NEED OF THE HOUR: REFORMING THE INDIAN CRIMINAL JUSTICE SYSTEM

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ABSTRACT
What profit the society if for it to escape the iron shackles of a felon, it has to surrender to the dreadful and inefficacious criminal justice system. In the current state of India’s criminal justice system, arrests number in the millions, jails are overcrowded, largely with undertrials, and courts are swamped with outstanding cases. In addition, the various flaws in the substantive and procedural legislation have blinded our justice delivery system, often amounting to illegal detentions and extra-judicial killings. Furthermore, the legal process takes time and is often directed towards the offender's interests and rights rather than the victims. The present criminal justice system is plagued with various defects and loopholes rendering it inefficient in providing swift and efficient justice and ensuring the certainty of punishment for criminals. The necessity therefore is to bring systematic reforms in various aspects of the criminal justice system and offer a reformed look that not only maintains and protects the rule of law but also questions the power imbalances in the system, elsewise the exercise will only be restricted to beautifying the facades.

INTRODUCTION AND BACKGROUND
Criminal Law is one of the most fundamental branches of law as it can have a climacteric impact upon the lives of all affected individuals in the society. A crime is not only a wrong against an individual, rather it is one against the entire society, as it creates a sense of fear which adversely

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judders the societal conscience and stability. Therefore, striking a balance between the interests of society and that of the individual is of paramount importance. The chief purpose of a criminal justice system is to instill faith and cohesion in the society by ensuring that the rules and the criminal procedure adhere to the Constitutional principles of justice, fairness, a moral conscience, equality, and non-arbitrariness.

The Indian Penal Code, 1860\(^2\), the Criminal Procedure Code, 1973\(^3\) and the Indian Evidence Act, 1872\(^4\) form the bedrock of India’s Criminal Justice System. These legislations have imperial roots and are often the replication of British laws. It is palpable that society has evolved dynamically since then, with new rights and ideals being recognized every day, however, these laws have remained largely static in comparison.

Although the Indian Criminal Justice System has undergone numerous crucial amendments so as to adapt to evolving social, economic, and technological changes over time, yet these amendments have proven to be grossly inadequate in creating a vigorous criminal administration system that is endowed to deal with the inimitable problems of the contemporary world. Moreover, the stakeholders have expressed obstinacy over time, to adopt a slew of other recommendations made by the government’s various committees, and thus, these proposals and recommendations are never implemented, thereby rendering the system - outdated.

It is manifest that a criminal justice system cannot be completely foolproof or flawless because the morals and ideals of the society vary over time, i.e., what was once a felony, might not be a crime later, and vice versa. However, when by dint of these loopholes and flaws, the criminal justice system becomes futile and inefficient, then it gives rise to an urgent need for reform.

The formation of the Vohra Committee in 1993, was India’s first effort at reforming the criminal justice system, wherein the committee highlighted the criminalization of politics and the nexus between terrorists, politicians, and bureaucrats.\(^5\) Subsequently in 2000, the government constituted a panel headed by Hon’ble Justice V.S. Malimath, to propose amendments to the existing century-
old criminal justice system. The Malimath Committee submitted its recommendations on reforms in criminal law in 2003, however, the suggestions were never accepted.

In this article, we aim to address the multifarious facets of the Indian Criminal Justice System wherein there exists a need for meaningful, effective, and efficient changes to secure the protection of individuals, communities, and the nation, while still prioritizing the fundamental ideals of justice, integrity, and intrinsic worth of an individual. These aspects may not be exhaustive or comprehensive, but should be a major concern of the committee when making the recommendations.

**DISCREPANCIES IN THE CRIMINAL JUSTICE SYSTEM**

1. **The Ineptness of Investigation Proceedings:**

The goal of the Criminal Justice System is to deliver public justice, convict felons, and ensure that the trial is precise and prompt. India chose to follow the common law-oriented ‘adversarial’ system of criminal justice administration, over the other given and accepted criminal justice systems of the world, i.e. ‘adversarial’ and ‘inquisitorial’ systems. Hence, in the ‘adversarial' system of criminal justice administration, the judge assumes a passive role, similar to that of a referee in a football game, i.e. they have no interference at the pre-trial stage, and the investigative arena is solely the realm of police and investigating authorities, which play a critical part in a criminal prosecution, serving as a link in the quest for justice. The investigating agencies have a major responsibility under the law of the land to follow the legislative mandate and maintain the banner of the "rule of law." Any compromise or dereliction in any way would be very costly to the rule of law and, most specifically, to justice.

In India, the shrinking conviction rate has emboldened the offenders, leading to an apparent rise in cases of violence. The deferral and its momentous consequences erode the public’s confidence
in the criminal justice system, causing it to exacerbate steadily. Even though, as per the recently published National Crime Records Bureau (NCRB) data of 2018\textsuperscript{12}, the average conviction rate rose to 48.8\% from 38.5\% percent in 2012\textsuperscript{13}, this rate is still rather poor. One cardinal reason for the poor conviction rate is the ineptness of the police and other allied agencies in investigation activities.\textsuperscript{14} Police often fail to investigate crimes without causing delay, resulting in degradation of the crime scene and evanescence of evidence. Moreover, the failure to enforce the laws that govern the collection of evidence often jeopardizes cases, and failure or reluctance in adopting cutting-edge forensic technology and resources weakens evidence processing. The primary reasons for the diminishing investigating skills of the police are both intrinsic to the organization and embedded in the regime's languor, or can it be said to be antagonism, as well as political parties' apathy. Although police recruitment deserves to be scrutinized, a shortage of officers puts the organization and its staff under pressure and tension, leaving little time for them to attend annual refreshers to keep their skills and experience up to date.\textsuperscript{15} And on the other hand, the politicization of the police as a result of abuse of power by most political parties has resulted in low morale among police officers and bureaucratic degeneration.\textsuperscript{16}

