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Need for A New Criminal Procedure Code in India Due to Increasing Crime Rate

by
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I. INTRODUCTION

We often feel that the crime rate in society depends upon various factors, but one of the factors which has never been taken upon serious is the procedural law of the country. As the crime rate in the society is increasing with every passing day, it is very important to find out the reason for the same. Though the punishment is given and it does act as a deterrent but only to a very little extent because there is no certainty or celerity in the punishment given.

In broad terms punishment may be expected to affect deterrence in one of two ways. First, by increasing the certainty of punishment, potential offenders may be deterred by the risk of apprehension. For example, if there is an increase in the number of state troopers patrolling highways on a holiday weekend, some drivers may reduce their speed in order to avoid receiving a ticket. Second, the severity of punishment may influence behaviour if potential offenders weigh the consequences of their actions and conclude that the risks of punishment are too severe. This is part of the logic behind "three strikes", and "truth in sentencing" policies, to utilize the threat of very severe sentences in order to deter some persons from engaging in criminal behaviour.

One problem with deterrence theory is that it assumes that human beings are rational actors who consider the consequences of their behaviour before deciding to commit a crime; however, this is often not the case. For example, half of all state prisoners were under the influence of drugs or alcohol

at the time of their offense[1]. Therefore, it is unlikely that such persons are deterred by either the certainty or severity of punishment because of their temporarily impaired capacity to consider the pros and cons of their actions.

Another means of understanding why deterrence is more limited than often assumed can be seen by considering the dynamics of the criminal justice system. If there was 100% certainty of being apprehended for committing a crime, few people would do so. But since most crimes, including serious ones, do not result in an arrest and conviction, the overall deterrent effect of the certainty of punishment is substantially reduced. Clearly, enhancing the severity of punishment will have little impact on people who do not believe they will be apprehended for their actions.

Economists often come to different conclusions than criminologists on the value of harsher sentences in reducing crime. While criminologists tend to regard various legal threats as the result of a complex and unpredictable process, economists approach the issue along the lines of a rational choice perspective that considers the risk and benefits of engaging in crime; sanctions merely represent the expected price of engaging in criminal behaviour. In critiquing this perspective, Michael Tonry, a leading scholar on crime and punishment, contends that "Such research is incapable of taking into account whether and to what extent purported policy changes are implemented,

whether and to what extent their adoption or implementation is perceived by would-be offenders, and whether and to what extent offenders are susceptible to influence by perceived changes in legal threats. At the very least, macro-level research on deterrent effects should test the null hypothesis of no effect rather than the price theory assumption that offenders' behaviour will change in response to changes in legal threats"[2]. Another problem in assessing deterrence is that in order for sanctions to deter, potential offenders must be aware of sanction risks and consequences before they commit an offense. In this regard, research illustrates that the general public tends to underestimate the severity of sanctions generally imposed.[3] [4] This is not surprising given that members of the public are often unaware of the specifics of sentencing policies. Potential offenders are also unlikely to be aware of modifications to sentencing policies, thus diminishing any deterrent effect. The absence of such data on awareness of punishment risks

makes it difficult to draw conclusions regarding the deterrent effects of sanction levels and prospects. Below we explore these outcomes in greater detail".

Criminological research over several decades and in various nations generally concludes that enhancing the certainty of punishment produces a stronger deterrent effect than increasing the severity of punishment. Key findings in this regard include the following:

The Institute of Criminology at Cambridge University was commissioned by the British Home Office to conduct a review of research on major studies of deterrence. Their 1999 report concluded that "…the studies reviewed do not provide a basis for inferring that increasing the severity of sentences generally is capable of enhancing deterrent effects"[5]. In addition, in reviewing macro level studies that examine offense rates of a specific population, the researchers found than an increased likelihood (certainty) of apprehension and punishment was associated with declining crime rates[6]."

Daniel Nagin and Greg Pogarsky, leading scholars on deterrence, conclude that "punishment certainty is far more consistently found to deter crime than punishment severity, and the extra-legal consequences of crime seem at least as great a deterrent as the legal consequences"[7].

Similar findings are observed in micro-level studies on deterrence that assess the likelihood of individuals engaging in crime. People who perceive that sanctions are more certain tend to be less likely to engage in criminal activity. Scenario-based research using self-reports that examine the effect of certainty of punishment on individual behaviour has shown that as the perceptions of the risk of arrest for petty theft, drunk driving, and tax evasion increases, individuals report they would be less likely to offend.

