



## Criminal law reforms in India: Expectations & prospects

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### Abstract

Legislations governing criminal justice system in India such as IPC, Cr.P.C or Evidence Act are either of colonial origin or a replication of British laws. Since then while the society has undergone massive changes by recognising new rights and values, these legislations have not changed significantly to accommodate these developments. Further, there has been reluctance on the part of various stakeholders as well to implement certain changes which have been brought. Due to these reasons, the criminal justice system has become largely ineffective which is evident from poor records be it pitiful conviction rates or massive backlogs.

The need for reforms in the criminal justice has always been felt and recommendations have been made by committees constituted by government, however these recommendations never saw the light of the day. In this regard, the recently constituted five-member committee for suggesting criminal law reforms brings some hope with regards to modifications in the system. In this paper we have discussed certain aspects which even though are not exhaustive but should be major focus of the committee while recommending reforms.

We have emphasised on the need of having gender neutral laws in matters pertaining to sexual offences in order to include victimisation of transgenders as well as men. This issue has become significant in light of recent developments whereby the Supreme Court recognised transgenders as third gender and also decriminalised consensual adult gay sex. Further, we have dealt with scope of arbitrariness and discretion in sentencing which has led to inconsistent sentences even in similar crimes. Furthermore, we have discussed the poor state of conviction in criminal cases which can largely be attributed to the methods on investigation adopted by our agencies and the need to accept, develop and promote use of forensic investigation. Lastly, we have elaborated upon the immense backlog of cases and poor standards of justice delivery and suggestions to tackle this through specialisation as well as ensuring implementation of plea bargaining.

**Keywords:** gender neutral, arbitrariness, forensic, investigation, plea bargain, and specialisation

### Introduction

The debate of criminal law reforms in India has been reignited again, since the Ministry of Home Affairs notified the constitution of a 5-member committee headed by Prof. (Dr) Ranbir Singh to recommend criminal law reforms in May 2020 <sup>[1]</sup>. The committee will recommend the restructuring of criminal laws in order to bring it in conformity with the needs and requirements of the society in an effective and efficient manner. Criminal legislations in India, especially the Indian Penal Code, 1860, still have the colonial touch and have not undergone significant changes since then. Due to stagnancy in the provisions of IPC and Cr.P.C, they do not address the recent developments such as rights of transgenders, gender neutrality, arbitrariness in sentencing, growing backlog and poor rates of conviction e.tc. Previously, in 2003, the Malimath Committee submitted its recommendations on reforms in criminal law; however, the recommendations were never accepted.

It is desirable that the newly constituted committee should recommend progressive changes which act towards eradicating delays, uncertainties and inefficiency within the system. However, it is relevant that these recommendations

be made keeping in mind the basic philosophies of criminal law. In this paper, we suggest some of the major structural reforms which must be deliberated upon while considering the recommendations. These suggestions are by no means exhaustive, but key modifications which are not only highly expected but of utmost need as well.

We discuss the need of gender-neutral criminal laws in India in order to bring it in lines with the recent developments such as recognition of third gender and decriminalisation of consensual gay sex. We then emphasise on the need and means to account for the scope of arbitrariness in sentencing by courts. Further we discuss about the poor standard of investigation in India and the need to actively use forensic evidences and finally about the menace of backlog of cases and how proper utilisation of existing provisions can be the way out.

### 1. Gender neutral laws pertaining to sexual offences

The laws of any country must adapt with the changes as the society progresses. In this context the provisions pertaining to sexual offences such as Rape <sup>[2]</sup>, outraging the modesty <sup>[3]</sup>, assault with the intention of disrobing <sup>[4]</sup>, stalking <sup>[5]</sup> e.tc need a complete overhaul. At present, these laws are gender specific for both the victim and the accused. This essentially

<sup>1</sup> Ministry of Home Affairs, Constitution of Committee for Reforms in Criminal Laws, 1-2-19 Judicial Cell, Part I (Notified on May 4, 2020), available at [https://images.assettype.com/barandbench/2020-05/2687c0fb-db01-45a5-8e58-e9ddc1a28ad3/Committee\\_on\\_Criminal\\_Law\\_Reforms\\_\\_\\_NLUD.pdf](https://images.assettype.com/barandbench/2020-05/2687c0fb-db01-45a5-8e58-e9ddc1a28ad3/Committee_on_Criminal_Law_Reforms___NLUD.pdf). (Last visited on June 21, 2020).

<sup>2</sup> The Indian Penal Code, 1860, §375.

<sup>3</sup> The Indian Penal Code, 1860, §354.

<sup>4</sup> The Indian Penal Code, 1860, §354 B.

<sup>5</sup> The India Penal Code, 1860, §354 D.

means the law only recognises 'male to female' sexual offences where only man can be the perpetrator and woman only can be the victim. The law as it stands excludes transgenders and men from the ambit of being victims of sexual exploitation<sup>[6]</sup>.

The POCSO Act, 2012 which seeks to protect children from sexual offences, under S. 2 (d) provides that 'child' means 'any person' below the age of 18 years and thereby ensuring protection to everyone below 18 years of age regardless of gender<sup>[7]</sup>. Hence, gender neutral law in matters of sexual offences are not new to Indian criminal law. The 172<sup>nd</sup> report of Law Commission of India had recommended gender neutral criminal laws, however the modalities were not expressed<sup>[8]</sup>. Even the Supreme Court in 2018 in *Criminal Justice Society v. Union of India*, was of view that parliament may consider gender neutral rape laws<sup>[9]</sup>.