A classic whodunit in May 2008, wherein a 14-year-old girl and a servant were murdered,\textsuperscript{17} very much proved that a nihilist and sinful mob mentality prevails in the world's largest democracy. The true adroitness of investigating agencies and their scientific support systems were tested, and, it is distressing to say that it failed miserably. The parents of the victim, who had lost their only child, were incarcerated for over nine years, for being possible suspects of her murder.\textsuperscript{18} It is a source of rage and sadness that the nation's system, which runs on the backs of hard-working taxpayers, treats them too callously? The police made a mockery of the case, if one can gather newspaper clippings and television videos from the time, it can be seen how our police force excels


\textsuperscript{14} Id. at 12


\textsuperscript{16} Id. at 14


\textsuperscript{18} Dr. Rajesh Talwar and Another v. Central Bureau of Investigation, 2013 (82) ACC 303
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at fabricating half-truths and distortions out of other people's suffering, and how the gullible media serves as the police's court jester.\(^{19}\) It is past time for our nation to wake up and take a hard and critical look at every aspect of our country's system for dealing with violence, bringing criminals to justice, and administering justice to its people.

Thus, it is essential to bring major reforms for the betterment of the investigating system, i.e. introduction of a system that is an infusion of characteristics of the continental inquisitorial system in the adversarial system inherited from the British tradition. The former is best prepared to seek truth as the investigation is overseen by a Judge, as Judges are assigned a proactive role to give direction to investigating officers and prosecution agencies in areas of inquiry, and leading evidence with the goal of hunting for the truth and focusing on justice for the victims, resulting in an increase in the conviction rate. Whereas, the latter guarantees a fair trial, and in particular, justice to the convicted. This suggestion would undoubtedly take a long time to implement, but then Rome too was not built in a day. Moreover, police training, especially at the cutting-edge level, must be tailored to teach recruits about democratic standards that must be followed when policing a plural society like India. Oversight mechanisms must be established in such a way that the police are held accountable to the law and the public they represent, rather than their political masters. This will not only result in restoring the true spirit – to tend to the law of land, rather than to any powerful master one is obedient to and work with, but also, the ‘lollipop' of rewards in the name of promotions and transfers will fade out.

2. **Inefficient usage of Forensic Technology:**

There has been rapid progress in forensic science as a result of advances in science and technology. Medical and forensic evidence is widely acknowledged as playing a critical part in assisting courts of law in reaching logical conclusions, as it provides the investigating agencies with invaluable insights, and reduces the risk involved. Although the use of forensic evidence has recently witnessed a spike in the judicial system, however, one can see the limited usage of the same as our investigation system is primarily predicated upon circumstantial evidence and eyewitness testimony.\(^{20}\) Forensic evidence in India is accounted only if it conforms with all other evidence on

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\(^{19}\) The Wire, *supra* note 14.

record\textsuperscript{21}, elsewise they are just considered to be mere opinions and hold little to no value in the eyes of law. Thus, it is pertinent to say that India's colonial-era criminal justice system leaves little room for the inclusion of forensic evidence.

It is unfortunate that due to a lack of certain provisions and a reluctance to establish procedures, resources, equipment, and visibility in this region, the growth of investigation in India has been hampered, and such neglect towards forensic evidence leads to the insinuation of innocent people. In its 239th report, the Law Commission of India stated that the poor and incompetent use of scientific procedures, a lack of needed competency, and a significant reliance on oral testimony throughout the inquiry have resulted in the risk of criminal cases in India.\textsuperscript{22}

Doubtlessly, unlike traditional approaches such as eye-witness testimony or circumstantial evidence, forensic evidence like DNA profiling facilitates experimental analysis and offers accurate, simple, and definitive proofs.\textsuperscript{23} Furthermore, courts all over the world have not only recognized the accuracy and admissibility of forensic and scientific evidence, particularly DNA, but have also encouraged it,\textsuperscript{24} but, they have also appreciated its probative value, and have understood the importance of forensic evidence as a facilitator in bringing a criminal prosecution to a conclusion.\textsuperscript{25} Furthermore, the use of forensic techniques and scientific technologies aid law enforcement authorities in cases related to rape, kidnapping, sexual assaults, and other crimes where the accused often benefits from a lack of evidence and gets acquitted.\textsuperscript{26} Almost every facet of society operates on the assumption that there can be errors in decision-making, but, in cases of criminal trials, the consequences of errors are life-threatening. Hence, given the advancements in forensic science and the deplorable state of criminal justice delivery in India, it is beyond time to broaden our investigation's reach and methods. It is the need of the moment, that certain reforms

\textsuperscript{21} Khushboo Enterprises v. Forest Range Officer, AIR 1994 SC 120.
\textsuperscript{25} *Id.* at 23
\textsuperscript{26} Law Commission of India, *supra* note 21.
are brought in regarding protocols, infrastructure advancement, and other necessary specialties to ensure that forensic evidence is used efficiently in our criminal investigation system.