Researchers have also compared the relative importance of both certainty and severity as dimensions of punishment. In a 2001 study published in the journal *Criminology*, researchers utilized a sample of college students to assess the likelihood of drinking and driving. The authors found that the certainty of punishment was a more robust predictor of deterrence than severity. Increasing the probability of apprehension by 10% was predicted to reduce the likelihood of drunk driving by 3.5%, while the effect of severity eroded when the effects of certainty and severity were combined[8].

Existing evidence does not support any significant public safety benefit of the practice of increasing the severity of sentences by imposing longer prison terms. In fact, research findings imply that increasingly lengthy prison terms are counterproductive. Overall, the evidence indicates that the deterrent effect of lengthy prison sentences would not be substantially diminished if punishments were reduced from their current levels. Thus, policies such as California's Three Strikes law or mandatory minimums that increase imprisonment not only burden state budgets, but also fail to enhance public safety. As a result, such policies are not justifiable based on their ability to deter.

Based upon the existing evidence, both crime and imprisonment can be simultaneously reduced if policy-makers reconsider their overreliance on severity based policies such as long prison sentences. Instead, an evidence-based approach would entail increasing the certainty of punishment by improving the likelihood that criminal behaviour would be detected. Such an approach would also free up resources devoted to incarceration and allow for increased initiatives of prevention and treatment".

Therefore, as it is certain that certainty and celerity plays a major role in creating a deterrence in future offenders, and hence affecting the crime rate in the society. Therefore it is obvious that criminal procedural law has a major role in its association with the crime rate in society. The researcher plans to study the same.

Even after the development of procedural laws in the country, there seems to be a great lacunae in the system as still a lot of cases are pending and a lot of criminals are acquitted because of the laxity in the procedure or loopholes in the procedure. The study aims to pinpoint those loopholes and recommend the amendments which could be made to improve the current situation.

Object of the research will be to critically analyse the current situation, laws and policies and make some suggestions to fill the gap if any.

It seems to be strange that how criminal justice procedure has its impact on crime rate in society. But, it does have a very strong impact in the society. The basic purpose of punishment is to create a deterrent effect i.e. to create a fear among the members of the society that if they would be doing a similar act then, they would be meeting out with the same punishment as that of the offender.

"The theory of deterrence that has developed from the work of Hobbes, Beccaria, and Bentham relies on three individual components: severity, certainty, and celerity. The more severe a punishment, it is thought, the more

likely that a rationally calculating human being will desist from criminal acts. To prevent crime, therefore, criminal law must emphasize penalties to encourage citizens to obey the law. Punishment that is too severe is unjust, and punishment that is not severe enough will not deter criminals from committing crimes. As far as Indian substantive law is concerned, the severity of the punishment is appropriate in most of the crimes and is something which not very much debatable.

Certainty of punishment simply means making sure that punishment takes place whenever a criminal act is committed. Classical theorists such as Beccaria believe that

if individuals know that their undesirable acts will be punished, they will refrain from offending in the future. Moreover, their punishment must be swift in order to deter crime. The closer the application of punishment is to the commission of the offense, the greater the likelihood that offenders will realize that crime does not pay.

In short, deterrence theorists believe that if punishment is severe, certain, and swift, a rational person will measure the gains and losses before engaging in crime and will be deterred from violating the law if the loss is greater than the gain. Classical philosophers thought that certainty is more effective in preventing crimes than the severity of punishment.

Going by the above theories, in order for the punishment to become effective, it has to be severe, certain and quick. As severity depends upon the substantive law, but both certainty and celerity (quickness) completely depends upon the procedural law in a country. But it is difficult to prove the connection between the two since only those offenders not deterred come to the notice of law enforcement. Thus, we may never know why others do not offend.

The study is important as it will point out the flaws in Indian Criminal procedural law and will also study and appreciate the procedural laws of other countries due to which crime rate in those countries is very less as compared to India.

Moreover, our Indian criminal procedural law has been replaced earlier as well when we needed to quicken the procedure. The Criminal Procedure Code, 1861 which was passed by the British Parliament was replaced by Criminal Procedure Code, 1973 after almost 110 years. Now, as the procedure has become too lengthy which is affecting the deterrent effect of punishment, it has now become necessary to amend it again after almost 40 years".

II. MALIMATH COMMITTEE REPORT[9]

The report gave various recommendations of the amendments which could have done in the criminal justice system.

The Government release a paper delineating the genesis of organised crime in India, its international ramifications and its hold over the society, politics and the economy of the country.

Enabling legislative proposals be undertaken speedily to amend domestic laws to conform to the provisions of the UN Convention on Transnational Organised Crime. An inter-Ministerial Standing Committee be constituted to oversee the implementation of the Convention.

