The (Malimath) Committee on Reforms of Criminal Justice System: Premises, Politics and Implications for Human Rights

AMNESTY INTERNATIONAL INDIA

With an Introductory Critique by

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INTRODUCTION

The Committee on Reforms of (the) Criminal Justice System was constituted by the Ministry of Home Affairs, Government of India, on 24 November 2000.

The terms of reference were as follows:

i. To examine the fundamental principles of criminal jurisprudence, including the constitutional provisions relating to criminal jurisprudence and see if any modifications or amendments are required thereto;

ii. To examine in the light of findings on fundamental principles and aspects of criminal jurisprudence as to whether there is a need to re-write the Code of Criminal Procedure, the Indian Penal Code and the Indian Evidence Act to bring them in tune with the demand of the times and in harmony with the aspirations of the people of India;

iii. To make specific recommendations on simplifying judicial procedures and practices and making the delivery of justice to the common man closer, faster, uncomplicated and inexpensive;

iv. To suggest ways and means of developing such synergy among the Judiciary, the Prosecution and the Police as restores the confidence of the common man in the Criminal Justice System by protecting the innocent and the victim and by punishing unsparingly the guilty and the criminal;

v. To suggest sound system of managing, on professional lines, the pendency of cases at investigation and trial stages and making the Police, the Prosecution and the Judiciary accountable for delays in their respective domains.

vi. To examine the feasibility of introducing the concept of "Federal Crime" which can be put on List I of the Seventh Schedule of the Constitution.

The Committee, headed by former Chief Justice of Kerala and Karnataka, and former member of the National Human Rights

Commission (NHRC), Justice V.S. Malimath, submitted its report - including 158 recommendations - to the Ministry of Home Affairs, apparently, on 21 April 2003.[1]

Amnesty International is concerned that the Committee's report has not to date been made publicly available or widely circulated.[2] There has been sporadic media coverage of selected recommendations in the report, and on 11 August 2003 it was reported that the government was introducing a Bill to amend the Code of Criminal Procedure, reflecting a few of the Committee's recommendations.[3] However, there has been no official government response to the report indicating the government's position.

Given the importance of the issue of reform of the criminal justice system and the impact of any reforms on all members of society, Amnesty International India believes that the discussions should be transparent and broadly consultative.

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1 See R. Venkataraman, *Guilty or Innocent? Let Accused Speak*, The Telegraph, 22 April 2003, page 1. The Malimath Report, however, is dated "March 2003".

2 A question was asked in the Rajya Sabha on 13 August 2003 by Shri K. Chandran Pillai as to whether the report had been submitted to the Government of India and whether, and where it was available for public reference. See rajyasabha.nic.in/dailyques/199/uq13082003.pdf (last visited 10 September 2003). Amnesty International India is unaware of the Ministry of Home Affair's answer to this question.
Further, several of the participants attending a National Consultation on the Malimath Committee Recommendations [organized by Human Rights Law Network (New Delhi) and the International Commission on Jurists (Geneva) on 9-10 August 2003], including several senior retired judges and lawyers and a former Director of the Central Bureau of Investigation, had been unable to obtain a copy.

3 Reports indicated that the Bill includes provisions permitting plea bargaining, making cruelty under section 498A IPC a compoundable offence and prosecution for witnesses who commit perjury. (*Law will target hostile witness, offers no relief to Zaheeras*, Indian Express, 12 August 2003). However, lawyers and human rights activists have been unable to obtain copies of the draft Bill and to Amnesty International India's knowledge the Bill has not been formally tabled in Parliament. The media has however suggested to the contrary. See Chandan Nandy, *Violent spouses may be sent Bill*, Hindustan Times, 12 September 2003, p.1 (New Delhi edition).

Structure of this Report

This Report is divided into three parts. Part 1 of this Report is an Introductory Critique by Professor Upendra Baxi that examines the normative framework of the Malimath Committee Report.

Part 2 is a critical examination of the methodology of the Malimath Committee. This part also seeks to interrogate the premises of the Malimath Committee Report and unravel its exclusions and silences.

Part 3 examines the human rights implications of the recommendations proposed by the Malimath Committee. It focuses on key recommendations, examining them in the light of India's human rights obligations and other international human rights standards.

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The National Consultation on the Recommendations proposed by the Malimath Committee organised by the Human

Rights Law Network, New Delhi and the International Commission of Jurists, Geneva provided an opportunity to draw on a wide range of perspectives and critiques.

The International Secretariat of Amnesty International also provided valuable comments and suggestions in the preparation of the report.

PART I - PREMISES AND PRINCIPLES

An Honest Citizen's Guide To Criminal Justice System Reform: A Critique Of The Malimath Report

– Upendra Baxi

I. THE *SAID* AMIDST THE *UNSAID*

The two volume Report of the Committee on Reforms of Criminal Justice System, chaired by Justice Malimath,[4] acknowledges the inspiration of Andre Gide's maxim: 'Everything has been said already, but as no one listens we must always begin again'. This *only* literary flourish, in an otherwise turgid text, speaks volumes. 'We must begin again' suggests a considerable familiarity with what has been said but the Report provides little discerning grasp of the already said! The considerable scholarly literature offering diagnosis of pathologies of what ails the criminal justice system (hereafter CJS) is wholly here unacknowledged[5] indeed to a point that raises levels of just anxiety concerning what

[4] The first volume (298 pages) is the main text; the second (381 closely printed pages) provides a mass of appendices. I refer to the former as 'Report' and the latter simply as Volume 2.

[5] I had the privilege of reviewing such work in my *Crisis of the Indian Legal System* (New Delhi, Vikas, 1982). Since then significant empirical literature concerning the Indian CJS has emerged. One looks in vain for any meaningful conversation with the Indian scholarly literature. In this, the Committee, like all law reform bodies, remain overly Anglophile. No doubt, the Committee benefits from 16 commissioned papers (Volume 2, pp. 369-370); of these only six are authored by Indian University based academics; only two academics in this list have authored books in areas of their specialist interest. No serious effort to expand further significant academic contributions remains in sight.

the Committee really knows of what 'has been said before'.[6]

This false pretence of knowledge of the already said is a dangerous normalizing augury. An unwary reader is thus lulled into complacency at the outset into believing that the Report presents a distillation of accumulated wisdom, saying nothing radically new. However, this deeply calibrated rhetoric masks the extraordinary discontinuity between prior sane and safe thinking on restoration of efficiency and equity in the CJS and the proposals now made for a wholesale departure from human rights oriented criminal justice system. Indeed, this Report vulgarizes the notion of reform itself by regarding human rights orientation of criminal justice administration as a part of the problem!

II. The Magics of the Mandate

No one knows quite why the Government of India decided to establish the Committee now. The Report acknowledges this much but suggests that no reasons were necessary, because everyone knows that the CJS 'in India was about to collapse'. High rate of pendency and low rate of conviction have made crime 'a profitable business' (Para 1.3). This form of rather 'ancient' knowledge' justifies now a 'comprehensive review' by yet another 'expert' committee! With unbecoming modesty, the Malimath

[6] The Committee understands its mandate in terms of 'taking into account the recommendations of the Indian Law Commission, the Conference of Chief Ministers on Internal Security, the Report of the Task Force on Internal Security, and Padmnabhaiah Committee Report on Police Reforms" (Para 1:5). See, for a listing of materials consulted, Volume 2, pp. 371-374 It is not clear why only this material stands thus privileged; nor it is clear what 'taking into account' really signifies. It gives, for example, a short shrift to the well-conceived (May 2002) 180th Report of the Indian Law Commission, which negated any limitation on the right of silence any such limitation being *per se* violative of Article 20(3) and Article 21 of the Indian Constitution. The Malimath Report (submitted March 2003) suggests abundant limitation of this basic constitutional and human right! The Indian Law Commission has been moved to make a public protest [see *Pioneer* 18 August 2003, page 5, New Delhi edition] at the Malimath Committee's misperception and misrepresentation of its position.

Committee seeks to revitalize the system; it in fact complains that the tasks assigned to it fall far short of such a review (Para 1.5). The range of substantive law reform suggestions made by the Committee ultimately, proffering versions of its 'modesty', suggest otherwise.

The Terms of Reference suggest a very heavy programschrift of reform. Malimath indeed faced a mammoth task! Inflicted by its self-cultivated image of a redeemer of the CJS, the Committee stands animated by a sense of historic desperation; it was a *now* or *never* option to 'revamp' the CJS. The Report expresses the urgency of its mission in Fali Nariman's striking phrase: 'this is the last bus to catch' (Para 1.41). Only the ordinary commuters of the 'last bus', not the highly placed lawpersons and justices, know the perils of such an adventure! Even so, given this precocious self-image, the Committee would have served the historic role far better with a much greater measure of deliberation.

