HUMAN RIGHTS *analysis*

Criminal justice system and human rights

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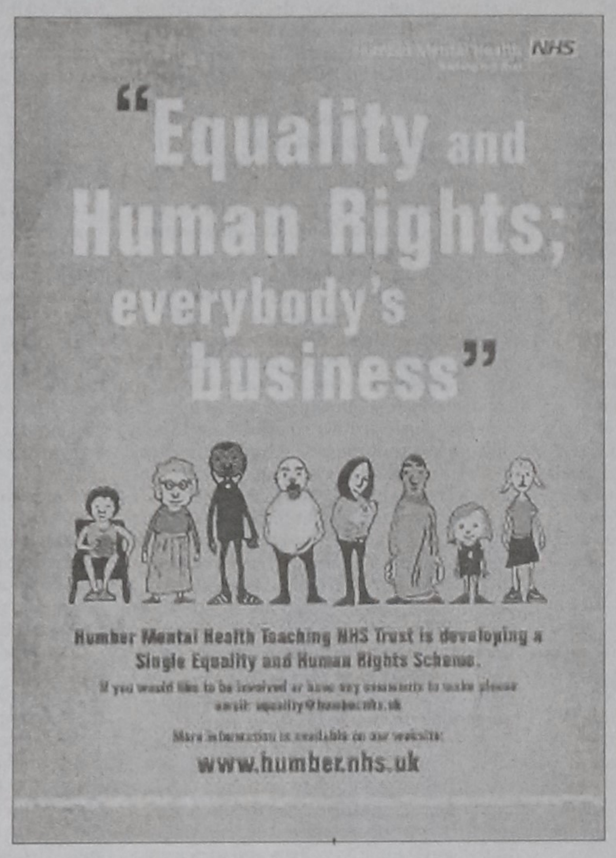
CRIMINAL justice is the system of legislation, practice, and organisation, used by any government or the state, which are all directed to maintain social control, deter and control crime, and sanctioning those who violate laws. Criminal justice is distinct from the field of criminology, which involves the study of crime as a social phenomenon, causes of crime, criminal behaviour, and other aspects of crime.

Over time, criminal justice has got recognition of universally accepted principles as the following:

- Justice is proportionate to actions.
- Justice is retributive.
- Justice is vindicatory.
- Justice is compensatory.
- Judgment under the law is declaratory.
- Judgment under the law is remedial.
- Judgment under the law is directive.
- Burden of proof 'beyond reasonable doubt' equates to moral certainty.
- Inalienable right to property; individual cannot be forced to give up rights to property unless found guilty of a crime which amounts to forfeiture.
- No one can be treated like a criminal unless he/she has been tried and convicted as a criminal.

Criminal justice emerged as an academic discipline in the 1920s. The modern criminal justice system has evolved since ancient times, with new forms of punishment, added rights for offenders and victims, and police reforms. These developments have reflected changing customs, political ideals, and economic conditions. Exile was a common form of punishment in ancient period. For violent crimes, payment to the victim or their family was another common punishment during the middle ages. The criminal justice system consists of law enforcement (police), courts, and corrections which administer punishment for those found guilty. Criminal justice agencies operate within rule of law. When processing the accused through the criminal justice system, government must keep within the framework of laws that protect individual rights.



Enforcement

Historically police were not respected by any community due to their involvement with rampant corruption. The first police force comparable to the present-day police was established in 1667 under King Louis XIV in France. After that the first modern police force was established in 1829 by Sir Robert Peel (commonly said to be the London Metropolitan Police), which promoted the preventive role of police as a deterrent to urban crime and disorder. In the United States, police departments were first established in Boston and New York City in 1838 and in 1844 respectively. The notion that police are primarily concerned with enforcing criminal law was popularized in the 1930s with the rise of the Federal Bureau of Investigation (FBI) as the pre-eminent 'law enforcement agency' in the United States.