Suitable amendments to provisions of the Code of Criminal Procedure, the Indian Penal Code, the Indian Evidence Act and such other relevant laws as required may be made to deal with the dangerous nexus between politicians, bureaucrats and criminals.

A special mechanism be put in place to deal with the cases involving a Central Minister or a State Minister, Members of Parliament and State Assemblies to proceed against them for their involvement.

That the Code of Criminal Procedure provide for attachment, seizure and confiscation of immovable properties on the same lines as available in special laws.

A Central, special legislation be enacted to fight Organised Crime for a uniform and unified legal statute for the entire country.

That in view of legal complexity of such cases, underworld criminals/crimes should be tried by federal courts (to be established), as distinguished from the courts set up by the State Governments.

That Government must ensure that End User Certificate for international sales of arms is not misused (as happened in the Purulia Arms Drop).

The banking laws should be so liberalized as to make transparency the corner-stone of transactions which would help in preventing money laundering since India has become a signatory to the U.N. Convention against Transnational Organised Crime".

That a Federal Law to deal with crimes of inter-state and/or international/transnational ramification be included in List I (Union List) of the Seventh Schedule to the Constitution of India.

A Department of Criminal Justice be established to not only carry out the recommendations of the Committee but also set up a Committee, preferably under an Act of Parliament, to appraise procedural and criminal laws with a view to amend them as and when necessary.

Crime Units comprising dedicated investigators and prosecutors and Special Courts by way of Federal Courts be set up to expeditiously deal with the challenges of 'terrorist and organised' crimes.

A comprehensive and inclusive definition of terrorists acts, disruptive activities and organised crimes be provided in the Indian Penal Code 1860 so that there is no legal vacuum in dealing with terrorists, underworld criminals and their activities after special laws are permitted to lapse as in the case of TADA 1987.

The sunset provision of POTA 2002 must be examined in the light of experiences gained since its enactment and necessary amendments carried out to maintain human rights and civil liberties.

Possession of prohibited automatic or semi-automatic weapons like AK-47, AK-56 Rifles, Machine Guns, etc.) and lethal explosives and devices such as RDX, Landmines detonators, time devices and such other components should be made punishable with a punishment of upto 10 years.

Power of search and seizure be vested in the Intelligence agencies in the areas declared as Disturbed Areas under the relevant laws.

Inspite of well over 70 laws, apart from earlier laws in the Penal Code, the magnitude and variety of Economic Crimes is going at a fast rate. The number of agencies for regulation and investigation have also increased. Yet, the need for rigorous laws and strong regulatory enforcement and investigation agencies cannot be more obvious. The attempts made in the last few decades to legislate in the matter have not been quite successful. Our judicial processes have not been helpful either. It is essential that these crimes are tackled urgently through legislative and other measures and it is for this purpose that the following recommendations are made:"

Sunset provisions should be continued in statutes and these provisions be examined keeping in view the continuing changes in economy and technology. Such statutes should not be allowed to become out-of-date which

can be ensured by comprehensive drafting of those statutes to cover future crimes.

The procedural laws regarding presumption of burden of proof in the case of economic crimes should not be limited to explanation of an accused who must rebut charges conclusively.

Adverse inference should be drawn if violation of accounting procedures are prima facie established and public documents including bank documents, should be deemed to be correct.

Sentences in economic offences should not run concurrently, but consecutively. Fines in these cases should be partly based on seriousness of offence, partly on the ability of the individual/corporation to pay, but ensuring that its deterrence is not lost.

Legislation on proceeds of crime be enacted on the lines of similar legislation in the UK and Ireland. An Asset Recovery Agency at the Federal level and similar agency at the State Levels may be created.

In the past, non-compliance with procedures, healthy norms, and institutional rules has led to financial frauds of enormous proportion. The abdication of responsibility by Regulatory Bodies has also contributed to the perpetuity of frauds. Keeping this in view, it is recommended that Regulatory agencies should at all times be vigilant and launch timely investigation and punish offenders expeditiously.

While *bona fide* or inadvertent irregularities should normally be ignored with appropriate advice for remedial action, the failure of the Regulatory bodies in serious lapses should be viewed adversely by the Central Government.

Most economic crimes are amenable to investigation and prosecution by the existing law and institutions, there are still some economic offenders of such magnitude and complexity that could call for investigation by a group of different kind of specialists.

Therefore, it is recommended that a mechanism by name 'Serious Fraud Office' be established by an Act of Parliament with strong provisions to enable them to investigate and launch prosecution promptly.