There is no gainsaying that in our country, competency in performing post-mortem and forensic investigations is almost non-existent. The doctors who administer post-mortem in the hospitals of our mofussil cities, and whose findings determine the fate of our criminal cases, are woefully underqualified. Therefore, some degree of a standard must be implemented, protocols must be established for procedures to be followed for experiments and tests to be performed, facilities and infrastructure must be built, and laboratories must be encouraged to pursue innovation and study in the field of forensic sciences and criminal justice. Moreover, forensic science should be taught in law and medical schools, and students should be encouraged to pursue careers in the profession. The government must take action to raise public consciousness about the role of forensic science in the criminal justice system. The advancement of science and technology, as well as the value of such evidence, must be taught to police, investigation officers, detectives, and scientists.

3. Ineffectual Police System:

Regimes come and go, and each new party and leadership bring their new chapter to India's political past. However, India’s khaki tales keep repeating the same old story – hackneyed, brutal, and sad, both for the general public and for the rank-and-file police. The British had a negative impression of the Indian Police System, as they deemed Indian police to be "all but worthless in the avoidance of crime and unfortunately ineffective in the investigation of crime; unscrupulous in the exercising of power with a generalized reputation for corruption and injustice." The Indian Police Commission reviewed the operation of the police in India at the turn of the 20th Century and discovered that the police were widely viewed as incompetent,

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27 Law Commission of India, supra note 21.
30 National Crime Records Bureau, supra note 11.
31 Vibhuti Narain Rai, We have a brutal and oppressive police because British masters designed it as such, NATIONAL HERALD (18.01.2020), https://www.nationalheraldindia.com/opinion/we-have-a-brutal-and-oppressive-police-because-british-masters-designed-it-as-such (Last Visited: 18.07.2021).
corrupt, and tyrannical. The commission found that the police force in the country was in disarray, the crimes were widespread, and that this resulted in significant harm to the public and tarnishment of the government.  

The National Police Commission further added that the powers of arrest, search, seizure, and institution of criminal cases are stages in an executive police action that incorporate a wide range of opportunities for wrongdoing by police officers of various levels, especially at the organizational level, resulting in citizen abuse. Moreover, The National Police Commission, in its third report on the efficiency of the police power of arrest in India, stated that none of the major sources of police corruption was the power of arrest. “If the protector becomes the predator, civilized society will cease to exist.”

Mr. M N Venkatachaliah, a former Chief Justice of India, had once highlighted that 60% of all the arrests in India are superfluous and without any justification. A considerable percentage of those that are guilty go unpunished, whereas, many innocent civilians are held as undertrial detainees without any pretext or explanation. Also, there is a myriad of large-scale arbitrary detentions that occur on a routine basis and are not recorded. Moreover, plenty of people withered in jails as undertrials, or remand prisoners, or unable to find sureties even after the bail is issued, remain in jails for periods longer than their full sentence for the crimes they were accused of committing. The system takes years to provide justice and has lost its effectiveness in deterring felons. There is a lack of coordination between the judiciary, prosecutors, and police, and this is a poor reflection on the criminal justice system of our country.

“Nothing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts a deeper wound in our constitutional culture than a state official running berserk regardless of human rights.” Since the police are the most recognizable representation of state control and are vested with broad powers to use force to protect people's lives and liberties, thus, if Custodial Violence is perpetrated by those who are meant to be the people's protectors,

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33 Id. at 31
under the shield of police uniform and jurisdiction inside the four walls of a police station, the victim is completely powerless, and it is a tremendous breach of his fundamental rights. “Custodial torture is a naked violation of human dignity and degradation destroys, to a very large extent, the individual personality; it is calculated as an assault on human dignity and when human dignity is wounded, civilization takes a step backward.”38 The foulest violations of civil rights frequently occur during the course of an interrogation when officers use third-degree methods, as the police routinely use barbaric and unfair tactics to extract confessions, fabricate evidence to frame innocent people, use third-degree methods to brutalize suspects, torment the victim's family, and engage in extrajudicial killings.39 Custodial violence is not a recent problem in India; it has always been a major issue whenever the criminal justice system is discussed. When state authorities seize control of the law and police officers transform into jurors, judges, and executioners, there is no distinction between an encounter and an incarcerated homicide. And thus, such state-sanctioned killings often go unchallenged and become standard institution procedure. Deaths in police custody and encounters are common, and the fact that the bulk of the victims are from the poorer parts of society, as a result of third-degree methods and flagrant violations of citizens' human rights and is alarming to the right-thinking citizens.40 Therefore, basic human rights, including the right to a dignified life, which is the bedrock of a civilized society, should be at the heart of how law enforcement agencies operate. The Constitution of India, under Article 2141, guarantees every individual right to live with human dignity, which also includes within itself a guarantee against torture and assault by the state or its functionaries.42 Further, Article 2243 of the Constitution, guarantees immunity from arrest and imprisonment and declares that no person arrested shall be held in jail without being told of the reasons for their arrest and that the person so arrested and held in detention must be brought before the nearest magistrate within 24 hours of their arrest, minus travel time from the place of arrest to the Judicial Magistrate's court. Moreover, the law under Article 20(3)44 of the Constitution, states that a person who has been convicted cannot be

