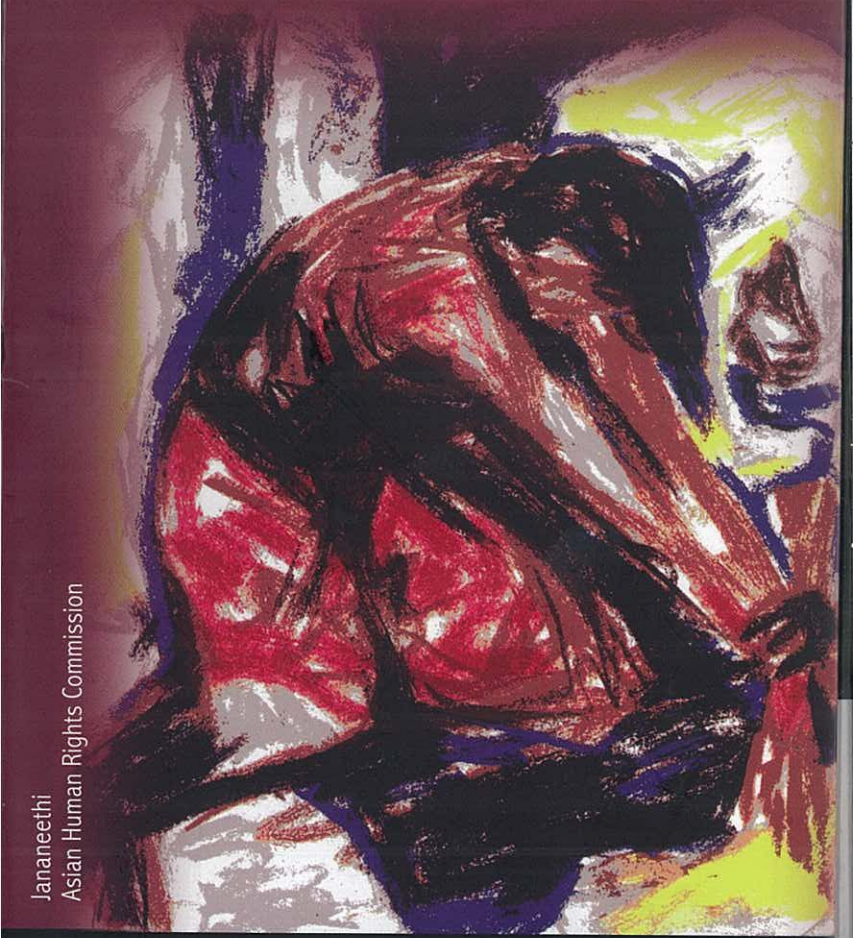
Basil Fernando

Crime and Justice

A critique of the Recommendations by the Committee on Reforms of the Criminal Justice System in India



Jananeethi
Asian Human Rights Commission

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Crime and Justice

Human Rights

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Published by
Jananeethi, Thrissur - 680 001, Kerala, India
Asian Human Rights Commission, Hongkong

First Published by 2003
Copies 1000
Cover :
C.F. John
Printed at St.Mary's, Thrissur, Kerala, India

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Foreword

THE RULE OF LAW is the foundation of a justice system and the soul of a civilized society. Any attempt to dismantle the fabric of the rule of law will eventually crumble the edifice of the Constitutional supremacy and will lead to the enthronement of anarchy. Eternal vigil and fearless debate on justice system in progression, therefore, should be held the essential prerogatives of a responsible citizenship and the democratic health of a society writ large. Every effort to refurbish the criminal justice system from being corrupt and ethically disastrous is indeed laudable.

A critique of the recommendations the Committee on Reforms of the Indian Criminal Justice System by the Asian Human Rights Commission is a welcome move in this route. In his consistently people-centred and judiciously balanced gauging of the document, Mr. Basil Fernando, the Executive Director of the Asian Human Rights Commission has critically examined the latent infringements of human rights throughout the document. Mr.Fernando often dives into the labyrinth of the virulent but implicit violations of human rights in the document and exposes their possible aftermath.

Nevertheless, the author or the publishers do not claim an exhaustive study of the document, word by word. A relentless defender of human rights and civil liberties, Mr.Fernando, and Jananeethi wish to highlight those sections of the impugned document, abounded in serious anomalies, that according to them, will certainly have catastrophic and devastating consequences on the otherwise fragile and unscrupulously encroached human rights milieu in India. Hence our readers are cautioned that only those relevant parts of the recommendations are being examined here and the rest are not dealt with. The numbers, sections, sub-sections etc are, therefore, retained just as in the questionnaire

to help our readership to locate them in the document that is available on the net at http.//www.cjsreformscommittee.org.

Jananeethi places on record its sincere thanks to Mr. Basil Fernando and the Asian Human Rights Commission for initiating a bold discussion on the human rights issues implied in the document. Jananeethi takes pride in publishing Mr. Fernando's responses with a hope that it would invite and facilitate nation-wide discussions at all spheres and would help evolving a national consensus on the Constitutional legitimacy of the recommendations by the Committee. Jananeethi remains obliged to Prof. K.G.Sankara Pillai, Prof.T.R.Venugopalan, Adv. Ms. Jasmine Joseph and Mr. A.B.Prasad for their time, creative involvement and human rights concerns that made this publication possible.

Adv. George Pulikuthiyil
Executive Director,
Jananeethi

Thrissur
12-06-03

OPEN LETTER

Reject the Recommendations of the Committee on Reforms of the Criminal Justice System in India

The Asian Human Rights Commission has today released a detailed statement on how the Government of India plans to undermine the foundations of criminal justice there under the guise of the recommendations of the Committee on Reforms of the Criminal Justice System (AS-17-2003). The statement notes that the "Quest for Truth" proposed by the Committee as the guiding principle of criminal justice in India is nothing more than centuries-old bunk that has served to reinforce, rather than challenge, social inequality and injustice. It also appears to mimic China's "Finding Truth from Facts", which in practice means the denial of fundamental principles of a fair trial.

