

THE CRIMINAL JUSTICE SYSTEM AND THE HUMAN RIGHTS VIOLATIONS IN PERSPECTIVE OF SYSTEMIC RELATIONS[†]

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I. INTRODUCTION

The criminal justice system of our country being a part of the legal system is basically circumscribed by economic and social system besides the political system and, therefore, it imbibes the values of the broader set-up. Since such a set-up came to develop over a long period of time, it would be worthwhile to view the basic relations historically particularly due to continuity of legal relations from the colonial past in our country.

II. SYSTEMIC PERSPECTIVE

Our society is based on unequal economic and social relations inherited from the hoary past. Being basically an agricultural country, land has been the pivot around which economic and social relations have evolved. The land relations have played an important role in shaping societal relations and the values. This has affected the values of the legal system and the criminal justice system which, in turn, defined the shape of human rights.

The land-relations have been controlled by the intermediary system which has been prevalent in India since hoary past¹. It was, however, during the British period that the Zamindars collecting land revenue were conferred proprietary rights by making permanent settlement with them². This proliferated the intermediaries between the state and the actual tillers of soil. Such intermediary relations also came to prevail in raiyatwari system which was based on collection of land revenue from the ryots, and in

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¹ See A.S. Altekar, *STATE AND GOVERNMENT IN ANCIENT INDIA* (1949) at 368-69; S.A.Shah; *STRUCTURAL OBSTACLES TO ECONOMIC DEVELOPMENT - A POLITICAL ECONOMY OF INDIA* (1969) at 95-97; and S. Nural Hasan (edited by R.E. Frykenberg), *ZAMINDARS UNDER THE MUGHALS IN LAND CONTROL AND SOCIAL STRUCTURE IN INDIAN HISTORY* (1979) at 17.

² See Articles II and III, Bengal Regulation I of 1793.

'mahalwari' system which recognized collective responsibility for payment of land revenue. The result was the exploitation of the actual tillers on a large scale as the British sided with landed aristocracy in order to continue their rule.³ With few intermediaries acquiring power and position vis-a-vis the vast rural population, the societal values came to be dominated by feudal values. This, in turn, affected the criminal justice system which became loaded in favour of the intermediaries. Thus, in the British period, the criminal justice system forming the support-base of the British rulers and their intermediary allies acquired the pro-establishment character, with the Indian Penal Code, 1860, The Police Act 1861, The Indian Evidence Act, 1872 and the Criminal Procedure Code, 1898 providing the solid substantive and procedural basis. The vast arresting powers of the police officers and the colonial norms in respect of bails and bonds etc. under the Criminal Procedure Code, 1898 as also the police and the jail system structured under the Police Act, 1861 and the Indian Prisons Act, 1894 and the Jail Manuals indicated it. The police system structured under The Police Act, 1861 enacted after the 1857 rebellion continues to be operational. Even the revised Criminal Procedure Code, 1973 continues the colonial norms particularly regarding arrest and detention. The powers of arrest vested in a police officer under section 41 of the Code are quite vast and he can exercise these powers without an order from a magistrate and without a warrant.⁴ Such a vast discretionary power, indeed, becomes

³ See REPORTS OF THE UNITED PROVINCES ZAMINDARI ABOLITION COMMITTEE, Vol. I (1948) at 111-12.

⁴ Under section 41 of the Criminal Procedure Code, a police officer is authorized to arrest any person on the ground of being concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned. He can also arrest a person, *inter alia*, for having in his possession without lawful excuse any implement of house breaking; or being found in possession of any thing suspected to be stolen property and being reasonably suspected of having committed an offence with reference to such things; or for obstructing a police officer in the execution of his duty or escaping or attempting to escape from lawful custody; or on reasonable suspicion of having been concerned in any act committed outside India and punishable as an offence in India and for which he is legally liable to be apprehended or detained in custody in India; or on oral requisition from another police officer authorized to arrest. Likewise, he can also arrest a person under sections 109 and 110 for taking security for good behaviour from suspected persons and habitual offenders. Moreover under section 42, a person can also be arrested for refusing to give name or residence or giving name or residence which the police officer believes to be false, if such person has committed or has been accused of committing a non-cognizable offence.

the breeding ground not only for indiscriminate and unjustified arrests but also for illegal detention of the arrested persons beyond the permitted constitutional and statutory period⁵.

