no more than that of a post office. Its role is limited to forwarding complaints of 'serious misconduct' to the State Accountability Commission and those of 'misconduct' to the appropriate authority for departmental action and to monitor the same.

Offences by the police

The MPA enumerates certain offences by the police and under a single provision unlawful search, seizure, arrest, detention, threat, gross misbehaviour and torture are all clubbed together and treated as minor offences which entail a maximum sentence of one year . Not only does the MPA dilute grave crimes like torture which is regarded as *jus cogens* under international human rights law, but this model law also fails to codify certain crimes. The Supreme Court's opening observation that despite radical changes in the political, social and economic situation in the country the law governing the police has remained stagnant, is perhaps most appropriate with respect to the need to codify new crimes. Disappearance is a crime that the Indian penal law is yet to specifically codify. Any sincere effort to secure accountability requires the jurisprudential principles of command or superior responsibility, individual criminal responsibility, embodied in the ICC statute, be incorporated.

Immunity entrenched

The Supreme Court judgment and the MPA while claiming to draw upon the recommendations of the NPC have both been unfaithful to this legacy. The Eighth Commission report had recommended that Section 132 and 197 CrPC, which require that prior to prosecution of a police officer sanction must be obtained from the government, must be withdrawn. Contrary to this, the MPA suggests that no police officer can be prosecuted by a court without the previous sanction of the state government. Thus, the hurdle of prior sanction that has repeatedly stumped attempts to criminally prosecute the police has been retained. Ironically, while political interference in police functioning is unacceptable, political interference in the functioning of the judicial process through the via media of 'prior sanction for prosecution' is acceptable to the eminent jurists who drafted the model law!

Institutional bias

The 1984 anti-Sikh riots and the Gujarat carnage of Muslims in 2002, both bear testimony to the fact that the police force is afflicted by a deep sectarian bias against religious minorities. An admission of the same was made by the Ahmedabad Police Commissioner PC Pande "where the whole society has opted for a certain colour in [sic] a particular issue it's very difficult to expect the policemen to be totally isolated and unaffected". Institutional bias has also been displayed against Dalits, workers, and ethnic minorities on many occasions. Much earlier the Sixth National Police Commission, 1981, noted, "several instances where police officers and policemen have shown an unmistakable bias against a particular community while dealing with communal situation." The MPA and the apex court fail to acknowledge and address this dark truth. The police reforms give no reason to hope that the image of an Indian citizen pleading with folded hands to the police to come and save his life would not recur in secular India.

Conclusion

Consider these: Over 2,000 persons killed and cremated in Punjab by the police. Not a single prosecution till date.

Government committee indicts 72 police officers for their role in the 1984 anti Sikh massacre and recommends summary dismissal of six senior police officers. No senior officer penalised.

On 22nd May 1987, over 40 Muslim men of Hashimpura in Meerut murdered by the PAC. After 20 years, the trial of 19 accused policemen is still pending in the worst communally motivated custodial killings in independent India.

Some policemen indicted for their role in the Mumbai riots of 1992-1993 by the Sri Krishna Commission report. Not a single cop convicted.

Many encounter killings by the police in Andhra Pradesh. Not a single FIR registered against any policeman.

Hundreds have disappeared in Kashmir after being taken into custody. Not a single conviction.

Daily reports of torture and custodial violence from police stations across the country.

Against the backdrop of these spine chilling facts and figures greater autonomy is being granted to the police force without instituting adequate and effective accountability measures. Under the garb of police reform, the police has staked its claim for a share of State power. Free from Executive control, privileged above the district magistrate, shielded from the ordinary law of the land and unaccountability to the people, the police force can pose a serious threat to democratic practices and institutions. We, the people of India, have little reason to celebrate these police reforms. The police, of course, have much to cheer about.

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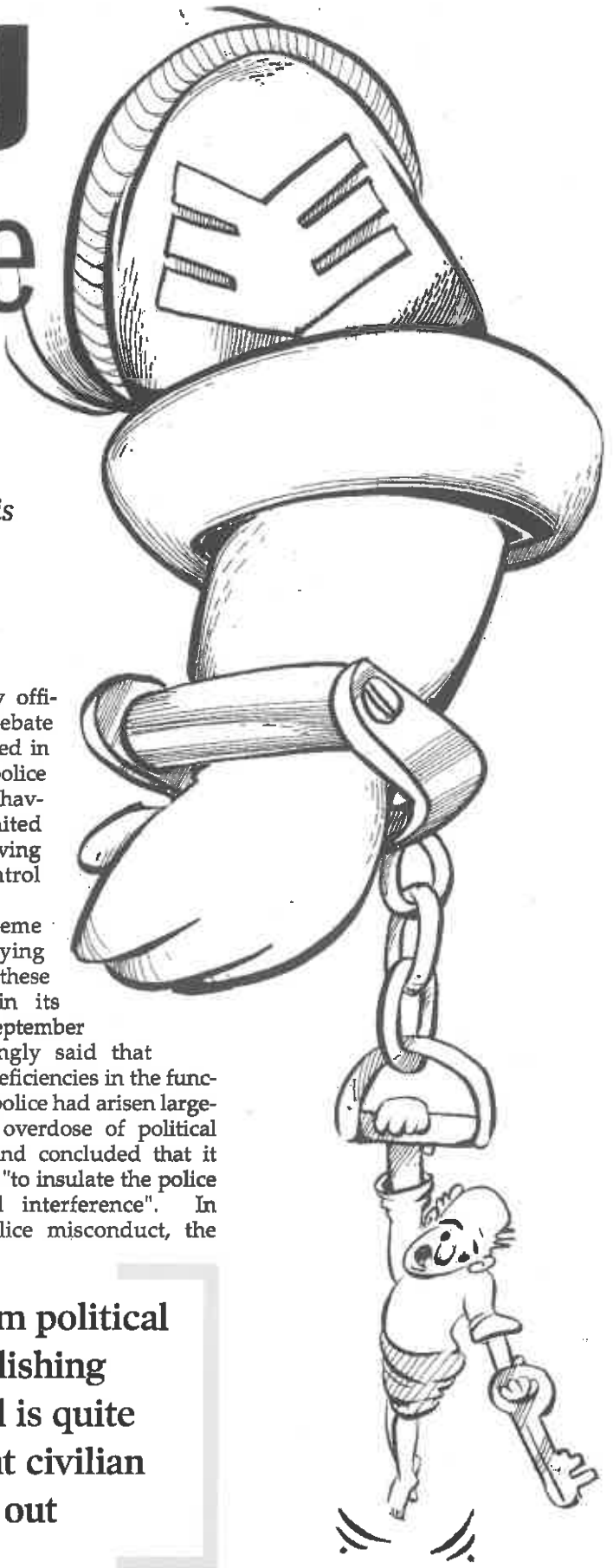
Policing the police



In India, the police clamour to be freed from political control. Though this may be necessary, unless effective and independent civilian control is introduced first, this force in uniform may hold the entire society to ransom, argues

Colin Gonsalves

Not a day passes without a report in the press regarding abuse of power by the police. Torture is widespread. Corruption is routine. Anti-women, anti-Dalit, anti-Muslim and anti-poor attitudes dominate. All these we know. The Nithari killings only brought into focus once again the need for radical police reforms.

There is an attempt to do police reforms in this country but it is led by the police and this alone should make the public wary. Besides the National Police Commission reports, recommendations have also been made by the NHRC, the Law Commission, the Ribeiro Committee, the Padmanabhaiah Committee and the Malimath Committee. The last three committees were dominated by home ministry officials. The debate has been slanted in favour of the police with reforms having the limited scope of removing political control over the force.

The Supreme Court relying exclusively on these reports has in its order dated September 22, 2006 wrongly said that "many of the deficiencies in the functioning of the police had arisen largely due to an overdose of political interference" and concluded that it was important "to insulate the police from political interference". In respect of police misconduct, the

Insulating the police force from political control is one thing, establishing independent civilian control is quite another ...it is imperative that civilian control be clearly spelt out

The Supreme Court ought to broaden its horizon from its present reliance on police reports and thereby establish effective civilian control over the police

Supreme Court held that there ought to be a Public Complaints Authority, selected on the basis of recommendations made by the state human rights commission, the Lok Ayukta's and the state public service commissions.

Insulating the police force from political control is one thing, establishing independent civilian control is quite another. In a country where the poor face torture by the police on a day-to-day basis, it is imperative that civilian control be clearly spelt out and credibly independent so as to act as a deterring safeguard against police misconduct everywhere. To place faith in the state human rights commissions which are toothless tigers often subservient to the government and which have been recently criticised by the Chief Justice himself, is to fall in bureaucratic trap laid by the government and miss the point completely.

The police force in India was modeled and continues to this day along the lines of the British paramilitary forces that policed the colonies by terror. After the breakup of the empire, the British Police were reformed but the police forces in the colonies raised corruption and torture to the level of a virtual art form. India probably has one of the most debauched forces in the world. For such a criminal force to be freed from political control without first setting up and testing civilian control structures and procedures, is to push the citizen from the proverbial frying pan to the fire. Freed from political control and supervised only by formal ineffective structures this criminal force will come to rule society. De-facto power will, with the Supreme Court order, become *de-jure* police power.

In the UK, pursuant to the Police Reform Act, 2002, an Independent Police Complaints Commission has been formed. With its own team of mainly civilian investigators to investigate cases against the police, these investigators have all the powers of the police during investigation and have access to documents and a right of entry into police premises. Independent non-police persons preside over hearing panels looking into serious cases. The commission can also present cases on behalf of complainants at police disciplinary hearings.