The “Quest for Truth” violates the Constitution of India by undermining the presumption of innocence. It demands that the accused presents statements of defence prior to prosecution. It waters down the burden of proof from “beyond reasonable doubt” to a “clear and convincing” standard, thereby trivialising criminal procedure and reducing it to the level of civil trials. It permits police control over both criminal investigation and prosecution, by making a police officer the public prosecutor. It incites torture by admitting confessions in trials without safeguards to prevent its use to extract confession. It proposes a state security and surveillance apparatus of unprecedented proportions with frightening consequences. It will totally undermine the role of judges and lawyers, giving police absolute supremacy. It will dehumanise the human being. It will make the police force a much more powerful tool to suppress popular demands and political dissent than it has ever been before. It will impose silence on vast numbers of oppressed, struggling to break free from the inhuman conditions in

which they live, particularly the Dalits, by denying them the only rights they have: to protest, and to shout in court.

In short, the “Quest for Truth” invites the establishment of a draconian police state. It proposes an end to the fundamental rights. Consequently India will return to the Law of Manu, the ruthlessly authoritarian style of rule it suffered for most of its history.

I call on the Government of India to reject the recommendations of the Committee on Reforms of the Criminal Justice System, by signing this open letter and taking all other steps necessary to avert their implementation. The Government of India must do all it can to uphold fair trial principles and the rule of law. Above all, the government must ratify the Convention against Torture and make torture a crime under domestic legislation. By taking such steps it will uphold the principles of the Constitution and the norms of international human rights, rather than mimic the practices of dictators.

A Statement by the
Asian Human Rights Commission – AHRC

The recommendations of the Reforms Committee will throw the Indian criminal justice system back into the dark ages

In November 2000 the Government of India set up the Committee on Reforms of the Criminal Justice System, purportedly to assess fairly and propose changes to the manner in which criminal trials are conducted in India. 2003 April, the true objectives of the Committee have been revealed. A summary of its 158 recommendations shows that despite its smart expression of noble sentiments, the Committee has in fact been intended as a means for the government to attack the very foundations of criminal justice in India, and to give enormous powers to the police.

If the proposal to demolish the fundamental principles of criminal justice in India was initiated by the government itself, it would have been met with great resistance. The Reforms Committee, then, is a neat and carefully crafted vehicle to drive home the government's agenda. If its recommendations are implemented, it will be unnecessary for India to introduce new anti-terrorism laws or emergency legislation: their cumulative effect will far exceed the powers of such regulations. The Asian Human Rights Commission's initial assessment of these recommendations is as follows.

To begin with, the Committee has suggested that the Indian criminal justice system be guided by a "Quest for Truth". The Committee may believes that this is a reasonable proposition, and perhaps even an original one, but the "Quest for Truth" is nothing new to India. Ironically, however, Every humbug politician trying to look pious begins with the popular refrain *Stayam Sivam Sundaram*. Notwithstanding, the inequalities and untruths that continue to

consume India have few parallels in world history. This is because the “Quest for Truth” is de-linked from the search for justice and thus it permits cruel rampant inequality. Now the old ideal is being recalled to undo the system of criminal justice. The “Quest for Truth” also recalls the motto of the Chinese judicial system: “Finding Truth from Facts”. Whereas the Committee is pretending to introduce practices from continental European legal systems it is in fact borrowing the motto and practices of an authoritarian system that only now is developing new and less primitive judicial methods.

To achieve this “truth”, the Reforms Committee has in fact launched an assault on the Constitution of India, without making mention of it. Article 20(3) of the Constitution ensures that an accused not be compelled to act as a witness for the prosecution. The Committee is effectively proposing that this article of the Constitution should be discarded, as it recommends the accused to present a statement of defence at the beginning of the trial. This is like

what is done in China, although there the right of the accused to remain silent is not recognised at all. This clever proposal aims to reduce criminal trial to civil trial standards. In India, where the poor lack access to competent lawyers, it will mean a growth in criminal convictions without adequate defence. The number of innocent persons languishing in jail due to ignorance and lack of resources will increase immeasurably.

The Committee has also proposed a change to the burden of proof, from “proof beyond reasonable doubt” to a “clear and convincing” standard of proof. The Committee has justified its decision on the grounds that “beyond reasonable doubt” is too high a standard for prosecutors to meet. In fact, this proposal is to undo the presumption of innocence itself. Lower standards of proof and the presumption of innocence cannot coexist. This was observed by Basil Fernando, Executive Director of the Asian Human Rights Commission, in his response to the questionnaire distributed by the Committee in 2002: “To effect such a

change goes against the very fundamentals of criminal trial, which deal with the life and liberty of individuals... [It] would trivialise criminal justice. A direct outcome would be the further degeneration of the police investigators and prosecutors. It would open the road for miscarriages of justice..." (Published in *article 2*, vol. 1, no. 2, April 2002, online at *[http://www.article2.org/mainfile.php/0102/26]*). Once again, this is nothing other than a devious attack on one of the pillars of criminal justice.

Another remarkable suggestion of the committee is that an officer at the rank of Director General of Police be appointed as Director of Prosecution. This appointment would virtually end the separation of the criminal investigation and prosecution functions, as both would be in the hands of the police. Civilian control of the system by way of an independent public prosecutor would be lost. Such a model is typical not of more developed systems but rather more primitive ones.

On the other hand, the Reforms Committee has refrained from making

recommendations in a number of important areas, including the use of torture by the police. India has not ratified the UN Convention against Torture and nor has it made torture an offence, unlike several other Asian counties, despite strong recommendations by the National Human Rights Commission. Meanwhile, the police continues to be responsible for endemic torture and extrajudicial killing. Although the Committee has acknowledged this situation, it has failed to make a specific corresponding recommendation. Under these circumstances its proposal that confessions be made admissible by amending section 25 of the Evidence Ordinance is a dangerous incitement of further torture. That such a statement would have to be made to an officer not below the rank of Superintendent of Police, or recorded on tape, is no safeguard without legal provisions to prohibit statements taken by means of torture.

The Committee is also silent about the extreme corruption prevalent among the police. It has ignored suggestions that an

independent commission to monitor corruption be established. Again, this means that its recommendations to strengthen the position of police investigation through a National Security Commission and State Security Commission is dangerous. Together with a proposed Apex Criminal Intelligence Bureau, such agencies could become a surveillance system threatening all independent organisations. Moreover, in the hands of a state inimical to the interests of some specific groups in society, they could prove lethal. The Gujarat massacre is not long passed, and the threat of such state-managed violence yet looms large over millions in India.

What is needed now is not more freedom for the policing agencies to encourage and commit further atrocities. Independent bodies to monitor and control the police are the need of the hour.