III. CONTINUAL DISREGARD OF HUMAN RIGHTS

In the post-independence period, the character of economic and social system as well as of the criminal justice system could not change much. Despite the much publicized zamindari and ceiling laws, concentration of land holdings could not be diffused.⁶ It has, indeed, been unequivocally admitted in the Ninth Plan that despite attempts at land reforms over successive plan periods, the basic character of the agrarian economy has not undergone any substantial change.⁷ The result has been the continuance of the lop-sided rural set-up and the feudal values. The continuance of the criminal law and the police system originating in colonial days maintained its pro-establishment character. The operational effect of this has been the violation of human rights of the vast populace on a large scale.⁸ The vast discretion of the police officers as mentioned above, with colonial and feudal mind-set and the pro-establishment approach, provides the firm

⁵ Article 22(2) of the Constitution of India enjoins that the arrested person has to be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate. Likewise, in terms of sections 57 and 76 of the Criminal Procedure Code, 1973, the police officer has no authority to detain the arrested person beyond the said period of twenty four hours.

⁶ It came to be revealed that 2.4% large holdings (2.15 million) being 10 hectares and above covered 22.8% area (37.17 million hectares) of the total land of the country. See Government of India, AGRICULTURAL SITUATION IN INDIA, Vol. XL, No. 5 (Aug. 1985) at 406. According to Tenth Five Year Plan, the small and marginal holdings constitute 78.2% of the total holdings of the country and operate only about 32.4% area of the total land. See Planning Commission, Government of India, New Delhi, TENTH FIVE YEAR PLAN, Vol. II (2002-2007) at 528.

⁷ See Planning Commission, Govt. of India, NINTH FIVE YEAR PLAN (1997-2002) at 24.

⁸ The National Human Rights Commissions has been consistently concerned about the custodial deaths, rape and torture. See *infra* note 11. In 2001-2002, 1305 custodial deaths (165 deaths in police custody and 1140 deaths in judicial custody) were reported to the Commission. See ANNUAL REPORT, 2001-2002 at 33.

base for violation of human rights. The National Human Rights commission is of the considered view that the police by its archaic methods, insensitivity and unprovoked incivility towards members of society, has alienated the public.⁹ The Commission has been receiving a large number of complaints in respect of human rights violations as a result of the abuse of police powers, particularly regarding arrest and detention¹⁰. It has therefore, been consistently stressing the need for systemic reforms in the police system besides the reforms in the prison system and the broader criminal justice system.¹¹ The arresting powers of police under the Criminal Procedure Code, 1973 obviously result in unjustified arrests.¹² The situation could not be improved even after laying down of the guidelines in this respect by the Supreme Court in *Joginder Kumar*¹³ and other cases¹⁴ that followed and the police continued to work in a routine way. In *Joginder Kumar*¹⁵ where a young advocate was unlawfully detained for a period of five days by the police, the Supreme Court, after examining the American and English position and the Report of the National Police Commission, drew the distinction between existence of the power to arrest and the justification for the exercise of it. Putting the burden of proof of justifying the arrest on the police officer, the Court required the police to inform the right of some one being informed to the arrested person and to make an entry in the Diary as to who was informed of the arrest as required under Articles 21 and 22(1) of the constitution. In *Dilip K. Basu*¹⁶ the Supreme Court reiterated the basic requirement for preventing the custodial violence

⁹ See ANNUAL REPORT, 1998-99 at 21.

¹⁰ See ANNUAL REPORT, 1999-2000 at 27.

¹¹ See National Human Rights Commission, ANNUAL REPORT, 1995-96 at 16-20; ANNUAL REPORT, 1996-1997, at 22-31; ANNUAL REPORT, 1997-1998 at 15-20; ANNUAL REPORT, 1998-1999 at 18-24; ANNUAL REPORT, 1999-2000 at 25-45; ANNUAL REPORT, 2000-2001 at 23-39; ANNUAL REPORT, 2001-2002 at 36-46.

¹² According to Third Report of the National Police Commission, 60% arrests were either unnecessary or unjustified and that such as a power of arrest was one of the chief sources of corruption in the police. Quoted in *Joginder Kumar v. State of U.P.*, AIR 1994 SC 1349 at 1352.