41 India Const. art. 21.
42 People's Union for Civil Liberties and another v. State of Maharashtra and others, 2014 (10) SCC 635.
43 India Const. art. 22
44 India Const. art. 20, cl. (3)
forced to testify against himself. These provisions act as a shield for the citizens to defend their life and personal liberties from unjustified state assault. Numerous other laws, under the Constitutional Guarantee, aim to protect a person's liberty, independence, and fundamental rights. Moreover, the Universal Declaration of Human Rights in 1948 stipulated in Article 5 that "No one shall be subject to torture or cruel, inhumane or degrading treatment or punishment."\(^{45}\) Despite these paramount provisions, pious declarations, and multifarious orders of the Supreme Court, the exercise of arbitrary authority of the police and abuse of power by police while executing arrests or while interrogating criminals at any point in the investigation is unremitting.\(^{46}\) Thus, if the government itself breaks the law, it loses its moral power and invites disorder. Therefore, the police serve as a humane institution at the behest of the public, as the deprivation of fundamental liberty of an individual is a serious matter, and since an arrest and incarceration will do irreparable damage to a person’s integrity and self-esteem, no arrest should be made on a casual basis or only on simple allegations of crime, or just because it is lawful for a police officer to do so. The existence of the power of arrest is one thing and the justification for its exercise is another. Only once a fair judgement has been reached after an investigation into the authenticity and bona fides of a complaint, as well as reasonable confidence in all parties' culpability and the need for arrest, may an arrest be made.\(^{47}\) Further, any sort of custodial abuse, extrajudicial murders, mistaken encounters, are all unacceptable in a civilized society and they undermine the rule of law, which demands that the executive’s authority be derived from the law while still being limited by it. Therefore, to discourage custodial abuse, the state must make it clear that the use of third-degree tactics against people in detention will not be tolerated, and that anyone who commits such crimes will face immediate deterrent action. Also, it is important to educate police officers at all levels on the importance of civil rights and to make it known that extralegal tactics are ineffective. Furthermore, it will be beneficial and efficient to set up adequate machinery for the contemporaneous monitoring and reporting of all arrest and detention proceedings to increase transparency and accountability.\(^{48}\) Moreover, besides the constitutional and statutory safeguards, certain other guidelines safeguarding the rights and dignity of the arrestee were laid down by the

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\(^{45}\) The Universal Declaration of Human Rights, Article 5. (1948)


\(^{48}\) DK Basu v. Government of West Bengal (1997 (1) SCC 416)
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Supreme Court as preventive measures, in D.K. Basu vs State of West Bengal (1997). These guidelines should be strictly adhered to, and in case of failure to comply with these provisions, the culprit department in addition to departmental action would also be subjected to contempt of court charges. In addition to this, there should be an imperative judicial inquiry in each case of custodial death, custodial rape, or hurt.

4. Justice Delayed is Justice Denied:

In a criminal justice system, the foremost prerequisite is that a victim receives justice, and more importantly, on time. The Indian criminal justice system is notorious for this particular feature of delayed justice, which essentially defeats the intent of the entire trial, if not completely, at least partially. It is inconceivable to call a trial fair if it is not concluded promptly, as an inordinate and unnecessary delay in deciding legal cases inevitably results in defeating the ends of justice.

If there is no veritable rationale for the events, an undue delay in issuing the verdict is itself prejudiced to the suspected felon. Moreover, none can fathom the anxieties and frustrations of an ingenious victim who approaches to seek asylum from the courts to obtain justice, as he is the worst affected by such delay, because it is impossible for him to calculate when the so-called justice will arrive, if at all. Furthermore, delayed justice has become a prodigious cause of rampant corruption in the country. Many politicians are enamored of their ministerial posts, despite there being a slew of cases pending against them.

Indubitably, one of the greatest obstacles that our country is facing in the 21st century is ensuring timely justice. It is appropriate to state that human and economic growth is hindered if the state fails to make justice available to its people.

The Indian judiciary plays an important role in the criminal justice system by promoting the administration of justice, but the unremitting and over-increasing case backlogs and judicial vacancies were impeding the aqueduct to delivery of justice. The average length of a trial under the Indian judicial system is 6 years, which is often prolonged by dragging the matter to the

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49 Id. at 47
51 Dr. Justice V.S. Malimath, Committee on Reforms of Criminal Justice System, Need for Reform of Criminal Justice System, MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA (2003)
Supreme Court. The huge pendency of cases has been regarded as an infraction of the "right to a speedy trial" as part of the "right to life and liberty" under Article 21 of the Constitution.

The reasons for the backlog are multifold. In India, judicial vacancy is the leading cause of the increasing pendency of cases, as there are an estimated 32 million lawsuits in arrears, with an average of 20 million new cases being filed per year. In its 120th survey, published in 1987, the Law Commission recommended that a ratio of 50 judges per million people be retained. According to figures published by the Ministry of Law and Justice in 2019 for debate in Parliament, the current judge to population ratio is 20 judges per million citizens. Furthermore, the courts in this country take far too many vacations per year, the Supreme Court usually sits for 176-190 working days a year, the high court for 210 days, and the district courts for 245 days a year, with the remaining half-year designated as vacation/holidays. In terms of interest and need, such lengthy vacations and holidays are no longer necessary.

It is incomprehensible how much harm our country would endure, at the very least from an ethical and moral standpoint, as a result of the delays in resolving the cases. Therefore, it is beyond time for us to formulate a concrete strategy to dwindle down and gradually annihilate this vicious cycle of arrears and delays, and to retain the confidence of the people in the credibility and ability of our system. In an ideal world, such deadly lacuna should not persist.

Filling the judicial vacancy, followed by specialization of courts and judges, is a likely solution to the huge issue of pendency cases and delayed justice. In its study, the Malimath Committee on Criminal Law Changes proposed that specialized criminal law benches would help in the early resolution of cases since a judge who specializes in criminal law would take less time to absorb


53 Hussainara Khatoon and Others v. Home Secretary State of Bihar 1979 SCR (3) 532.


and assess the evidence and deliver a judgement.\textsuperscript{58} However, the paucity of judges to preside over such specialized benches at the lower judiciary makes it difficult to establish them. As a result, specialized benches are still a pipe dream in some cases, when even formal trials are impractical. Therefore, to promote justice, a push for filling the vacancies at the lower level is an imperative prerequisite. Although criminal cases account for 28\% of all pending matters in high courts, they account for 72.11 percent in the lower judiciary, indicating the need to improve the lower judiciary to deal with the backlog of criminal cases.\textsuperscript{59} Thus, the administration must carefully evaluate the proposals and ensure that vacancies are filled as soon as possible, allowing the specialist benches to be formed.