The first contact an offender has with the criminal justice system is with the police who make the arrest. Police or law enforcement agencies and officers are empowered to use force and other forms of legal coercion and legal means to effect public and social order. The term is most commonly associated with police departments of a state that are authorized to exercise the police power of that state within a defined legal or territorial area of responsibility. Policing has included an array of activities in different contexts, but the predominant ones are concerned with order maintenance and the provision of services.

Courts

The courts serve as the venue wherein disputes are then settled and justice is administered. With regard to criminal justice, there are a number of critical players in any court setting. These include the judge, prosecutor, and the defense attorney. The judge, or magistrate, is a person knowledgeable in the law whose function is to objectively administrate the legal proceedings and offer a final decision on how a case is disposed of. The prosecutor is the lawyer who brings charges against a criminal. It is the prosecutor's duty to explain to the court what crime was committed and to detail what evidence has been found which incriminates the accused.

A defence attorney counsels the accused on the legal process and, at trial, would attempt to offer a rebuttal to the prosecutor's accusations. It is the defence attorney's duty to present exculpatory evidence and argue on behalf of his client. In modern state, all accused criminals are offered the assistance of a defence attorney. Those who cannot afford a private attorney may be provided with one by the state, though historically the right to a defense attorney has not always been universal.

Truth is decided by which party offers the argument that is more sound and compelling. But entire trial process, whatever the country, is fraught with problems and criticisms. Bias and discrimination form an ever-present threat to an objective decision. Any prejudice on the part of the lawyers, the judge, or jury members threatens to destroy the court's credibility.

Corrections

Offenders are turned over to the correctional authorities from the court system after the accused has been found guilty. Like all other aspects of criminal justice, the administration of punishment has taken many different forms throughout history. Earlier when civilisations lacked the resources necessary to construct and maintain prisons, exile and execution were the primary forms of punishment. The most publicly visible form of punishment in the modern era is the prison. Prisons may serve as detention centers for prisoners before, during, and after trial. Early prisons were used primarily to sequester criminals and little thought was given to living conditions within their walls. This can also been seen as a critical moment in the debate regarding the purpose of punishment.

There are numerous other forms of punishment which are commonly used in conjunction with or in place of prison terms. Monetary fines are one of the oldest forms of punishment still used today. These fines may be paid to the state or to the victims as a form of reparation. Probation and house arrest are also sanctions which seek to limit a person's mobility and him opportunities to commit crimes without actually placing him in a prison setting. Many jurisdictions may require some form of public service as a form of reparation for lesser offenses. Punishment in the prison may serve a variety of purposes. First, and most obviously, the incarceration of criminals removes them from the general population and inhibits their ability to perpetrate further crimes. Many societies also view prison terms as a form of revenge or retribution, and any harm or discomfort the prisoners suffer is 'payback' for the harm they have caused to their victims. A new goal of prison punishments is to offer criminals a chance of rehabilitation. Many modern prisons offer schooling or job training to prisoners as a chance to learn a vocation and thereby earn a legitimate living when they are returned to society. Religious institutions also have a presence in many prisons, with the goal of teaching ethics and instilling a sense of morality in the prisoners.

Execution or capital punishment is still used around the world. Its use is one of the most heavily debated aspects of the criminal justice system. Some societies are willing to use executions as a form of political control, or for relatively minor misdeeds. Other societies reserve execution for only the most sinister and brutal offences. Others still have outlawed the practice entirely, believing the use of execution to be excessively cruel or hypocritical.

'Justice to Common People' is the primary objective of the legal mechanism of any country. But in the present situation the common people are having hardly any hope of getting justice. In the judicial mechanism there are three players, i.e. judge, legal practitioners and the common people; among which the common people are the target group and at the receiving end everywhere. The unspoken law of delays in most courts of many countries is the main roadblock in the way of distributive justice. Pending cases need long time to dispose off. The situation in the subordinate judiciary is more serious, as numerous cases remain pending in the subordinate judiciary. Appeals, adjournments and stay orders etc. are certain complex areas in the subordinate judiciary which must be addressed in order to have a free, fair and timely process of justice.

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LAW *news*

Indian SC lets camera crew film Lok Adalat session

THE judiciary on Saturday took the historic first step towards videographing court proceedings, as often demanded by critics seeking more transparency, by throwing open the doors of its court rooms to TV cameras and print cameramen to record proceedings of 'people's court' dispensing speedy justice.

