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Criminal justice system and social defence

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Abstract: *The early criminologist, magistrate and novelist, Henry Fielding of the late eighteenth century, categorically stated that the total effort to defend society, against the problem of crime and criminals, should be organized on three fronts: first, the traditional methods of preventing crime through the provisions of the law and the legally approved executive methods of the police, life patrolling and surveillance; second, the public cooperation methods of preventing crime, through programmes involving the utilization of precautions, equipment, personnel and organisation, in short, erecting a defensible space around, calculated to make criminal operation more difficult; and third, the basic removal of the causes of crime from the individual and from society, involving all relevant preventive and correctional strategies, which are normally thought of when Social Defence is mentioned. There is no reason why Social Defence should mean only the third and not the other two. It should, in fact, cover all. In the United Nations Congress too, there is now a growing realization of this position and so Crime Prevention Programmes and Criminal Justice System have come to occupy quiet a lot of its agenda and time. Member countries, however, have not always followed suit. But in the U.S.A., the pendulum has swung to the other side, because of alarming increase in the crime rate, and correction has received a set-back, adversely affecting that major area of social defence.*

Key words: *Criminal Justice,* Jurisprudence, *Social Defence*

"Justice will come when it is deserved by our being and feeling strong".
"Justice that love gives is a surrender justice that law gives is a punishment".
--Mahatma Gandhi.

Introduction: Of late the relevance of our Criminal Judicial System – both substantial and procedural, which is a replica of British Colonial Jurisprudence is being seriously questioned. Perhaps the Criminal Judicial System is based on the laws which are arbitrary and operate to the disadvantage of the poor. It oppressly operates on the weaker sections of the community notwithstanding constitutional guarantee to the contrary.

There is none to advocate for new laws to help the poor, there is none to pressure the government and the legislature to amend the laws to protect the weak and the poor. Even after almost six decades of independence no serious efforts have been made to redraft penal norms, radicalize punitive processes, humanize prison houses and make anti-social and anti-national criminals, such as hoarders, smugglers, tax-evaders, black-marketers incapable of escaping the legal coils. On the other hand, whatever legislation piecemeal amendments, substitutions and deletions that have taken place during the last six decades to ameliorate the conditions of downtrodden masses are all aimed at protecting the interests of rich and bourgeoious class so as to retain status quo[1]

The Criminal Judicial System is cumbersome, expensive and cumulatively disastrous. The poor can never reach the temple of Justice because of heavy cost of its access and the mystique of legal ethos. The hierarchy of courts, with appeals after appeals put legal justice beyond the reach of the poor. Professional service is a monopoly of a few rich professionals who are too dear to be fed for by the poor. Making the legal process costlier is an indirect denial of justice to the people and this hits hard on the lowest of the low in society.

A careful perusal of the provisions of the Penal Code would reveal that it is undoubtedly a manifestation of will of the dominant social class, determined by economic and political motives. The ideals of justice has lot to do with law which was often an instrument of oppression. It makes broad classification of crimes against property, person and the State. Of a total of 511 sections in the Code, 81 sections have been devoted to protection of property interest (Sections. 378 to 462), 32 sections to offences against human body (Sections. 377 to 399). Thus, more than 58 per cent of the total number of sections have been earmarked to protect the interests of elite. But not even a single section is enacted to take care of the interests of the poor and weaker sections of the community.

It is important to note in this context that judiciary in our country in last years have taken a lead and came forward with a helping hand to give some relief to the victims of Criminal Judicial System in their limited way.

One of the decisions handed over by the Supreme Court in recent years was *Hoakot*[2], *Moti Ram*[3], *Hussainara*[4], *Sunil Batra*[5], *Sheela Barse*[6], *Charles Sobhraj*[7] have depicted that despite the constitutional mandate and statutory guarantees the legal rights even today, remain non-existent for a large percentage of illiterate, ignorant and poor population of our country. The Courts in these cases did not simply affirm the blue print of legal norms, but have tried to assess the reality prevailing in society and administration in different stages, viz., prison stage, bail stage and other law enforcement levels revealing the sad state of affairs prevailing in the society depicting the vast gap existing between law in words and law in action.[8]

In view of the importance of the subject matter, it is proposed to explain in brief about each of the provisions and discuss a few leading cases on the subject. These are:

1. Public Interest Litigation.
2. Bail Justice Jurisprudence.
3. Prison Jurisprudence.
4. Compensation to victims of Crime.
5. Legal Aid and Legal Services.