¹³ See *Joginder Kumar v. State of U.P.*, AIR 1994 SC 1349.

¹⁴ *D.K. Basu v. State of W.B.*, 1997 AIR S.C.W. 233 and *Dilip K. Basu v. State of W.B.*, AIR 1997 SC 3017.

¹⁵ See *supra* note 13.

¹⁶ See *supra* note 14.

laid down in *D.K. Basu's* case¹⁷ regarding arrest and detention. These requirements, inter alia, pertain to: (i) bearing accurate, visible and clear identification and name tags with their designation by the police personnel carrying out the arrest and handling the interrogation of the arrestee and recording of particulars of all such police personnel handling interrogation of the arrestee in a register; (ii) preparing of a memo of arrest by the police officer at the time of arrest and attesting of such memo by at least one witness, being either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made; (iii) informing the friend or relative or other person known to the arrestee and making of an entry in this regard; (iv) notification of the time, place of arrest and venue of custody of an arrestee by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the district and the police station of the area concerned telegraphically within a period of 6 to 12 hours after the arrest; (v) examination of the arrestee on his request at the time of arrest and recording of major or minor injuries if any present on his/her body; (vi) medical examination by a trained doctor every 48 hours during his detention in custody; and (vii) permission to the arrestee to meet his lawyer during interrogation. But the police personnel continue to work in complete disregard of human rights and these guidelines are not being followed by them as pointed out by the Delhi High Court in *Poonam Sharma's* case¹⁸ which brings forth the callous attitude of the police and doctors of the government hospital towards the victim of a road accident with head injury alleged to be in a drunken state. This was held to be in gross violation of his fundamental right under Article 21 of the constitution leading to the award of damages in public law remedy. The victim, in this case, after having been given first aid at the hospital but without having been subjected to tests to determine whether there was head injuries due to accidents and therefore, need to be kept under observation, was arrested. He was taken to hospital twice by police but he was not hospitalized. Neither medical tests were conducted on him nor he was given further treatment. As a result, the victim died. The Court held that he was entitled to be released within two hours, if the tests specified under the Motor Vehicles Act, 1988 necessary to be conducted for determining that the accused was in a

¹⁷ *Ibid.*

¹⁸ *Poonam Sharma v. Union of India*, AIR 2003 Delhi 50.

drunken state were not taken. He could have been released on personal bond due to his injuries and in view of facts and circumstances of the case¹⁹. *Smt. Shakila Abdul Gafar Khan*²⁰ brings to the fore the difficulty of proving torture and custodial violence against the policemen as direct evidence is rarely available. Observations of the Supreme Court in this respect are quite apposite :

“Rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel alone who can only explain the circumstances in which a person in their custody had died is available. Bound as they are by the ties of brotherhood, it is not unknown that police personnel prefer to remain silent and more often than not even prevent the truth to save their colleagues - and the present case is an apt illustration - as to how one after the other police witnesses feigned ignorance about the whole matter²¹

The Court further observed that the dehumanizing torture, assault and death in custody which have assumed alarming proportions raise serious questions about the credibility of rule of law and administration of criminal justice system.²²

The routine handcuffing of the accused even long after laying down of the strict norms in this respect by the Supreme Court²³ further exemplifies the fact that the police personnel lack the mind-set for giving due respect to the basic rights of the people and the law of the land. Even in respect of the arrests in cases of breach of peace under sections 107 and 116 of the Criminal Procedure Code, the arrested persons are routinely handcuffed and the provisions of section 151 authorizing arrest without a warrant and order from a magistrate for preventing the commission of cognizable offences, are invoked for effecting arrest without application of mind in a routine manner.

¹⁹ *Ibid.*

²⁰ *Smt. Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble*, AIR 2003 SC 4567.

²¹ *Id.* at 4570.

²² *Id.* at 4569.

²³ *Prem Shanker Shuila v. Delhi Adm.*, AIR 1980 SC 1535.