The *Criminal Law (Amendment) Act, 2013* expanded and made the laws on sexual offences more stringent providing greater security to the victims, however the gender specific nature of law was retained<sup>[10]</sup>. Preceding the amendment, a Criminal law (amendment) Ordinance, 2013 was promulgated which recognised and paved way for gender neutral laws for sexual offences by including terms such as 'any person' instead of man or woman<sup>[11]</sup>. However, the ordinance later lapsed. Since then, the government has maintained its stand to recognise sexual assaults (other than male to female) to be unnatural offences under S. 377 of IPC<sup>[12]</sup>.

Hon'ble Supreme Court in *National Legal Services Authority v. Union of India* recognised transgenders as third gender and further asked to 'amend legislations including criminal laws to bring them in conformity with the universal enjoyment of human rights'<sup>[13]</sup>. The judgement highlighted the issues of sexual violence such as assault, rape, molestation etc against the community. Not extending protection to third gender in instances of sexual offences is discrimination on grounds of sex prohibited under Article 14 of the Constitution<sup>[14]</sup>. It is high time that criminal law should break the shackles of stereotypes and take a step towards achieving equality.

With the ruling of Supreme Court in *Navtej Singh Johar case*, decriminalising consensual adult gay sex<sup>[15]</sup>, the need of having gender neutral laws pertaining to sexual offences has become necessary. The court stated that sexual orientation is natural and people have no control on it<sup>[16]</sup>. Now that all forms of adult consensual sex (including male to male & female to female) has been held to be natural,

<sup>6</sup> Manupatra, *Gender Neutral laws-How Needful in India?* available at <http://docs.manupatra.in/newsline/articles/Upload/3FE150D0-E784-49BD-8328-4134C0E87955.pdf>. (Last visited on June 1, 2020).

<sup>7</sup> Protection of Children from Sexual Offences Act, 2012, §2 D.

<sup>8</sup> Law Commission of India, *Review of Rape Laws*, Report No. 172, (March 2000), ¶6.

<sup>9</sup> *Criminal Justice Society of India v. Union of India & Ors.*, W.P. (C) No. 1262/2018.

<sup>10</sup> The Criminal Law (Amendment) Act, 2013.

<sup>11</sup> The Criminal Law (Amendment) Ordinance, 2013, (April 13, 2013).

<sup>12</sup> The Hindu, *Do not alter existing definition of rape, Centre tells High Court*, July 4, 2019, available at <https://www.thehindu.com/news/cities/Delhi/do-not-alter-existing-definition-of-rape-centre-tells-high-court/article28277009.ece> (Last visited on June 8, 2020).

<sup>13</sup> *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

<sup>14</sup> The Constitution of India, 1950, Art. 14.

<sup>15</sup> *Navtej Singh Johar v. Union of India & Ors.*, 2018 SCC Online SC 1350.

<sup>16</sup> *Ibid.*

there is no rationale in holding non-consensual gay sex as unnatural offence under S. 377 of IPC<sup>[17]</sup>, and hence it must be brought under the ambit of rape. Therefore, considering the recent developments it is imperative that criminal law on all sexual offences be made gender neutral extending its protection to not only women but men as well as transgenders.

Data from a survey conducted in 2013 suggests that around 18% (of surveyed) adult men in India have been subjected to forced sex, of which 16% claimed the accused to be female while 2% male<sup>[18]</sup>. However, the current criminal jurisprudence, being victim specific, fails to acknowledge the harassment faced by men as well as transgenders.

In this regard, government must consider the pending "Criminal Law (Amendment) Bill, 2019 which seeks to substitute the word 'male or female' with 'male, female or transgender' in S.8 of IPC<sup>[19]</sup>. Further, it seeks to amend laws relating to 'outraging the modesty', 'assault with intent to disrobe and stalking', by substituting the words 'any man' with 'whoever' and 'any woman' with 'any person'<sup>[20]</sup>. Moreover, S.375 pertaining to rape must also substitute words such as 'man' or 'woman' with any person<sup>[21]</sup>. It is further required to substitute gender specific genitals such as vagina, penis etc. in S.375 with only "genitals" which not only covers male victims but also extends protection to transgenders who might have ambiguous genitals<sup>[22]</sup>. Most importantly the bill proposes an additional provision, S.375A, to be included which would deal specifically with sexual assault. This would include touching of genitals, anus and breast of any person, or using words or making gestures which cause the apprehension of a threat of sexual nature, protecting everyone regardless of gender<sup>[23]</sup>.

It is important to recognise that sexual offences are not only act of sex, but overpowering and dominance based on caste, class and religion as well and can affect any person regardless of gender<sup>[24]</sup>. Taking these issues into consideration, there is no merit in ignoring the victimization of genders other than female<sup>[25]</sup>. As part of our march towards a more progressive society, we must include victimization of each gender under the statutory protection granted by criminal laws.