At this juncture, it is critical that, in addition to filling vacancies, the adoption of plea bargaining be given prominence to reduce the backlog of cases. A plea bargain is an agreement between the accused and the state in which the accused formally admits their guilt in exchange for the dismissal of some charges and a lower sentence, therefore shortening the trial.\textsuperscript{60} On the recommendations of the Law Commission of India in its 142nd and 154th reports, this concept was adopted in 2005 and implemented in 2006.\textsuperscript{61} However, this concept was introduced with many limitations on its use, including prohibitions on offenses against women and girls; crimes punished by 7 years or more in jail; crimes punishable by life incarceration or death, etc., thus, making it difficult to use.\textsuperscript{62} Moreover, the courts remained a roadblock because of their choice in sentencing the accused.\textsuperscript{63} Therefore, owing to the aforementioned reasons, the idea of plea bargaining has not been a story of success. However, if fully enforced per the Law Commission's guidelines, it may be used as an important means of easing the judiciary’s burden.

Furthermore, the country’s judicial system has formed tribunals to address delays in the administration of justice by ordinary courts. Alternative Dispute Resolution (ADR) is a process

\textsuperscript{58} Dr. Justice V.S. Malimath Committee on Reforms of Criminal Justice System, \textit{supra} note 47.

\textsuperscript{59} NJDG E-courts Dashboard, NJDG (District and Taluka Courts of India), \textsuperscript{https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard}. (Last Visited 15.07.2021)

\textsuperscript{60} Bryan A Gamer, Henry Campbell Black, \textit{Black’s Law Dictionary}, (8\textsuperscript{th} Edition 2004).


where if it appears to the court that the dispute can be resolved amicably by both the parties, then it might propose that the matter be settled outside of court through mediation or arbitration. It is one of the most powerful tools for resolving conflicts because it is a quick mechanism and is less expensive than litigation, and thus, promoting the use of ADR, as a means of resolving issues outside of the court system may be a good way to ease out the burden on the judiciary, and reduce its backlog.64

Another such mechanism wherein the disputes can be settled amicably at the pre-litigation stage is Lok Adalat.65 Lok Adalats, as quoted by Justice Ramaswamy “not only help in resolving the disputes at a lower litigation charge but it also saves time of the parties, and their witnesses and thus, provides an inexpensive and prompt remedy to the satisfaction of both the parties.”66 The Lok Adalats’ decision is considered equal to a civil court's decision and is hence definitive and binding on all parties. As a consequence, the usage of Lok Adalat will aid in the alleviation of the Indian judiciary's backlog by ensuring that cases are handled swiftly and at a minimal cost, to the satisfaction of all parties.67

Finally, it is critical to enhance the existing state of the Indian legal system, in addition to developing new means of settling conflicts. It is now crucial to guarantee that the Indian legal system does not fall behind due to a shortage of infrastructure.

5. Gender Sensitisation of Judges:

The Judges of this country initiate their path by committing to an oath to uphold the sanctity of the Constitution and all laws, in the execution of their duty. Social prejudices, archaic traditions and practices, myths, cultural constructs, and stereotypes hold no place in the realm of adjudication before any court because they can potentially compromise the impartiality and integrity of the justice system. This can consequently lead to miscarriage of justice and re-victimization of the complainants, thereby vitiating the very oath that was to be upheld by the Judiciary. The people need to be able to rely on a Judiciary mechanism whose impartiality is not compromised by these

65 Id. at 63
67 Id. at 65
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biased assumptions. However, as we see from the below-mentioned instances, much remains to be desired from certain sections of the Judicial fraternity in this regard.

The Supreme Court recently stayed the bizarre judgment of the Nagpur bench of the Bombay High Court, regarding a case of alleged sexual assault on a minor, in which the presiding Judge – Hon’ble Justice Ganediwala ruled that for the provisions of the Protection of Children from Sexual Offences Act, 2012, to apply, there must be physical contact or “skin-to-skin contact with sexual intent”. It was also held that mere groping/over the cloth contact would not amount to sexual assault.68

In another unfortunate case, a 22-year-old victim who had accused an anchor from channel ET Now of rape, drafted a letter to the then, Chief Justice of India – S.A. Bobde, bringing his attention to the Additional Sessions Judge’s (Patiala District Courts in New Delhi) alleged insensitive, inappropriate and traumatizing behavior during an anticipatory bail hearing in the case. In the letter, it was stated that “… the counsel representing the accused, one Mr. Vijay Aggarwal repeatedly made false, gravely humiliating and disparaging remarks against me and assassinated my character throughout the course of the hearing by slut-shaming me. All this happened in the presence of the Judge, Sh. Sanjay Khanagwal, who to my shock, instead of reprimanding Mr. Aggarwal and restraining him from doing so, laughed with him, on multiple instances.” 69

A report published by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in 2013, titled – ‘Gender Stereotyping as a Human Rights Violation’ 71 presented an analysis on all member State’s obligations under various human rights treaties to work towards eliminating gender stereotyping. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)72, also provides for express obligations concerning stereotyping, and multiple human rights treaty bodies have identified such obligations through

70 Established under the Universal Declaration of Human Rights, adopted in the 1948 by the UN General Assembly.
72 The Convention on the Elimination of All Forms of Discrimination against Women adopted in 1979 by the UN General Assembly.
The interpretation of the right to non-discrimination and equality, as well as other human rights. Such international obligations all collectively also lay down the duty of eliminating gender stereotyping with the respective Judicial bodies of the member States.