The first term is the heart of the Committee's mandate: its duty is to 'examine the fundamental principles of criminal jurisprudence, including the constitutional provisions relating to criminal jurisprudence, and see if any modifications or amendments are required thereto'. The Committee understands this term of reference as a mandate for 'revamping' the CJS. The first interpretive step it takes is to assert that 'Nowhere have the broad objectives of the Criminal Justice System been codified'; these need to be 'inferred from different statutes, including the Constitution, and judicial pronouncements'. From this it seems to follow that 'revamping' must proceed in the direction of reduction of 'criminality in society by ensuring maximum detection of the reported crimes, conviction and arrest of the accused persons without delay, awarding appropriate punishment to the convicted to meet the ends of justice and to prevent recidivism'(Para 1.40).

Conspicuous in this search for fundamental CJS principles in need of 'revamping' is the Committee's demotion of the constitution of India as a 'statute'. In its understanding, the

overriding goals of CJS reform render the Indian Constitution as one of the many '*statutes*' that may need reform. This is startling indeed. The constitution is the *basic law* that imparts legitimacy and legality to all statutes and judicial pronouncements. As such, it offers codification of salient principles of criminal jurisprudence as well, especially via Part III assurances of fundamental rights of all citizens and persons. Under the Indian Supreme Court well-crafted jurisprudence of the Basic Structure of the Indian Constitution, even Parliament, in its professed exercise of constituent power, may not change its essential features. This at least means that that governmental committees should act within the Constitution; any changes they propose must be accompanied by deference to the basic structure doctrine. Understandably, even the very same regime constituted Constitutional Review Committee reported no deficiency in constitutional conceptions of, and standards for, the administration of criminal justice. The Malimath Committee now prefers to act in disguise yet another constitutional review commission!

The Report stands premised on the recognition that Article 21 due process rights to life and liberty is a 'precious right' that has been turned into a 'pipe dream to the many millions to whom justice is delayed, distorted, or denied' by the unsound and inefficient 'functioning of the Criminal Justice System'. It is clear thus that the learned Committee means to suggest that increasing levels of criminality violates Article 21 rights. The State by its failure to provide an efficient crime control system violates Article 21 rights.

This extraordinary interpretation necessarily invites contestation. The Constitution promulgates a due process oriented crime control model, *not* a crime control model *per se*. A crime control model, as is well known, rests on the presumption of the guilt of the accused; 'efficient' criminal investigation necessarily operates this canon, once the range of suspects stands narrowed and more focused. The due process model takes over the trial and

appeals phase. The Committee seems troubled by this institutional asymmetry; accordingly, it finds the constitutional standards of due process adjudication to be a part of the problem, rather than a part of the solution. It thus seeks to remodel constitutional conceptions of CJS.

This names a formidable problem. Unlike the Report, the Indian Constitution does not contemplate every day, even extraordinary, criminality as a *human rights violation*. Rather, it richly suggests that the violation of canons of fair trial (the right against self-incrimination, the right to have a legal practitioner of one's choice, the right to bail, the right to legal service, the right to speedy trial) constitute human rights violation. Even Article 22 authorizing preventive detention stands subjected by the Supreme Court to a veritable enclyopedia of due process constraints. In contrast, the Committee seems to think that state/ governmental failure to achieve optimal levels of crime control constitutes violation of constitutionally enshrined fundamental rights. It seems to endorse the Calcutta High Court response that some of the constitutional due process standards and safeguards (like Article 20 (3) right to silence) constitute a 'stumbling block' (Volume 2, p.108). The learned High Court is more careful in its counsel that 'due deliberation' is called for in any systemic change. However, for the Committee, in sum, criminality, not state failure to observe minima of human rights in the administration of criminal justice, poses frontally the constitutional issue.

The Committee's principal premise is that the 'entire existence of the orderly society depends on the sound and efficient functioning of the Criminal Justice System' (Para 1.19). This truism becomes, however deeply flawed when it provide the sole vantage point with which to commence the task of 'revamping' the Indian CJS. 'Orderly' societies depend as much on the fear of criminal law system engines as on the flourishing of robust civic cultures that prize the ideal of legality, the ethic of following rules because they are made by legitimate authority in accordance with

due procedure and within the dictates of deliberative public rationality. Further, civic culture is worthy of the name only when citizens exercise a defeasible (that is prima facie) right to resistance; in other words, they have the obligation (qua citizens acting under Part IV-A of the Constitution) to contest manifestly unjust law, a point that still needs reiteration in once-upon-a-time Mahatma's India. In contrast to the Indian Constitution's much larger perspective by which the production of 'orderly' society stands contested and adjudged by those living under it, the Report proceeds unfortunately on mere law-and-order and public security premise.

To be sure, the Committee is right in stressing the rise in crime (Para 1.20). However, its reform excursions and exhortations would have benefited further by empirical explorations in what criminologists name as 'the dark figure of crime', crimes that go unreported best demonstrated by the criminology tradition of 'victim' studies. However, so determined is the Committee in inventing a talismanic CJS machine that it finds such research labours unnecessary!

Instead of making the CJS subservient to the 'precious' fundamental rights, the Malimath Committee proceeds to recommend wholesale and retail modification of the schema of basic human rights! It converts the language of the first Term of Reference into an unauthorized charter for constitutional change; after all, that term suggests with charming reticence that the Committee may '*see* if any modifications or amendments are required thereto.' In a surfeit of loyalty, the Committee proceeds *as if it was required to suggest/ prescribe modifications and amendments to the constitutional conception of a civilized constitutional criminal justice system!* It marshals its so-called 'wholesome combination of expertise of all the relevant fields' (Para 1.2) as justifying for itself the arrogation of uncertain measure of constituent power! Such arrogance is simply

unprecedented in the annals of Indian law reform.[7]

The Second Term of reference asks of the Committee 'whether there is a need to re-write the Code of Criminal Procedure, the Indian Penal Code, the Indian Evidence Act to bring them in tune with the demands of the times and in harmony with the aspirations of the people of India'. This interlocution serves for the Committee as a freestanding charter of CJS reform! Paragraphs 1.9-1.15 of the Report nowhere mention the ways in which the Committee garners the 'aspiration of peoples of India'. The various state governments, the criminal justice operators, lawyers and so-called 'jurists', the device of several seminars held at indifferent venues[8] constitute for the Committee the 'people of India!'

The Second Term of Reference did not explicitly urge consultation merely with assorted 'jurists' and state governments as exhausting representation of the people; it mandated consultation with the people of India by way of transparent inclusive dialogue with them. As far as I can see, the Committee makes no conscientious effort in this direction; it relies wholly instead on paternalistic and patriarchal 'expert' perception. Nor are the preeminent figures of the 'common' person, and the 'victim' (in the Third and Fourth Terms of Reference) visited or marked with any vigorous consultative contact. Foreclosed thus all across is *dialogical* criminal justice reform, in a costly surrender to aggregate criminological data analysis and the mere say-so of handpicked experts and a very few responding governments (only *seven* states, and 284 out of 3164 individuals, responded to its

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[7] The only explicit mandate for constitutional change is contained in the sixth term of reference: "To examine the feasibility of introducing the concept of 'Federal Crime' which can be put in the Seventh Schedule of the Constitution'

[8] The Committee itself organized four seminars at Chennai, Jaipur, Mumbai, and Delhi. Out of eight other seminars, *three* were held at Delhi and the rest at Karnataka, Hyderabad, Lucknow, Allahabad, and Pune (Paras 1.13/ 1.14). Neither Gujarat (burning in, and since, 2002), nor any venue in the Northeast, or the State of Jammu and Kashmir, feature in this listing!

complex questionnaire: Para 1.11; see also Volume 2 pp.271-324).

Indeed, Appendix 3, Volume 2, purporting to provide analysis of the questionnaires response remains undiscerning and undifferentiated; it tells us very little of who constitutes the statistical aggregates that 'favored', and were 'against' this or that indifferently and ambivalently framed range of questions.[9] From this *slender* response-base, the Committee fabricates a national consensus on wholesale reform of criminal justice system!