## 2. Guidelines regulating sentencing policy

Sentencing is one of the most vital constituents in criminal jurisprudence which seeks to give proportionate and sufficient punishment corresponding to the crime committed<sup>[26]</sup>. However, Supreme Court in *Soman v. State of Kerala* highlighted that in India "sentencing is the weakest part of the administration of criminal justice"<sup>[27]</sup>. The twofold objectives of sentencing are deterrence and rehabilitation<sup>[28]</sup>. The prospect of deterrence is to endorse the assurance in

<sup>17</sup> The Indian Penal Code, 1860, §377.

<sup>18</sup> Centre for Civil Society, *India's law should recognise that men can be raped too*, available at <https://ccsindia.org/indias-law-should-recognise-men-can-be-raped-too>. (Last visited on June 8, 2020).

<sup>19</sup> The Criminal Law (Amendment) Bill, 2019, §8.

<sup>20</sup> The Criminal Law (Amendment) Bill, 2019.

<sup>21</sup> The Criminal Law (Amendment) Act, 2019, §375.

<sup>22</sup> *Ibid.*

<sup>23</sup> The Criminal Law (Amendment) Bill, 2019, §375 A.

<sup>24</sup> *Supra* note 6.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Alister Anthony Pereira v. State of Maharashtra*, (2012) 2 SCC 648.

<sup>27</sup> *Soman v. State of Kerala*, (2013) 11 SCC 382.

<sup>28</sup> *Supra* note 26.

influencing the behaviour of other potential delinquents in the society <sup>[29]</sup>, whereas rehabilitation refers to the process of assisting the offenders to conform to the societal norms <sup>[30]</sup>. However, if such imposition is done without taking into account the effects on society, it loses its purpose <sup>[31]</sup>.

In India, while imposing sentences, judges take into consideration various factors as aggravating and mitigating circumstances such as age and background of accused, vulnerability of victim, severity of crime e.tc. Yet, the whole exercise is largely based on their discretion. Some judges might be guided by the principle of deterrence, while others might prioritise rehabilitation and refurbishment, some might as well be driven by the emotions of society <sup>[32]</sup>. It is required that the growing disparity in sentencing in similar nature of crimes, should be accounted and a uniform and robust mechanism should be established.

Similar to other common law countries like Canada, Australia, New Zealand e.tc, sentencing policy in India as well provides wide discretion to courts in deciding the exact sentence <sup>[33]</sup>. Penal laws in India prescribe only minimum or maximum punishments for various crimes committed. At this extent, judges enjoy two-fold discretion, firstly whether to invoke welfare legislations such as probation <sup>[34]</sup> or not and secondly if punishment is to be granted, the quantum of such punishment <sup>[35]</sup>. What is more problematic is that there is no guidance or uniformity in exercise of this discretion by judges, opening scope for conflicting sentences in similar cases. Hence, it is often questioned that whether sentencing should depend on values and philosophies of the judge or should there be some objective criteria to determine the same? <sup>[36]</sup>

Hon'ble Supreme Court in *State of Punjab v. Prem Sagar and Ors.* noted that we have not been able to develop legal principles regarding sentencing like those exist in developed and advanced legal systems and that there is need to have guidelines for sentencing to reduce ambiguity <sup>[37]</sup>. Having an established set of guidelines will not only facilitate consistency in sentencing but also assist in determining which principle (deterrence, retribution or rehabilitation) should guide punishment in a given case <sup>[38]</sup>.

The Malimath committee in 2003 had recommended statutory guidelines to bring uniformity in sentencing and regulate the scope of discretion <sup>[39]</sup>. The committee

suggested constitution of a permanent committee for prescribing guidelines pertaining to sentencing. In 2008, the Madhava Menon Committee on Draft National Policy on Criminal Justice reiterated the need to incorporate statutory guidelines pertaining to sentencing in order to bring predictability and consistency in the whole process <sup>[40]</sup>.

The newly constituted committee suggesting reforms might look at jurisdiction of UK and USA where determinate sentencing schemes have been successfully implemented. In England and Wales, though a statutory body for sentencing guidelines was established in 1998 under the *Crime and Disorder Act* <sup>[41]</sup>, a new statutory body (Sentencing Council) was formed under the new 2009 *Coroners and Justice Act* <sup>[42]</sup>. The sentencing council is tasked not only with the duty to formulate guidelines but also assess and monitor the effects of these guidelines <sup>[43]</sup>. These principles are in the nature of definitive guidelines based on gravity of the crime and guide the nature and sternness of the punishment <sup>[44]</sup>. However, these guidelines are by no means restrictive and allow courts to impose appropriate sentence in extraordinary circumstances. Similarly, in the USA, the United States Sentencing Commission established under Sentencing Reform Act, 1984 provides guidelines based on severity of crime as well as history of the criminal <sup>[45]</sup>. The sentencing manual pairs the brutality of crime with the criminal background of the offender and prescribes a range of sentence thereby lessening the scope of disparity in the process <sup>[46]</sup>.

It is highly desirable that criminal legislations in India must also introduce statute backed guidelines which should be in conformity with the objectives of sentencing as well as requirement of the contemporary society. It should be harsh where it ought to be, at the same time, it should be compassionate wherever essential.