In fact, due to its pro-establishment approach, the police lacking respect for constitutional norms of democratic governance, is in a habit of maintaining *status quo* in complete disregard of individual and collective rights of the people and even by committing illegal acts of torture and violence. This is exemplified by the facts of the *Khedut Mazdoor Chetna Sangath*²⁴ where the police and the administration committed brutal torture on the members of a social organization dedicated to the social cause of preventing the exploitation of the tribal people by the constitutional means. The same approach is reflected by the facts of *Uttarakhand Jan Morcha*²⁵ where police atrocities on agitationists demanding separate Uttarakhand resulted in deaths, injuries, rape and molestation of women besides loot and plunder.

In view of the above, the pertinent question is - Why could the constitutional values not affect the criminal justice even after half a century of the adoption of the constitution. The answer can be found in the character of the economic and social set-up and the contradictory nature of constitutional values and the societal values. Our constitutional values have been declaratory through the constitutional document which assimilates the values developed in the western countries through gradual materialistic and intellectual development and struggles for such values²⁶. It is for this reason that the constitutional guarantees had to be given broader interpretation by the Supreme Court²⁷. But even such an interpretation could not bring about desired improvement in respect of the human rights situation.

Increasing international concern for human rights and the compelling national situation saw the enactment of The Protection of Human Rights Act in 1993 and the formation of the National Human Rights Commission.

²⁴ *Khedut Mazdoor Chetna Sangath v. State of M.P.*, AIR 1995 SC 31.

²⁵ *A.K. Singh v. Uttarakhand Jan Morcha*, AIR 1999 SC 2193.

²⁶ The English Bill of Rights, 1689; The French Declaration of the Rights of Man and of Citizen, 1789 and The American Bill of Rights, 1791 as also the Civil War Amendments (1865-1870) exemplify it.

²⁷ For instance, see *Kharag Singh v. State of U.P.*, AIR 1963 SC 295, *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *Francis Coralie v. The Administrator, Union Territory of Delhi*, AIR 1981 SC 746; *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802, *Joginder Kumar v. State of U.P.*, AIR 1994 SC 1349; *D.K. Basu v. State of W.B.*, AIR 1997 SC 3017 and *Smt. Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble*, AIR 2003 SC 4567.

The Commission has no doubt been active in taking cognizance of human rights violations in various spheres²⁸ but the recommendatory nature of its directions and the broader systemic hurdles limit its actions. Moreover, since the establishment of the State Human Rights Commissions, has been left at the discretion of the respective states²⁹; The Human Rights Act appears to be a half-hearted legislative attempt vis-a-vis protection of human rights.

IV. REPERCUSSIONS OF THE RECOMMENDATIONS OF THE MALIMATH COMMITTEE

The tenor of the recommendations of the Malimath Committee shows that it basically seeks to strengthen the prosecution system in order to raise the conviction rate³⁰. The effort here is to view some recommendations of the committee likely to affect the accused adversely. For instance, in respect of burden of proof, the Committee has recommended lower standard of proof - "the clear and convincing standard" or "the court's conviction that it is true"³¹. Accordingly, it has recommended for adding a clause in section 3 of the Indian Evidence Act - "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" or the words to that effect.³² The present system of proof followed in criminal cases is the "proof beyond reasonable doubt" under which the accused is presumed to be innocent and, therefore, the prosecution has to prove the case against him

²⁸ For instance, terrorism and insurgency, police harassment, fake encounters, custodial death, rape and torture, prisons, remand homes, child marriage, child labour, child prostitution, bonded labour, health, manual scavenging and rehabilitation of people displaced by mega projects. The Commission received 69083 complaints during 2001-02, the complaints from Uttar Pradesh accounting for 57.3% of these complaints. See National Human Rights Commission, ANNUAL REPORT, 2001-2002 at 138.

²⁹ See section 21, Protection of Human Rights Act, 1993. The National Human Rights Commission has recommended the substitution of the word "may" by "shall" in section 21 of the Protection of Human Rights Act, 1993. See ANNUAL REPORT, 2001-2002, Annexure 1 at 250.

³⁰ See Government of India, Ministry of Home Affairs, REPORT OF THE COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM, Vol. I (March 2003) at 265-97.

³¹ *Id.* at 269-70.