In conclusion, if these recommendations are implemented, the consequences will be that:

1. The judiciary and lawyers will be subordinated to the police. Judges hold an important place in society due to the high standards they uphold. Once they become mere arbiters of civil-style cases, they will also be viewed as nothing more than that. Judges—and the lawyers presenting cases—will lose respect, to the short-term benefit of the executive.
2. By applying civil law standards to criminal trials, the value of life and liberty will be reduced to same position as that of property. In India, where society has been built upon graded inequalities, the removal of the little recognition of human equality given by the law can only have very sad consequences. The vast number of Indians, and particularly more discriminated groups—such as women, tribal groups, low castes and Dalits—will lose the small gains they have made since independence.
3. Powerful groups will use the police as a tool without fear of challenge. Given the already naked use of power by some

political groups associated with the ruling party, it is frightening to think of what could happen next.

4. Ultimately, degenerating criminal justice will in turn affect the basic democratic system enshrined in the Constitution. The electoral system will be weakened, as opposition groups will face new and unprecedented police powers. Again, those who represent minority interests will experience the gravest of problems.

Therefore, the Asian Human Rights Commission urges all democratic-minded persons to do whatever they can to expose and resist the attack on criminal justice and democracy contained in the recommendations of the Committee on Reforms of the Criminal Justice System. These are not forward-looking reforms but a carefully concealed attempt to throw India back to the primitive Law of Manu. There must be full and open public debate on the Committee's findings.

THE RESPONSE

With a view to revamping its criminal justice system, which is on the verge of collapse, the Indian Ministry of Home Affairs has constituted the Committee on Reforms of the Criminal Justice System. The committee has prepared a questionnaire to elicit suggestions and recommendations from knowledgeable persons. On behalf of the Asian Human Rights Commission (AHRC) I submitted answers to the Committee, of which the following are a selection.

PART A :
LAW AND JUSTICE

Section I:
Adversarial System & Right of Silence

1.1 ***Do you think that the adversarial system as followed in our Country has contributed to satisfactory dispensation of criminal justice? If not what changes do you suggest?***

The unsatisfactory state of criminal justice in India has nothing to with the adversarial system. The reason for the unsatisfactory situation lies elsewhere. India's social structure and attitudes are very much conditioned by entrenched habits of discrimination. There are various forms of discrimination, among which one may mention caste discrimination, discrimination of indigenous (tribal) people, and minorities. Discrimination weighs heavily on the justice system. This has created severe obstacles on the development

The shortcomings of Indian Criminal Justice System is not because of its adversarial nature but of incompetent policing, prosecution and rampant corruption

of India's justice system in general and the criminal justice system in particular. The investigative machinery regarding crimes is terribly crude, both in terms of attitudes as well as facilities. Further, the justice that one may get is also associated with poverty. The level of poverty in India is so appalling that the poor cannot afford justice. Beside this, the management of the criminal justice system is inefficient and obsolete. Poor human resources and technical resources affect every area of the system.

The adversarial system in India which is a backdrop of the British rule had brought changes in the pre-colonial justice systems. The new system could not incorporate the history and culture of the nation and to an extend failed to prove its merits.

The effect of abandoning the adversarial system will be negative for the people who

have been less powerful in society throughout Indian history. Under the pretext of abandoning the adversarial system what seems to be underway is an effort to in fact abandon the more progressive aspects of the law, for the purpose of getting more easy convictions.

Hong Kong has an adversarial system. There is no move to change it. Instead much has been done to improve it, by creating better police and a system of control of corruption by means of an independent investigative body.

1.2 Do you favour investigation of cases being done under the supervision of the Judge, as in the inquisitorial system in France?

First it should be noted that many aspects of the inquisitorial system have come under heavy criticism in the European Court of Human Rights, and also from many French

jurists. Now the tendency is to modify the inquisitorial system by incorporating many aspects of the adversarial system.

It is naïve to think that the civil law system merely involves having an inquiring judge. That system has had its own historical development and one of its major advantages is its mechanism to guide police investigators to act legally. That system requires a very highly developed police force. If India could develop such police, then there would be no need for any change because the adversarial system itself would function well with such an advanced policing system.

Rather than changing the system all together it is better to strengthen the present one.

- Inquisitorial System (IS) itself is under criticism in the places of inception.
- I S requires a highly developed police structure.
- IS is more expensive as it involves two judges; one inquiring and other adjudicating/trial.
- Getting in tune with a whole new system has its own intricacy.

It must also be noted that civil law system would be more expensive. In the place of one judge required for a court, there would

have to be two—one inquiring judge and a trial judge—doubling the problem of finding good magistrates in India.

Therefore, it would be better to seriously address the defects of operation in the adversarial system in a comprehensive manner and improve its real operation. This would mean improving the policing system, prosecution system and judicial system—particularly in the lower courts and those excising criminal jurisdiction.

1.3 In the system presently followed, the accused enjoys the "right of silence", which often comes in the way of search for truth in criminal cases. Should this be changed requiring the accused to disclose his defence, once the prosecution case/charge levelled is made known to him?

The rule against self incrimination is the corner stone of personal liberty and forms

part of the basic structure of the Constitution of India. The duty of the prosecution is to prove guilt beyond reasonable doubt and not to gain upon the defence of the accused. The shift of burden of proof on the accused will create an unfavourable circumstance. Given the Indian condition of lack of accessibility to competent lawyers the situation can cast a shadow on personal liberty. The coveted principle of 'presumption of innocence' will be dethroned to the detriment of the marginalised.

- The presumption of innocence will be diluted.
- Availing efficient legal advice for all the accused is a mirage in Indian situation.
- Criminal trial will reduce to the standard of civil trial .

Demanding a defence beforehand will also reduce criminal trials to civil standards and blur the difference between the two. Given the fact that a person's life and liberty is at risk, reducing criminal trials to the same level as civil ones is immoral. To me this suggestion implies a great departure from the principles and practices of criminal law.

SECTION II:
BURDEN OF PROOF

2.1 Do you favour proof on the basis of preponderance of probabilities as in civil cases, instead of proof beyond reasonable doubt?

Importing preponderance of probabilities principles to criminal procedure will equate life and liberty with property and will lead to miscarriage of justice

I am absolutely opposed to it. To effect such a change goes against the very fundamentals of criminal trial, which deal with the life and liberty of individuals. Civil disputes deal mainly with property matters and criminal trials deal with the life and liberty of people. If a person is to be sentenced to death on the preponderance of probabilities that is a mockery of justice. The same applies to imprisonment. Such a change to the standard of proof would trivialise criminal justice. A direct outcome would be the further degeneration of the police investigators and prosecutors.