### 3. Promoting use of forensic evidence in investigation

Delayed investigations, pending cases and poor conviction rates in criminal cases in India have always been a matter of concern. The deferment and its consequential impacts lead to corrosion of faith in the criminal justice system. Even though the recently released NCRB data of 2018 <sup>[47]</sup> suggests that overall conviction rate improved to 48.8% in 2018 from 38.5% in 2012 <sup>[48]</sup>, the rate still remains poor. What is more alarming is the awfully low rate of conviction in rape cases i.e. 27.2% which decreased from 32.2% in previous year <sup>[49]</sup>. The rate of charge sheet in rape cases in 2018 stood high at 85% even after a decrease from 96% in

<sup>29</sup> Valerie Right, Deterrence in Criminal Justice: Evaluating certainty Vs. Severity in Punishment, available at <https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf>, (Last visited on June 21, 2020).

<sup>30</sup> Kathryn M. Campbell, Rehabilitation theory, available at <https://marisluste.files.wordpress.com/2010/11/rehabilitation-theory.pdf>, (Last visited on June 21, 2020).

<sup>31</sup> *Supra* note 26.

<sup>32</sup> Narinder Singh v. State of Punjab, MANU/SC/0235/2014.

<sup>33</sup> Julian V. Roberts, Umar Azme, Kartikeya Tripathi, *Structured Sentencing in England and Wales: Recent Developments and Lessons for India*; National Law School of India Review, Vol. 23, No. 1 (2011), pp. 27-45.

<sup>34</sup> The Probation of Offenders Act, 1958.

<sup>35</sup> DR. JUSTICE V.S. MALIMATH COMMITTEE, *Committee on Reforms of Criminal Justice System*, Volume 1, p. 170 (March, 2003).

<sup>36</sup> Pallab Das, Paras Padhi, *Sentencing Disparity in India: Need for Comprehensive Sentencing guidelines*, LIBERTATEM MAGAZINE, FEBRUARY 15, 2015, available at <http://libertatem.in/articles/sentencing-disparity-in-india-need-for-comprehensive-sentencing-guidelines/> (Last visited on June 1, 2020).

<sup>37</sup> State of Punjab v. Prem Sagar & Ors., MANU/SC/7692/2008.

<sup>38</sup> *Supra* note 36.

<sup>39</sup> DR. JUSTICE V.S. MALIMATH COMMITTEE, *Reforms of Criminal Justice System*, Volume 1, p. 288 (March, 2003).

<sup>40</sup> N.R. MADHAVA MENON COMMITTEE, *Draft National Policy on Criminal Justice*, (2008).

<sup>41</sup> The Crime and Disorder Act, 1998.

<sup>42</sup> *Supra* note 33.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Supra* note 33.

<sup>45</sup> Sentencing Reform Act, 1984 available at <https://www.ussc.gov/>, (Last visited on June 8, 2020).

<sup>46</sup> *Ibid*.

<sup>47</sup> National Crime Records Bureau, *Crime in India 2018*, p. XV available on <https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%201.pdf>, (Last visited on June 7, 2020).

<sup>48</sup> Divya Shukla, *An Analytical Study of Decreasing Rate of Conviction in India*, International Journal of Law, Volume 4; Issue 2, p. 91-94 (2018).

<sup>49</sup> Economic Times, Conviction rates for rape only 27% even as country celebrates justice in Nirbhaya case, available at <https://economictimes.indiatimes.com/news/politics-and-nation/conviction-rate-for-rape-only-27-2-even-as-country-celebrates-justice-in-nirbhaya-case/articleshow/73169787>, (Last visited on June 1, 2020).

2015, however, the abysmal conviction and disposal rate point towards inadequacies in the system especially, the investigation<sup>[50]</sup>.

One of the major causes of low conviction rates has been ineffective and inept utilisation of scientific investigation<sup>[51]</sup>. The Law Commission of India in its 239<sup>th</sup> report highlighted that non-usage of scientific techniques, lack of required proficiency and heavy dependency on oral testimonies during investigation has led to the menace of low conviction in criminal cases in India<sup>[52]</sup>. The report also suggested that the current investigation methods and an attitude of neglect towards forensic evidence leads to insinuation of innocent people as well<sup>[53]</sup>. Currently, forensic science and its use for investigating purposes is merely on paper and restricted to major or high-profile cases. Despite claims of development in this regard, no result in this sector in terms of technology or strategy has been witnessed. For instance, in 2010 the Ministry of Home Affairs appointed a committee for providing 'Prospective Plan for Indian Forensics', however the recommendations of the committee were neither debated nor implemented<sup>[54]</sup>. Forensic evidence such as DNA profiling promotes scientific investigation and provides precise, quick and definite proofs unlike conventional methods like testimonies of eye witness or circumstantial evidences<sup>[55]</sup>. The use of scientific methods and technology assists the enforcement agencies in cases such as rape, sexual assaults e.tc where lack of evidence provides benefit to the accused which is evident from the miserable conviction rate. Though, the colonial era criminal laws in India provides very less room for forensic evidences such as DNA, however there has been some developments in statutes and even courts have slowly started to account for such evidences considering its consistency in other jurisdictions<sup>[56]</sup>.