Northern Island has a police ombudsman. In Australia, there is a New South Wales ombudsman for less serious complaints and the police integrity commissioner for serious crimes. The latter was established following a Royal Commission report which concluded that the level of corruption in the police had grown enormously and the existing complaint structures were unable to address the issue. External watch or oversight with fully independent investigation was sorely needed. In Quebec (Canada) the police ethics commissioner is a civilian agency which supervises the conduct of police officers and receives complaints from the public. The police ethics committee is a specialised administrative tribunal that protects citizens in their relations and dealings with the police. In British Columbia the office of the police complaints commissioner is an independent agency handling complaints. The commission for public complaints against the Royal Canadian Mounted Police provides civilian review of the mounted police and has been established by Parliament as an independent body. South Africa, after its transition to democracy in 1990, began the reforms of its racist and violent police force. Of all the institutions involved in holding the police accountable, the independent complaints directorate is the most significant though questions about its independence remain. In New Zealand there are strident calls for an independent police complaints authority to be merged with an independent police inspectorate.

The Supreme Court, therefore, ought to broaden its horizon from its present reliance on police reports and thereby establish effective civilian control over the police with an independent machinery for investigation into police misconduct.

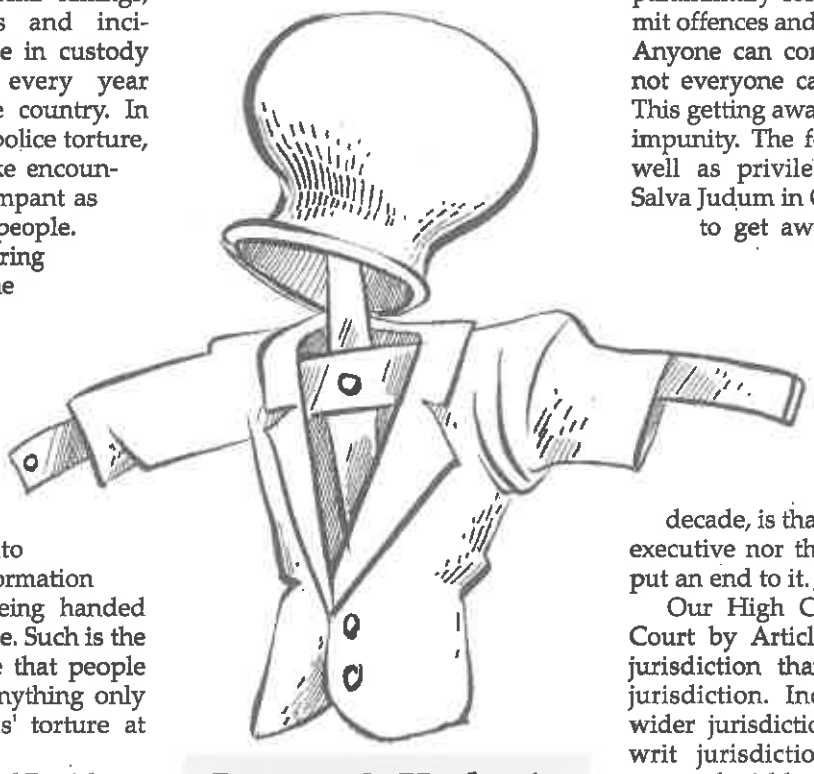
Terrorism of the police kind

Neither the State nor organisations like the NHRC are looking at the issue of police high-handedness, bias and extremities of the law that often take the toll of common man's human rights. Unless we seriously address this issue, the State machinery will continue to persecute, torture and execute innocent people in the name of order, says **K Balagopal**

Sadly, extra-judicial killings, disappearances and incidents of torture in custody are growing every year throughout the country. In Andhra Pradesh alone police torture, custody deaths and fake encounters have become so rampant as to create dread among people. If one tours the bordering districts of the state, one invariably comes across stories of torture and arrests of common people because of alleged Naxalite connections. People narrate stories of being threatened into revealing whatever information they have to escape being handed over to the Andhra Police. Such is the reputation of the police that people will reveal just about anything only to escape the 'infamous' torture at their hands.

Jammu & Kashmir and Punjab are two states where cases of disappearance run into thousands. Torture is common. Electric shocks given to sensitive parts of the human body is a very common form of torture in Andhra Pradesh. Even more than physical beating, people dread these electric shocks because these destroy a victim's individuality for life.

The police, the army and the paramilitary forces are able to commit offences and get away with them. Anyone can commit an offence but not everyone can get away with it. This getting away is what amounts to impunity. The forces of the State as well as privileged gangs like the Salva Judum in Chhattisgarh are able to get away with them. They have impunity; they commit offences and get away with it. The reason why this goes on year after year, decade after decade, is that neither the political executive nor the judiciary wants to put an end to it.



Jammu & Kashmir and Punjab are two states where cases of disappearance run into thousands. Torture is common

Our High Courts and Supreme Court by Article 226 give a wider jurisdiction than the English writ jurisdiction. India does require a wider jurisdiction than the English writ jurisdiction. Why have our courts slavishly followed that principle? They could have institutionalised a different way of looking at it as Article 226 is wide enough to do so but they have chosen not to. They resort to a strange measure of asking the victim to file a private complaint in case of being unjustifiably victimised by police. There is no such way of taking up private complaints in criminal court.

As far as torture is concerned, the IPC itself penalises it. You do not require a new law to say that torture for the purpose of extracting information is an offence, as it is an offence under the Indian Penal Code

The magistrate has different ways of taking cognisance. One of the ways of taking cognisance is on a complaint made by someone. Even a phone call received by the magistrate is sufficient to take cognisance. To equate them as equally efficacious ways of initiating prosecution does not make any sense. Prosecution requires investigation. An ordinary citizen does not have any power to search someone's house, to seize any object from anyone, to take anybody into custody or interrogate the person. A citizen probably doesn't even have the power to ask a forensic expert to submit a report on anything. How is then a citizen supposed to prosecute privately? It is not as if the courts do not know this, they do but they have decided not to go beyond this. *Habeas corpus* for them is to convert illegal custody into legal custody and they don't want to go beyond that.

Other institutions like the National Human Rights Commission (NHRC) have also been equally hesitant. As far as torture is concerned, the IPC itself penalises it. You do not require a new law to say that torture for the purpose of extracting information is an offence, as it is an offence under the IPC. If it results in serious injury, the punishment can go up to 10 years of imprisonment, as it is a serious offence under the IPC.

Thirty years ago the Law Commission made a recommendation, "if somebody dies in police custody, there shall be a presumption in law that his death has been caused by the police." Thirty years hence, we still don't find this amendment incorporated in the law today. Amendments that strengthen human rights are seldom allowed.

In the proposed 2006 amendments to the CrPC, the DK Basu guidelines have been incorporated. These guidelines spell out the course of action the police are supposed to take. Yet it does not provide for punishing and prosecuting those police officers who violate the guidelines. It is at par with any other rule or procedure laid down in the CrPC.

We still do not have a set method to follow. There is no initial arrest memo. An arrest memo is the one thing they have adopted from all the DK Basu guidelines. Such a memo is issued on the day they decide to produce the person in court. He may have been in custody for 10-15 days but the day he is produced in court, they produce a memo and obtain signatures very lawfully, following the DK Basu guidelines, from the father/mother/wife and the arrestee's relative knows that if he/she doesn't sign, the person in custody will face the hell and may never see the court. Hence they sign.

Thus DK Basu guidelines have unfortunately, become a way of sanctifying illegal arrests. If tomorrow a person has to go to court, the court will say that your own wife or family member have signed to affirm that you were arrested on the date mentioned and not 10 days before.

The real question is who will prosecute? We all know that in this country to prosecute a police officer and survive is almost impossible. It is a part of impunity that police officers are allowed to wreak vengeance and the State prefers to remain a quiet bystander.

Law allows the NHRC to have its own investigative machinery. The NHRC can use it to investigate the offences of human rights violation on registering complaints. This is provided for both the State Human Rights Commissions (SHRCs) and the NHRC. But the investigative machinery of NHRC has a top-heavy structure. People like retired DGs of police or other high ranking former police officers are appointed. Sadly, they can give orders with best of intentions but cannot investigate cases of human rights violations themselves. The need is to appoint inspectors or sub-inspectors of police who can actually investigate. In order that all serious allegations of human rights violation can be investigated, a sufficient number of such people need to be recruited. It should be ensured that this force should be recruited separately and not made out of transferred officers from the central or state police forces.

The NHRC has now become an agency that only holds seminars like any other debating forum. It has the power to investigate and make recommendations but the utilisation of these powers still remains a far cry. The NHRC should take all cases of human rights violation under its purview and investigate and not limit itself to the case of violation by the paramilitary or police forces. Since the NHRC does not seem inclined to do so, torture goes on with impunity.

The police, the army and the paramilitary forces are able to commit offences and get away with them... This getting away is what amounts to impunity. The forces of the State as well as privileged gangs like the *Salva Judum* in Chhattisgarh are able to get away with them