To inspire the confidence of the people and ensure autonomy, the Chairman and Members of Serious Fraud Office be appointed for a term of not more than five years following a procedure that itself should inspire confidence, integrity, objectivity and independence.

In a similar manner, State Government must set up Serious Fraud Office, but appointment be made in consultation with the Chairman of the Central Fraud Office to eliminate political influence.

The Committee recommends that the existing Economic Intelligence Units under Ministry of Finance be not only strengthened suitably by induction of specialists, state of-the-art technology and specialised training. To achieve a common preventive strategy for tackling serious economic crimes, it is necessary that a closer co-ordination be maintained between the National Authority, the SFO, the Intelligence Units and the regulatory authorities as also private agencies. They should develop and share intelligence tools and database, which would help investigation and prosecution of cases".

For tackling serious economic offences, it is necessary that our domestic laws are

made compatible with laws of other Countries. Mutual legal assistance, under appropriate Conventions/Treaties/Protocols of the United Nations should be developed for exchange of information of a continuous basis.

It is recommended that to reduce the work of Judges, the responsibility of recovery of assets be given to a newly created Assets Recovery Agency which will deal with not only forfeiture of confiscation on behalf of courts and government departments but also support in certain other type of work.

The practice of appointing serving representatives of regulators on the Board of Directors of financial institutions be discontinued immediately to avoid conflict of interests. To ensure compliance with guidelines of Regulators, the Government may consider appointing independent professionals to represent regulators.

An effective co-ordination mechanism must be introduced between the Government and Regulators to detect suspicious activities in time and take prompt action.

Violations of environmental laws having serious economic and public health consequences must be dealt with effectively and expeditiously.

The Committee recommends the enactment of a law to protect Informers, covering major crimes.

"Government and Judiciary will be well advised to invest in training according to the eight point agenda (set out in the section on 'Training strategy for Reform') for reaping the benefits of criminal justice reforms in reasonable time".

Society changes, so do its values. Crimes are increasing especially with changes in technology. Ad hoc policy making and piecemeal legislation is not the answer. The Committee therefore recommends the following:

That the Government may come out with a policy statement on criminal justice. That a provision be incorporated in the Constitution to provide for a Presidential Commission for periodical review of the functioning of the Criminal Justice System.

III. JUDICIAL SYSTEMS IN US, UK, FRANCE AND INDIA: A COMPARISON[10]

Even within the adversarial systems of trial there is vast difference between the trial in USA, England and India. As far as England and USA are concerned there is jury trial in existence. As regards India, after the enactment of Code of Criminal Procedure, 1973, the trial by jury came to an end. Even regarding the jury trial, there is difference in the approach between USA and UK. As regards USA, where there is prosecutor control over the investigation, many movements are towards inquisitorial approach. As regards allegations against the President the entire investigating power is with the Special Prosecutor.

The submission of no case by the accused or his counsel after the close of the evidence by the prosecution in U.K., resembles the hearing under Sec. 232 Cr.P.C. during the sessions trial in India. Such a procedure is not there after framing of charge in the cases triable by the magistrates.

In USA, there is dual court system such as federal and state. In U.K. even the Supreme Court of United Kingdom has no jurisdiction over the criminal cases from Scotland. After the Crown Prosecution Service was implemented, there is prosecutor control over the investigation to a certain extent. Even though it ensures independence of the prosecuting agency from the police, it has not that much control over the investigation as in the case of USA".

Even though India is following adversarial system of trial, recent movement in India like plea bargaining is a deviation from the conventional Indian method. The power of the Magistrate to monitor the investigation as held by the Hon'ble Supreme Court in *Sakiri Vasu's case*, the concept that the judge is not an Umpire, the broad interpretation of the power of the judge u/s. 165 of Evidence Act etc. are approaches towards an inquisitorial

system. Anyhow, it is entirely different from the inquisitorial system of trial which is followed in France.

Preliminary investigation in the European countries with an inquisitorial system of procedure has remained with the judge of the court of first instance. His extensive powers include hearing of witnesses, interrogation of the accused, inspection on the spot, ordering searches and seizures, apprehension and arrest of the accused to put him in the hands of the law.