Public Interest Litigation.

Public Interest Litigation has its origin in the United States. It was during the 1980's that the Public Interest Litigation emerged as part of the legal aid movement primarily aimed at protecting the rights of the weaker sections of the community, such as women, children, physically and mentally challenged, minority and the like.[9]

In India, during the last few years, a new wave has struck the courts. It is the wave of Public Interest Litigation. Petition after petition are being filed and argued on and reliefs sought, in the interest not of an

individual or two but upon grievances which have affected community at large. It is a new development in the Indian context under which legal remedies are being sought not by an affected individual or family, but by those who may not have suffered directly but have reason to believe that injustice is being done.

Against the public interest litigation, it is being argued in some quarters that it has opened a floodgate of litigation and by such action; the Indian judiciary is betraying a tendency of 'projecting itself as the upholder of the freedom of the people, the champion of the dull millions'.[10] This overt act of judiciary is remarked as nothing but interference in the action of the executive, which is making good and effective government impossible. In staking a claim on the administration and finance, and even the police and the magistracy, it is pointed out that the judiciary might collide head on with the other two organs of the State – executive and legislature in which event being the weakest it would collapse.

To this criticism perhaps Justice P.N. Bhagwati's remarks would be most appropriate, when he says:

"Public Interest Litigation is not in the nature of adversary litigation but a challenge and an opportunity to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community to assure them social and economic justice which is the signature tune of our Constitution".[11]

Bail Justice System.

Bail is a generic term used to mean judicial release from *custodia legis*.[12] The right to bail—the right to be released from jail in criminal case after furnishing sufficient security and bond has been recognized in every civilized society as a fundamental aspect of human rights.[13] This is based on the principle that the object of a criminal proceeding is to secure the presence of the accused to serve the sentence, if convicted. It would be unjust and unfair to deprive a person of his freedom and liberty and keep him in confinement, if his presence in the court is assured whenever required for trial by the Court.[14]

The Code of Crimial Procedure, 1973 accordingly, (in Sections. 436 to 450) has laid down in detail the norms as to grant of bail and bonds in criminal cases.

The entire system of monetary bail is anti-poor since it is not possible for a poor man to furnish bail because of poverty, while a rich man otherwise, similarly situated can afford to buy freedom from arrest by furnishing bail. In other words, the accused with means can afford to buy his freedom, but the poor accused cannot pay the price. Hence, a poor defendant languishes in jail for weeks, months and perhaps even for years as undertrial prisoner.[15] He does not stay in jail because he is guilty, or because he has been convicted, or because he may cross the prison walls before trial. He stays in jail because he is poor and not able to purchase the heavy cost of freedom from jail. Poverty prices them out of the freedom and is a crime in itself.

Prison Justice.

Justice delayed is justice denied.[16] This is more so in criminal cases where the personal liberty of an individual is at stake and in jeopardy. Irony of the fate is

that in all such cases it is the poor, the weak who are the victims of the criminal justice system and not the rich who are going to get away out of the net. Pavement dwellers and palace hovers have different yard sticks in court, in prison and even after release. If a rich man accidentally become victim of exigencies of judicial process and sentenced to a normal term of imprisonment for violations of grave economic offences, like smuggling, hoarding, black marketing, etc., he enjoys all the comforts of life while remaining in jail and operates his business from there unlike the poor and innocent prisoners who languish in jail and suffer inhuman torture and remain in solitary confinement.[17]

The plight of undertrial prisoners for the first time came to the notice of Supreme Court in *Hussainara Khatun v. State of Bihar*.[18] While granting a charter of freedom for undertrials who had spent virtually their whole life waiting trial, the Court observed:

"*It is a travesty of justice that many poor accused, little Indian, are forced into long cellular servitude for little offences because the bail procedure is beyond their meager means and trials do not commence and even if they do they never conclude*".[19]

Compensation to victims of crime.