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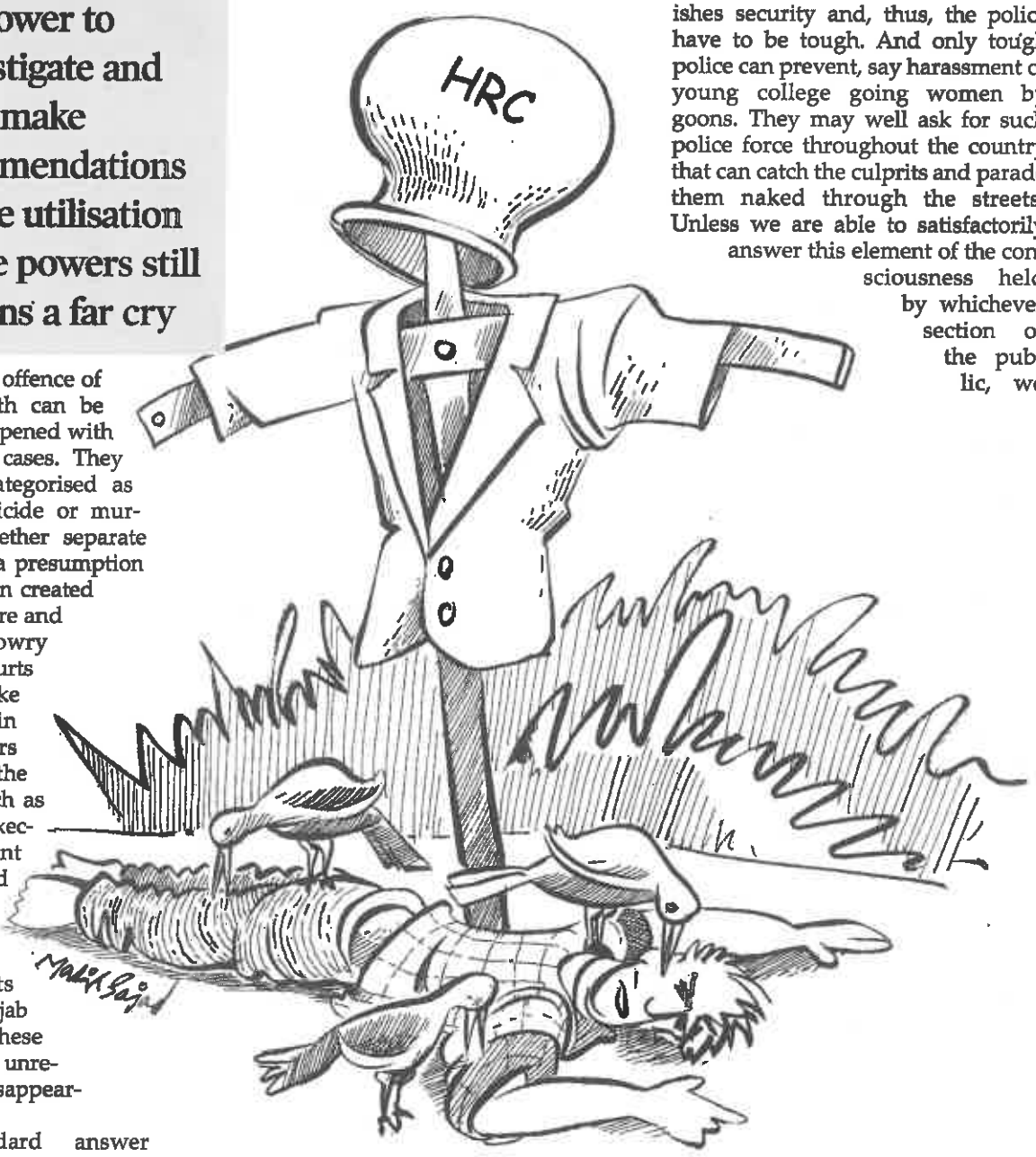
A separate offence of custodial death can be created as happened with dowry death cases. They are no more categorised as culpable homicide or murder. An altogether separate offence, with a presumption clause has been created given the nature and scale of dowry deaths. The courts will never take initiative in these matters because the courts, as much as the political executive, want impunity. And so despite all the sacrifices and efforts of human rights activists in Punjab and J&K, these issues remain unresolved and disappearances continue.

The standard answer given by the authorities is that people cross the LoC to get weapons to fight the Indian forces and, thus, thought to have disappeared. Police is neither asked nor do they answer how a person taken in custody could cross LoC unless he escapes from custody.

A common plea that police take is that there is public sanction for what we do. In the Chambal valley, we are told that the police are regarded as heroes. They are a brand name there. But if in 1968, 1000 so-called dacoits were killed by them in the Chambal valley and in 2007 the killings are still going on. This means that something is definitely wrong somewhere. Public sanction to all these actions is flaunted to justify torture and extra-judicial encounter. If not a sizeable section, a highly articulate one does believe that a tough police force is required.

This maybe because of the opinion that is being manufactured, or general sense of insecurity among people. Whatever may be the reason, there is a strong feeling among public mainly middle classes that the criminal justice system is lax. They believe that talks of human rights increases crime and disorder, diminishes security and, thus, the police have to be tough. And only tough police can prevent, say harassment of young college going women by goons. They may well ask for such police force throughout the country that can catch the culprits and parade them naked through the streets. Unless we are able to satisfactorily answer this element of the consciousness held by whichever section of the public, we as human right activists will simply end up simply having dialogues without mush meaning.



—The author is a prominent human rights activist

Binayak Sen: Victim of State vendetta

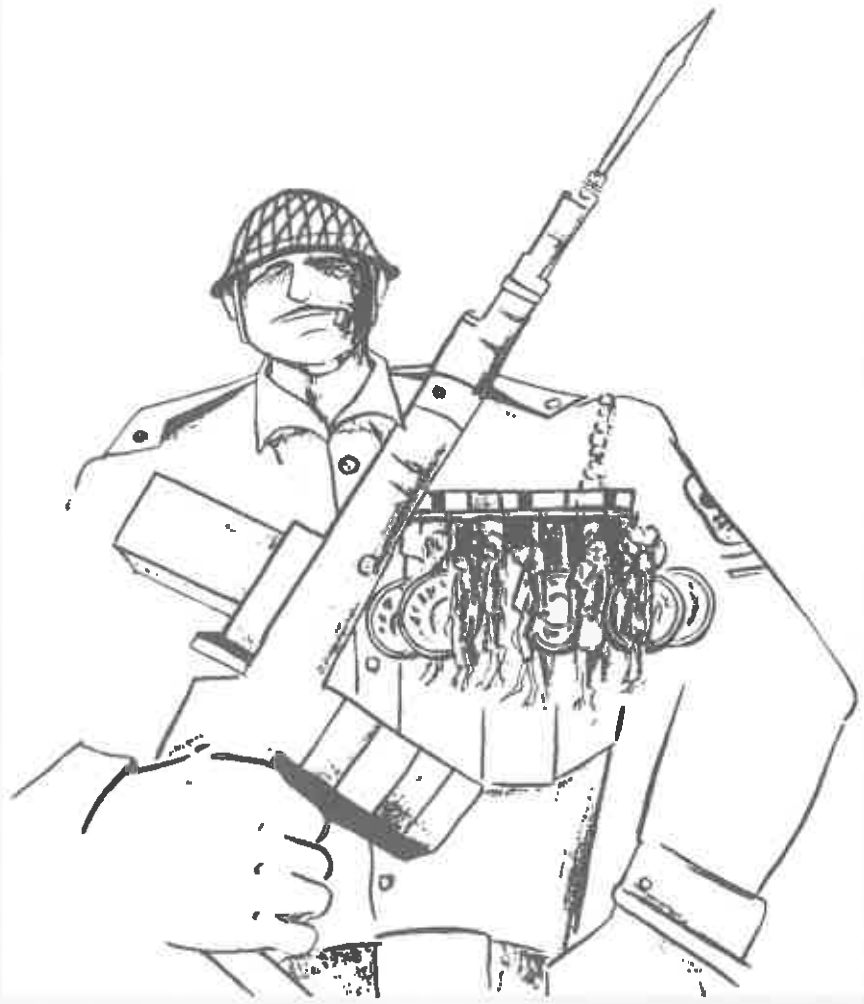

Binayak Sen

For over two months a civil rights champion has been behind the bars because of the arrogance of the powers-that-be in Chhattisgarh. **Harsh Dobhal** *writes that this is because of the black laws being used by the state to cover up its misdeeds*

Dr Binayak Sen, a human rights activist, a paediatrician and a public health doctor, was arrsted on May 14, 2007 in Bilaspur, Chhattisgarh. His crime: He and his organisation (People's Union for Civil Liberties - PUCL) had helped draw public attention to the unlawful killings on March 31, 2007, of several adivasis in Santoshpur, Chhattisgarh.

Sen was detained under provisions of the Chhattisgarh Special Public Security Act, 2006 (CSPSA), and the Unlawful Activities (Prevention) Act, 1967), which was amended in 2004 to include key aspects of the Prevention of Terrorist Activities Act (POTA), 2002.

A number of organsiations and individuals across the world have protested against the arbritrary arrest of Dr Sen following which a police probe into the incident was ordered on May 5. As is the pattern, the evidence was destroyed promptly. Bodies of the victims were exhumed in the week immediately preceding Sen's arrest. Autopsy report has confirmed that three of the victims were hit on the head and waist by bullets



Binayak Sen's arrest has once againg raised disturbing questions regarding threats, harassment and intimidation by the State against those who defend and protect human rights. The rights to freedom of expression, association and assembly are fundamental human rights

at close range. Others had been brutally axed to death. Police have been quoted as admitting that it was "certain that some police personnel crossed the limits and killed innocent villagers branding them as Maoist militants... Now the government has to decide whether the cops involved in killings should be arrested or not." However, a minister from chattisgarh has ruled out any arrest of any police personnel involved in the ghastly killings of the innocents.

Binayak Sen's arrest has once again raised disturbing questions regarding threats, harassment and intimidation by the State against those who defend and protect human rights. The rights to freedom of expression, association and assembly are fundamental human rights. Activists continue to be targeted for harassment and intimidation by state officials. Their activities, their rights to freedom of expression, association and assembly are being restricted.

What was wrong in what Sen, vice president of the PUCL, was trying to highlight? In his capacity as an active member of the PUCL, he has helped organise numerous fact finding missions into human rights violations that included extra-judicial killings, tortures, rapes and unlawful detentions. Sen was actively pursuing these investigations and highhandedness of the State, including cold-blooded murders of unarmed civilians by police and government-backed 'Salwa Judoom'. Sen and his organisation has been on the forefront of chronicling fake encounters, rapes, burning of villages, displacement of Adivasis and loss of their livelihoods. He has always stood against senseless killings and advocated for peaceful methods

Dr Sen's arrest is clearly an attempt to intimidate human rights activists and democratic voices that have been speaking out against rights violations. In recent days, the targets of state harassment have widened to include Dr Ilina Sen, who for years has been active in the women's movement, Gautam Bandopadhyaya of Nadi Ghati Morcha, PUCL's Rashmi Dwivedi, and other activists of PUCL in the region.