2.2 If no presumption of innocence or guilt of the accused is drawn, do you think that such neutrality would affect unfairly or lead to failure of justice?

The presumption of innocence is a foundation stone of Indian criminal justice system; any move to change the same will be retracting from civilization

Of course it would destroy the very fabric of the criminal justice system. As the presumption of innocence of the accused was developed after a long struggle against very barbaric practices, not long after the removal of this presumption the system would surely fall back into such black practices.

2.3 In some laws, the burden of proof is placed on the defence by raising certain rebuttable presumptions against the accused. Do you think that similar presumptions should be raised in respect of other offences? If yes, please indicate such offences.

Proving guilty by efficient investigation is the duty cast on police and prosecution. Gaining from the defense by way of presumption is not something to revere

The practice of placing rebuttable presumptions should be limited as much as possible, especially in India (South Asia) where the police are yet to establish a reputation for acting in a fair manner.

SECTION III:
PLEA-BARGAINING/ SETTLEMENT WITHOUT TRAIL/ COMPOUNDING OF OFFENCES

3.1 Do you favour introduction of the concept of 'plea-bargaining' as is practised in USA?

While the concept of plea bargaining itself need not be rejected, some preconditions should be set out, such as representation by competent counsel. Given

the social context of India, where many poorer persons become accused, they can be pressurised into bargaining even when they have had nothing to with the offence. In such circumstances the threat is that, "You may lose the case and if you fight you'll be punished severely—so why not bargain for lesser punishment?" Thus a legally weak position of an accused without competent counsel can be exploited, even when the prosecution is aware that its case is a weak one.

Plea-bargaining will lead to justice only if there is competent representation in court for the accused.
An element of threat is possible to occuy the place of justice in Indian state of affairs

3.2 Do you favour the scheme of "Concessional treatment for offenders who on their own initiative choose to plead guilty without any bargaining" as recommended by the Law Commission of India in Chapter IX of its One Hundred and Forty Second report?

The Indian circumstance can offer scapegoats in a situation of pleading guilty

This statement merely restates a practice that has existed for a long time. It is also supported by such considerations as self-remorse and regret for wrongdoing. However, even in these instances it is the duty of the judge to ensure that the accused is in fact acting freely and is well advised legally. Again, in the Indian social context this must be a primary consideration.

3.3 Do you favour enlarging the number of offences compoundable with or without the permission of the court? If yes, indicate such offences.

Compounding should be limited according to the nature of the case not a blanket premise

This should not be allowed for serious crimes. Particularly, the compounding of offences should not allowed for crimes

where offenders are state officers: for example, acts of torture by police.

3.4 Do you favour incorporating a general provision in the Criminal Procedure Code (Cr. P. C.), to the effect that unless otherwise expressly provided, all offences under special enactment shall be compoundable?

Compounding of offence can belittle the trial

No. The general principle should be that compounding of offences is not allowed unless specifically stated otherwise. Once again what is at stake is the very nature of criminal trial. Criminal trial will be trivialized if all criminal actions can be compounded. It will also encourage further corruption where police in particular will try to make greater profit. This will also adversely affect offenses against persons belonging to specially protected groups, such as women and “low castes”. Further, it will

affect the judicial mentality, which for the purpose of easy disposal of cases will develop bargaining habits instead of judicial habits. The same will happen also to the quality of lawyers.

3.5 Do you favour enlarging the scope of Sec. 206 of Cr. P. C., by making it applicable to all offences where penalty prescribed is fine with or without imprisonment?

Punishment limiting to fine will create separate standards for the affluent and poor

This should become a general principle. Threat of imprisonment is necessary for prevention of crime. More serious crimes, if proved, must result in imprisonment. Payment of fines is not enough. Payment of fines as the only punishment will also benefit the rich not the poor. Even now many people go to prison for non-payment of fines. Finally, the special offences for protection

of weaker social groups will become meaningless without the threat of possible imprisonment.

SECTION IV: SENTENCES AND SENTENCING

4.1 The predominant global view, including international conventions, appears to favour the abolition of death penalty. The Supreme Court of India has ruled that death penalty is not unconstitutional, and may be imposed in rarest of rare cases. Do you favour the abolition of death penalty? If so please indicate the reasons.

Yes. Life imprisonment exists as an alternative and that is quite enough punishment. Further, more and more cases are

Abolition of death penalty gains more importance read together with the miscarriage of justice often occurring

coming to light that indicate miscarriage of justice in a significant number of cases ending in death sentences. Discovery of a miscarriage of justice after execution is futile for the person concerned and his or her family. And further, the people who end up with death sentences are mostly the poor.

4.2 In the absence of a statutory definition for "imprisonment for life" the said expression has "imprisonment for life" to mean imprisonment till death, as is in vogue in several countries?

The legal definition should leave much discretion to the judges in determining imprisonment till death, subject to an absolute fixed minimum term. However, it is also necessary that in cases of serious

For life imprisonment, minimum term could be specified and extension should be on the discretion of the judge acting within a set of guide-lines

crimes the term of imprisonment should not be subjected to easy reductions. In the future, when offences such as crimes against humanity are likely to enter into criminal codes, it will be necessary that a difference in punishment be maintained depending on the nature and the gravity of crimes. A set of guidelines can be developed to this end.

4.3 The punishments provided under Sec. 53 of Indian Penal Code (IPC) are death, imprisonment for life, imprisonment—rigorous or simple, forfeiture of property and fine. In many countries, there are other types of punishments, including rendering community service. What new forms of punishment do you suggest for various offences?

For less serious crimes, offenders who are not hardened criminals with demonstrably bad records, and young

State should develop more creative rehabilitation programs rather than sticking on to the traditional modes of punishments which tends to forget correction and rehabilitation

offenders, community service is a better form of punishment. Working for voluntary organisations dealing with humanitarian issues is even better, and orders to follow compulsory courses on humanism conducted by approved groups can also be useful and may contribute to rehabilitation. The state can develop more creative rehabilitation programs which can combine basic moral and ethical education plus skill training.

Where offences are against specially protected groups such as women and "low castes", convicts can be ordered to go through special orientation courses, and where possible to do community service related to the victims of this social group. This can help to reduce the prejudice levels and improve tolerance.

PART B: INSTITUTIONS

KINDLY NOTE that my comments on this section are subject to overall consideration that the improvement of the institutions of justice—courts, police and prosecutors—depends on weeding out corruption and the ensuring that the system really works. Improvement of this or that part of a system in order to avoid existing problems will only lead to the reappearance of the problem under the new arrangement.