Criminal Law, which reflects the social ambitions and norms of the society is designed to punish as well as to reform the criminals, but it hardly takes an important note of byproduct of crime – its victim. The poor victims of crime are entirely overlooked in misplaced sympathy for the criminal. The guilty man is lodged, fed clothed, warmed, lighted, entertained at the expense of the State in a model cell from the taxes the victim pays to the treasury. And the victim, instead of being looked after is contributing towards the care of prisoners during his stay in the prison.

Of course, in recent years the Supreme Court by invoking Article. 21 of the Constitution has tried to give some compensatory relief to the poor victims of illegal detention at the hands of the executive.[20] But such cases are numbered and are not going to solve the malady. Perhaps *Rudal Shah*[21] is an admirable example of exploitation of criminal judicial process in recent history which came before the Supreme Court for reparation.

Legal Aid And Legal Services.

A new era in the direction of legal aid and legal services in India has begun. The year 1976 witnessed a fundamental change in the philosophy underlying the programme for extending legal aid and legal services to the indigent. The Constitution (Forty-second Amendment) Act, 1976 inserted Article. 39A in Chapter IV (Directive Principles) of the Constitution of India making it a duty on the part of Federal and State Governments to provide social defence to the poor and weaker sections of the Community.

Article. 39A provides that:

"*The State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall, in particular provide free legal aid by suitable legislation or schemes or any other way, to ensure that opportunities for securing justice are not*

denied to any citizen by reason of economic or other disabilities".

It is in this context that the programme of legal aid and legal services in India has assumed a special significance. The participation of law schools in the national programme of legal assistance is a unique experiment in a developing country like India with a population of 100 million people, out of which about 80 percent of its population live at the subsistence level and others are left without resources by taxation.[22]

In *Hussainara Khatoon v. Home Secretary, State of Bihar*,[23] the Supreme Court laid down that in a criminal case legal aid to the poor is a constitutional right which cannot be denied by the Government. The Supreme Court speaking through Justice P.N. Bhagwati held that when Article. 21 of the Constitution provided that 'no person shall be deprived of his life or liberty except in accordance with the procedure established by law', it is not enough that there should be some semblance of procedure passed by law, but the procedure under which a person may be deprived or his life and liberty should be reasonable, fair and just. Now a procedure which does not make available legal service to an accused person who is too poor to afford a lawyer and who would therefore, have to go through the trial without legal assistance, cannot possibly be said as reasonable, fair and just procedure to a prisoner who is to seek his liberation through the courts' process that he would have legal service available to him.

While reviewing the provisions of legal aid and legal services contained under Article. 39A of the Constitution, the Court observed, that the said Article. 39A emphasizes that free legal service is an unalienable element of reasonable, fair and just procedure for without it, a person suffering from economic or other disabilities would be deprived of opportunity for securing justice. The right to free legal service is, therefore, clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article. 21. There is a constitutional right of every accused person who is unable to engage a lawyer and secure legal service on account of reasons such as poverty, indigence or incommunicable situation the State is under a mandate to provide a lawyer to an accused person, if the circumstances of the accused and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer.

Necessary provision for providing legal aid in criminal cases have been made in Section. 304 of the Code of Criminal Procedure, 1973[24] enabling the High Courts, with the previous approval of the state government concerned, to make rules providing for mode of selecting pleaders for defence of accused at the expense of the state in trial before the Court of Session in case he is not represented, or he has not sufficient means to engage one, the facilities to be allowed and fee payable to such pleaders by the government. Similar provisions have also been made in sub-rule (2) of Rule 9-A, Order XXXIII of the Code of Civil Procedure (Act 5 of 1908)[25] and the High Courts have been empowered with the previous approval of the state government concerned, to frame rules for regulating the appointment of pleaders to represent indigent persons in civil suits.[26]

Conclusion:

Criminal law is constantly undergoing reform through enactments by legislatures and continuous reinterpretation by judges. One might expect a penal reformer to start by listing a set of goals. It is easy to enumerate such goals which have been articulated in centuries of philosophic reflection and penological debate. The usual ones are deterrence of crime, rehabilitation of offenders, retribution and isolation of dangerous persons to incapacitate them from committing further crimes. Unfortunately it turns out that these goals are to some degree unattainable and are frequently inconsistent. Obviously, no penal system could deter or repress all crime. Some types of crime are so dominated by passion or psychopathy that no threat of punishment, however certain and drastic, would prevent their commission. Thus rehabilitation of offenders is obviously a worthy aspiration, especially since much crime is committed by previous offenders. Crimes would be reduced, therefore, if first offenders could be educated, reoriented or inspired to reform themselves. However, it may be noted that although rehabilitation undoubtedly occurs, even in prison conditions, its feasibility has been seriously impugned by studies of recidivism under such supposedly rehabilitative regimes as probation, parole, and juvenile court supervision. But some criminologists and sociologists assert that society is responsible for criminal behaviour and the offender is merely the individual committing the criminal offence. Believing in moral values, its adherents tried to establish a balance between society and the criminal.

With that end in view the penal policy of Indian Criminal Justice System also

References.

[1]. Reddy, O. Chinnappa, *Judicial Process and Social Change*, 25, J.I.C.I., pp. 149-157.
[2]. *M.H. Hoakot* v. *State of Maharashtra*, A.I.R. 1978 SC 1548.
[3]. *Moti Ram* v. *State of Uttar Pradesh*, A.I.R. 1978 SC 1994.
[4]. *Hussainara Khatun* v. *State of Bihar*, (1980), 1 SCC 88, 91, 93 and 108 respectively. These five cases are numbered serially.
[5]. *Sunil Batra* v. *Delhi Administration*, A.I.R. 1980 SC 1579.
[6]. *Sheela Barse* v. *State of Maharashtra*, A.I.R. 1983 SC 378.
[7]. *Charles Sobhraj v. Superintendent, Central Jail*, A.I.R. 1978 SC 1514.
[8]. Reddy, O. Chinnappa, *Judicial Process and Social Change*, 25 J.I.L.I. (1983) 157.
[9]. Menon, Madhava N.R., *Public Interest Litigation: A major breakthrough in the delivery of social justice*, (1982), JBCI, vol. IX, p. 150.
[10]. Das, A.K., *Judiciary's New Role*, Statesman, June 22, 1983, p. 5.
[11]. Nandita Haksar, *Giving Justice Reach*, Indian Express, Feb. 9, 1984, p. 6.
See report on National Judicature (1977), Ministry of Law, Justice and Company Affairs, Government of India, p. 61. "We have injustices, inherited and acquired...The victims are large numbers of the community...The community suffers the hardships...In our expensive court system, it is impossible for lower income groups and the poor to enforce rights...The poor people of a village may be prevented from walking along a public pathway by a feudal chief, Harijan workers may be denied fair wages, women workers as a class may be refused equal wages. Collective wrongs like this

call for class action…There may be representative suits necessary when one man's wrong is typical (of many like consumer interests). Each one being driven to court on his separate cause of action is itself a public wrong…The rule of *locus standi* requires to be broad based and any organisation (or individual) must be able to start such legal action. Community proceedings, public interest litigation, class action and the like before courts, tribunals and other authorities must be financed and/or undertaken by legal aid organisations and public interest lawyers".

[12]. See 78th Law Commission Report on Congestion of undertrial prisoners in jail, (1979), pp. 6 to 11 for concept and history of bail.

[13]. *Superintendent and Remembrancer of Legal Affairs* v. *Amiya Kumar Ray Choudhary*, (1974) 78 Cal. W.N. 320, 325.

[14]. In U.S.A., the Court has power to release an individual accused of crime even without bail on his own recognition. See *American Jurisprudence*, (2nd ed., vol. 8, Part. 6), p. 785.

[15]. *Supra* n. 5, AIR 1979 SC 1899 (1979) Cr.L.J. 1036, 1045, 1052. The SC directed the state Government to set free thousands of undertrial prisoners who were already in jail for the maximum period of sentence for which they could be sentenced on conviction.