Dr Sen has been involved in many other activities. He is renowned for extending health care to the poorest of the poor, a dwindling tradition among health professionals in India. For the past 30 years, he has been promoting community rural health care centres in the country. He helped to set up the Chhattisgarh Mukti Morcha's Shaheed Hospital, a pioneering health programme for the region. The hospital is owned and operated by a workers' organisation for the benefit of all, regardless of caste or other distinctions.

Sen remains in police custody till date. Human rights activist like Mr Sen form the backbone of a vibrant democratic struggle. Strangely, the State does not look upon such activists as partners in the democratic process. They are periodically targeted, subjected to a suspicion, hostility and vendetta. More often, they are also perceived as threats to the "national interest"

Dr Sen is an advisor to Jan Swasthya Sahyog, a health care organisation committed to developing a low-cost, effective, community health programme in the tribal and rural areas of Bilaspur district of Chhattisgarh.

He was also a member of the state advisory committee set up to pilot the community-based health worker programme across Chhattisgarh, later well-known as the Mitanin programme. He also gives his services to a weekly clinic in a tribal community.

His arrest is a grave assault on the democratic rights movement in India. Democratic voices across the globe have stood up in defence of Dr Sen and other human rights activists. Noam Chomsky headed a list of prominent persons issuing a press statement on June 16, 2007. "Dr Sen has been detained under the Chhattisgarh Special Public Security Act, 2006 and the Unlawful Activities (Prevention) Act, 2004 on charges that are completely baseless. Both these extraordinary laws have been criticised by numerous civil rights groups for being extremely vague and subjective in what is deemed unlawful, and for giving arbitrary powers to the State to silence all manners of dissent."

Protests against Dr Sen's arrest has been joined by other prominent personalities such as Nobel Prize winner Amartya Sen, Magsaysay Prize winner Aruna Roy, Booker Prize winner Arundathi Roy, retired Chief Justice Rajindar Sachar of the Delhi High Court, film maker Shyam Benegal and many eminent medical professors and scientists in India, the USA, the United Kingdom, Australia and elsewhere.

Sen remains in police custody till date. Chhattisgarh High Court has rejected his bail. Human rights activist like Mr Sen form the backbone of a vibrant democratic struggle. Strangely, the State does not look upon such activists as partners in the democratic process. They are periodically targeted, subjected to a suspicion, hostility and vendetta. More often, they are also perceived as threats to the "national interest."

Consequently, individuals, organisations, lawyers, journalists, and physicians, among other freedom and justice loving persons find themselves at considerable risk when they take on issues dubbed as 'sensitive' by the government. Nothing can illustrate this more conclusively than Dr Binayak Sen's recent unjustified and illegal arrest under some of the black laws that the state opted for the sake of expediency.

Of inhuman bondage

The wheels of justice move invariably to crush the poor who do not have the means to defend themselves despite provisions in the law for free legal aid. The worst tyranny is being faced by children of women prisoners even while scores of undertrials languish in jails without any sign of their trial, writes **Parul Sharma**

Access to justice for a person in need of legal representation fails even at the initial stages. The vastly low fees of the legal aid lawyer triggers a legal process based on non-application of mind, in dealing with a poor person's case in a just and fair manner. The fee of a legal aid lawyer could be anything between Rs 300-700 per case, a case which could go on and on for time unlimited. The issue of delay of payments to legal aid lawyers is another "put-off" factor for lawyers not to opt for legal aid services.

Mostly, the assistance of legal aid is delayed; however, the law provides for legal aid at the point of arrest and has to ideally be notified within 24 hours. A public prosecutor, however, receives a salary from the government, and a sum of a couple of hundred rupees per day. Norms for appointing lawyers for the above mentioned purposes should be uniform and based on specialised skills, but unfortunately these are not. Of course, the preference of the aggrieved persons must be taken into consideration whilst determining the appointment of lawyers.

Furthermore, it is here that the journey of an injustice system begins. This injustice system is about labelling the poor further, making him belong to a separate scheme altogether. The injustice system maintains a façade, which has been on for years.

A typical case of delayed justice is when the injustice system makes a poor person a so-called undertrial without a trial. A person who has been languishing in a prison in Uttar Pradesh for over 33 years with both the complainant and witnesses in the case having passed away. Devi Prasad, a resident of Ghazipur township in the district, was arrested and lodged as an undertrial for allegedly murdering his wife in 1973. He was later shifted to the Varanasi jail and his family had also given him up for dead. However, his brother Pitambar, who got information that Mr Prasad was lodged in jail, met him recently, though the latter failed to recognise his relative. "He was 24 when he was jailed and today he is neither mentally nor physically fit after spending almost his entire life behind bars." (The Hindu, Sunday, March 19, 2006)

Our justice system constantly refers to the principle of "right to life", however, clearly within the justice system, this principle is equated to animal existence and nothing beyond, removing all human aspects, physical and mental from Article 21 of the Indian Constitution.

Empathy

Empathy is partly defined as "closely related to the ability to read other people's emotions – the arousal of an emotion in an observer that is a vicarious response to the other person's situation... Empathy depends not only on one's ability to identify someone else's emotions but also on one's capacity to put oneself in the other person's place and to experience an appropriate emotional response. Just as sensitivity to non-verbal cues increases with age, so does empathy." (Psychology - An Introduction (Ninth Edition) Charles G. Morris, 1996)

Most unfortunately, there is such a grave lack of empathy in our justice system. This is blatant in a very recent and crucial investigation conducted by Tribune India (Aditi Tandon, From Behind the Bars- III, Children Suffer with Mothers, Chandigarh July 3, 2007). The investigation brings up horrendous examples of children of undertrials. Anita, 27, lodged at Jalandhar Central Jail is sad that she delivered her first child as an undertrial. Sahil, just three-month-old has not yet seen his father

lodged in the men's barracks right across. Nor has he had his share of sights and sounds that aid cognitive growth.

In every jail, a gynaecologist visits only once a week, while pre and post-natal care remains poor. "When I was pregnant, I used to get some milk in addition to a routine *dal-roti* diet," says Anita, whose delivery has left her very weak. Poorly fed and traumatised, she, like other mothers, is unable to properly tend to her child.

The affects of such neglect can be damaging, says clinical psychologist Kalki Gupta: "A child in confinement is impacted most by his mother's state of mind. She's the only major influence he has. Also, a child develops maximum emotional strength in the first five years. When things go wrong here, they can take years to mend." Huddled up with 86 prisoners in unclean cells, he takes from the surroundings the best they can offer—dullness, monotony and pain. Like Anita, mothers of six other children living here, too, are scared that their wards will only know a world of jail jargons. "We are helpless. Our families are also in jail. Who will raise the children", asks Priya, 34, an undertrial, whose daughter Rohini, two, can't distinguish a male from a female.

The investigation further states that at Jalandhar jail, children have no toys, games or colours to trigger their cognitive growth, which is the highest in the first six years of life. The Tribune investigation has rightly underlined that six is also the upper age limit which the Supreme Court of India has fixed for children who can stay in jails with their mothers. The Supreme Court has directed the state governments to build a crèche and nursery in every jail.

Apparently, children of the ones belonging to the injustice system are different from others, otherwise why would DGP, Prisons, Punjab, Izhar Alam, state that women and children in Punjab jails were well-off, considering natural legal curbs and implications thereof: "We plan to further ease congestion by making new jails at Phagwara, Moga, Dasuya, Pathankot, Palti and some more locations. Ludhiana women's jail is still underutilised."

Even the children are confined to animal existence, which is a clear violation of the Convention on the Rights of the Child (CRC). In the year of the convention's acceptance and signing, UNICEF used its 1990 issue of *The State of the World's Children* to launch a vigorous restatement of what was now called the 'Principle of the first call': "...that the lives and the normal development of children should have first call on society's concerns and capacities and that children should be able to depend upon that commitment in good times and bad, in normal times and in times of emergency, in times of peace and in times of war, in times of prosperity and in times of recession." However, the Indian justice system (injustice system) completely disregards the above-mentioned concerns because these children are labelled so early in the legal process, as children of lesser human beings.

One sometimes wishes that our justice system was a scrapbook where we could erase text and write new balanced and realistic principles where right to life surely goes beyond animal existence, and includes both physical and mental rights

One sometimes wishes that our justice system was a scrapbook where we could erase text and write new balanced and realistic principles where right to life surely goes beyond animal existence, and includes both physical and mental rights.

—The writer is a Stockholm-based Human Rights Lawyer. Her book "Right to Life: the Pluralism of Human Existence" has recently been released by India Research Press

आप जागरूक और जिम्मेदार नागरिक हैं इसलिए पढ़ें
हिंदी में भी
मानवाधिकार के मोर्चे पर डटी द्वैमासिक पत्रिका

कॉम्बैट लॉ

- कानून अदालतों और फैसलों तक सीमित नहीं होता वह हमारे जीवन के हर क्षेत्र को प्रभावित करता है हमारी हदें तय करता है
- जरूरी है कानून जानना, समझना और इसकी पेचीदगी को तोड़ना कानून जानना हर नागरिक का अधिकार है तभी संभव है जन विरोधी कानूनों का प्रतिरोध और मानवाधिकारों की रक्षा

एक प्रति : 20 रुपये
वार्षिक : 100 रुपये
आजीवन सदस्य : 3000 रुपये

नोट : सदस्यता शुल्क चेक/ड्राफ्ट द्वारा केवल **कॉम्बैट लॉ (Combat Law)** के पक्ष में भेजें।

पत्रिका की सदस्यता के लिए लिखें :

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Tinkering, trivialising, trashing law

As criminality saps the body politic, a few privileged smart alecks are toying with the idea of reforming criminal justice system so that culprits get trussed and victims feel relief. Yet, **Professor BB Pande** *debunks these claims reflected through the policy documents of previous and this government targeting some of the very tenets of criminal justice system*

It appears that of late the criminal justice system reform idea has caught the fancy of the Indian ruling classes. The earlier NDA government had constituted the Malimath Committee for Criminal Justice Reform (2003) with a view to stemming the near total breakdown of the Indian Criminal Justice system, through its over-wide six-point terms of reference. As a sequel several of the Malimath Committee recommendations have already found their way into the procedural and substantive criminal law of the country. Recently the *Fifth report of the Second Administrative Reform Commission on Public Order* under the chairmanship of Veerappa Moiley (June 2007) has in chapter 7 made elaborate recommendations on 'Reforms in the Criminal Justice System', as an aspect of comprehensive reforms for securing better public order. The last in this series is the *Draft National Policy on Criminal Justice* prepared by a committee appointed by the ministry of home affairs, Government of India (March 2007). But the paradox is, while we are busy finding new ways, and means of effecting CJS reforms, the process of 'Criminalisation of Politics' goes on uninterrupted, making a farce of the reform idea itself. Still, it shall be our endeavour to identify the core thrust of the proposed Draft National Policy on Criminal Justice (DNP) and the tasks it is likely to achieve, in the following pages.