The Report nowhere shows any understanding of why the official and popular response rate was so indifferent, or to put the matter somewhat strongly so abysmally *low*. Had this something to do with the ways in which the questionnaire stood formulated

[9] Appendix 3 lists a large number of suggestions made by unnamed respondents in bare ways, forsaking the richness of Appendix 5 nuanced responses, especially by the twenty-one High Courts. It would impermissibly expand this essay to here reproduce the tabulated responses with which I have worked with here. I may only suggest here that Appendix 5 responses, overall, flatten the diversity of High Court responses. On my reading of this, indifferently presented mass, 8 High Courts militated against change to 'inquisitorial system'; 6 favoured it; others either did not clearly respond or remained ambivalent. I do not burden this text with similar differential response concerning changes in the presumption of innocence or the modification of the burden of proof. No doubt, a fully-fledged analysis remains crucial to any claim to consensus on CJS reform; available evidence, however, militates against such change.

and administered?[10] Did the Committee, with all its professed expertise, fail to command a measure of legitimacy with states and assorted respondents? How may we understand that only *seven* states, ruled by regimes often different from the ruling national coalition, responded to the questionnaire? Why was the follow-up for recalcitrant respondents so effete and counterproductive? Why did only 284, out of 3164, individuals respond? Why did so many High Courts, despite directives from the Chief Justice of India, fail to furnish the information in the required format (Para 1.10)? Why, out of the many respondent 'legal luminaries' (a peculiarly embarrassing Indian legal phrase) were most predictably Delhi-based (Para 1.15)? The Report dutifully mentions communicative failures but is silent on the causes for it, even when proceeding boldly with its far-reaching recommendations!

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[10] The questionnaire (Volume 2, pp. 1-12) imposes extraordinary burdens on respondents. Key terms are not operationalized, a standard requirement for such an exercise, as any novitiate empirical researcher knows well,
To take but just one example, question 2.2 asks the respondent to answer the question: 'If no presumption of innocence or guilt of the accused is drawn, do you think that that such neutrality would impact unfairly or lead to failure of justice'? How is one ever going to be able to satisfactorily respond to such a bizarre question? If the question is whether presumption of guilt would lead to such an impact / result, much will here depend on what that kind of presumption may operationally mean. Moreover, the question already presumes that everyone understands the same thing by terms like' impact', 'neutrality', and 'justice'! Even in an opnionairre, operationalization of key terms is considered essential.
Further, the Questionnaire poses leading (and loaded) questions. How many respondents may be able to answer question 1.2 ('Do you favour investigation of cases being done under the supervision of the Judge, as in the Inquisitorial System as in France"?) As far as I know neither key bureaucrats nor High Court personnel possess a semblance of knowledge of the so – called inquisitorial system or of French jurisprudence! Indeed, some High Court Justices explicitly disavowed any knowledge of the French or any other 'inquisitorial' system! See, for example, the Calcutta High Court's response (Vol. 2, p. 108).
My erstwhile colleague and esteemed friend, Professor N.R. Madhava Menon was the only empirically literate member of the Committee; even he now forfeits his privileged craft!

It is, indeed, unsurprising that the Report is unabashedly *elitist* in the worst sense of that term. It construes 'the demands of the times' in terms of what a handful, and handpicked, individuals conceive these to be! These in turn stand equated with 'the aspirations of the people of India'!

III. Shoddy Research, Ramshackle Reasoning

The Report stands all through riddled with extraordinary lapses of research and curious ways of illogical justification for recommendations proposed. At most times, its 'findings' (as we shortly see) at best summon the depth of newspaper headlines and indifferently composed edit pages. At so many places, it is guilty of what lawyers name as *suppressio veri* (suppression of truth) and *suggestion falsi* (making manifestly false suggestions).

I take here just one major example concerning the way the Report sculpts the constitutional demise of the right to silence. It summarily concludes that

> *…drawing of adverse inference against the accused on his silence will not offend the fundamental right granted by article 20(3) of the Constitution as it does not involve any testimonial compulsion. Therefore, the Committee is in favour of amending the Code to provide for appropriate inferences from the silence of the accused* (Para 3.40).

The argument that such a provision may run afoul of Article 21 due process rights shrivels in the Report to a pre - *Maneka Gandhi* interpretation that merely confined Article 21 rights to life and liberty to subjection by 'procedure established by law'. The Malimath Committee thus operates on an obsolete understanding of Indian constitutional jurisprudence. It is another matter that any law student in a good law school who made a similar argument would have failed to obtain a pass mark!

Troubled somewhat by this shoddy reasoning, the Report seeks to rescue its recommendation by suggesting that Article 21

may not pose any problems 'during trial after the charge is framed'. The courts may, according to the Report (Para 3.42), 'liberally', 'vigorously', and 'proactively' exercise their power 'to put questions to the accused for the purpose of discovering truth without affecting that right'.

This 'precious' recommendation stands accompanied by two caveats: first, only the court may frame and put questions; second, 'the accused will not be administered oath and he will not be liable for punishment for refusal to answer questions or for giving false answers'. What is new is not the prospect of the court putting the questions; what is new is the recommendation that the accused may now run risks of the of adverse inference being drawn from the exercise of the right to silence. According to the Committee, this does not amount to testimonial compulsion violative of rights to fair trial and to life and liberty!

Not understanding of Indian constitutionalism but *poorly researched* comparative jurisprudence guides this Report. It relies primarily on two decisions of the European Court of Human Rights: *Murray*[11] and *Condron*.[12] Neither supports this sweeping recommendation. In *Murray* the accused did not testify on oath; in *Condron* the accused did so. The latter involved the issue of directions given by justices to the jury, a situation of little or no juristic relevance to the Indian situation. Indeed, the Court observed in the latter case:

> *The Government observed that the following safeguards must also not be overlooked in assessing whether it was appropriate to leave the jury with the possibility of drawing an adverse inference from the applicants' silence at the police station: the burden of proof rested with the prosecution throughout to prove the applicants' guilt beyond reasonable doubt; the jury were specifically*

[11] (1996) 22 EHHR 29
[12] *Case of Condron* v. *United Kingdom* (App. no 3571897; decided 2 May 2002).

> *directed that the applicants' silence could not on its own prove their guilt; the trial judge had to satisfy himself that there was a case to answer before directing the jury on the issue of the applicants' silence; the jury could only draw an adverse inference if they were sure beyond reasonable doubt that the applicants' silence during police interview could only sensibly be attributed to their having no answer or none that would stand up to cross-examination; finally, the jury were under no duty to draw an adverse inference.*

This necessarily long quote underscores that the 'the burden of proof' governed by the absolute standard of guilt beyond reasonable doubt, a standard that the Report considers ripe for demolition in Indian criminal justice administration! Under the United Kingdom's own submissions, the trial judge 'had to satisfy himself that there was a case to answer', a much higher threshold than commended by the Report which merely contents itself with the mere fact of charges being framed for trial. The jury may draw an adverse inference 'if they were sure beyond reasonable doubt' but the Malimath Report will give judges a much greater human rights adverse latitude. Besides, these cases insist on the impermissibility of drawing adverse inference because the accused exercises the right to silence; or when there is little evidence that justifies drawing such inference. Indeed, these decisions establish the power to draw such inference only upon reasoned and justifiable conclusion in the full, considered weight of available evidence. This discretionary power becomes available primarily when the accused chooses to testify under oath and then too under the most stringent circumstances, eminently reviewable under the national and regional human rights monitoring systems.

The fifteenth hand, headnote type reading of these cases that masquerades as comparative law research render the Committee's comparative jurisprudence citations deeply suspect. It is improbable that the learned members of the Committee had the

slender most understanding of this jurisprudence. Its references to United Kingdom jurisprudence are deeply manifestly flawed. Indeed, its citation to Australian jurisprudence is stunning if only because it is bereft of a Bill of Rights. In addition, it offers scant evidence, even by way of citational support, of jurisprudence of the United States, Canada, France and Italy! In this arc of ignorance, it is too much to ask of the Committee to have the *slightest* familiarity with comparative criminal and human rights jurisprudence.[13] Indeed, the Committee shows little regard for the text and interpretation of the right to fair trial in supranational and international human rights conventions.

The Malimath Committee, furthermore, ignores the differential access to legal services available to the Indian accused. The grudging departures from the right to silence in the more 'developed' Euroamerican system remain secure in the in a residual welfare state, which still bears staggering financial burdens of providing effective and equitable defense counsel services to the accused. In contrast, even a perfunctory look at the Union and State budgets for legal services would have shown fully the human and human rights costs already borne by the disenfranchised Indian peoples caught in the web of CJS. The Committee egregiously regards the meagre Indian legal state services as a functional equivalent to highly professional, and exorbitant, provision of right to counsel. It needed only a small reality check to realize fully the cruel imbalance between the Indian legal aid appointed counsel for the impoverished accused pitted against the might of public prosecution and the reign of torture and terror of custodial regimes.