The Supreme Court has also recognized the need for immediate reform and directed the National Judicial Academy and the Bar Council of India to arrange for programs and syllabi aimed at gender sensitization for Judges and Bar Council examinees. The Court has also reportedly directed Judges to display sensitivity when hearing a sexual violence case, to ensure that the complainant/Victim suffers no further trauma during the proceedings and does not lose confidence in the Court’s impartiality because of the judge’s words.

Recently, the Attorney General of India – Mr. K.K. Venugopal, in his written submission to the Supreme Court, has emphasized the need for greater gender sensitization among members of both, the Bar and the Bench. Reference was made to the recent order pronounced by Madhya Pradesh High Court wherein bail was granted to a rape accused on condition that he get a rakhi tied by the survivor. It was suggested that such unacceptable remarks be excluded from the purview of any further decision taken by the Judicial fraternity and that strict measures be laid down in the eventuality of such unfortunate occasions. It was also highlighted that the representation of female Judges has been consistently low across the Higher Judiciary. Furthermore, no data is centrally maintained on the number of women appointed as Judges in Tribunals or Lower Courts. Improving the representation of women in the judiciary is of crucial importance and has to go a long way towards a more balanced and empathetic approach in cases involving sexual violence and gender-based discrimination.

Changing the long-established demographics of a Court can make the institution more amenable to consider itself in a new light, and potentially lead to further modernization and reform. As a court's composition becomes more diverse, its customary practices become less entrenched;

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75 Id. at 63.
76 Aparna Bhat v. The State of Madhya Pradesh and Ors., (SLP (C) D. No. 20318 OF 2020), Written Submissions on behalf of the Attorney General of India. (01.12.2020)
consequently, the old methods, often based on unstated codes of behavior, or simply inertia, are no longer adequate.

6. Marital Rape:

Marital rape can be defined as any unwanted sexual intercourse or penetration (vaginal, anal, or oral) obtained by force, the threat of force, or when the wife does not consent. Rape of any nature must be understood as an extreme manifestation of sexual violence that negates the human rights of the woman/victim completely. However, an apparent but ironic occurrence in the subject of sexual offenses is the restricted interpretation of the word ‘rape’ i.e. a married woman cannot be raped by her husband. In the realm of marital rape, it is not the violent or unwanted nature of the sexual act that defines the act, but rather the ‘illegality’ of the sexual act. In other words, a sexual relationship with a woman who is not considered one’s property is rape but sexual violence within marriage is permissible.

Under the Indian Penal Code 1860, the exception to Section 375 (Rape) is provided that Sexual intercourse by a man with his wife, the wife not being under fifteen years\(^77\) of age, is not rape\(^78\).

The law, therefore, legitimizes the patriarchal supremacy of establishing the husband’s right of absolute control over his wife’s physical being, even when she may be well below the age of marriage. The only instance wherein the law provides some form of protection in this regard is for legally separated couples, residing separately under section 376B of the Indian Penal Code 1860\(^79\).

The Law Commission expressed its disinclination to increase the age for a wife from the age of 15 years to 18 years under the Exception to Section 375 the Indian Penal Code 1860\(^80\), in the 156th Law Commission Report. Further, in the 172nd Law Commission Report it was noted that the removal of the exception to Section 375 of the Indian Penal Code 1860 should not be preferred as it may result in excessive interference with the sanctity of a marital relationship. Therefore, a married woman in essence has no form of physical or sexual autonomy under Indian law.\(^81\)

\(^{77}\) It is only under the 2013 Amendment to the Indian Penal Code 1860, that the age in such exception was raised from 12 years to 15 years.

\(^{78}\) Indian Penal Code, 1860, § 375, Exception 2, No. 45, Acts of Parliament, 1860 (India).


\(^{80}\) Law Commission of India, 156th Report on The Indian Penal Code, MINISTRY OF LAW AND JUSTICE, GOVERNMENT OF INDIA, (1997).

A recent Public Interest Litigation filed by NGO RTI Foundation\textsuperscript{82}, before the High Court of Delhi has sparked a discussion on the constitutional validity of Exception 2 to the Section 375\textsuperscript{83} of the Indian Penal Code 1860. The division bench presiding over the matter has expressed its concerns stating that “marital rape is a serious issue, which has notoriously become a part of the culture.” However, the Government has maintained in its response that “… criminalizing rape could destabilize marriages and make men vulnerable to harassment by their wives.” In response it was argued that several countries, including Nepal, the United States of America, the United Kingdom, and South Africa among other states have criminalized the act of marital rape. The government’s notion that the stability of marriage is ensured by preventing women from filing complaints about rape reveals the true mindset of the ruling patriarchs in a conservative society.

In a writ petition\textsuperscript{84} filed before the Supreme Court the scope and viability of Exception 2 to Section 375 Indian Penal Code 1860 while deciding on the validity of the provisions legitimizing marital rape when the husband has sexual intercourse with a wife who has not yet achieved the age of majority i.e. 15 to 18 years were taken into consideration, wherein, the Bench held - “Exception 2 to s-375 of the Indian Penal Code answers this in negative, but in our opinion, sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and definitely not in the best interest of the girl child.”