Thus the national policy appears to be fully wedded to a repressive crime control philosophy that views crime as a threat to national security and stability. The repressive philosophy is sustained by fear and anxiety associated with terrorism and other extremist criminal behaviours

A Plain Reading of the DNP

The 47-page DNP followed by a 13-page summary is divided into six parts or chapters. The first chapter that is titled as 'Constructing a National Policy: A Prefatory Note' is devoted to three issues, namely 'Composition, Terms of Reference and Methodology', 'Criminal Justice: Concept and Concerns' and 'Elements of a National Policy'. The second chapter titled as 'Criminal Justice Policy and Good Governance' is divided in seven parts, namely 'Preamble', 'Fresh approach to Crime and Criminal Justice', 'De-criminalisation and Diversion', 'A Victim Orientation to Criminal Justice', 'Multiple Codes based on Re-Classified Crimes', 'Federal/Joint Sector in Criminal Justice', 'Sentence and Sentencing'. The third chapter is titled as 'Policy Issues in Criminal Procedure and Administration'. Under this chapter fourteen issues devoted to criminal procedure matters are discussed. Chapter four is titled as 'Criminal Justice Policy vis-a-vis the Weaker Sections. The six issues discussed under this chapter are, namely 'Impact of Right to Equality and Social Justice', 'Criminal Justice and Children', 'Criminal Justice and Women', 'Criminal Justice involving Dalits and Tribals', 'Criminal Justice and Persons with Disabilities', 'Special Monitoring Cell in the Department of Criminal Justice'. Chapter five is titled as 'New Sector of concern in Criminal Justice Administration'. Under this also six issues are discussed, namely 'Criminal Justice and Communal Conflicts', 'Criminal Justice and Economic Security', 'Corruption and Criminal Justice', 'Media Involvement in Criminal Justice', Criminal Justice and Civil society' and 'Criminal Justice and International Legal Order'. The sixth chapter is titled as 'Planned Development of Social Defence'. This chapter has focussed on five issues, namely 'A National Strategy to Reduce Crime', 'A National Commission on Criminal Justice', 'Department of Criminal Justice at Centre and States', 'A Bureau of Criminal Justice Statistics', 'Criminal Justice, part of Planned Development.' The summary at the end comprises of fifty summing-ups of the issues discussed in the earlier chapters.

De-coding the DNP

The DNP would be analysed here in terms of its three major aspects, namely (a) the philosophical aspects, (b) the substantive aspects and (c) the procedural aspects.


Prof BB Pande

The philosophy of the DNP can be best located in the prefatory note (pp 3 to 7), the preamble (p 9), causes for popular dissatisfaction with criminal justice (p. 17), national strategy to reduce crime (pp.42 to 44), etc.

The committee, comprising of an academic (the chairperson), two bureaucrats, one lawyer and a retired police officer has coined its own conception of 'Criminal Justice' and its aims in these terms: "Its object is the maintenance of public order and peace, protection of the rights of the victims as well as persons in conflict with the law, punishment and rehabilitation of those adjudged guilty of committing crimes and generally protecting life and property through prevention of crime." (p 4 para 2.1). The committee considers 'criminal justice' as the "primary obligation of the State". In the same vein the committee clarifies "Rule of Law, democracy, development and human rights are dependent on the degree of success that governments are able to achieve on the criminal justice front. Even national security is nowadays linked to the maintenance of internal security. Given such critical importance for social defence and national integrity, the need for a coherent, coordinated long-term policy on criminal justice is obvious and urgent." (p 4 para 2.1)

What are the indicators of the proposed DNP? "Crime control and criminal justice management are the products of an efficient, effective and fair criminal justice system" (p 4 para 4.2). Further it is said: "It is important that each of these sub-systems also accomplish a desirable degree of efficiency and effectiveness in supporting the mission of freedom from crime." (p 4 para 2.2).

For culling out the philosophy the Committee's perception of crime are very significant which is reflected in the following observation: "In fact crime today makes the stability of state itself at stake" (p 6 para 3.4). In the same vein "India, which is the worst victim of terrorists violence is still showing great deal of patience in the hope that wisdom will prevail and violence will abate" (p 6 para 3.4). The committee goes on to speak on behalf of the suffering citizen thus: *"Citizen wants security at any cost.* They do not want to see that the state overprotects some and leaves the rest to their fate under a system which consistently fails to fulfil its obligation." (p 7 para 3.6; emphasis supplied). The committee identifies the existing situation as crisis situation, that is why it observes: "Proper balance has to be achieved between the law and liberty in the interest of safeguarding democracy itself, against the onslaughts by forces of anarchy and disorder." (p 7 para 3.5)

Furthermore, the philosophy of the DNP can also be gathered from its pre-occupation with the reduction in the number of crimes. The committee views "crime is a threat to freedom and democracy" (p 42 para 1.1), therefore the reduction of its incidence ought to be an integral aspect of the DNP.

Thus the national policy appears to be fully wedded to a repressive crime control philosophy that views crime as a threat to national security and stability. The repressive philosophy is sustained by fear and anxiety associated with terrorism and other extremist criminal behaviours. The argument of 'fear of crime' is so central to the DNP that it almost suggests a review of the due process and constitutional guarantees in the words of the committee itself: "However, much the "Crime control model" of criminal justice, may appear appropriate in certain situations, it may not be possible to accommodate drastic changes to the 'due process model" currently institutionalised in our system of criminal justice." (p 6 para 3.3)

The substantive aspects of the DNP often mark a departure from the philosophical aspect, particularly the ideas suggested in chapters two, four, five and six. For example, chapter two that proposes an idea of a new look to the policy of criminalisation, including use of techniques of diversion, decriminalisation, reclassification of crimes, etc, hardly go well with the conservative philosophy expounded earlier. Similarly, and even more importantly, the concern shown for the weaker sections like children, women, scheduled castes and STs and persons with disabilities requires a criminal justice policy that looks beyond 'terrorism' and 'forces of anarchy and disorder' syndrome. However, even if suggested without serious thought, a policy designed to incorporate the substantive issues raised in the aforesaid chapters is certainly most welcome aspect of the DNP.

The procedural aspects of the DNP are mostly located in the chapter three that has touched upon a wide range of fourteen procedural issues. Of these the following deserve a special mention:

(a) Search for truth as the ideal of criminal justice

The committee, comprising of an academic (the chairperson), two bureaucrats, one lawyer and a retired police officer has coined its own conception of 'criminal justice' and its aims

(b) Standard of proof in criminal cases
(c) Confessions and statements to police
(d) Discarding right to silence

Like the Malimath Committee, the DNP appear to be obsessed with the 'search for truth' as the new mantra for criminal procedure. It laments that the normal operation of the adversarial system works to the detriment of the victim and the society, therefore, there is a need to incorporate 'search for truth' as a new ideal in a preamble to the procedural law. The DNP seems to be suggesting a shift in adversarial system presumptions when it suggests: "The object is not to stifle procedures nor to compromise them to the advantage of one party or other; the object is to remind everyone in the game that procedures are intended to be fair to both sides while not letting it defeat the ends of justice itself" (p 18 para 2.2). In the above observation the DNP appears to be convinced that the existing procedure favours one party and that it is leading to the defeat the ends of justice.

The DNP at 20 para 3.2 has taken a very casual view of standard or proof in these words: "The concept of "Proof beyond reasonable doubt" is an axiom evolved by judges following Anglo-American jurisprudence which over a period of time was clear in the minds of judges and lawyers. The said concept has, however, been blunted by the passage of time. The judges and lawyers are seen to be interpreting it by different yardsticks." We had heard that the overuse leads to the refinement of the concept, but the committee wants us to believe that the concept gets 'blunted' by repeated reliance upon it. It may be mentioned here that the standard of proof evolved by the Anglo-American courts over a long period of time has become an integral aspect of the due process guarantees that have crystallised into a normative system, so well articulated by Herbert L Packer in his classic *Limits of the Criminal Sanction* (1968).

In respect of confessions and statements to the police the DNP is inclined to view the police, particularly the higher ranks, in a new light that will do away with the philosophy of treating every evidence coming from police source as tainted. The DNP at p 22 para 6.1 observes: "To cut out such evidence totally on ground that whatever is given by the police is not admissible is neither logical nor prudent, particularly when there are technological or procedural guarantees to ensure the voluntary character of such statements." It may be true that physical verification through video-conference may ensure voluntarily-ness to some extent, but the subtle or the passive threat emanating from the police may not be easily detectable in ordinary confessions before the camera. Perhaps because of the over-bearing role of the police or the investigating officer Section 217 of the Criminal Procedure Act of South Africa, thus:

"Provided:

(a) that a confession made to a peace officer, other than a magistrate or justice, or in the case of a peace officer referred to in Section 334, *a confession made to such a peace officer which relates to an offence with reference to which such peace officer is authorised to exercise any power conferred upon him under that section, shall not be admissible ion evidence unless confirmed and reduced to writing in the presence of a magistrate or justice ....*" (emphasis supplied). Similar caution against the use of such evidence also flows from the US Supreme Court landmark ruling in *Miranda vs Arizona* (384 US 436 (1966)). The United Nations Special Rapporteur on Torture, Mr Nowak, had at the end of his visit to China in December 2005 pointed out the perniciousness of the prevalent forced confessions before the police and strongly recommended the abolition of provisions such as Section,306 of the Chinese Criminal Law that makes it an offence for a lawyer to counsel his client to repudiate a forced confession.