S.53 of Cr.P.C provides that if it is believed that medical examination of accused can adduce evidence, in such cases medical examination through a registered practitioner shall be permissible<sup>[57]</sup>. The 2005 amendment introduced S.53A which included blood samples, swabs, semen, and nail clippings under the ambit of examination through scientific methods including DNA profiling<sup>[58]</sup>. However, one of the main challenges with these forensic evidences is Article 20(3) of the Constitution which provides for right against self-incrimination, as the courts scrutinise the methods of investigation so they do not violate the fundamental right of the accused<sup>[59]</sup>. Though, the Hon'ble Supreme Court in

*Kathi Kalu* case held that, "being a witness does not mean merely making oral/written statements but to impart knowledge about relevant facts by someone who may have the awareness of the same"<sup>[60]</sup>. However, in another landmark judgement, *Selvi v. State of Karnataka*, though the court accepted that bodily substances such as blood, semen, DNA e.tc constitute physical evidence, it has suspected the credibility of the techniques used in these investigations such as lie detector, brain mapping etc<sup>[61]</sup>. Hence, courts have distinguished between physical and mental privacy of evidences whereby physical evidences such as DNA, fingerprints have been allowed but evidences which do not provide mental volition to accused have been discredited<sup>[62]</sup>.

Furthermore, the forensic evidences under the Indian criminal justice system are not construed as conclusive evidences and are used for corroborative purpose. These evidences are to be backed by the expert opinion that has to satisfy the court that findings are methodical and unbiased. It was held in *Khushboo Enterprises v. Forest Range Officer* that expert evidences are mere opinions, and opinions of witnesses on a question of law or fact hold no value in eyes of la<sup>[63]</sup>. Hence, expert opinions and forensic evidences are accounted only if they are in conformity with all other evidences on record.

Unfortunately, lack of certain provisions and moreover unwillingness towards developing procedures, resources, equipments and exposure in this area has not allowed growth of investigation in India. Considering the development in forensic science and tragic condition of criminal justice delivery in India, it is time that we must widen our scope and means of investigation. The Malimath Committee had also suggested widespread use of forensic science by investigative agencies and provided that DNA experts should be brought under the ambit of 'experts' under S.293 (4) of Cr.P.C<sup>[64]</sup>. The committee further recommended a legislation pertaining to guidelines for police and agencies in order to create safety measure<sup>[65]</sup>. Since, it is necessary that some degree of standard be applied before admitting such evidences, protocols must be laid down for procedures to be undertaken for the tests to be done, infrastructure must be developed and laboratories must be encouraged towards ingenuity and research. In this regard, *The DNA Technology (Use and Application) Regulation Bill, 2019*, pending with the parliamentary standing committee can be the way forward. The bill provides directives for collection and use of DNA data for criminal offences, establishing data banks and laboratories under supervision of a regulatory authority<sup>[66]</sup>. Another important aspect is to promote learning, research and application in the field of forensic sciences and criminal

<sup>50</sup> The Indian Express, 32 per cent conviction rate in rape cases: NCRB, December 4, 2019, available on <https://indianexpress.com/article/india/32-per-cent-conviction-rate-in-rape-cases-ncrb-6149331/>, (Last visited on June 1, 2020).

<sup>51</sup> Law Commission of India, *Expedient Investigation and Trial of Criminal Cases Against Influential Public Personalities*, Report No. 239, (March 2012).

<sup>52</sup> *Ibid.*

<sup>53</sup> *Supra* note 51.

<sup>54</sup> DR. GOPAL JI MISRA, DR. C. DAMODARAN, *Final Report on Perspective Plan for Indian Forensic*, (2010), available at [http://dfs.nic.in/pdfs/IFS\(2010\)-FinalRpt\\_0.pdf](http://dfs.nic.in/pdfs/IFS(2010)-FinalRpt_0.pdf), (Last visited on June 21, 2020).

<sup>55</sup> Dipa Dube, *Determining the Applicability of DNA Evidence in Rape Trials in India*, International Journal of Social Science Research, Vol. 2 No. 1, 176-202 (September 5, 2014), available at <https://ssrn.com/abstract=2492014>, (Last visited on 29 May, 2020).

<sup>56</sup> *Ibid.*

<sup>57</sup> The Code of Criminal Procedure, 1973, §53.

<sup>58</sup> The Code of Criminal Procedure, 1973, §53A.

<sup>59</sup> The Constitution of India, 1950, Art. 20(3).

<sup>60</sup> *State of Bombay v. Kathi Kalu Oghad*, 1961 CrLJ 856.

<sup>61</sup> *Smt. Selvi v. State of Karnataka*, AIR 2010 SC 1974.

<sup>62</sup> Gautam Bhatia, *Privacy and the Criminal Process: Selvi v. State of Karnataka*, Yale Law University (April 22, 2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3166849#:~:text=In%20Selvi%20v%20State%20of,and%20personal%20liberty%20under%20Ar](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3166849#:~:text=In%20Selvi%20v%20State%20of,and%20personal%20liberty%20under%20Ar) ticle, (Last visited on 29 May, 2020).

<sup>63</sup> *Khushboo Enterprises v. Forest Range Officer*, AIR 1994 SC 120.

<sup>64</sup> *Supra* note 35.