Therefore, the Supreme Court has taken a landmark decision by recognizing the rape of a wife who is yet to achieve the age of majority, in such line of thought it was also suggested that the Legislature take active and adequate steps to make the practice of child marriages void ab initio.

However, with all being said and done, in the 74 years of gaining independence, wives over the age of 18 have failed at gaining any judicial sympathy, to get the act of marital rape declared as a criminal act. Marital rape is not an occurrence limited to any specific group, religion, class, or race, and therefore the blatant ignorance by the Government is a sign of active acceptance of the archaic ideology wherein a wife is considered as the property of her husband. While intended, to exist as

\textsuperscript{82} RTI Foundation v. Union of India, W.P.(C) 284/2015, High Court of Delhi

\textsuperscript{83} Id. at 67

\textsuperscript{84} Independent Thought v. Union of India, (2017) 10 SCC 800
a deterrent provision, the narrow and restrictive definition of rape defeats such intent. The provision allows for exemption in cases of marital relations thereby turning the definition of rape into a hollow statement, which is used as an escape route by the perpetrators of such acts. Much is left to be desired in the quest for justice.

7. Gender Neutrality in Rape Laws:

Section 375 of the Indian Penal Code, 1860\textsuperscript{85} clearly states:

“\textit{A man is said to commit rape who, except in the case hereinafter excepted, has sexual intercourse with a woman …}”

It is observed that the above-mentioned provision restricts the scope for an inclusive interpretation because the gender gets predetermined for the victim and for the perpetrator of the crime. Therefore, this legal provision de facto legitimates sexual stigmatization, by turning a blind eye towards the cases wherein a perpetrator may target victims who belong to the male or other genders besides females. It is also wholly arbitrary and discriminatory to only consider that it is only a ‘masculine’ perpetrator who can commit the crime of rape. Such a provision creates an unfair division by not according to the same punishment for perpetrators of other genders and not according to the same level of protection to the victims who have suffered through the trauma of rape but are helpless because the State does not recognize that act as a crime solely based on the gender of the victim. Section 375 of the Indian Penal Code, 1860\textsuperscript{86} legalises the assumption that the crime of rape, stems directly and exclusively from our patriarchal societal mindset and the consequent abuse of male privilege and dominance. As a progressively developing society and being the world’s largest democracy, India needs to transform its legal system and the understanding of laws, according to the needs of India’s evolving society so as to cater to the dynamicity of law.

The first time that the requirement for gender neutrality came up for deliberation was in 1996, under the case of Jhaku v. Jhaku\textsuperscript{87}, where the bench was of the opinion, that men who have been victims of sexual assault, be accorded the same level of protection under law, as is given to female victims. However, in Sakshi v. Union of India\textsuperscript{88}, the Supreme Court sought to shift such issue

\begin{itemize}
\item \textsuperscript{85} Indian Penal Code, 1860, § 375, No. 45, Acts of Parliament, 1860 (India).
\item \textsuperscript{86} Id. at 74.
\item \textsuperscript{87} Sudesh Jhaku v. K.C. Jhaku, (1996) 62 DLT 563
\item \textsuperscript{88} Sakshi v. Union of India, (1999) 6 SCC 591
\end{itemize}
entirely within the purview of the Law Commission of India. Accordingly, in 2000, the 172\textsuperscript{nd} Law Commission Report\textsuperscript{89} suggested that rape laws need to incorporate gender-neutral nature for both, the victim and the offender of such offence and not limit the same on one gender exclusively. Thereafter the Justice J.S. Verma Committee Report\textsuperscript{90} also stated the need for the introduction of gender-neutral rape legislation in 2013.

Where the Supreme Court decriminalized the act of homosexuality under Section 377 of the Indian Penal Code\textsuperscript{91} in 2018 through a landmark judgment in Navtej Singh Johar v. Union of India\textsuperscript{92}, a void remains in the place for legal remedy for rape cases among adult male victims. Although the Protection of Children from Sexual Offences Act of 2012\textsuperscript{93} does house provisions for the protection of minor male rape victims, the thirst for justice under the aegis of the Indian Penal Code remains unquenched.

Even though the Apex Court took cognizance of the rights and remedies of the transgender community under the case of National Legal Services Authority v. Union of India\textsuperscript{94} in 2014, it was not until 2019 that India made specific laws against sexual assault committed against the people of the Transgender community. The Transgender Persons (Protection of Rights) Act which was enacted in 2019, was aimed at giving Transgender an equal standing but instead, it was the cause of much uproar and controversy. Such opposition stems from the wording of the provision regarding offences and penalties under Section 18\textsuperscript{95} of the penalties wherein it is stated that any form of injury including physical or sexual injury caused to a Transgender person shall be punished with imprisonment of a term ranging from 6 months to a maximum of 2 years. This provision creates a clear division based on gender, where a similar offence committed against a woman might lead to imprisonment for life. Therefore, the offence against a Transgender has been treated as a crime of lesser significance.

\textsuperscript{89} Id. at 70
\textsuperscript{91} Indian Penal Code, 1860, § 377, No. 45, Acts of Parliament, 1860 (India).
\textsuperscript{92} Navtej Singh Johar v. Union of India, (2018) 10 SCALE 386.
\textsuperscript{94} National Legal Services Authority v. Union of India, AIR 2014 SC 1863.
Such a form of insensitivity and blatant ignorance endorses a gender-specific dictum wherein the criminal legislations of this country breach the principles of equality and non-discrimination that have guaranteed to all citizens regardless of their gender, as part of the basic structure\textsuperscript{96} of our Constitution.