³² *Id.* at 270.

beyond reasonable doubt. The accused need not adduce any evidence in his defence but has only to create doubt in the prosecution story for his acquittal as the benefit of doubt goes to the accused. But under the system of "clear and convincing standard" the court has to be convinced and this would obviously be done by both the prosecution and defence. The recommendation of the Committee pertaining to the submission of the prosecution statement by the prosecution and defence statement by the accused³³ suggests that the accused would invariably be required to prove his innocence. This has the effect of doing away with the presumption of innocence of the accused which in turn would bring about further attitudinal and behavioural changes in the police officials prejudicial to the accused. This may not affect the hard-core criminals, with money and muscle, much in the given societal conditions. But this would certainly affect the poor accused adversely in view of the large scale false implication and unjustified arrests particularly in the rural areas.

The committee has also recommended substitution of section 313 of the Criminal Procedure Code, 1973, by sections 313-A, 313-B and 313-C³⁴. In doing so, the Committee seeks to empower the court in mandatory terms to put such questions to the accused as the court considers necessary with the object of discovering the truth in the case. However, in case of the accused remaining silent or refusing to answer any question put to him by the court which he is not compelled by law to answer, the court may draw adverse inference³⁵. This would have the effect of violating the rights of the accused in view of their right to remain silent under Articles 20(3) and 21 of constitution. The Committee, on the one hand, recognizes the right of the accused to remain silent and on the other, it recommends for drawing adverse inference if the accused remains silent which indeed, amounts to compelling the accused to speak. This makes the recommendation contradictory and violative of the constitutional right of the accused. It may be mentioned that the existing section 313 of the Criminal Procedure Code empowers the court to put questions to the accused but the purpose of such questions is to enable the accused personally to explain any circumstances appearing in the evidence against

³³ *Id.* at 268-69.

³⁴ *Id.* at 267-68.

³⁵ *Id.* at 267, proposed section 313-B(1).

him. It may be pointed out that the Law Commission of India has recommended against any changes in the law relating to silence of the accused³⁶. It has also pointed out that if any such changes are made, they would be ultravires of Article 20(3) and Article 21 of the constitution³⁷. It is worth mentioning that the Commission took this view after examining the legal position in this respect in various countries like U.K., U.S.A., Canada, Australia and China.

The recommendation of the Malimath Committee for increasing the maximum period of police custody to 30 days under section 167(2) of the Criminal Procedure Code in respect of offences punishable with sentence of more than seven years and for extending the period of 90 days under section 167 for filing chargesheet by a further period upto 90 days³⁸ would have the effect of increasing custodial violence and delaying the investigation. The suggestion for making the witness sign the statement recorded by the police officers in terms of section 162 of the Criminal Procedure Code³⁹ would affect the right of free testimony of the witness before the court and would thus affect the fairness of the trial.

The committee's recommendation for expressly making quest for truth as the foundation of the criminal justice system⁴⁰ appears to be superfluous as the criminal justice can not have its basis on falsity. Administration of justice in criminal cases has to be invariably based on truth whether expressly written or not. However, the value of truth can hardly be absolute in a society and is coloured by the values of the economic and social system.

V. CONCLUSION

It would thus appear that the problem of human rights vis-a-vis the criminal justice system is not an isolated problem but is related to the broader economic and social system as well as the colonial legal system and its values. The wide hiatus between the constitutional values and the

³⁶ See Law Commission of India, ONE HUNDRED EIGHTIETH REPORT ON ARTICLE 20(3) OF THE CONSTITUTION OF INDIA AND THE RIGHT TO SILENCE, May 2002 at 45.

³⁷ *Ibid.*

³⁸ *Supra* note 30 at 275.

³⁹ *Id.* at 276.

⁴⁰ *Id.* at 266.

values of the police system rooted in the colonial and feudal mind-set largely forms the basis for continual violations of human rights. Inculcation of the broader constitutional values based on liberty and equality and other concomitant rights in the personnel associated with the criminal justice system is essential for democratic governance consonant with welfare norms in constitutional terms. Improvement in the human rights situation, *inter alia*, requires not only structural police and prison reforms along with the criminal justice system but also amelioration in the economic and social conditions of the poor and down trodden people. The stark realities of the societal conditions of our country have to be taken into account in reforming the criminal justice system in order that the lives of the vast poor populace, particularly living in rural areas, are not affected adversely.