[13] For example, Article 14(3)(g) of the International Covenant on Civil and Political Rights, the provisions relating to right to silence in the Yugoslav Tribunal, and the recommendations of the International Law Commission concerning the right to silence in the Draft Treaty on International Criminal Court. Amnesty International and kindred human rights organizations canvassed this fully before the European Court of Human Rights.

IV. Presumption of Innocence

The Committee in search of 'revamping' criminal justice system gives some anxious attention to the presumption of innocence and the standard of proof. The Report recognizes that 'cardinal' principle of criminal jurisprudence is 'that the burden rests on the Prosecution to prove the case' beyond reasonable doubt; the few statutory exceptions, however, reinforce the rule (Para 5.6). The Report insists that there is something flawed about the presumption of innocence and seeks to modify the standard of burden of proof. However, its analysis on either score remains inchoate, or put more sharply the learned Committee does not give much evidence of what it is really talking about!

The principle that 'Every man is presumed to be innocent until proved guilty' stands hailed frequently in the Report as a 'cardinal' and 'pivotal' principle of civilized criminal justice administration. The Report also reiterates that the presumption of innocence is a vital civil and political right under the International Covenant on Civil and Political Rights, anticipated by the Indian Constitution's Part III safeguarding peoples' fundamental rights. All too swiftly, however, it expresses a profound disquiet concerning the doctrine of presumption of innocence. Thus, in Para 5.15, the Report maintains that it 'is as much a miscarriage of justice to acquit a guilty person as it is to convict an innocent'. Armed with the authority of acontextual observations from Professor Glanville Williams (Para 5.14/5.15), the Report speaks of 'unmerited acquittals' of 'the large percentage of acquittals of guilty persons' and blithely asserts that:

> *More the number of acquittals of the guilty, more are the criminals that are let loose on the society to commit more crimes. They would do this with greater daring for they know by their own experience that there is no chance of their being punished* (Para 5.16).

As far as the Committee's understanding of Professor Glanville Williams is correct, this is a most specious sort of reasoning, to the

say the least. How does one already *know* that '*criminals*' remain actually acquitted under the sway of presumption of innocence? Surely, such a view logically entails the notion that the epistemology of due process (that is requirements of knowledge inherent to determination of criminality) is wrong. To reach that result, one has to *prejudge, outside any established legal process*, the accused as necessarily guilty by their mere ascription of that status to them, a result that so astute a thinker would not have intended!

How may we come to know, further, that many accused/ convicted persons regard the presumption of innocence as license of committing more crimes with impunity? The Report does not cite a *single* study (there is no question of course of its commissioning such a study), which verifies its conclusions. It does not conduct a stratified survey of acquittal and recidivist population that, for example, would have verified/ disverified the proposition. Such a study will have to verify the key assumption that the sample population actually holds the operational belief that that the presumption of innocence will inexorably set them free every time they embark on criminal conduct.

Instead of doing any sustained empirical work bearing on so crucial a matter, the Report relies merely on 'commonsense' expressed *ad nauseum* in judicial reiteration of the maxim: 'it is better that ten guilty persons may escape rather than one innocent person may suffer' (Para 5.15). This 'commonsense' beclouds the basic question: how may we in advance of due process based trial process determine the status of the alleged fact that 'ten guilty persons' escape conviction and punishment? The maxim is a *rhetorical*, not a *performative*, device. Put another way, in thus ritually underscoring the presumption of innocence; courts do not in fact actually perform the task of acquitting ten guilty to save one innocent person. In each case, judges and courts have to decide on guilt or innocence of the accused on facts and arguments before them. To reiterate, the maxim does not actually describe the fact

that ten guilty persons actually stand acquitted lest one innocent person suffer; rather it reiterates that courts do not somehow presume that ten out of eleven persons are *actually guilty of crimes alleged*. The Report seeks to, subvert under the banner of its involuted invention of a new criminal justice commonsense, this precious rhetorical power of the maxim.

This new commonsense is further flavoured by populist rhetoric. The Committee blandly asserts that 'criminals' acquitted under presumption of innocence

> *[M]ay occupy important and sensitive position in public life. If criminals start ruling the country one can imagine the consequences* (Para 5.16).

This dire prospect, some may say, in agreement with the Committee, has happened! The already, and unfortunately for the Malimath Committee, richly available, reports, such as the Vohra Committee (and electoral reforms under the auspices of the Election Commission) do *not* place, as does this Report, the blame on the operation of the doctrine of presumption of innocence. They find approaches to solution of the problem in reforms of electoral system and grater insistence on accountability mechanisms for corruption in high places. Even when these make recommendations concerning CJS reform, they do not go so far as to advocate abolition, or fundamental modification, of the doctrine.

The more fundamental difficulty with the Report is its *blithe* assumption that each accused may be guilty unless he/ she proves innocence. Haunted by the scepter of the ten 'guilty' set free in order to save one innocent person, the Committee here claims for itself an extraordinary epistemic privilege. It already knows that the ten acquitted persons are actually 'guilty' persons, in advance of a due process based trial and appellate process! This is a staggeringly astonishing proposition, a gift of prophecy given to six members of a randomly constituted committee by an arbitrary regime!

V. 'Guilty beyond Reasonable Doubt'

The Report is preeminently agonized by this heavy burden of the standard of proof. However, one looks in vain for the sources of this agonizing!

A formidable obstacle to understanding its meandering discourse is the fact that Committee is not quite sure of its target. On the one hand, it bemoans this standard necessarily stemming from the doctrine of the presumption of innocence; on the other hand, the Committee itself acknowledges at several places that the standard is not absolute'. Legislative derogations and deviations, it notes, have been held constitutional when impugned at the bar of due process rights under Article 21 of the Constitution (Para. 5.6-5.8). Indeed, it asserts and demonstrates that the standard is 'becoming flexible' (Para 5.18). What then is the problematic that the Committee seeks to address? To this question, the Report provides *no* answer at all!

Something, we are asked to take in an act of *faith*, is *wrong* with the standard/burden of proof. That 'something' stands described with deep indifference. We are educated (without any detailed narration) that that 'proof beyond reasonable doubt' is *not* a 'standard of universal application'; 'France has not adopted this standard' (Para 5.22). What *follows* from this comparative jurisprudence tidbit? Going back to 1867, we are educated and entertained by the fact that section 4 of Public Gambling Act dispenses with this standard. What follows then from this colonial history gossip? The Report says that times have changed.

> *Now there is a sea change … People now a-days are better informed. The Press, the radio, the television, films, and various type of literature have enormous influence in educating and making people aware of the different ways of committing crimes. They use sophisticated weapons and employ techniques so as not to leave any trace of evidence that may implicate them. The accused are becoming more daring and reckless. The level of*

> *morality has gone down and regard for truth is waning. …It looks as though the criminals are emerging stronger than the law enforcing agency (Para 5.28).*

What *follows* from this set of platitudes is simply the *ipse dixit* (something is true merely because we say it is!) that the standard of proof needs modification.[14] Law reform measures backed only by platitudes, gossip, and slogans constitute the gravest threat there is today to human rights in the administration of criminal justice.

In any event, the Report is determined *even* to change the existing 'flexible' standard of proof beyond reasonable doubt. In Para 5.30, it suggests that we adopt a different standard that of 'clear and convincing' proof. This, according to the Committee, is the golden mean between the 'preponderance of probability' standard in civil adjudication and 'beyond the reasonable doubt' standard in criminal cases. The latter, the Report maintains, is too 'subjective'; it is unclear how the proposed standard will be any the less so. It recommends (Para 5.13(iii) at page 270) that Section 3 of the Evidence Act be modified to read that

> *In criminal cases, unless otherwise provided, a fact is said to be proved when, after considering the matters before it, the court is convinced that it is true.*

To ensure that proof beyond reasonable doubt standard does not surface ever again in the annals of Indian adjudication, the

[14] I call these platitudes because none of the assertions stands based or backed up by any data. In addition, any contrary indications stand suppressed. Do mass media and literature, for example, promote only education in the life of crime? Do bulk of crimes involve sophisticated weapons that eliminate traces of the criminal actor? What evidence exists for saying that 'the accused are becoming 'more daring and reckless'? Is there a growth curve in such criminality over the decades? The above quote says that ' it looks as though criminals are emerging stronger than the law enforcing agency'. '*Looks as though'*, even in an era of POTA? In addition, of digital surveillance which exposes affairs like cricket match–fixing? Do we need a high power committee to entertain and educate us by such platitudinous utterances?