The matters you have in your questions under this part all speak to one overall concern: CONFIDENCE IN THE SYSTEM. All parties—judges, police, prosecutors and the public—need to have real confidence. For this it is necessary to break the demoralization that presently pervades all these segments of society, particularly among the public.

Combating corruption and fair functioning of the system is elementary for every institution

To illustrate how confidence can be built, I offer the example of Hong Kong, where the system has really been improved. In Hong Kong improvement was based on the development of an outside agency—outside the police in particular—which deals with corruption in a very comprehensive manner.

Below I include a brief history of Hong Kong's Independent Commission Against Corruption (ICAC), taken from its website, at [http://www.icac.org.hk].

The Independent Commission Against Corruption was set up in 1974. Since its inception, the Commission adopts a three-pronged approach of investigation, prevention and education to fight corruption. With the support of the Government and the community, Hong Kong has now become one of the least corrupt places in the world.

But how serious was the problem of corruption in Hong Kong before the ICAC was established? What was the reason for setting up an independent body to fight

graft? Let us now take a look at the history of the setting up of the ICAC.

Hong Kong was in a state of rapid change in the sixties and seventies. The massive growth in population and the fast expansion of the manufacturing industry accelerated the pace of social and economic development. The Government, while maintaining social order and delivering the bare essentials in housing and other services, was unable to satisfy the insatiable needs of the exploding population. This provided a fertile environment for the unscrupulous. In order to earn a living and secure the services which they needed the public was forced to adopt the "backdoor route". "Tea money", "black money", "hell money" - whatever the phrase - became not only well-known to many Hong Kong people, but accepted with resignation as a necessary evil.

At that time, the problem of corruption was very serious in the public sector. Vivid examples included ambulance attendants

demanding tea money before picking up a sick person and firemen soliciting water money before they would turn on the hoses to put out a fire. Even hospital amahs asked for "tips" before they gave patients a bedpan or a glass of water. Offering bribes to the right officials was also necessary for the application of public housing, schooling and other public services. Corruption was particularly serious in the Police Force. Corrupt police officers covered up vice, gambling and drug activities. Social law and order was under threat. Many in the community had fallen victims to corruption. And yet, they swallowed their anger.

Corruption had no doubt become a major social problem in Hong Kong. But the Government seemed powerless to deal with it. The community patience was running thin and more and more people began to express their anger at the Government's lukewarm attitude towards tackling the

problem. In the early seventies, a new and potent force of public opinion emerged. People pressed incessantly for the Government to take decisive action to fight graft. Public resentment escalated to new heights when a corrupt expatriate police officer under investigation succeeded in fleeing Hong Kong. The case provided the straw that broke the camel's back...

The Independent Commission Against Corruption (ICAC) was established in February 1974. Since its inception, the Commission has been committed to fighting corruption with the three-pronged approach of investigation, prevention and education.

SECTION VI:
TRIAL/COURTS/JUDGES

6.2 Do you think that the present level of equipment and experience of the Judges of the Criminal Courts is adequate and satisfactory? If not, suggest appropriate improvements.

The knowledge, insight, sensibility, sensitivity and approach of the judges are considered to be the pivotal point in justice administration

What is required at the moment is the change of mentality. Judges must be able to use modern communication and administration methods. However, for that they must feel that the system they are leading is really working. Above all they need higher morale. It is a common principle that every profession needs improvement. How you bring it about is another matter.

6.3 In the present system, Judicial Magistrates First Class are recruited from amongst Lawyers having about four years of practice at the Bar, do you think that this experience is inadequate?

Recruitment to the post of judges should be efficient and objective

If proper managerial training can be provided, four years experience should be enough. But, how do you measure experience? There must be objective measurement by way of tests. Some serious tests can be developed to go into all areas of ability before recruitment.

6.16 Witnesses are often subject to serious threats to life/ property by the accused or their supporters. What measures do you suggest to protect the witnesses?

A reinforcement of the police system can answer the threats towards witnesses

The causes of such threats can be removed only by strong anti-corruption measures as suggested above. Systematic threats and intimidation take place due to the weaknesses of the system. The people who intimidate feel that law enforcement is weak and they can do what they like. Without improving the overall system it is not possible to change such a mentality.

6.20 Do you subscribe to the view that Judges should be accountable? If so, suggest measures?

An efficient system, which will not challenge the fundamental principles of immunity of judges, will be beneficial while thinking in terms of accountability

Immunity of Judges for actions taken in official capacity and in good faith is a concomitant part of the independence of judiciary. At the same time a Judge

who lives in the society open to the 'pulls and pressures of the cosmos' cannot be left unaccounted too. To strike a via media is therefore the task. An independent and efficient body should be devised to monitor the judiciary.

SECTION VII: INVESTIGATION

7.2 What measures do you suggest to improve the quality of investigation by the Police?

Accountability maintains the quality of investigation

The quality of investigations will depend on accountability. Improving police is a very hard nut to crack. A strong anti-corruption strategy, completely outside police control, is essential. Besides there should be education and training.

7.3 Should there be a cadre of Investigating Officers devoted exclusively to investigation of cases? If so, what should be their qualification, and rank?

Special cadres for investigation could be favorable if controlled through strong and independent

There should be such a group. But this group must be under supervision of officers of higher rank. In the long run, without a strong anti–corruption agency such a group can turn out to be very dangerous. When crime is organised by the police, it is this type of special group that becomes its hard core. The control of police must be through an outside source, such as the ICAC in Hong Kong.

7.5 It is becoming more and more difficult to obtain reliable oral evidence. The use of modern scientific evidence has therefore become indispensable for proof. But

unfortunately, the forensic science techniques available in our country are neither adequate nor up-to-date. What measures do you think should be taken to improve the situation?

Developing the branch of forensic science is essential

Introduction of forensic facilities of the highest quality is essential. Funds must be provided for this; in fact, they are a priority. Attempts to improve the system will fail if more adequate forensic facilities are not provided.

7.17 Do you favour the confessional statements made by the accused during investigation being video recorded in the presence of an officer not below the rank of Dy. S. P. [Deputy Superintendent]?