8. White Collar Crimes:

The aftermath of the 2008 Global Financial Crisis, saw a meteoric rise in the number of failed businesses and if history has taught us anything, the events following the COVID 19 pandemic might hold a similar fate for the global economy. It is already apparent from the rampant illegal profiteering and rise in crippled business. It is imperative that reform be introduced to tackle such and other similar situations in the arena of white-collar crimes.

It is pertinent to note that numerous cases fall at the preliminary stage itself owing to the shortfalls in the investigations conducted by the relevant authorities. The 14th Law Commission Report\textsuperscript{97} noted that lack of legal assistance at the investigation stage often leads to the acquittal of the accused. The investigators need to be more closely involved with the prosecutors so that the case of the prosecution is not prejudiced by the quality of the investigation. Any change in such a scenario can only be brought through legislative action.

The integrity and transparency of the corporate mechanism whether public or private is dependent to a large extent on the people willing to reveal the truth behind the actions undertaken also referred to as “whistleblowers”. Section 206 of the Companies Act, 2013\textsuperscript{98} empowers the Registrar to investigate the affairs of the company based on such information received by him. Furthermore, Section 177 of the Companies Act\textsuperscript{99} authorizes the formation of a vigilance commission for the employees of a Company to express their concerns or objections. The Companies Act also includes provisions for the protection of such persons (whistleblower) during the investigation. Similar provisions have also found a place in Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015.

\textsuperscript{97} Law Commission of India, 14th Report on Reform of Judicial Administration, MINISTRY OF LAW AND JUSTICE, GOVERNMENT OF INDIA (2000), \url{https://lawcommissionofindia.nic.in/1-50/Report14Vol2.pdf}.
However, despite the abovementioned provision for protection, whistleblowers often find themselves at the short end of the stick by being discriminated against or laid off. The protection offered by these provisions is obscenely inadequate and thereby deterring potential persons from revealing acts of corporate malfeasance. To avoid such mishapenning, inspiration may be adopted from the United States wherein organizations like the ‘Securities and Exchange Commission’ and the ‘Internal Revenue Service’ offer an award to the whistleblower which may amount to up to 30% of the amount collected or penalized thereby incentivizing such act.

However, the same attention needs to be accorded to improve the protection of whistleblowers against any form of victimization, over and above the incentives awarded.

The Government, however, has adopted a seemingly reluctant approach towards improving the situation, as is evident from the fate of the Whistleblowers Protection Act of 2014 which is yet to be brought into force by the Legislature and through the 2015 Amendment Bill, diluted even further to prohibit the disclosure of any information classified under the Official Secrets Act of 1923.

Another area of concern arises in the pressing need for the modifications and decriminalisation of certain provisions so that corporate criminal liabilities may be assessed with greater accuracy. An instance in this regard may be found under the definition of the term “Fraud” as provided under Section 447 of the Companies Act 2013 wherein it is stated that “Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud”.

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101 Ayush Tiwari, *‘I’ve been forced to resign’: A tight-lipped HT Media lays off over 100 employees*, THE NEWSLAUNDRY (30.05.2020), https://www.newslaundry.com/2020/05/30/ive-been-forced-to-resign-a-tightlipped-ht-media-lays-off-over-100-employees. (Last Visited 15.05.2021)


NEED OF THE HOUR: REFORMING THE INDIAN CRIMINAL JUSTICE SYSTEM

Though it appears that the original intent behind such a definition would be to ensure that a person guilty of fraud is not absolved of any of his actions, but the usage of the terms such as “including... any other law” may lead to arbitrariness. The reason behind this arises from the apparent inclusive nature of the definition which consequently provides additional authority for the investigators or prosecutors to include any other act or omission within the ambit of the definition. This may potentially render the definition vague and unconstitutionally invalid.

It is pertinent to note that the aforementioned shortcomings and anomalies in the field of white-collar are in no way – exhaustive. With the rise in the prominence of white-collar crimes, the very dynamic of the term “crime” has changed and demands a new understanding. However, the legal system and the mechanism to tackle white-collar crimes, have failed to catch up to the recent developments.

Resolving the hindrances which plague the investigative process would play a crucial part in ensuring that bona fide business decisions and transactions are not subjected to criminal treatment and at the same time making sure that real and apparent corporate crimes are prosecuted and punished appropriately and effectively.

CONCLUDING REMARKS

It is apparent that a number of decisions delivered by the Courts have indicated a failure of the criminal justice system owing to either inadequate investigations, the absence of evidence, an inherent bias or prejudice or other material lapses. This issue is further supplemented by the inaction on part of the legislature to bring in material reforms. Thus, the vicious cycle has ultimately instilled a sense of fear, insecurity and indifference in the society and lack of confidence in the criminal justice system of the country.

The debate to reform the criminal laws in India has resurfaced, ever since the Ministry of Home Affairs in May 2020 notified the constitution of a 5-member committee headed by Prof. (Dr) Ranbir Singh, to propose Criminal law reforms.107 It is advisable that the newly constituted committee should revisit and consequently reform the entire Criminal Justice System, and make recommendations for progressive improvements in the criminal justice system following the

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changing egalitarian reality of modern society, and at the same time make it more accessible and efficient.

It is pertinent to bring in a complete overhaul of the criminal justice system to remove the vices of archaic interpretation of offences, punishment and procedure. Quoting Shri Rabindranath Tagore, “Facts are many, but the truth is one”; it is of utmost importance that the State and the Judiciary work hand in hand to achieve the true purpose of the justice system i.e., securing the absolute truth and being accessible to all of the humanity.