The DNP questions the existing right to silence, perfectly in line with the Malimath Committee and an added support from FS Nariman *(India's legal System: Can it be saved", Penguin (2006).* The right to silence matter has been very elaborately discussed by the Law Commission of India in its 180th report (2002), that prefers to highlight the constitutionality of the right, flowing from Articles 20(3) and 21 of the Constitution. The commission observed in this vein, thus: "The law in India appears to be the same as in USA and Canada. In view of the provisions of clause (3) of Art.20 and the requirement of fair procedure under Art. 21 and the provisions of ICCPR to which India is a party and taking into account the problems faced by the courts in the UK, we are firmly of the view that it will not only be impractical to introduce the changes which have been made in UK but any such changes would also be contrary to constitutional provisions."

Just to remind those who are parading the 'novel' idea of discarding the right to silence, the 1898 Criminal Procedure Code in Section 342 (2) did give freedom to the judge to draw adverse inference in these terms:

"Section 342 (2) the accused shall not render himself liable to punish-

Like the Malimath Committee, the DNP appear to be obsessed with the 'search for truth' as the new mantra for criminal procedure

ment by refusing to answer questions or by giving false answers to them; but the court and the jury (if any) may draw such inference from such refusal or answers as it thinks fit." But the 1973 Code of Criminal Procedure dropped this provision because of its direct conflict with Art. 20(3). Therefore, the test is, do we favour rule of the Constitution or the rule of exigency? Perhaps the renowned constitutionalist like Nariman would like to say in this context: the society must move on, the constitutional guarantees can wait.

Appreciating the DNP

(a) Its high degree of philosophical ambivalence

The DNP appears to be taking diverse philosophical stands on various criminal justice issues. When it comes to understanding and appreciation of the contemporary crime reality it is given in to conservative crime control philosophy that identifies crime as: "forces of anarchy and disorder" - against which: "citizen wants security at any cost." But in chapters two and four the DNP appears to be toeing a totally new philosophy, when it suggests a new look to criminalisation or 'Criminal justice and children' 'Criminal Justice and Women, etc. The underlying philosophy of the policy issues raised in these chapters is bound to be due-process-oriented and liberal in their thrust. May be the different chapters were done under different moods and periods of time, but they do create serious problems when it comes to drawing a meaning out of the DNP.

(b) Its softness vis-a-vis 'State Lawlessness' and other 'Power Crimes'

Steven Box (Power, Crime and Mystification (1983)) had warned long ago "for too long too many people have been socialised to see crime and criminals through the eyes of the state" (p 14). Therefore, the DNP has to look to the 'otherside' as well as bring within its crime radar the emerging phenomenon of corporate crime and police crime. In particular police encounters and lawlessness are influencing the common citizens' perception of crime most profoundly and that ought not to be ignored for developing a holistic crime policy.

(c) Without going into the process of depowerment through criminalisation how can you effectively 'decriminalise' or 're-classify crimes?

Criminalisation of the poor and the weaker sections is a well known phenomenon throughout the history of criminal law the world over. Therefore, if at this historical juncture the DNP decides to reverse the process, it must first appropriately, understand what it is trying to undo.

(d) An authentic DNP has to be a democratic exercise that not only elicits the view of the largest numbers of 'wise men', but also has to believe in peoples who have a real stake in a healthy criminal justice policy

But the bane of our criminal justice reform exercise is its isolation from the people for whom it is ultimately meant. In the words of Steven Box again: "The Public seems to have little awareness of the democratic principles and the rights and duties these impose on the citizens..."

But the bane of our criminal justice reform exercise is its isolation from the people for whom it is ultimately meant. In the words of Steven Box again: "The Public seems to have little awareness of the democratic principles and the rights and duties these impose on the citizens. The state seems determined not to relieve this ignorance but actually compounds it further by introducing or firming up 'authoritarian' control devices." (p 203)

Anyway, who cares for a DNP?

Ideally, the DNP should have served as a meaningful guideline for the legislatures, the executive and the judiciary. But in the existing state of things when some of the best throughout suggestions mooted out by the official law reform suggesting body, the Law Commission of India, on several criminal justice issues lie unheeded and unimplemented, when most of the progressive recommendations, like that of the Police Commission (1979-81) and Prison Committee (1980-82) remain in cold storage for so long, what is the guarantee that the DNP would influence the course of legislative power in the near future? Similarly, the executive that is increasingly getting used to lawless ways of action in situations of 'war' as well as 'peace' is much less likely to rely upon the DNP for its day-to-day functioning. The judiciary that has the responsibility of implementing the laws, may find the DNP of some use, here and there, but the possibilities of its drawing any substantial strength from the DNP are too indirect and remote.

Therefore, why must the Ministry have undertaken the exercise of coming out with a DNP?

The only plausible explanation is that like the previous NDA government that kept its eyes wide open for locating 'bad guys' who are out to destroy our society, the present government has also shown keenness to appear a "good-guy" that is out to protect the society against the 'bad-guys'. Therefore, every opportunity of painting the 'bad-guys' with the darkest hue is to be utilised. 'Darker' the bad-guys the good-guys appear brighter through simple contrast. That is what appears to be the easiest explanation for a tearing hurry to have a criminal justice policy, without even thinking about distributive justice policy, or victim justice policy or even a prisoner justice policy.

— The writer is Consultant, NHRC

A meek, weak NHRC

Throughout its about a decade-and-half-long existence, the NHRC could not become an effective forum for the redress of human rights violations because of the lack of government's commitment to protect rights of its citizens. So it has been content by creating a showpiece in the name of human rights. Now groaning under the weight of a huge backlog of cases, NHRC and its still worse shadows SHRCs need to reinvent themselves in order to redeem their credibility. This is what participants of a national consultation on criminal justice, recently held in New Delhi, felt. A factsheet based on the deliberations by **Josh Gammon**

The National Human Rights Commission (NHRC) was established on October 12, 1993, pursuant to the Protection of Human Rights Act (PHRA). "Rather than being seen as an organ of genuine accountability, the NHRC was viewed politically as a means of deflecting increasing international criticism." Since their inception, the various human rights commissions have evolved from effective, accessible avenues for addressing the peoples' human rights grievances to inefficient, bureaucratic enclaves of former government officials with hefty pensions and little concern for the people. The definition of "human rights" applied pursuant to the PHRA provisions and governmental indifference perpetuate the HRCs' failure to safeguard human rights and human dignity. The available statistics indicate that the NHRC fails to conclude approximately 80 percent of its cases.

Several reports analyse the performance of the NHRC, and all suggest broad reforms. The reports indicate that under-staffing, an overwhelmingly large caseload, and inefficient management plague the NHRC

The PHRA delineates the duties, responsibilities, and powers of the NHRC. Under the Act, the NHRC is to enquire *suo motu* or upon a petition into matters pertaining to human rights violations. It may intervene in any judicial proceeding on human rights, summon or seek attendance of witnesses, procure documents and evidence, and visit any institution of detention to study and make recommendations. The NHRC may also investigate through any officer or investigating agency of the centre or state governments. The commission is responsible for ensuring the persons prejudicially affected in matters involving human rights are heard.

Critique

Despite its broad language, the PHRA envisages an NHRC with merely recommendatory powers and an inappropriate objective: that of preserving India's international image. The NHRC lacks jurisdiction to independently investigate human rights violations committed by the armed forces; it has no enforcement power whatsoever. Moreover, the NHRC must rely on the central government for whatever funds it "may think fit," and must utilise government police and agencies for investigative functions. Its appointment process is highly politicised, and virtually ensures a government-friendly NHRC: the appointment committee consists solely of the prime minister, the Speaker of the Lower House, the minister of home affairs, and the Leader of the Opposition. The procedure is kept confidential and civil society plays no role in the process of selection of its chairperson, or members. Despite a legislative mandate that two members of the commission be chosen from among people with knowledge of or experience with matters involving human rights, the overwhelming majority of appointees are former officials or people with close ties to the central government. Staff is borrowed from other governmental departments, including the intelligence services.

The definition of "human rights" utilised by the PHRA is also troublesome. The PHRA defines "human rights" to be whatever the Indian Constitution or international covenants say. However, the Constitution does not set out *per se* offences and, thus, creating punishable offences necessitates implementing legislation; without the Indian Penal Code, for example, murder would not constitute an offence. No such legislation exists as to specify an offence under human rights, and,

thus, the scope of the PHRA is limited to an ill-defined set of violations perpetrated only by public servants and government officials. Individual perpetrators of human rights violations fall outside the purview of the NHRC and the various SHRCs. As a result, the judiciary interprets the statutory ambiguities as it sees fit. The result is a confusing and contradictory body of common law with negligible power of precedent.

The NHRC's annual reports comprise the only publicly available information on the commission, and "tend to be severely deficient." For example, "the 1997-98 report provided descriptions of only 24 of the 40,000 plus cases pending for consideration during the year," and most of those were "extremely brief, vague, and incomplete." Further, the few cases successfully concluded by the commission "face non-compliance by both central and local government agencies." Through 2004-05, a staggering 75,000 complaints were filed with the NHRC; and as of 31 March 2005, 50,000 were still pending. Of those 95 percent were languishing because reports were awaited from the authorities concerned or because the reports had been received, but were awaiting consideration of the commission itself. The abundance of cases awaiting reports from various authorities indicate hostility towards the NHRC on the part of the various government agencies.