<sup>65</sup> *Ibid.*

<sup>66</sup> The DNA Technology (Use and Application) Regulation Bill, 2019 available at, [https://www.prsindia.org/sites/default/files/bill\\_files/The%20DNA%20Technology%20Use%20and%20Application%29%20Regulation%20Bill%2C%202019%20Bill%20Text.pdf](https://www.prsindia.org/sites/default/files/bill_files/The%20DNA%20Technology%20Use%20and%20Application%29%20Regulation%20Bill%2C%202019%20Bill%20Text.pdf), (Last visited on June 4, 2020).

justice. One more bill pending in the parliament, *The National Forensic Sciences University Bill, 2020* seeks to achieve the same objective, and it is of utmost importance<sup>[67]</sup>.

Courts across the world have accepted the accuracy and admissibility of scientific evidences especially DNA<sup>[68]</sup>. These evidences play vital role in assisting the courts in arriving at concrete conclusions hence it is desirable that the committee should recommend procedures, need for infrastructural development and other required specialities in order to ensure efficient use of forensic evidences in our criminal investigation. Needless to say, it must be followed by measures of implementation by the executive.

#### 4. De-burdening the judiciary from backlogs

Indian judiciary plays a crucial role in criminal justice system by facilitating the justice delivery mechanism, but it was realized soon that case arrears and judicial vacancies are blocking the conduit to delivery of justice<sup>[69]</sup>. In India, there is an estimated arrear of 32 million cases and an average 20 million new cases being instituted every year<sup>[70]</sup>. As judicial vacancy is the prime contributor to increasing pendency of cases, The Law Commission in its 120<sup>th</sup> report, 1987, recommended that a ratio of 50 Judges per million people needs to be maintained<sup>[71]</sup>. Unfortunately, there has been no substantial improvement in this regard despite the earnestness to do so. The data released in 2019 by Ministry of Law and Justice for discussion in Parliament, shows the present judge-population ratio to be 20 Judges per million people<sup>[72]</sup>.

The major challenge of covering these backlogs, especially in criminal cases, lies on the lower tiers of the judiciary. This is because out of estimated 32.6 million pending cases in the lower judiciary, 23.5 million are criminal cases<sup>[73]</sup>. While 28 per cent of all pending matters in high courts are criminal cases, the numbers in lower judiciary is 72.11 per cent, pointing towards a necessity of strengthening the lower judiciary in catering to the pendency of criminal cases<sup>[74]</sup>. In subordinate courts, 15.56 per cent of all the pending criminal cases are pending for over five years and 7.77 per cent for over a decade<sup>[75]</sup>. The huge pendency of cases has

been regarded as an infringement of 'right to speedy trial' as part of right to life and liberty under Article 21 of the Constitution, by the Supreme Court in *Hussainara Khatoon v. Home Secretary State of Bihar*<sup>[76]</sup>, and reiterated in *All India Judges Association v. Union of India*<sup>[77]</sup>.

The committee constituted for suggesting criminal reforms in India must consider measures to ensure clearing of backlogs. Two probable solutions to this mammoth issue of pendency, which are discussed briefly in the next section, can be filling up the judicial vacancy followed by specialization of courts and judges and bringing into practice the concept of Plea bargaining.

#### a. Judicial vacancy and need of specialization of courts

As suggested by the data, maximum pendency in criminal cases lies with the lower judiciary and one of the major contributors to it is immense judicial vacancies. The data released by Ministry of Law and Justice in the year 2018 reveals that Indian judiciary faces a major shortage as it accounts vacancy of more than six thousand judges<sup>[78]</sup>. The report shows that out of 6160 vacant posts of judicial officers, 5748 vacancies are from lower courts only<sup>[79]</sup>. In 2019, the lower judiciary had 26 per cent posts of approved strength vacant while the high courts were working with 63 per cent of total approved strength leaving 410 seats vacant<sup>[80]</sup>. Recently in July 2019, the Supreme Court observed that there is an urgency of filling up the vacancies in the lower judiciary<sup>[81]</sup>. It came after a year-long monitoring by the Supreme Court of the progress made by the states, respective high courts and union territories, when it took cognizance of over five thousand vacancies in the lower judiciary<sup>[82]</sup>.

At this juncture, it is crucial that along with filling vacancies, prominence should also be given on specialization of these 'to-be appointed' judges in order to enable the formation of specialized benches. The constitution of specialized benches in criminal law in subordinate courts is of utmost urgency, which is evident from data regarding arrears in criminal cases. Malimath Committee on criminal law reforms in its report had suggested, that specialized benches in criminal law will help early disposal of cases as a judge specialized in criminal law will take less time to comprehend and analyse the facts and deliver judgment<sup>[83]</sup>. The Supreme Court in 2014 laid perfect example depicting greater efficiency of specialized benches by constituting a 'special tax bench' which

<sup>67</sup> The National Forensic Sciences University Bill, 2020 available at, [https://www.prsindia.org/sites/default/files/bill\\_files/The%20National%20Forensic%20Sciences%20University%20Bill%2C%202020.pdf](https://www.prsindia.org/sites/default/files/bill_files/The%20National%20Forensic%20Sciences%20University%20Bill%2C%202020.pdf), (Last visited on June 4, 2020).

<sup>68</sup> Report to the President, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature- Comparison Methods, September 2016, available at [https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast\\_forensic\\_science\\_report\\_final.pdf](https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf), (Last visited on 3 June, 2020).