The continental procedure has often been criticised for the use of non-confrontative information in the dossier. The criticism is based on the fear that the source of such information can lie in the rack and thumbs-crew techniques, which may be deployed for the purpose. The apprehensions are not illusory. However, the same can be said about the common law countries where despite the protective rules of procedure the police modes of torture are not unknown. In the inquisitorial system, the case diary contains inter alia the first information report which form the basis of the dossier, information received by the police officer in connection with the investigation, reports of inspection of the spot visited, statement of witnesses, any action required to be taken or directions given by a court in the course of the police investigations or the inquiry by the court and any facts ascertained as a result thereof. The case diary is available to the magistrate. This gives him a complete picture of the case before he proceeds to examine the complaint with a view to determining further action, if necessary, by way of summoning the accused, issuing warrants of arrest, and subsequently to decide whether to frame a charge against any person. This procedure is materially different from the one prevailing in English law and procedure. It is true that the courts in India get a previous knowledge of the case, which is not the case under the English law.

In the system of trial in France, even though there is decline in the percentage of cases conducted by a *Judge d'instruction*, still no effective alternative has been found out. In France, the Reform Commission in 2009 recommended abolition of the office of the *judge d'instruction* with the prosecutor taking responsibility for all investigations. But, due to controversy, the proposal was postponed. Still there is doubt about the effective investigation by the prosecutor in case of abolition of the office of *judge d'instruction*".

As regards the plea of guilty, there is vast difference between the system of trial in France and that in the remaining countries of common law jurisdiction.

The procedure of plea bargaining was implemented in France in the year 2004 which is different from that in U.S.A. It is only in respect of cases

where maximum punishment is sentence of imprisonment for 5 years. Even though

there are slight movements in India which indicate inclination towards an inquisitorial system of trial, the prospects of the same seems to be doubtful without having an effective control over the investigating agency. At least prosecutorial control over investigation is warranted with sufficient safeguards. If it is not feasible, at least the independence of the investigative agency from the clutches of the Government requires urgent consideration. The fact that even the Central Bureau of Investigation in India is not an independent agency for the time being is to be remembered in this context. Reforms in the Indian Judicial system that promote movement to find out the truth without prejudice to the right of the accused to a fair trial are to be welcomed".

IV. DETERRENCE THEORY

Because criminal justice policies are sometimes based on the foundations of the deterrence doctrine, debates on the deterrence effect of punishment continue to be waged in criminological research. Programs such as boot camps for teenage offenders and "scared straight" programs continue to rely on the deterrence theory. Across the nation, "get tough" policies are based as well on the actual and threatened incarceration of offenders. In their efforts to have more empirical support, criminologists today are working in the direction of expanding the deterrence concepts from certainty, severity, and celerity to include informal social processes of reward and moral beliefs".

Since some aspects of deterrence and rational choice theories are part of the routine activities theory, deterrence theory has been modified and expanded to include the rational choice perspectives.

In summary, support for deterrence theory is much greater than it has been during the past two decades. However, research demonstrates that contemporary criminal justice policies place more emphasis on the severity of punishment than it places on certainty. Death penalty, longer imprisonments, three-strike laws, mandatory sentencing, and a plethora of other "get tough" policies have not demonstrated greater deterrent effects of punishment than less severe penalties. Indeed, increases in the severity of punishment, rather than reduce crime, may actually increase it. On the other hand, increases in the certainty of apprehension of offenders' conviction and punishment have been found to have possible effects on crime reduction. The current trend toward the use of death penalty in the United States contradicts Beccaria's ideas on certainty and quick punishment".

V. CONCLUSION

In India, we give punishment to the offenders mainly due to our belief in the deterrence theory which states that the punishment given would have a deterrent effect on the offender as well as on the potential offenders as it will create a fear in their mind that they will be meted out with a similar punishment for a similar offense.

But as per Bentham, the deterrence theory of punishment is only successful if the punishment meted out is fulfilling the three relevant components: severity, certainty and celerity. In India, the punishment is severe enough as compared to the crime committed in most of the cases, therefore the researcher assumes that the substantive law needs no changes. But as we all know that there is no certainty and celerity of the punishment which is why the authorities are not able to create a fear in the mind of the offenders as well as potential offenders and the deterrence effect of the

punishment is a failure.

The celerity and certainty of the punishment is completely dependent on the procedural law of the country i.e. Cr.P.C. 1973. Due to the lack of celerity and certainty in the punishment, we can conclude that Cr.P.C. 1973 is a failure and there is a dire need for a new procedural law in the country. For e.g. if one is not able to successfully solve a Maths problem because of some calculation error, then one should not just scribble on the same page but one should simply answer it afresh. With the same analogy, we should not just amend Cr.P.C. but rewrite it.

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[10] Judicial Systems and others, 'Chapter 2 JUDICIAL SYSTEMS IN U.S., U.K., FRANCE AND INDIA : A COMPARISON' 38.