Committee further recommends that the proposed amendment 'shall have effect notwithstanding anything contained to the contrary in any judgement order or decision of any court'. Lawyers term this as an 'ouster clause', a provision designed to eliminate judicial power. The Indian Supreme Court has often pronounced on the validity of such clauses; there is no doubt that were such a clause legislated, its validity will be impugned both under the ordinary jurisprudence and under the doctrine of the basic structure of the constitution, which frowns upon abridgement of judicial power. The Malimath Committee, which specializes in the genre of 'fly-now-pay -later' law reform, stands unperturbed by this prospect.

It is both conceivable and likely that the proposed amendment will operationally result in *de facto* judicial recourse to the disfavoured lesser standard of preponderance of probabilities. No careful Court will of course justify its decision by an overt recourse to this language; but it may indeed find that the fact is true precisely because it thinks that the preponderance of probability is sufficient to justify judicial conviction. The Report does not attend to this probability; this default is fraught with danger to human rights in the administration of criminal justice, especially when the scope of the additional amendment ousting altogether judicial discourse concerning the earlier standard is borne fully in view. This tinkering with CJS postulates may only be grasped when we understand the logic of partial amendment of the adversary system that the Report wholeheartedly enunciates.

VI. Towards A Hybrid System of Criminal Justice

Pages 265-269 of the Report constitute its bleeding heart. Without detailed prior analysis, these pages lurch us towards the need for fundamental changes in the existing adversarial system. Expressing itself firmly against a wholesale transformation to 'inquisitorial' system, the Committee favours adoption of some of its 'good points' that may 'strengthen the Adversarial System' (Page 265). According to the Report these 'good points' are as

follows:

- The duty of the Court to 'search for truth'
- Assignation of 'pro-active role to the Judges'
- Empowering judges' to give directions to investigative agencies in the matter of investigation'
- Empowering judges further with the duty of 'leading evidence with the object of seeking the truth and focusing on justice to victims'.

Towards these ends, the Report suggests seven fundamental changes in criminal law (pp. 266-267). Available space forbids a detailed analysis; instead, I here briefly explore the logic of compatibility of these principles with the existing system.

I believe that the actual text of the Report disrupts the deceptive exercise of selective incorporation of 'good' features of the 'inquisitorial' system. Volume 1 provides us with a rather undifferentiated picture of the inquisitorial 'system'; the only evidence we have of the Committee's direct understanding of inquisitorial system is contained in Appendix 10, volume 2.[15] Volume 2 focuses on only *one* jurisdiction: France. Even here, the narrative is somewhat sloppy. The Committee was informed that the 'prosecution has to prove the case beyond reasonable doubt' (Volume 2, Page 378); if so, one fails to understand why it recommends dispensation from this standard and burden of proof. The Committee notes further that the system of judicial verification of truth is not precedent-based; 'earlier decisions' do not constitute precedents and are rarely cited. France seems to have a jury system even for criminal appeals. How may selective

[15] The Chair of the Committee and a member visited Paris in November19-22, 2002. They were victims of crime themselves as upon landing at Orly International Airport their 'brief-bag' (containing 'valuables such as money, camera, tickets, credit cards, and all the important papers was stolen' (Volume 2, p.377). In the circumstance, the Committee's overweening concern with victims of crimes assumes a new shade of importance!

incorporation relate to the jury - free and precedent happy Indian CJS is not a question that at all *interests* the Committee! What appeals to it is the fact (or rumour?) that in France cases are disposed off expeditiously 'within 1 day or 2 years depending upon the nature and complexity of the case'. Would selective incorporation deliver this desideratum for Indian CJS? In France, the 'highest court will not go in the merits of the case'; how may we adopt this even selectively without fundamentally altering the code of judicial review powers under the actually existing Indian Constitution? In France, the offices of magistrates and prosecutors remain interchangeable; is this transformation desirable and feasible for India? If so, the Report owed us a fuller enunciation. The atmosphere in French courts is 'solemn' and brisk compared with ' the busy atmosphere of the Court that we find in India'. What follows? The Committee further finds on a flying visit further that that the '[P]eople in France seem to be happy and satisfied with the quality of justice administered in their country'(Page 378). It did not of course meet the French people. Upon this caricature of popular contentment is based the overall recommendation of selective incorporation![16] So invigorating are the effects of the holiday in Paris that the Committee simply refuses to listen to the disquiet expressed by several High Courts

[16] The veteran human rights lawyer K.G. Kannabiran is right to observe: 'The Committee suggested a change over to the French Inquisitorial system Nobody knows the present position of the Inquisitorial system. What changes are brought about in the French system after the setting up of the European Human Rights Courts operating the European Human Rights Convention? People are entitled to know about the French system and the effect of Strasbourg Jurisprudence on the French criminal Justice system. Even before the advent of Human Rights Court, there have been complaints against the French system respecting two major aspects' (*The Hindu* December 08, 2002).

concerning the 'switchover'.[17]

To revert to the 'good features' *somehow* discovered, the assertion of 'fundamental duty ' of every court to embark on a 'quest for truth' entails investing judges with some extraordinary powers, hitherto unknown to our jurisprudence. We at least ought to pause- to note the subtle distinction between finding *facts* and discovering *truth*. The distinction is crucial to a human rights oriented CJS. The American legal realists, led by Judge Jerome Frank, demonstrated a long time ago[18] that the organization of CJS procedures (the law of evidence and criminal procedure) ensure that what truly happened is not ever allowed to emerge fully in courtrooms. Judge Frank, in his famous work *Courts on Trial,* went so far as to suggest that at the end of the day what all we have are educated guesses about what really happened. He named this phenomenon as 'guessstimates'; judicial guesses concerning what may have actually happened. Given this, we need at least asks: Does the replacement of 'fact' finding with discovery of 'truth' make any real life difference such that confers inherent superiority upon the 'inquisitorial' as compared with the 'adversarial' CJS? Not endowed with the mysterious expertise of the Committee, I am simply unable to say whether its advocacy of transition from a

[17] It takes little account of Appendix 5, volume 2 containing High Court responses. The Madhya Pradesh High Court, for example, states that the suggestion concerning inquisitorial system' as prevalent in France would not be workable in India' (Volume 2, Page 207). The Calcutta High Court simply 'reserves' it opinion on the issue (Volume 2, Page 108). The Himachal Pradesh High Court (Volume 2, Page 157) elaborates its resistance to an. switchover on the ground that 'because most people are illiterate and develop rivalry and enmity over trifling matters… false accusations of serious nature are made due to rivalry and enmity over trifling matters, under well thought out plans. Therefore, if the crimes are investigated under the supervision of a Judge and the Judge is misled by the schemers, for which there will be every likelihood, chances of an innocent person being convicted and punished will always be there'.

[18] See, Jerome Frank, *Law and the Modern Mind* (New York, 1930). For a recent sustained analysis, see Bernard S. Jackson, *Law, Fact, and Narrative Coherence* Liverpool, Deborah Charles Publication, 1988).

fact-based to a truth- based regime of CJS addresses, let alone solves, any intransigent problematic of the Indian criminal justice administration.[19]

Under the amending proposals, judges may 'examine' any person as a 'witness' or any 'person in attendance though not summoned as a witness'. They may at will also 'recall and re-examine any person already examined as it appears necessary for discovering truth in the case'. This means specifically that the Court may 'at any stage of trial' not merely 'put such questions' to the accused as it 'considers necessary with the object of discovering the truth' but also draw appropriate, including adverse, inference from the refusal to answer (Page 266). Under no compulsion to give evidence, the accused now runs risks of adverse inference in case of non-compliance. By a sleigh of hand, the Report thus seeks to avoid the constitutional vice of testimonial compulsion violative of Fundamental Rights. The Committee seems to think that not requiring the accused to answer questions under oath and not punishing her for refusal to answer is good enough basis for negating the charge of testimonial compulsion (Page 268).