Till the whole system goes through thorough reform it would be dangerous to

The counter question of reliability of superior officers should be answered first. Higher rank does not substitute integrity always

do this. Police act as a group. High-ranking officers will only be used to give credibility. The problem as it stands now is that many high-ranking people are not reliable. If they were reliable, the system would not be bad. Their subordinates would not do wrong things. If the subordinates are not reliable then the superiors too are not reliable. Higher rank often means higher craftiness and not higher morality

PART C
SECTION VIII: PROSECUTION

8.1 Do you think that the level of prosecution is far from satisfactory? If so, what improvements do you suggest?

In AHRC's understanding of criminal justice in Asian countries, the weakest link in the system is the prosecution. We have

particularly studied Sri Lanka, where this weakness is very obvious. There we have been making recommendations for changes during the last few years. The major defect lies in not incorporating the changes that have taken place in common law countries during the 20th century and instead keeping the same practices that the British introduced in the 19th Century, which the British have since changed in their own country. I believe this is also the case in India. In our view it is more appropriate to adopt these changes rather than trying to adopt aspects of the inquisitorial system. The adversarial system has improved its prosecution systems during the last century. The prosecutors' branch in the UK, US and Australia has developed more sophisticated prosecution strategies. One area of improvement is that investigators must keep prosecutors informed of cases from the very start, and be guided by their legal advice. To achieve

Prosecution is the weakest link in most of the Asian countries. Strengthening the prosecutor's desk is essential but the modus need not be a shift to inquisitorial system

that, the prosecutors' branch has spread competent prosecutors throughout all parts of the judicial system in these countries. The central body provides guidelines and supervises the work. This way the excesses of investigators can be prevented and negligence addressed. Thus, bringing criminals before courts becomes a joint responsibility of prosecutors as well as investigators. Hence the improvements of these common law jurisdictions must be studied and adopted.

8.2 Do you agree that Prosecutors are often appointed on political and other irrelevant considerations and not on merits? If yes, what measures do you suggest to ensure appointment on merit of competent Lawyers as Prosecutors?

The presence of political influence is a common perception. A real alternative to that is the ICAC-type of strategy suggested

above. Without such an alternative there will be no change, as better people will find that they are not allowed to work professionally by others motivated by different factors. The recruitment of better persons must be accompanied by serious reforms to deal with corruption.

The political influence in appointment of prosecutors is detrimental to the system

8.11 What in your opinion are good and proper grounds for withdrawal from prosecution?

A prosecution case should be filed only when there is a likelihood of a successful prosecution. Thus, in principle, there can be no grounds for withdrawal. However, a settlement arrived at in court or in a manner acceptable in law may be a ground for withdrawal. Withdrawal at will only shows that the

Withdrawing prosecution should have strict mandates, as every prosecution is expected to be a successful prosecution

prosecution should not have been undertaken at all. The prosecutors owe serious explanations if they are to withdraw a prosecution.

8.13 Are you in favour of notifying the victim before granting permission to withdraw from the prosecution, and to give him an opportunity, to continue the prosecution, if he so desires?

Victim's rights should be protected

Absolutely. At all stages the prosecution must keep the victims aware of all that is happening to their cases. Victims rights must not be taken away by the prosecutors. The last word on these issues must be left to the victim.

PART D: GENERAL

10.9 Protection of Human Rights of the Citizens is one of the important responsibilities of the Criminal Justice System. Do you think that the performance of the Criminal Justice System in protecting Human Rights is satisfactory? If not, suggest improvements.

Protection of human right of the citizen should be a cardinal responsibility of criminal justice system

It is not satisfactory at all. Systemic problems must be corrected by addressing them in a decisive way and introducing an ICAC-type institution. Meanwhile:

Legal redress must be provided to victims of human rights violations.

India must ratify the Convention Against Torture.

Torture must be made an offence with serious punishment provided to offenders.

Human rights claims must receive priority in courts.

More compensation must be granted to victims.

Violators should be debarred from the civil service.

10.10 Do you think that the existing laws dealing with crimes against women, children, Dalits and the disadvantaged persons do not adequately safeguard their interests? If yes, suggest appropriate ammendments.

Implementation of existing law together with correct enforcement and fortification by additional law are necessary in the areas of crimes against women, children, *dalits* and the marginalized

There need to more improvements. Details can be provided later. The

most important aspect is the implementation of existing laws. For example, there are many laws relating to Dalits but they are hardly implemented. The reasons for non-implementation should be studied. One obvious reason is the attitudes of the law enforcement agencies. Radical change is needed in this area.

10.24 What measures do you suggest to employ information technology for improving the functional efficiency of administration of the Criminal Justice System?

Tapping the development of information technology is the need of the hour

ALL aspects of the criminal justice system must be revolutionized by the introduction of computers, data processing, web-sites and other communication systems. Advice of experts must be sought. A whole new section in the justice system must be established to this end.

10.25 If there are any aspects not covered by the above questions, feel free to offer your suggestions.

It is an overhauling that is necessary not just patchworks

My feeling is that the questions must be reworked to provide greater emphasis on overall fundamental changes than small changes here and there. What is needed is an overarching strategy for improvement of the criminal justice system. In that I consider the following most important:

Address corruption.

Change the prosecution system.

Radically change the communication system.

PROPOSED CRIMINAL JUSTICE REFORMS WILL DESTROY DALIT RIGHTS

The Committee on Reforms of Criminal Justice System presented its Report to Mr. L.K.Advani the Deputy Prime Minister of India on 21 of April 2003. The recommendations made by the Committee will remove all the safeguards available in the Indian Criminal law to protect the Civil Liberties: They include, virtual undermining of the presumption of innocence; abandoning the proof beyond reasonable doubt to a lesser standard of proof; abandoning criminal trial and adopting a civil arbitration approach, abandoning the right of silence of the accused, admissibility of confessions in trials and the appointment of a police officer as a Director General of Public Prosecutions. The total impact of all this is a draconian police state.

The worst affected will be, the Dalits, the indigenous people and the minorities. The rich and the powerful have always enjoyed absolute impunity. The organisation of Dalits struggling to liberate themselves will have to pay a very heavy price. Bondage and torture will be easily revived, with no effective response to tyranny. The Upper Caste right wing organisations which have gained tremendous power in recent times, will now also have the complete backing of the police. Following words from the novel by Arundhati Roy “God of Small Things” is grim reminder of what lies ahead; “They heard the thud of wood on flesh. Boot on bone. On teeth. The muffled grunt when a stomach is kicked in. The muted crunch of skull on cement. The gurgle of blood on a man’s breath when his lung is torn by the jagged end of a broken rib. Blue-lipped and dinner-plate-eyed, they watched, mesmerized by something that they sensed but didn’t understand: the absence of caprice in what the policemen did. The abyss where anger should have been; the sober, steady brutality, the economy of it all.”