The judges Chief Justice K G Balakrishnan and Justices Ashok Bhan, Arijit Pasayat and Aftab Alam were without their black robes, sat close to the litigants under the glare of the camera and dispensed justice by thrashing out settlements, an experience unique to the apex court where the cameras are kept 100 metres away from the court rooms.

Is this the first step towards videographing the apex court proceedings? TOI asked the CJI. "You may say so, but the proceedings were not strictly court proceedings though they were held inside the CJI's Court and in Court No 2 of the apex court.

The judges were presiding over the Lok Adalats," said Justice Balakrishnan.

The CJI is not averse to the idea of videorecording the court proceedings. He knows that it is done in several countries mainly for the purpose of maintaining an official record of the proceedings. "The time has not come to allow cameras inside SC proceedings," the CJI said.

He is an optimist though. "Ultimately, time will come when it will be allowed," he said. He feels the time is not ripe for allowing videorecording of proceedings because the judiciary handles several sensitive matters and that the proceedings are not always civilised.

"Sometimes there are embarrassing moments during court hearings. There are so many sensitive matters. And many acrimonious exchanges between lawyers. It will take some time before the courts allowed videorecording of their proceedings," he said.

Justice Balakrishnan, who has initiated many a new step for clearing the huge backlog of cases that slows down the wheels of justice, said the focus was on making the common people in rural areas aware of their rights under existing laws and providing them a helping hand to seek redressal of their grievances.

Does the spate of criticism of lack of transparency, accountability, pendency of cases exasperate him? "I do not feel exasperated at all. There are many challenges before the judiciary. We will do our best to meet them to the best of our ability and it is the litigants who should judge us," he said.

The single important factor delaying quick adjudication of cases is the lack of adequate number of judges and infrastructure, he said. Reminded about his recent remark about the difficulty in filling up the existing vacancies in judges' posts for lower courts, he said most of the states were conducting examinations and exuded confidence that around 2,500 vacant posts would be filled within six months.

Despite the inadequacy of numbers, the judiciary has always risen to the occasion, he said, recalling the prompt service rendered by the judicial officers in earthquake and tsunami-affected states in speedily deciding cases relating to payment of compensation to victims and their families. With setting up of additional family courts and CBI courts, as agreed to by the government, the burden on the lower court judges would reduce considerably, he said.

How does it feel to be judge who has a heavy work load and pittance of a salary?

"The job gives tremendous satisfaction. Moreover, there is no one who would call us in the middle of work to do this or that. There is no tension of pleasing the superiors," the CJI said refusing to comment on the need for increase in salary. dhananjay.mahapatra@timesgroup.com

Source: The Times of India

LAW *opinion*

Supreme Judicial Commission needs readjustment

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THE concept of a Judicial Commission for appointing Judges to the Higher Judiciary is not a new one. The Beijing Statement of Principles on the independence of judiciary in the LAWASIA Region [Beijing Statement] 1995 in its Art. 15 states that: 'In some societies, the appointment of judges, by, with the consent of or after consultation with, a Judicial Service Commission has been seen as a means of ensuring that those chosen as judges are appropriate for the purpose' (Sarkar Ali Akkas, Independence and Accountability of Judiciary: A Critical Review, p. 127). In Bangladesh the demand for an independent Commission to supervise the appointment of Supreme Court judges was even more acute. The vehement politicisation of the appointment process over the past years has seriously undermined the image and efficacy of the Supreme Court. Against this backdrop, the President promulgated 'The Supreme Judicial Commission Ordinance' on March 13, 2008 and it was published in Official Gazette on March 16, 2008.

.....there should be a provision that in case of appointment to the Appellate Division, the seniority should be prime consideration unless there are persuasive reasons for not doing so.