In addition, the Courts are now to be vested by a new 'inherent power' to make such orders as may be necessary 'to discover truth, or to give effect to any order…or to prevent abuse of the process of the court or otherwise to secure the ends of

[19] Moreover, comparative criminal jurisprudence illustrates in abundance that convictions based on *facts* are not always *truth* based. The struggles for reversal of convictions (in the Anglo-American and the European Union legal worlds) on behalf of the convicted persons all too often reveal that their conviction, based on judicial finding of 'facts' had little to do with the discovery of 'truth'. Both the adversary and inquisitorial system eventuate 'miscarriages of justice', regardless of the vaunted distinctions between 'fact' and 'truth' finding by courts and judges. Given the Report's accentuation concerning discovering truths through the administration of criminal justice systems, such that justifies transition from adversary to the so-called inquisitorial system, it ought to have taken us all in confidence concerning this vital distinction.

justice' (Page 266). Space forbids analysis of the proposed transformation of this inherent power. I may, however, say just this: when read with the emphasis on the objective of 'focusing on justice to victims', one may well imagine how the new form of inherent powers may be actually deployed.

Given all this, it is difficult to grasp the notion of selective incorporation from 'inquisitorial' systems. What is really proposed is full-scale dilution of the adversarial system, as it now exists. Charged with the duty to find truth and invested with enormous new powers to direct the investigation, as well as the attenuation of right to silence and presumption of innocence, judges and courts may well begin to read their obligation to find the truth as their duty to increase the conviction rate.

This will be at least the initial impact, until a new jurisprudence develops fully. How that may develop is anyone's guess. What may furnish, for example, grounds of appeal against conviction based on the supple standard of court's 'inner' conviction that the facts alleged are true in its belief? How does the trial court draw constitutionally valid adverse inferences from refusal by the accused to answer questions and how may these be appealed against when the entire conception of the right to free and fair trial thus stand substantially recast? How may the proposed innovation rendering previous conviction as evidence of 'bad character', (Page 267) furnish the bases for determination of the guilt of innocence of the accused in the instant proceeding before it? What may be the relationship between the pursuit of truth in the instant case with the fact of prior conviction? How may, the High Courts, engage, in any event, their review powers? What considerations may now guide them in the exercise of their mandatory power to 'confirm' capital punishment? How may the Supreme Court of India exercise its appellate criminal jurisdiction under the system proposed by the Committee excepting under its Article 142 power 'to do complete justice'?

Suchlike questions simply do *not* engage the Malimath

Committee's attention, so heavily preoccupied it is with trial court duty to find the truth with a focus on 'justice to the victim'. I do not know if any of the inquisitorial system allegedly studied by the Committee had to deal with the complex Indian criminal judicial powers of revision, remand, appeal, and final appeals to the Supreme Court.

Nor does the Committee wrestle with the pertinent issues that necessarily arise from its recommendations. One such concerns the role of the Bar (the defense and prosecuting attorneys) in criminal trial process. Under the proposed system, prosecuting and defense attorneys will owe full and complete obligations to the Court 'to actively pursue the quest for truth' (Page 266), a quest relatively unburdened and uncomplicated by the prevalent due process standards that secure human rights observance in the administration of criminal justice in its quest for 'truth'. What recodification, on this scenario, of the existing canons of legal ethics that distinguishes the roles of the prosecuting from the defense counsel will now be entailed? The Prosecution, liberated from the duty to prove guilt beyond reasonable doubt, will now have the duty to foster inner conviction of the judge to find facts'; the Defense strategies may frequently be now subject to the new forms of inherent powers of the Court.

Regardless of the merits and demerits of the proposed innovation, the Committee should have at least felt obligated to consider the specific forms of transition planning necessary to achieve its stated objectives. Obviously, substantive recasting of the legal profession and legal education would be necessary as providing infrastructure for the realization of the move towards the incorporation of the 'good' features of the 'inquisitorial' system. Its homilies in Chapter 21 concerning the 'emerging role of the legal profession' remain irritatingly vacuous. The Report only attends, and this too with characteristic indifference, the need for reorientation and repositioning of judges (Chapters 9,12,13).

In sum, the Committee proposes fundamental renovation of

the Indian criminal justice system both by *stealth* and by *sloth*. By stealth, because it seeks to smuggle inquisitorial system under the guise of improving the present adversarial one, by sloth, because it is simply not bothered to carefully and responsibly attend to the craft and task of transition this entailed. This furnishes a very sad and poignant symptom, after more than five decades of the Indian independence, of half-baked law reform processes, which can only aggravate the crises of the future of human rights in India. It is even more unfortunate than incumbent Union Law Minister signals his advance commitment to the Malimath Committee that he will 'implement the reforms' that it may suggest! (See 'Acknowledgement' to the Report). Veritably, this is law reform by way of *carte blanche!*

VII. Offences, Arrest, Investigation, and Bail

Rightly, concerned with these issues, the Report proposes some large-scale changes. First, it recommends the removal of distinction between 'cognizable' and 'non-cognizable' offences (Para 7.20.13). Second, concerned co-equally with the 'spiraling crime graph and the menace posed by terrorism, organized crime, and drug mafia in the country' (Para 7.26.8), it recommends ample powers of arrest 'for dealing with serious crimes' (Para 7.26.7). Third, Para 7.32 issues a series of expansion in time periods for police remand; it proposes that the maximum time be increased to 30 (from 15 days), the remand for investigation after the charge is framed to 180 (from present 90) days; and exclusion of time spent by the suspect / accused in hospital from the next time prescribed for police custody. Fourth, the Report suggests continuance of anticipatory bail but with new specific restrictions (Para 7.33.1). Fifth, it suggests that no police arrests be empowered when 'the punishment is fine only and … fine is an alternative to punishment' (Para 7.26.9); nevertheless, this stands accompanied by the caveat that in four categories of serious offences (Para 7.26.4) arrest shall be the norm. Sixth, in modification of previous recommendations of the Law Commission of India, it recommends that 'the confession recorded by a Superintendent of Police or a higher

ranking official should be admissible in evidence subject to the condition that the accused is informed of his right to consult a legal practitioner' (Para 7.35.2). Seventh and contrary to a Supreme Court ruling the Report recommends the making of 'adequate statutory provision … for electronic surveillance and interception in criminal cases' (Para 7.35.7). Finally, (without being exhaustive) the Report makes a large number of suggestions for effective law enforcement, including the need to evolve 'a structured system for collection and dissemination of political intelligence' (Para 7.27) directed towards a more efficient CJS.

This potpourri of suggestions remains interesting and important; many, even including human rights activists, will agree that some move ahead is necessary. After all, who can argue against stricter crime control model against 'organized crime' and crimes of terrorism? What matters beyond these evocative labels is how a crime control model may still respect a due process paradigm of investigation, trial, appeals, and final conviction and punishment.

Civil liberties/ human rights groups may feel justified in their incomprehension of this technical change of the very first suggestion above; what impact may the proposed abolition/ mutation of the distinction between 'cognizable' and 'non-cognizable' offences may have for CJS and constitutional conceptions of good life? Even renowned human rights activists may have difficulty in describing the future impact. I can only here suggest (without further elaboration) that this recommendation needs a close look because it proposes an enlargement of police powers to arrest without the need for any order by the magistrate. The police, under the proposed revision, will function as initial judges of whether the reported or 'cognized' offence requires arrest, on the generalized ground of the 'impact' of crime on' society and victim etc' (Para 7.20.12). It is scandalous that a large number of serious offences should remain non-cognizable, even compoundable (Para 7.20.8). I am not sure (and we see later, in the penultimate section of the essay, nor is the Committee) however

that a proper response lies in expanding police power to arrest, especially given the recognition of custodial malpractices and torture that the Report itself fulsomely acknowledges.

The Committee notes (Para 7.26.7) that the 'real' power to arrest in cognizable and non-bailable category of offences (under the Indian Penal Code) is *allegedly* 'open to much abuse'. This *qualifier* suggests a state of officially cultivated disbelief/ amnesia concerning custodial violence in the face of considerable jurisprudence of Indian courts, including the Indian Supreme Court. The Committee, otherwise ever so open to take commonsense acknowledgement of the facts of the state of crime and punishment under the Indian CJS, emerges here as a coquettish new bride on her wedding night! Such romantic reticence, with all its seductive potential, ill behooves those who would pioneer significant reform of criminal justice system.

Further, civil/ human rights groups may feel enthused by the fifth recommendation mentioned above, until they study the fine print of the caveat in Para 7.26.4. Under this, arrest becomes the *norm*, not the exception. Expansion of arrest power for serious offence stands now justified 'to infuse confidence among the terror stricken victims'. Arrest (with its now jusfied extensions of police remand and pre-trial detention) becomes now the norm directed at all suspects or accused, such as 'habitual' 'violent' and 'absconding' offenders. To this we must now add the more serious Report proposals for 'federal crimes'.