Case examples

The NHRC's failure to adequately describe its handling of cases masks the commisson's habitual failure to conclude cases satisfactorily. Case-by-case analysis reveals a performance marked by inaction and apathy. The cases discussed below exemplify the NHRC's deficient performance.

On 4 June 1996, The *Tribune* published a piece entitled "Police Torture Alleged," detailing an accusation of police torture. The three victims claimed to have visited Machhiwara police station to lodge a complaint after a close relative of theirs was shot dead at that station. They alleged that the police beat, burned, and tortured them until a politician ordered their release. Pursuant to a commission request for an enquiry, the department of home affairs and the justice of the Government of Punjab sent a report denying the allegations. Three letters accompanying the report were purported to be from the victims. They stated that the allegations had been made out of dissatisfaction with the police investigation in the matter, and that the investigation was now proceeding. The commission made no independent investigation into the matter and accepted the Punjab authorities' report, despite none of the letters were signed and they were nearly identical besides lacking the name of an attesting police officer.

In a similar case, one Mukhtyar filed a complaint on January 4, 1997, alleging that deputy superintendent of police (DSP) Davinder Singh and Punjab Police officers arrested, confined, and tortured him. After filing complaints with several authorities and subsequently receiving threatening letters demanding withdrawal of the complaints, Mukhtyar filed a complaint with the NHRC. The NHRC responded by ordering the SSP, District Sangrur, Punjab, the alleged perpetrators of the human rights violations in the case, to investigate the matter.

"The NHRC is a kind of system for the redressing human rights related violations that has turned out to be a toothless tiger. Moreover, it is a mechanism for lining the pockets of retired judges and officials. State too created a farce to show the nation that they have an HRC. Yet the reality is that it has no force in practice."

— Navkiran Singh, a lawyer from Punjab

Independent reports

Several independent reports analyse and evaluate the performance of the NHRC, and all suggest broad reforms. The various reports indicate that under-staffing, an overwhelmingly large caseload, and inefficient management plague the NHRC. Although they omit consideration of the external factors hindering the commission, these reports reveal the problems limiting functionality at the organisational level and suggest several possible solutions.

On January 2, 1996, the Registrar of the Kerala High Court, the Deputy Registrar of the Supreme Court, and the Deputy Registrar of the Central Administrative Tribunal, New Delhi, submitted the National Human Rights Commission's (Procedure) Amendment Regulations to the chairperson. The chairperson was asked to address the complaints received and *suo motu* action taken by the commission. The report sought to promote efficient complaint processing, eliminate duplication of work, and promote office infrastructure to assist commission members in their tasks. Based on analysis of the relevant PHRA provisions and an on-site study of the law division's operations, the report recommended broad revisions in the PHRA with a view to streamline processes while implementing several stages of documentation.

McKinsey & Co Inc also authored a recommendatory report, citing a massive case backlog as the NHRC's primary problem. Entitled *Preparing for a Fresh Start*, the McKinsey Report was submitted on August 7, 1997. It

"As lawyers, we follow justice according to the law, not justice generally in a comprehensive manner. Whenever statutes and acts are not well worded, we stand to suffer. The legislature tries to consider itself as the State as well as judiciary, but forgets the people."

— Irfan Noor, Srinagar, J&K

"The powers [of the NHRC and SHRCs] seem to be broad, but in practice, this does not translate into justice for the victims of human rights violations."

— Geetha D, an HRLN advocate from Chennai

documented the rapid increase in annual complaints filed during the several years after the NHRC's inception, predicting that 190,000 cases would be pending by January 2000. The report also noted that the backlog compromised NHRC functions; it increases the time taken to redress and complicates procedures. The McKinsey report proffered a three-tiered solution and thoroughly detailed the specific procedures and principles through which the solution could be found. It recommended the addition of qualified personnel in several key areas and revised management mechanisms to augment capacity and efficiency in the short term; segmentation of the caseload in the long term; and an eventual split in the commission. The "old commission" was to include a special task force and process pending cases; the "new commission" was to address new cases according to the report's recommendations.

"The former Chief Justice, now chairperson of the National Human Rights Commission, goes after bus accident cases in order to get a good press."

— KG Kannabiran, PUCL president

Finally, the Staff Inspection Unit (SIU) prepared a study of the NHRC in May 1999 at the behest of the ministry of home affairs, examining both the law division and the Investigative division. The SIU recommended a substantial increase in the number of assistant registrars in the law division and subsequent additional increases in proportion to the anticipated growth in the number of complaints per year. The Investigative division, the report recommended, should be allocated additional personnel at all levels and should establish a division for record inputting and maintenance. In total, the SIU recommended that 94 new positions be created and staffed.

Governmental responses

Since 1993, the "Indian government has made a sport of creating the illusion of handling recommendations issued by the NHRC." The ministry of home affairs routinely forwards recommendations to the state Governments "as matters of 'State jurisdiction', sets aside others as recommendations perennially 'under consideration,' and returned the remainder back to the NHRC categorically dismissing the commission's proposals." Recommendations for systematic reform in the areas of criminal justice, police conduct, and child welfare receive similar treatment; the home ministry responds "as ambiguously as possible in order to create the illusion of responsiveness while initiating nothing of substance."

Despite the obvious need for increased allocation of funds, resources, and powers, the government refuses to remedy the situation. Disappointed with the various restrictions limiting its effectiveness, the NHRC formed a committee to review the PHRA in 1998. Under the leadership of former Chief Justice AM Ahmadi, the committee promulgated a Draft Amendment Bill recommending important improvements to the PHRA; the Ahmadi Committee proposal was forwarded to the government in early 2000. The recommendations were disregarded for six years. Finally, the government incorporated a meagre selection of the Ahmadi Committee proposal's less significant recommendations in the PHRA in 2006. For example the NHRC is no longer required to apprise a state government prior to conducting visits to detention facilities within the state. However, notice must still be given before visits to facilities utilised by army and paramilitary forces and visits to non-prison custodial facilities. The PHRA as amended fails to provide the NHRC with the independence laid down under the Paris Principles, a set of guidelines for "establishing and maintaining strong and effective national human rights institutions" as promulgated by the United Nations.

During 1998-99, the NHRC considered 53,711 new cases, dismissed 32,277 of these in *limini*, disposed of 11,389 with directions to the appropriate authorities, and concluded 3,395 cases after reviewing reports from the relevant authorities

Each of these flaws survived the amendment process; the government

"When choosing the members of the HRCs, it is ensure that those selected will not speak against the appointers."

—Meihoubam Rakesh, an HRLN lawyer from Manipur

deliberately perpetuated the NHRC's lack of resources and enforcement power, opaque appointment and general operating procedures to ensure government-friendliness of members and staff. Even more telling are the parliamentary delays faced by the NHRC's annual reports, whereby the government postpones their public release. The NHRC today exists as a façade of justice, an international public relations gimmick, and a retirement windfall for former government officials.

The shortcomings in the PHRA and parliamentary refusal to remove them manifest themselves in an almost-complete failure of the NHRC to redress human rights grievances. The vast majority of complaints receives no NHRC investigative attention, but instead is forwarded to the government agency or police department accused of perpetrating the human rights violation. The NHRC typically accepts the report of the accused party without question or independent investigation, and the complaints are dismissed. In other cases, the NHRC disposes of complaints by forwarding them to other authorities with directions to take appropriate action; follow-up by the NHRC is too rare to ensure justice. In either case, the victims rarely receive notice that their case has been closed. In the few cases where wrongdoing is established, compensation is the only remedy that the commission can at best offer; punitive measures, criminal or departmental, are not employed.

Statistical analysis illustrates the gravity of the NHRC's deficiency. During 1998-99, the NHRC considered 53,711 new cases, dismissed 32,277 of these in *limini*, disposed of 11,389 with directions to the appropriate authorities, and concluded 3,395 cases after reviewing reports from the relevant authorities. Dismissal of 60 percent of cases in *limini* creates suspicion to say the least. Yet what is more glaring is the complete lack of transparency in the complaint redress process and subsequent monitoring and accountability. Despite ostensibly representing a vast increase in the disposal rate from the previous year, the statistics indicate that only 20.1 percent of pending cases were concluded. Of 5,669 cases pending from 1997-98 for which the relevant investigative reports were completed and became available and 11,389 cases from the current year for which the reports were completed and made available, only 3,395 cases were actually disposed of. Thus, of cases requiring only commission consideration for conclusion, as opposed to cases awaiting investigative reports, the NHRC failed to dispose of 80.1 percent cases. The backlog continues to mount.

"The members of HRCs are committed to the political system instead of the people."

— Justice Rave

The SHRCs

The various state human rights commissions (SHRCs) struggle with the same problems faced by the NHRC. The victims are not intimated when the accused file counters to their complaints; likewise, organisations which file complaints on victims' behalf are not informed of the location and date of hearings. Instead, only the victims themselves, typically ignorant of the relevant issues, are informed. Hearings are conducted in the state capitals, which often prove inaccessible for the victim, and cross-examination of victims is routinely conducted without the assistance of an attorney. High Courts refuse to hear human rights complaints and refer them to the SHRC; the courts then refuse to enforce commission orders issued pursuant to them. Moreover, the SHRCs are barred from considering complaints whose cognisance has been taken by the NHRC. Such complaints then face delays and conflicts of interest. Neither the NHRC nor the SHRCs have formal procedures for acknowledging receipt of complaints, which make monitoring and disposal in the right manner almost impossible. The SHRCs are empowered to submit complaints to the High Courts as ordinary writs, but seldom do so; the abundance of retired High Court judges in the SHRCs makes deference to the High Courts unlikely.

The failure of the NHRC and the SHRCs necessitates drastic reform. Procedures for members' appointment and general operations must be made transparent

Conclusion

The failure of the NHRC and the SHRCs necessitates drastic reform. Procedures for members' appointment and general operations must be made transparent and revised to ensure the participation of individuals and organisations. Hearings should be conducted where the violation allegedly occurred, or in another place easily accessible to the victim. Victims should not be cross-examined without the help of an attorney, and recommendations should include criminal and departmental punitive measures wherever appropriate. Finally, more funds must be allocated to the NHRC and the various SHRCs to take care of the expenses brought by enormous workloads and to clear backlog.