<sup>69</sup> DR. JUSTICE V.S. MALIMATH, Report of the Arrears committee, (1990).

<sup>70</sup> Business Standard, *Why India's Courts are struggling to find Judges*, January 8, 2020, available at [https://www.business-standard.com/article/specials/why-india-s-courts-are-struggling-to-find-judges-116061600898\\_1.html](https://www.business-standard.com/article/specials/why-india-s-courts-are-struggling-to-find-judges-116061600898_1.html), (Last visited on June 3, 2020).

<sup>71</sup> Law Commission of India, *Manpower Planning Judiciary*, Report No. 120, (1987), available at <https://www.latestlaws.com/library/law-commission-of-india-reports/law-commission-report-no-120-manpower-planning-judiciary-blueprint/>, (Last visited on June 3, 2020).

<sup>72</sup> Ministry of Law and Justice, Statement on Unstarred Question No. 627 (November 20, 2019) available at [https://doj.gov.in/sites/default/files/LS-Eng\\_14.pdf](https://doj.gov.in/sites/default/files/LS-Eng_14.pdf), (Last visited on June 3, 2020).

<sup>73</sup> National Judicial Data Grid (District and Taluka Courts of India), available at [https://njdg.ecourts.gov.in/njdgnew/?p=main/pend\\_dashboard](https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard), (Last visited on June 5, 2020).

<sup>74</sup> Ibid

<sup>75</sup> *Supra* note 72.

<sup>76</sup> *Hussainara Khatoon and Others v. Home Secretary State of Bihar* 1979 SCR (3) 532.

<sup>77</sup> *All India Judges Association and others Vs. Union of India*, (2002) 4 SC 247.

<sup>78</sup> Ministry of Law and Justice, Statement on Unstarred Question No. 1600 (November 20, 2019) available at [https://doj.gov.in/sites/default/files/LS-Eng\\_14.pdf](https://doj.gov.in/sites/default/files/LS-Eng_14.pdf), (Last visited on June 3, 2020).

<sup>79</sup> The Print, *SC wants lower courts to speed up rape trials, but 26% judge vacancies make it difficult*, December 17, 2019, available at <https://theprint.in/judiciary/sc-wants-lower-courts-to-speed-up-rape-trials-but-26-judge-vacancies-make-it-difficult/336532/>, (Last visited on June 3, 2020).

<sup>80</sup> Ministry of Law and Justice, vacancy report <https://doj.gov.in/sites/default/files/Vacancy%20%2801.12..2019%29.pdf> <https://theprint.in/judiciary/not-just-govt-judiciary-also-to-blame-for-mounting-judge-vacancies-in-high-courts/352342/>, (Last visited on June 3, 2020).

<sup>81</sup> Ibid.

<sup>82</sup> *Supra* note 80.

<sup>83</sup> DR. JUSTICE V.S. MALIMATH COMMITTEE, *Committee on Reforms of Criminal Justice System*, Volume 1, (March, 2003).

attenuated the arrears of burgeoning tax matters<sup>[84]</sup>. The apex court also said that specialized roster for daily hearings can help in speedy disposal of case arrears<sup>[85]</sup>.

However, as stated the challenge to constitution of such specialized benches at the lower judiciary is the shortage of judges to preside over these specialized benches. In states like Bihar, the lower judiciary has a vacancy of 80 per cent of the capacity, with only 361 judges against approved strength of 1847 judges<sup>[86]</sup>. In such cases, where even proper hearings are unmanageable, specialized benches remain a day dream. Hence, the newly constituted committee must push for filling the vacancies and scheme for specialised benches in order to facilitate the delivery of justice. However, more importantly it is the duty of executive to actively consider the recommendations and ensure that vacancies are fulfilled at the earliest after which the specialised benches can be constituted.

### b. Implementing plea bargaining

Plea Bargain is a settlement between the accused and state, where the accused formally accepts their guilt in lieu of waiver of some charges as well as reduced punishment, thereby reducing the duration of trial<sup>[87]</sup>. This concept traces its origin in 1970s in USA where it was declared constitutionally valid in *Brady v. United States*<sup>[88]</sup>. Since then, plea bargaining has dominated the US judicial system as almost 75% of convictions in criminal cases is attained through plea bargaining<sup>[89]</sup>. Afterwards, this concept, with varying dimensions, has been adopted by many countries such as England, Australia and recently by China. The President of Chinese Supreme Court in fact stated that plea bargaining in Criminal cases have improved 'litigation efficiency' in the country<sup>[90]</sup>.

In India, the Supreme Court has openly expressed discontentment with the policy of plea bargaining and has in fact called it to be illegal and unconstitutional in its ruling in *Kasambhai Abdul Rehman Bhai Sheikh v. State of Gujarat*<sup>[91]</sup>. Similar view was reiterated again in *State of Uttar Pradesh v. Chandrika*, where the apex court clarified that the policy cannot be used to deal with criminal cases<sup>[92]</sup>. However, pursuant to the 154<sup>th</sup> report of Law Commission of India, that suggested inclusion of plea bargaining as 'essential component of administration of criminal justice'<sup>[93]</sup>. Chapter XXIA was introduced in the Code of Criminal Procedure by the Criminal Law (Amendment) Act, 2005<sup>[94]</sup>.