No doubt, serious crimes create terror stricken peoples. However, this category remains elusive in a post 1984 India. How may the masses of terror stricken citizens be identified and their confidence developed? The Committee does even acknowledge the extraordinary impunity of highly placed 'political' suspects prima facie responsible for violence of the 1984 Sikh massacre, December 6 at Ayodhya, and the ensuing carnage, nor the perpetrators of awesome complicity in crimes against Indian people manifest in Gujarat, 2002 events. How may its renovation of arrest powers

operate on these perpetrators? The 'terror stricken victims' stand here conceived as victims of routine, *not* politically animated, mayhem, murder, arson, and rape. There is, as far as I espy, *not a single recommendation* here that may take within its reach suspects or accused belonging to the political classes.

Likewise, the generous expansion of periods in police custody (see point three above) does not even mention what happens to underclass suspects in police remand. The recommendations made primarily, even exclusively, cater to the needs of 'efficient' investigation. The Committee is surely right to counsel that 'interrogation… should be done in a professional manner so as to elicit the truth' (Para 7.25). However, it nowhere stresses the need to combat (save the general endorsement of prior recommendation that India needs to revamp its colonially inherited Indian Police Act: Para 7.31) custodial violence, torture, and tyranny. Efficient Indian policing stands thus liberated from any efficacious preoccupation with human rights in the administration of criminal justice. Perhaps, the Committee thinks that digitalization of investigation (Para 7.25.1) is the best answer there is to human, and human rights, custodial violation; if so, it remains inarticulate concerning human rights responsiveness of new technologies.

Available space forbids further elaboration of the recommendations here highlighted. The Report celebrates a tendency to regard each serious crime as a human rights violation, meriting more severe treatment regardless of the presently constructed constitutional fair trial requirements and entailments. The genius of the Report lies in its version of distinctive human rights concerns that articulately justify its law and order and security dominated agendum and ideology. However, a pertinent wider concern raises itself: How does selective incorporation of the good features of the 'inquisitorial' system 'sit' with the overall recommendations? How may this neither fully adversarial nor fully inquisitorial system achieve even a semblance of equitable and efficient CJS?

VIII. Exceptional Laws

Available space further forbids a detailed analysis of Chapters 18-20 of the Report dealing with organized, economic, federal crimes and terrorism. Anyone looking for fresh insights is likely to be deeply disappointed. As concerns organized crime, the Committee does not proceed beyond inane journalistic observations and the only major suggestion it makes (following the lead of Vohra Committee) concerns extensive powers to confiscate property, proceeds, and instruments of crime (Para 17.17.7). This is welcome but scarcely constitutes a complete strategy in dealing with the 'organized crime'. The Committee, in its operative recommendations, ignores the implication of its own observation that

> *Indian political parties, irrespective of ideological hue and complexion cannot disclaim responsibility for induction of criminals into election processes. The criminals'* (sic) *support the political parties in all possible ways to either continue in or to assume power. Politicians not merely hire anti-social elements to assist them in elections…but also to eliminate their rivals. Murder of political workers, activists etc. by political rivals are assuming a serious proportion. The bonding between political parties and organized crimes complete* (Para 17.16.7).

The Committee does not make a *single* specific or direct suggestion for weakening this bonding! Its focus on 'economic' crimes and crimes of terrorism also does not quite suggest ways that break this bonding. The Report fails to make a single worthwhile recommendation for CJS change based on a study of the state of major prosecutions against top echelon of the political accused. It does not see any need to improvise the Penal Code with new definitions of crime that would more effectively deal with this nexus. Its worthwhile recommendation urging the Government to enunciate a policy statement concerning criminal justice system

also fails to highlight directions that assail this bonding. Surely, a Committee, which conceives its role as 'revamping' CJS, should have at least suggested a draft outline of such a policy. While it excels in a numerous suggestions for setting up specialist bodies to combat organized crimes and crimes of terrorism, the Report fails even to suggest a permanent constitutional mechanism to device ways and means to monitor this bonding for the future. In the circumstances, its lamentation concerning the nexus between politics and organized crime remains merely a cascade of crocodile tears.

The Report's concern with crimes of terrorism proceeds from a more complex understanding of the phenomenon; its own proposed definition (Para 19.2.6) is derived mainly from contexts of cross-border terrorism (Para 19.4) and the post 9/11 'global war on terror'. The Report does not fully recognize that much before 9/11, and almost since the Indian independence, Indian peoples experienced a whole encyclopedia of violation of basic human rights in response to forms of political insurgency, often branded as terrorism. Victimage arises not merely from insurgent political violence but also by state failure in political negotiation and anti-'terror' operations. The Report does not advert to histories of suffering thus entailed; it suggests rather casually that a relatively unknown 1995 NGO draft Bill should form the basis of relief, rehabilitition, and redress (Recommendation 14 (vii), Page 271).

Indeed, since the Independence, Indian law makers have regularly and routinely, developed ways of bypassing the everyday CJS. Social action litigation and human rights activism has unremittingly demonstrated not just the severity of blanket dragnet legislations but also their counter-productive impact. All through, and throughout the entire political spectrum, there has been articulate concern with political misuse of Draconian powers. Even the Malimath Committee is mindful of histories of such abuse of power and the violations of human rights in the actual implementation of these extraordinary laws. The rhetorical multi-

party consensus that security legislations ought not to constitute an *integral* part of the Indian CJS is a social fact; it is also a social fact that, despite this, such special measures continue to proliferate. The Report does not concern itself with this institutionalized ambivalence.[20] Rather, it veers towards *juridical institutionalization of regime/state paranoia*. Put another way, its underlying message, extremely worrisome, is that a more than half a century old distinction between everyday criminal justice system and the exceptional measures stands ready for constitutional erasure.

The things that the Report has to say concerning the POTA remain lacerating for its victims and their next of kin human rights activists. It finds the POTA '…less stringent than the American Act' (Para 19.10.2); it even suggests a review of its sunset (time bound expiration) provision (Recommendation 139; page 295); it further underscores the need for even a 'more comprehensive and inclusive definition of terrorists acts, disruptive activities, and organized crimes' (Recommendation 138, Page 294). Because those who may differ run the risk of dragnet arrest and prosecution (persecution?), the Committee here administers a chilling effect on freedom of speech and expression! In fairness, I should add that the Committee does not harbour such authorial intention. At the same time, should it not have displayed a more serious and sustained solicitude for human rights?

Such solicitude leads us to explore a specific recommendation, and the mode of its making. Concerned, without mentioning any

[20] This essay does not explore the impact of such ambivalence on human rights (civil and democratic rights) movements. Understandably, the activist energies of the best and brightest human rights entrepreneurs stand consumed with forms of 'state' terrorism. Subject to further sociological exploration, I submit that this causes a disproportion in dedication of activist commitment, energy, and talent. Everyday CJS human, and human rights, violation remains less charismatic for human rights movements and markets; the hapless Indian citizens caught in the vicious circle of the CJS thus remain at least twice orphaned. We need reflexive understandings of the causal impact of security legislations on the efflorescent human rights movements in India.

data whatsoever, about 'receipt of foreign contribution…by religious organizations' and their mis-utilization for 'anti-national activities', the Report suggests arming 'the Government with power for control' (Para 19.11.3). The rhetorical caveat that such powers may not compromise 'human rights or civil liberties' fails to persuade because the Report fails to operationally specify limitations thus arising on the grant of expanded governmental powers.

Given the extraordinary developments of regime sponsored violence and xenophobia in Gujarat 2002, and since then, one knows what pernicious communalistic distinctions may be drawn between 'nationalist' (like the Vishwa Hindu Parishad) and 'anti-national' (necessarily Muslim) organizations receiving foreign funds. This stands even more aggravated by the Report's purple prose concerning Indian Muslim 'underworld' (Para 18.10) and Pakistan aided terrorism (Para 19.4/ 19.5). The Report grievously errs in its wholly one-eyed presentation, which unfortunately seems to suggest that anti-national activities remain an inherent proclivity of named and marked communities. To be sure, the Committee did not intend this. But the text thus writ large unfortunately raises unintended, and politically violent, implications in the current political milieu.

The missile 'anti-national' stands often hurled recklessly, and with impunity, against conscientious and decent citizens who seek to perform their constitutional obligations under Part IV-A of the Indian Constitution. Any constitutionally oriented CJS reform should accord *some* space and place for the protection of their fundamental rights in their performance of their fundamental duties. The Report, sadly, misses a precious opportunity for re-democratizing the Indian CJS.[21]

[21] It poignantly fails even to note, in this context, the extraordinary amount of prosecutorial vigour brought to bear on the Tehelka.com expose of corruption in defence deals; one does *not* have to prejudge [as I certainly do *not*] the merits of this exercise in 'sting journalism' in any way to at least caution against the extraordinary partisan development of criminal justice prowess of the state thus entailed.