—The author is a law student from the US

"We have one SHRC member known for committing human rights violations; he once ordered to drag a man to be produced before his court in a stretcher, leaving his hospital bed."

A meeting of minds

A national consultation on criminal justice brought together the legal community from all over the country to New Delhi where they discussed moves to rob accused of the protections given in the law, reports **Josh Gammon**

On June 2-3, 2007, criminal law experts and officials from across India assembled in New Delhi for the first *National Consultation on Criminal Justice Reforms*. The long-awaited event was held at the India International Centre and boasted an impressive roster of respected legal professionals. Justice Mohammed Zakeria Yakoob of South Africa's Constitutional Court was also in attendance, and lent insight on several topics.

The consultation began on Saturday, June 2, 2007 with a session on court judgments and reform committees. Dhairyasheel Patil (Maharashtra) discussed recent judgments of the Supreme Court whereby the criminal law protections of the accused have been largely dismantled in recent years. Professor BB Pande (New Delhi) then proffered a harsh criticism of the Malimath Committee report.

Session Two focused on the Code of Criminal Procedure (Amendment) Act, 2005 and the Code of Criminal Procedure (Amendment) Bill, 2006. Among the speakers were Advocates Rajivinder Singh Bains (Punjab), Kirity Roy (West Bengal), Geo Paul (Kerala), PK Ibrahim (Kerala), Dr P Chandra Sekharan (Bangalore), and Senior Advocate and PUCL president KG Kannabiran (Andhra Pradesh).

The final Saturday session's topics included the various human rights commissions and human rights courts. Advocates Navkiran Singh (Punjab), Abdul Salam (Kerala), Geetha D (Tamil Nadu), Anil Aikara (Kerala), and Irfan Noor (Srinagar, J&K) discussed their experiences with the National Human Rights Commission and the state human rights commissions; all agreed that the commissions' performance was highly deficient. The day was concluded with a presentation on critical issues in criminal justice reform by Honorable Justice AM Ahmadi, former Chief Justice of India, and a speech on criminal justice reforms in South Africa by Justice Yakoob.

Sunday, June 3, 2007 began with the topic of the impunity for criminal offences enjoyed by many government officials and agencies, including the armed forces. KG Kannabiran (Andhra Pradesh) headed the discussion. K Balagopal (Andhra Pradesh) provided insight and knowledge on police torture, execution, and disappearance perpetrated with impunity.

The second session of June 3 Session Five of the Consultation, dealt with police reforms. The session featured contributions from Advocate Vrinda Grover (New Delhi), Prof SM Afzal Qadri (Srinagar J&K), Advocates Ashok Agrawal (New Delhi), Mahendra Pattnaik (Orissa), Khaidem Mani (Manipur), and former director-general (Investigations) of the NHRC Shankar Sen. Among the topics discussed were Prakash Singh's case, the Soli Sorabjee report on police reforms, police misconduct and civilian control, and recommendations for reform.

Session six covered the legal aid services authorities. The functioning of the national and state legal aid services authorities was evaluated, and recommendations for reform were made. The session featured contributions from Advocates Geetha Ramseshan (Tamil Nadu), A.R. Hanjura (Srinagar J&K), and Narain Samal (Orissa).

The *Lok Adalats* and the fast track courts were discussed in session seven. Once again the functioning was evaluated and recommendations for reform were proffered. Advocates Vecna Gowda (Mumbai), PK Awasthi (Uttar Pradesh), DB Binu (Kerala), Dr Archana Aggarwal (Delhi), and Vijay Hiremath were among the speakers.

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Is NHRC asleep?

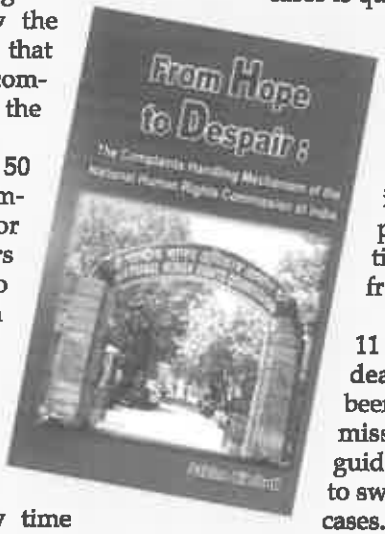
A recently published book "From Hope to Despair" by **Sabine Nierhoff** *brought out by People's Watch, concludes that the NHRC has miserably failed in handling complaints of human rights violations in India. Excerpts from its findings:*

The findings of our study are very damning for the NHRC. Not in any category of analysis have the results been of a positive nature:

In over one-third of complaints, the commission has not sent any response to the complainant, not even bothered to inform him/her whether the complaint has been received or is being considered.

In cases where no initial response was received, the average period of wait for such a response has been almost two years.

In nearly half of all responses, no details of the victim/complaint were included in the response, despite People Watch's repeated requests to do so as this would significantly simplify the work of NGOs that file multiple complaints before the Commission.



In nearly 50 percent of complaints, four or more reminders had to be sent to the commission due to lack of correspondence and information from the NHRC, costing unnecessary time and effort.

The average pending period for cases is nearly 23 months -- 18 months where a final order has been passed and 25 months where no order has yet been passed.

Major delays occur, not only because of slow responses from the state authorities, but also because of undue delays within the commission.

In only 18 percent of all complaints filed there has been a response from the opposite party. This means that in the majority of cases the complainant is not given the opportunity to comment on the concerned authority's report even if such report is available to the NHRC. This matter is of great concern, considering the large number of inadequate or insufficiently independent reports submitted by the authorities. This is often so in situations where the police themselves compile reports on alleged police brutality. The potential for biased and inadequate reports in such cases is quite high.

Only in 32.5 percent of cases has the commission passed a final order. In three instances, the case was closed without even informing the complainant. This information only became known from the NHRC website.

In not a single out of 11 cases filed on custodial death has a final order been passed by the commission, despite its own guidelines and commitment to swift investigation of such cases. The findings from this study also contradict the commission's statements in its 2002-2003 annual report that in all cases of custodial death orders have been passed.

The longest pendency period and the lowest number of final orders are in cases brought by, or on behalf of, members of the Schedule Castes. This contravenes the commission's statement in its annual report 2002-2003 that it places special emphasis on securing the rights of Dalits and pays careful attention to complaints received by them. The contrary of this may well be true where the cases moved by well off, higher caste sections may get more attention.

The commission has made very little use of its power to carry out on the spot inspection as a part of its investigations or inquiries, if the concerned authority's report is not received on time or it is not satisfied with the report received. In most cases, such action is deemed as unnecessary and uncalled for.

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One-fifth of complaints have not been placed on the NHRC's public website despite People Watch's repeated requests to do so.

Where information is available online there are great inaccuracies and inconsistencies. Often there is no indication of when certain information became available or when certain actions were taken. In 64 percent cases, that find place on the website, the details do not correspond to the information obtained from the commission by the complainant.

The above findings constitute an extremely regrettable outcome for an organisation in which so many of India's citizens, particularly those belonging to the most vulnerable and marginalised sections of the society, have pinned their hope for justice.

CRIMINAL JUSTICE RIP

CRIMINAL JUSTICE seems well and truly dead. Dhairyasheel Patil, senior advocate from Maharashtra and former chairperson of the Bar Council of India, has meticulously documented how the criminal law protection of accused persons has been diluted over the years in order to make it almost nugatory. Despite Professor Upendra Baxi's strident criticism of the recommendations of the Malimath Committee, these have been finding their way into the law through judges' orders and rulings. This is despite the reluctance of the State to accept these recommendations. Professor BB Pande too makes, in this volume, a no less impassioned criticism of government's Draft National Policy on Criminal Justice. This paper was presented at a National Consultation on Criminal Justice Reforms where lawyers and judges from different states discussed the grim future of criminal justice. A former Chief Justice of India, Justice AM Ahmadi, lamented the pitiable state of affairs. Even the National Human Rights Commission, which was expected to energetically investigate human rights violations, was found fast asleep. Two scathing studies – one by Ravi Nair of the South Asian Human Rights Documentation Centre, and another by Peoples Watch, found the NHRC ineffective, insensitive, and inefficient. Police reform, particularly the case being pursued by Prakash Singh in the Supreme Court was looked at with a great deal of suspicion. Participants pointed out that the principal concerns of civil society such as torture by, and corruption in, the police force did not seem to bother Prakash Singh who was more concerned about reliefs for the police rather than civil society. The setting up of a genuinely independent civilian oversight body to punish cases of police misconduct is still a distant dream. And so to ask for the removal of political control over the police in the absence of any civilian substitute for it could well mean that the criminals in uniform get a free rein. Prison reforms, felt the participants, have just slipped from the radar. The conditions in the prisons were worse than ever before. Dr P Chandra Sekharan exposed the farce of narcoanalysis and regretted the widespread misuse of the 'test' by the police throughout the country. He wondered why the judiciary always so keen on intervening in the public interest, was silent in the face of extensive abuse by investigation officers who leak wild stories to the press resulting in trial by media.

Lok Adalats also came in for a great deal of skeptical analysis. Do these institutions, around which much hype was created, really offer alternative systems for the speedy justice for the poor, or were the Lok Adalats a third rate system designed for the poor who were considered too inferior and, thus, unworthy of taking up the courts' precious time? Lawyer after lawyer from state after state were deeply concerned about the failure of the Lok Adalats in their state. Then KG Kannabiran, the president of the PUCL, and K Balagopal from the Human Rights Forum spoke impassionedly against the growing culture of impunity, so anathematic to international criminal jurisprudence, leading to torture, executions and disappearances. Indeed, an utterly hopeless situation. And not even a trace of enlightened thinking anywhere!

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