<sup>84</sup>The Economic Times, *Separate benches for tax cases may help reduce pendency at courts*, January 30, 2018, available at <https://m.economictimes.com/news/economy/policy/separate-benches-for-tax-cases-may-help-reduce-pendency-at-courts/articleshow/62701856.cms>, (Last visited on May 29, 2020).

<sup>85</sup> Ibid

<sup>86</sup> *Supra* note 84.

<sup>87</sup> Black's Law Dictionary 3657 (8<sup>th</sup> ed. 2004).

<sup>88</sup> *Brady v. United States*, 297 US 742: 25 L Ed 2d 747.

<sup>89</sup> Law Commission of India, *The Code of Criminal Procedure, 1973*, Report No. 154, (August 1996).

<sup>90</sup> The Times of India, *Know Your Rights: Plea bargaining, a silver lining of Indian criminal justice system*, August 15, 2018, available at [https://timesofindia.indiatimes.com/blogs/lawtics/know-your-rights-plea-bargaining-a-silver-lining-of-indian-criminal-justice-system/\\_](https://timesofindia.indiatimes.com/blogs/lawtics/know-your-rights-plea-bargaining-a-silver-lining-of-indian-criminal-justice-system/_) (Last visited on June 5, 2020).

<sup>91</sup> *Kasambhai Abdul Rehman Bhai Sheikh v. State of Gujarat*, AIR 1980 SC 854.

<sup>92</sup> *State of Uttar Pradesh v. Chandrika*, AIR 200 SC 164.

<sup>93</sup> *Supra* note, 89.

<sup>94</sup> The Criminal Law (Amendment) Act, 2005.

The Law Commission in its report stated that the policy must be administered with due care, considering the prevalent corruption in the system as well as keeping in mind the interests of the victim<sup>[95]</sup>. In compliance with the safeguards suggested, S. 265A of Cr.P.C provides that option of plea bargaining shall be available only for accused involved in crimes with punishment of less than 7 years<sup>[96]</sup>. The provision further excludes socio-economic crimes and crimes against women and children from its ambit. In order to exclude scope of coercion on the accused, the code under S. 265B provides for in-camera examination of the accused by the court to ensure complete understanding of consequences on their part<sup>[97]</sup>. Further, S. 265C of the code provides participation of the prosecution, the victim and the investigating officer in the process for a reasonable disposal of the case by taking care of interests of all concerned<sup>[98]</sup>. Unfortunately, despite the scheme being in place with sufficient safeguard mechanisms, it has not been implemented properly by the system. According to 2015 NCRB data only 0.45% cases were disposed through plea bargaining<sup>[99]</sup>. It is now expected that the newly constituted committee shall reach consensus with the judiciary and recommend increased implementation of the policy, keeping in mind the precautions, to expedite justice delivery for the parties and put resources of the judiciary to efficient use.

### Conclusion

Criminal law and the justice system have been established to ensure safety of the citizens as well as to reprimand the guilty. However, the legislations governing criminal justice system in India has either been codified by the British or is a replication of century old British laws. Since the enactment of these laws, our society has transformed massively, recognising new rights and enshrining new values. Unfortunately, the criminal laws remained largely the same due to which it either does not extend to newly recognised values or has become ineffective in most areas. Further there has been reluctance on the part of executive as well as judiciary to implement changes that have brought in. This is evident from the massive backlog, poor rates of conviction, etc. as we still subscribe to the colonial originated methods of investigation, trial, and sentencing and have been reluctant to modifications.

Apart from the changes that have to be brought in the criminal law to bring it in conformity with societal developments, there is need to ensure proper implementation of the existing provisions as well which will definitely add to the effectiveness and efficiency of the system. Better techniques of investigation, provisions such as plea bargaining, specialisation of judges etc will surely be helpful in expeditious disposal of cases have not been properly implemented by our courts.

The nexus between ineffective provisions and lack of implementation has pushed the criminal justice system into a pathetic condition; to an extent where people have begun losing faith in the system and sometimes resort to instant

<sup>95</sup> *Supra* note, 89.

<sup>96</sup> The Code of Criminal Procedure, 1973, §256A.

<sup>97</sup> The Code of Criminal Procedure, 1973, §256B.

<sup>98</sup> The Code of Criminal Procedure, 1973, §256C.

<sup>99</sup> Live Mint, *why hasn't plea bargaining taken off in India*, August 31, 2016, available at <https://www.livemint.com/Politics/otm5XvV7DTZJ9KaKScbJ4H/Why-hasnt-plea-bargaining-taken-off-in-India.html>, (Last visited on June 5, 2020).

mob justice <sup>[100]</sup>. The constitution of the reforms committee comes as a ray of hope towards the much-needed reforms in the criminal justice system to reinstate not only faith but safety and security of people as well. Needless to say, effective implementation of the recommendations of the committee must be undertaken otherwise the pitiful status quo will continue erode public faith in the already diminishing criminal justice system.

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<sup>100</sup> Delhi Post, *Prosecution by Public: Mob Justice in India*, July 24, 2018, available at <https://delhipostnews.com/prosecution-by-public-mob-justice-in-india/> (Last visited on June 21, 2020).