[16]. *See supra* n 5. The Supreme court in *Hussainara* case has affirmed that speedy trial is a part of fundamental right of life and personal liberty in Article. 21 of the Constitution. *See State of Maharashtra v. Champalal*, AIR 1981 SC 1675. The accused were charged under Section. 120B, I.P.C. read with Secttion. 135 of Sea Customs Act, 1962 and the Defence of India Rules, 1962 for having committed the offence of smuggling of 11,000 tolas of gold slabs with foreign exchange marking. Held, delayed trial is not necessarily unfair trial. Though a speedy trial is an implied ingredient of a fair trial the converse is not necessarily true. On the facts and circumstances of the case the Court held that in the instant case the accused himself was responsible for a fair part of the delay. See Upendra Baxi, *The Supreme Court Undertrial: Undertrials and the Supreme Court (1980)* I.S.S.C. 1514.

[17]. *See Supra* n 6.
Some of the instances reported in *Sunil Batra* case is given below:
Dharma Teja, the Shipping magnate who served his sentence in Tihar jail had thousands of rupees in jail and all comfort. He had an air cooler in his cell, a radio-cum-record player set and even the phone. Haridas Mundhra, a business man not only did he have all the facilities in jail but he could also go out of jail whenever he liked. At times he could be out for several days and travel beyond Delhi. Ram Kishan Dalmia, a business magnate spent most of his jail term in hospital. Smugglers imprisoned in Tihar jail get their food from posh hotels and whisky from Connaught Place in Delhi and women for recreation on payment.

[18]. *Supra* n 5.

[19]. *Ibid.*

[20]. *See Popular Jurist*, Vol. 1 (1984), p. 26; See *Deokinandan v. State of Bihar*, AIR 1983; Jain, S.N., *Money v. Compensation for Administrative Wrongs through Article. 32*, (1983) 25 JILI, pp. 31 to 39; *Jivan Mal Kochar v. Union of India*, AIR 1983 SC 1107.

[21]. *Rudal Shah v. State of Bihar*, AIR 1983 SC 1086; *Devaki Nandan Prasad v. State of Bihar*, AIR 1983 SC 1134. In 1971, a Constitution bench of the Supreme Court presided over by Sikri, C.J. had issued the

mandamus directing the government to pay to the petitioner his withheld person. But the government failed to comply with the *mandamus* for a long period of 12 years and treated it a scrap of paper. Being disappointed the petitioner had to move the court again. The court issued the *mandamus* a second time with a warning that the failure or deviation in the time schedule in carrying out this *mandamus* will be contempt of court and awarded exemplary costs of Rs. 25,000 to be paid to the petitioner since the officers of the state had harassed him which was intentional and deliberate.

[22]. *See* Gaur, K.D., *Legal Aid and Legal Services in India*, Madrid Conference on the Law of the World, September 16-20, 1979.

[23]. *See Supra* n 5. *See Sheela Barse v. State of Maharashtra*, AIR 1983 SC 378; *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *Veena Sethi v. State of Bihar*, 1983, 339; *Free Legal Aid Committee, Jamshedpur v. State of Bihar*, AIR 1982, SC 1463.

[24]. Section. 301 of Code of Criminal Procedure, 1973 reads as under:

Legal aid to accused at State expense in certain cases—

→where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.

→The High Court may, with the previous approval of the State Government, make rules providing for—

(a). the mode of selecting pleaders for defence under sub-section (1);

(b). the facilities to be allowed to such pleaders by the Courts;

(c). the fee payable to such pleaders by the Government, and generally for carrying out the purpose of sub-section (1).

→The state government may, by notification, direct that as, from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to trials before courts of session.

[25]. Order XXXIII, Rule 9A of the Code of Civil Procedure which was inserted in 1976 by the Code of Civil Procedure (Amendment) Act, 1966 provides that:

"9A Court to assign a pleader to an unrepresented indigent person –

→where a person, who is permitted to sue as an indigent person is not represented by a pleader, the Court may, if the circumstances of the case so require, assign a pleader to him.

→The High Court may, with the previous approval for the state government, make rules providing for;

(a) the mode of selecting pleaders to be assigned under sub-rule (1),

(b) the facilities to be provided to such pleaders by the Court,

(c) any other matter which is required to be or may be provided by the rules for giving effect to the provisions of sub-rule (a) (1)."

[26]. The Parliament has enacted in 1987 the Legal Service Authorities Act (39 of 1987) to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalat to secure that the operation of legal system promotes justice on a basis of equal opportunity.