Salient features of the Commission

Composition of the Supreme Judicial Commission: The Commission is a nine-member body consisting of the Chief Justice (The Chair), two senior most Judges of the Appellate Division, two Members of Parliament, one from treasury bench and another from the opposition bench, the Law, Justice and Parliamentary Affaires Minister, the Attorney General, the President of the Supreme Court Bar Association and the Secretary of the Law Ministry (Member Secretary) (s. 3(2)).

Commission Secretariat: Secretariat of the Ministry of Law, Justice and Parliamentary Affaires shall work as the Secretariat of the Commission (s. 3(4)).

Meeting of the Commission: Commission must meet once every six months (s. 4(5)). The Chief Justice is bound to call a meeting if requested by the President and the 'appropriate authority' (s. 4(6)) which is a Ministry, Department or Division assigned in this regard under the Rules of Business, 1996 (s. 2 (b))

Voting: The Commission shall try to take decision by consensus and if not possible, it shall decide by the majority of the members present (s. 4(7)).

Proposal for Appointment: Law, Justice ad Parliamentary Affaires Ministry shall propose minimum three and maximum five names per vacancy for consideration (s. 6(1)) whereas the Commission shall propose two names per vacancy for appointment (s. 6(2)). Names in addition to those proposed by the Ministry may be requested or considered by the Commission (s. 6(3)).

Commission's Recommendation: The President shall 'usually' appoint judges as per the recommendation of the Commission (s. 9(1)). The President may return any recommendation for reconsideration (s. 9(2)). In such case the Commission shall reconsider the recommendation. The amended recommendation or the original one, along with reasons explained, shall be sent back to the President (s. 9(3)). The recommendation of the Commission shall not be binding. The President may ignore the recommendation partially or wholly. If however he ignores the recommendation wholly, he shall assign reasons for that (s. 9(4)).

Submission of recommendation to the President: The Commission shall send its recommendation to the 'appropriate authority' (s. 7) which shall forward that to the President.

Loopholes of the Commission

The Supreme Judicial Commission Ordinance in its present form has grossly undermined the spirit behind the formation of the Commission itself. It has further extended the already extensive role of the executive in various ways. A commentator has termed this as 'Declaration of Independence by the Law Ministry' in the appointment process (Bicharpoti Nioge Ain Montronaloyer Shadinota Ghoshona, Mizanur Rahman Khan, Prothom Alo, March 24, 2008). The key issues are summed up as follows -

- The membership of the Law Minister and Law Secretary, Attorney General (who is usually appointed on political consideration), government party MP gives the ruling party a weighty voice in selection process (four out of nine votes). This is strengthened further by the proviso to s. 4(4) of the Ordinance which provides that the quorum of the Commission's meeting shall be five including the Chief Justice.
- In a meeting called by the Chief Justice upon the request of the 'appropriate authority' (the Chief Justice is bound to call the meeting in such case as per section 4(6)) the Chief Justice along with Law Minister, Law Secretary, ruling party MP and Attorney General may form the quorum and recommend the appointment of an executive sponsored candidate only by the vote of the Law Minister, Law Secretary, Attorney General and ruling party MP since the Commission shall decide by majority vote if the Chief Justice raises a note of dissent (MR Khan, Prothom Alo March 24, 2008).
- The membership of Law Secretary itself is seriously objectionable. In no case the qualification and background of a civil servant admit of his sitting over the judgment of the worth of a Supreme Court judge. Such membership is also an unprecedented one (MR Khan, Prothom Alo March 24, 2008).
- Again the membership of Law Minister, Attorney General, Law Secretary and MPs in the Commission offends the doctrine of separation of powers (Bicharpoti Nioger Udbot Oddadesh (Peculiar Ordinance for appointing Justices), Shahdin Malik, Prothom Alo, March 26, 2008).
- Allowing the Law Ministry to nominate three to five names per vacancy for appointment to the Appellate Division (s. 6(1) and (2)) has put the seniority rule at stake.
- The Law Ministry is given the power to propose the names under s.6 of the Ordinance. Though the Commission may request addition of more names or may consider other names, this scope is practically limited due to executive dominance in the Commission. Now the governing party can have the panel of preferable candidates settled well before the Commission.
- The primacy of the opinion of the Judiciary in selection process remains unrecognized as before. The President may ignore the recommendation of the Commission wholly. Though he is required to put in writing the reasons behind his so doing, there is no express provision for publication of the reasons. So the reasoning may be withheld from public on the excuse of the security of the State or public policy (MR Khan, Prothom Alo, March24, 2008). But the primacy of the Judiciary's opinion in the appointment process is a cornerstone of judicial independence. The Indian Supreme Court in Gupta v. President of India (1982) AIR (SC) 149 and Advocates-on-Record Association v. Union of India (1994) AIR (SC) 268 interpreted the 'consultation' referred to article 124(2) of the Indian Constitution as 'concurrence' (Appointment of Judges in the Supreme Court: Needs a fresh approach, Barrister Moyeen Firozee, 60 DLR (2008), February Issue, Journal p. 10). The Pakistani Supreme Court has done the same in Al-Jehad Trust v Federation of Pakistan, 1997 PLD SC 84 (Judicial Independence: Overview and Country-Level Summaries, Asian Development Bank, October 2003). Article 174 (4) (a), (b), (c) of the Constitution of South Africa also runs in the same line.