The Dalit movement must take up the fight to see that these recommendations will never be implemented. A huge campaign to compel the Indian Government to ratify the Convention against Torture and to make Torture a Crime Punishable with serious penal consequences is highly essential to resist the fascist agenda.

BRIEF SUMMARY OF THE MAIN RECOMMENDATIONS OF THE COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM

Though the Committee on Reforms of Criminal Justice System was constituted by the Government vide its notification dated 24.11.2000, the Committee became functional only from 1.6.2001 when it was provided with the office and staff. The Report was finalised within 22 months.

Crimes are increasing rapidly and new types of crimes are proliferating. There is huge pendency of criminal cases in the Country. As per the figures for 2000 published by the National Crime Record Bureau, there were 49,21,710 criminal cases under the IPC pending at the end of the year 2000. During that year only 9,33,181 cases were disposed of. So far as criminal cases under the special local laws are concerned, 36,49,230 cases were pending at the end of 2000 out of which only 25,18,475 cases were disposed of during that year. In many Session's Courts innumerable serious cases are pending for trial for more than 15 years. The rate of conviction of cases under the IPC during the year 2000 is 41.8%. The rate of conviction of serious crimes is much lower. The rate of conviction in countries like USA, Australia, Singapore, France, Germany, Japan is more than 90%. Criminal Justice System is virtually collapsing under its own weight. As it is slow, inefficient, ineffective and costly people are losing confidence in the System. The System that is followed in India was inherited from the Colonial rulers more than 150 years back. Over the years the system has proved grossly inadequate to meet the new challenges. Realising the seriousness of the problem, the Government of India, Ministry of Home Affairs constituted the Committee to recommend measures to revamp the Criminal Justice System. It was called upon to examine the fundamental principles governing the system. The

Committee has made many as 158 recommendations in its Report. A brief summary:

Quest for truth

The Committee felt that the ultimate objective of the system is to render justice. Justice should ideally be founded on Truth. Hence the Committee has recommended that "Quest for Truth" shall be the guiding star of the entire Criminal Justice System. The duty of every one is to actively pursue it. For this the court shall be empowered to summon and examine any necessary person as a witness and to issue relevant directions to the Investigating Officers to assist the court in its search for truth. The Committee has recommended conferment of inherent power on every criminal court which is presently restricted to the

High Court. The Courts, the police and the prosecution have to play a dynamic and proactive role in search for truth.

Search for truth and Role of Accused

Without affecting the precious right of the accused under Article 20(3) of the Constitution (not to be compelled to be a witness against himself) the Committee has suggested empowering the court to question the accused during trial with the object of ascertaining truth and to draw appropriate inferences including adverse inference if the accused refuses to answer.

Accused to file defence statement

To ensure fairness in trial it is recommended that the prosecution should serve a statement on the accused containing all relevant particulars about the alleged crime and on charge being framed, the accused shall be required to file

a defence statement meeting the allegations against him. The accused who wants to claim the benefit of any general or special exception should plead the same, failing which he shall be precluded from claiming benefit of the same. Allegations which are admitted or not denied are not required to be proved.

Standard of Proof

It is a fundamental principle of criminal jurisprudence that the accused is presumed to be innocent and the burden of proving that the accused is guilty is on the prosecution. So tar as standard of proof is concerned, it is governed by the judicial precedents that the standard in criminal cases shall be "proof beyond reasonable doubt". The Committee has come to the conclusion that this places a very unreasonable burden on the prosecution. In Continental countries the standard of proof is much lower namely "preponderance of probabilities". The Committee has recommended that standard of "proof beyond reasonable doubt" should be done away with and in its place a standard higher than 'preponderance of probabilities' and lower than 'proof beyond reasonable doubt' namely 'clear and convincing' standard of proof should be statutorily prescribed.

Focus on justice to victims

The Committee felt that the Criminal justice system does not adequately focus on justice to victim. It is therefore recommended that the victim should be given the right to be impleded as party in criminal cases involving serious offences punishable with impris-

onment for 7 years and above to enable him to participate in the trial. It is further recommended that a law should be enacted to provide reasonable compensation to the victim. As the victims are often subjected to serious threats it is recommended that a law should be enacted to provide adequate protection to them.

Better Investigation

So far as investigation is concerned it has made several recommendations to improve professionalism and efficiency of the Investigating Officers. Proper use of modern techniques provided by Forensic Science and involvement of forensic scientists from the inception of investigation is recommended. In order to improve efficiency, the Committee has endorsed the recommendations of the National Police

Separation of investigation from L& O

Commission that investigating wing should be separated from Law and Order functions and deal exclusively with investigating work. To insulate the investigating agency from political and other influences and to ensure fair treatment to them the Committee has recommended constitution of National Security Commission and State Security Commission on the lines suggested by the National Police Commission.

Security Commission

These measures would ensure a high level of credibility to the investigating offices. On that basis the Committee has recommended that the statements of witnesses examined during investigation should be recorded and got signed by the witnesses and made admissible in evidence by suitably amending Sections 161 and 162 of the Cr.P.C etc. The Com-

Admissibility of statemeants & confession

mittee has recommended amendment of Section 25 of the Evidence Act to provide recording of confession by an officer of the rank of Superintendent of Police or above with simultaneous audio/video recording and to render it admissible as evidence on the lines of Section 32 of POTA 2002.

All offences to be Registered & investigated

The distinction between cognisable and non-cognisable offence shall be done away with, thereby requiring the police officer to register and investigate every crime that is reported to him.

New Police Act Crime Intelligence Bureau

The Committee has also endorsed the recommendations of the National Police Commission for a new Police Act. It has recommended setting up of an Apex Criminal Intelligence Bureau for collection, collation

and dissemination of criminal intelligence.

No arrest for minor offences

The Committee has recommended that no arrest shall be made in cases where fine is the only or an alternate punishment. In cases where punishment is less than 7 years arrest can be made only under an order of the court.

For better prosecution

To achieve independence, efficiency, better co-ordination and supervision, the Committee has recommended that an officer of the rank of Director General of Police should be appointed as Director of Prosecution by the Government in consultation with the Advocate General to function under the general guidance of the Advocate General.

The Committee felt that specialisation in criminal law will contribute to expedition and

Need for specialisation

improvement in the quality of justice. Therefore it has recommended creation of permanent criminal benches in the Supreme Court and High Courts to be presided over by judges specialised in criminal work.

For better discipline

For ensuring discipline and better code of conduct the Committee has recommended conferment of certain powers on the Chief Justice on the lines of the US Judicial Council Reforms and Judicial Conduct and Disability Act 1980.

More cases for summary trial

To speed up the trial of cases involving less serious offences, it is recommended that all cases in which the punishment prescribed is 3 years or below should be tried summarily with power to the Magistrate to award punishment up to 3 years. It is further recommended that every Magistrate

shall have the power to try summarily.

More petty offences

Section 206 which prescribes the procedure for dealing with 'petty offences' is recommended to be liberalised.

Witnesses – Rights and obligations

The Committee has recommended that witnesses should be treated with due dignity and courtesy and be provided with facilities for their seating, resting, toilet, drinking water etc. The rates of travelling and other allowances should be reviewed and arrangements should be made for prompt payment. As witnesses involved in serious cases are often subjected to threats, the Committee has recommended enactment of a law for giving protection to the witnesses.

As a large number of witnesses gives false evidence in the

court, the Committee has recommended a summary procedure for trial and enhancement in. It is further recommended that before the evidence of the witnesses is recorded the judge should caution the witness that it is his duty to tell the truth and if the court finds that he is telling lie in the court is punishable.

Arrears eradication

The Committee has recommended an Arrears Eradication Scheme on the lines of the Fast Track Courts scheme to deal with arrears of cases pending for more than 2 years. For effective implementation of the scheme it is recommended that a retired judge of the High Court proficient in criminal work and known for quick disposal of cases should be incharge of this work.

The Committee has recommended amendment of the Penal Law to increase the fine amount.

Increase in fine

Sentence higher than Life Imprisonment

The Committee has recommended sentence of imprisonment of life without commutation, remission should be added as an alternative sentence.

Save innocent child from Prison

As it is wrong to inflict punishment on an innocent child by its remaining with the mother who is imprisoned, the Committee has recommended that when a pregnant woman or a woman who has a child below 7 years is sentenced to a term of imprisonment that sentence should be carried by directing her to remain under house arrest. The Committee has also recommended community service for a specified time sentence in default of payment of fine.

Sentencing guidelines

As there is no uniformity and consistency in the matter of imposing sentence, the Committee has recommended creation of a statutory Committee to prescribe guidelines in the matter.

Settlement of cases

The Committee has recommended implementation of the recommendations of the Law Commission in regard to the settlement of cases without trial so that more number of cases can be settled.

Offences against women

The Committee has recommended modification of section 498-A to the effect that the offence should be made bailable and compoundable.

No death penalty for Rape

The Committee is not in favour of imposing death penalty for the offence of rape for in its opinion the rapists may kill the victim. Instead, the Commit-

tee has recommended sentence of imprisonment for life without commutation or remission which is higher than the punishment of imprisonment for life now prescribed by the statute.

Liberalising S. 125 of Cr. P. C

The Committee has recommended that a woman who is living with the man like his wife for a reasonably long period also be entitled to the benefit of maintenance under S.125 of the Cr.PC.

Non-penile penetration to be a new offence

As several forms of non-penile penetration are not adequately punishable under present law the Committee recommended creation of a separate offence prescribing punishment on the lines of S.376 of the IPC.

Sensitising Magistrates

The Committee has recommended special training to Magistrates in regard to trial

of cases of rape and other sexual offences to instil in them sensitivity to the feelings, image, dignity and reputation of the victims.

Organised crime, Terrorism & Federal Crime

The Committee recommended enactment of a federal law to deal effectively with organised crime and terrorism. It has recommended amendment of the domestic law to conform to UN Convention Transnational Organised crime. The Committee has recommended a federal law to deal with crimes of inter-State and/or International /Transnational ramification by including them in List 1 of the Seventh Schedule of the Constitution. The Committee has recommended that the Nodal Group recommended by the Vohra Committee be given the status of a National Authority with legal frame-work with

adequate powers including powers to freeze accounts of the suspects/accused etc and to attach their property.

Economic Crime

Several measures have been recommended to effectively deal with growing menace of economic crimes. With the emergence and complexity of giant industries and the capitalist modern economic system, economic crimes have risen in numbers, size and complexity. A strong, quick and fair disposal of economic crimes with sufficient protection for the weaker parties will help reduce the rigors of the market economy. The peculiar problem as created by the proliferation of crimes involving finance and drugs with possible connections to organised crime terrorism can be dealt

with only by new laws and new procedures. Apart from laws, equally important is to put in place specialized investigation and prosecution teams to handle complicated cases of fraud. Regulation and regulators institutions need to be appropriately strengthened with clear demarcation of regulatory functions and non-regulatory activities. The Committee has recommended legislation on proceeds of crime on the lines of similar legislation in the UK and Ireland and also creation of Asset Recovery Agency at the federal level. The Committee has recommended establishment of a mechanism by name "Serious Fraud Office" by an Act of Parliament with adequate power to investigate and launch prosecution with utmost speed.

The Committee has recommended creation of Asset Recovery Agency to deal with forfeiture, confiscation etc. on behalf of courts and Govt. departments. The Committee has recommended that serving representatives or regulators should not be appointed on the Board of Directors of financial institutions to avoid conflict of interests.

Creation of Asset Recovery Agency

The Committee has recommended that violation of environmental laws which has serious economic and public health consequences should be dealt with effectively and expeditiously. The Committee has also recommended enactment of a law to protect informers, covering all kinds of major crimes.

Training

For the purpose of improving the quality of performance of

all the functionaries of the Criminal Justice System, the Committee has recommended training should be adopted as an important strategy.

Vision for the future

The Committee has recommended that a provision should be made in the Constitution for appointment of Presidential Commission to periodically review the functioning of the Criminal Justice System. There is need for the Govt. to come out with a policy statement on criminal justice and in particular implementation of the Committee's recommendations

"No cause is more worthy of sensitive soul's superlative concern than the cause of human rights which, do remember, are not mere legal titles. They are the quintessence of human justice, the conscience of global jurisprudence. They are holistic and make a person human in his dignity and divinity. Deny them and you diminish human status to that of a brute"

Justice V.R.Krishna Iyer
The Dialectics & Dynamics of Human Rights in India

Crime and Justice

Basil Fernando

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