Recommendations

To ensure substantial independence and to increase the efficiency of the Commission, the Ordinance should be amended to the following effect

- The membership of the Commission should be limited only to the Chief Justice and his two or three senior most colleagues in the Appellate Division keeping the concept of separation of powers in mind. Obviously, it is important to have some laymen participation in the selection process. Sometimes they play the role of the child in the story of the emperor's new cloth, who cries out, 'But he's got nothing on' (The South African Judicial Service Commission, Carmel Rickard, online: http://www.law.cam.ac.uk/docs/view.php?doc=879). According to the Ordinance, the Commission can invite any person in the meeting of the Commission if it feels necessary (s. 5(8)). The participation of Law Minister, MPs and Senior Advocates in the Commission should be seen from this perspective.
- Office of the Registrar of the Supreme Court should work as the Secretariat of the Commission.
- Instead of having names proposed by the Law Ministry, the Registrar of the Supreme Court pursuant to a formal order of the Chief Justice will make a request to the Commission indicating the number of positions vacant.
- An advertisement should be made inviting application from candidates meeting the requirements of Article 95(2)(c) of the Constitution.
- Written nominations together with written letters of consent to nomination by the candidates as well as candidates' CVs and completed questionnaires or application forms should be sent to the Registrar of the Supreme Court who shall circulate them to members of the Commission.
- A sub-committee may be appointed by the Chair of the Commission to sift through the applications and draw up a shortlist. Only once the Commission has approved the shortlist, the names of those to be interviewed may be published.
- Though the Commission can interview a candidate (s. 5(7)), there is no requirement for a full quorum for that purpose. Interview of short listed candidates should be conducted by the full Commission.
- Intermediary of the 'appropriate authority' in submitting Commission's recommendation to the President should be done away with. Rather the Commission shall submit its recommendation directly to the office of the President.
- Section 9(2) should be amended to provide that the President must advise the Commission, with reasons if any, of the nominees who are unacceptable and any appointment which remains to be made. Section 9(4) should be amended to the effect that the President must make the appointments as per the Commission's recommendation submitted under section 9(3).
- Keeping in mind that starting from 1976, different governments violated seniority more than ten times, there should be a provision that in case of appointment to the Appellate Division, the seniority should be the prime consideration unless there are persuasive reasons for not doing so. This is reasonable in the sense that a High Court Division judge, who has gone through the selection process twice earlier during his appointment as Additional Judge, and during his confirmation, should not be bypassed or denied appointment to the Appellate Division except in the rare case of incapacity or inefficiency.

Concluding remarks

The Caretaker Government is supposed to place diverse issues of reform on the table of upcoming dialogue with the political parties. Presumably ratification of the Ordinances promulgated by it would be a major demand on behalf of the government. Remembering their allergy towards an independent judiciary, the political parties should have no objection, I think, in ratifying such an executive friendly Ordinance for judicial appointment. The Supreme Judicial Commission Ordinance needs immediate amendment.

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