IX. MISCELANIA

This essay does not attempt to dignify further a whole host of related recommendations made by the Committee. Some recommendations have the quality of the Sermon on the Mount.[22] Some Chapters are simply vacuous. The Report remains perfunctory in its treatment of the problem of perjury, and leads *nowhere* (Pages 154-155). So remains the curious and inconclusive twaddle concerning arrears in courts (Chapter 13), which despite the appearance of solidity in the proposed Scheme for Eradicating Arrears (Para 13.6.1) does not show any responsive understanding of causation of arrears, despite the analysis available in my *Crisis of the Indian Legal System* published as early as 1982! It commends 'commitment and aggressive pursuit at all levels' and suggests that ' requisite finance, manpower, and infrastructure should be made available without cringing' (Page 166). One can only say: *Amen!* Surely, this high-minded preaching is bereft of all pertinence when unaccompanied by a minuscule understanding of the histories of economics, and the political economy, of justicing in India! Chapter 19 concerning policing in India does not add much to the wearisome stockpile of national reports concerning reform of the Indian police! Indeed, its prose raises serious doubts concerning the integrity of reading of past materials.

Some recommendations for the reform of Indian Penal Code stand made almost absent-mindedly. Para 16.4, for example, describes (without any data) Section 498A as a 'heartless provision' because it makes offences of cruelty against married women non-bailable and non-compoundable. Curiously, the Report assumes that for 'the Indian woman marriage is a sacred tie' even in the context of matrimonial and domestic cruelty and violence and the creation of the offence makes her 'fall from the frying pan to fire' because she remains always economically dependant (Para 16.4.3). It goes so far as to aver that a 'less tolerant and impulsive woman

[22] For example, Chapter 12 that commends that witnesses 'should be treated with great dignity and considered as guest(s) of honour' (Para 11.1).

may lodge an FIR even on a trivial act'! (Para 16.4.4). Further, the section 'helps neither the wife or the husband' (Para 16.4.4). From such *ex cathedra* 'reasoning', the Report recommends that the offence should be both bailable and compoundable to give 'a chance to the spouses to come together' (Para 16.4.5). This is indeed a crazy quilt! The Committee has not attempted to examine statistically and sociologically the problem of the social impact of the operation of this section; it recycles instead staid and offensive patriarchal assumptions. Even as pleading of special patriarchal interests, it fails to make any case for the changes it mindlessly proposes.

The same cavalier approach is manifest when it recommends that a 'suitable provision be incorporated in the (Criminal Procedure) Code for fixing a reasonable period for presenting FIR' in rape cases (Para 16.7). It is hard to believe that the Committee makes this recommendation even after the experience of Gujarat 2002, where only three FIRs represent prosecutorial vigour amidst massive violation of women in the regime sponsored pogrom. The Report adds insult to injury for the violated women.

X. In Lieu of a Conclusion

Friends of the Malimath Committee will no doubt find this analysis ungenerous. They will maintain that I have ignored the many 'constructive' aspects of its recommendations. It is a sheer metallurgical fact that recovery of precious matter like gold and diamonds requires us to dig deep through the tons of debris. The effort is always worth the exertion. Metallurgical ways of reading the Malimath Report merit encouragement; these still constitute a worthwhile challenge of de-mystification of its principal recommendations animated overall by an overwhelming law and order ideology that celebrates respect for human rights in the CJS as a marker for state and civil society vulnerability, rather than a source for their enduring strength.

I remain alive to further articulate allegation that I have read *more* into the Report than may have been intended. However, a close human rights reading of the text and the sub-texts, in all their

deep implication, is in itself a necessary human rights task, the performance of which may not be read as impugning formidable 'liberal' credentials of the authors of the Report. I had the privilege of knowing Justice Malimath and at least one member of the Committee, Vice Chancellor Madhava Menon, for well over two decades. *Nothing* will please me more than a full-scale demonstration of *how* and *where* I may have actually *misread*, or *misconstrued*, the Report.

However, this essay assails their performance in my role as a co-citizen animated entirely by Article 51-A obligation of all citizens to develop the sprit of scientific temper and excellence in all forms of public endeavour. The learned members of the Committee, I believe, have done considerable disservice to their own public eminence and worse still to the cause of CJS reform by their cavalier and lackadaisical approach to grave issues of law reform. A great opportunity for law reform here stands thus extravagantly squandered. Even its more sensible suggestions stand encoded in an ideology of criminal justice system reformation ill suited, and dysfunctional, to the future of human rights in India.

Law reform is ineluctably a political process, *never wholly* a domain of technical reform of the lawyers' law. Inescapably the non-'technical' and overtly political here then contest the 'political' unconscious of the Malimath Committee. It is unpersuasive, to say the least, that even a handpicked collocation of regime anointed experts may do no *better*.

Article 51-A, demanding Indian citizens to pursue excellence in all 'walks of life', places serious responsibility of strict human rights friendly interpretation; the very notion of 'excellence' *necessarily makes the best the enemy of the good*. Mediocrity in proposals for law reform, including reform of the CJS, is not a form of civic virtue that the Constitution enjoins upon citizens. Indeed, and by the same token, duties of 'excellence' invite an equally human rights friendly critique demonstrating the errors of this analysis.

Only out of such robust dialogical ventures are born anew the futures of Indian human rights. Regardless of the strength of one's conviction that the Malimath Committee Report unceremoniously aborts such futures, human rights hopes enable one even to think that such official wisdom remains open to democratic corrigibility.[23]

[23] I remain grateful to Vijay Nagaraj, of Amnesty International India, for his invitation to contribute to the monograph. The views stated here in no way cast any burden of responsibility of agreement or endorsement, wholly or in part, upon Amnesty International India or Amnesty International. This critique reflects my own thinking concerning similar worldwide initiatives in the post 9/11 CJS reformation currectly already-in-place and on the way. The restoration of the basic postulates of a civilized, and humane, administration of criminal justice names a most critical challenge for the future of human rights. I acknowledge here my debt to Bikram Jeet Batra's arduous editorial efforts.

PART II - THE POLITICS OF REFORM

Of 'Rights' & 'Wrongs' in the Criminal Justice System

A criminal justice system does not function in a vacuum. The system and the actors–be they police, prosecutors, judges or lawyers, are all embedded in specific social, economic, political and cultural contexts. Moreover a criminal justice system is 'just' only to the extent that it can protect the human rights of the most vulnerable or the disadvantaged. In India, like elsewhere, class, caste, gender, religious, ethnic and sexual identity and other (dis)abilities greatly influence the working of the criminal justice system.

In this respect, in the introduction to its report on Custodial Crimes, the Law Commission of India observed:

> *"Members of the weaker or poorer sections of society are arrested informally and kept in police custody for days together without any entry of such arrests in the police records…The relatives or friends of the victim are unable to seek protection of law on account of their poverty, ignorance and illiteracy … This situation gives rise to a belief that the laws' protection is meant for the rich and not for the poor. If the incidents of custodial crimes are not controlled or eliminated, the Constitution, the law, and the State would have no meaning to the people which may ultimately lead to anarchy de-stabilizing the society."*[24]

Thus it is critical that the purpose, sincerity and significance of any proposed reforms of the criminal justice system be judged by:

(1) The extent to which the process of drawing up the reforms was participatory and inclusive;

[24] 152nd report of the Law Commission of India on "Custodial Crimes", August 1994

(2) The extent to which they are intended to enhance the capacity of the system to be more just, and

(3) The extent to which they address social vulnerability and disadvantage and enable the system to better protect the human rights of those most discriminated against.

The purpose of this section is to subject the Malimath Committee reforms to this test, mainly by examining its methodology, interrogating its premises and unraveling its exclusions and silences.

I. WHO WILL DECIDE WHAT TO REFORM?

> *"The Committee is convinced that a comprehensive review of the IPC is long overdue and should be undertaken on a priority basis by a high power committee. This is not an exercise to be carried out only by lawyers and Judges. Public men and women representing different walks of life and different schools of thoughts, social scientists, politicians etc should be on such a committee to recommend to the Parliament a better and progressive penal law for the country."*[25]
> (Malimath Committee Report, Page 175, Para 14.6.3)

While the Committee is rightly concerned that a comprehensive review of the Indian Penal Code (IPC) must be an inclusive and representative process, it seems to ignore the fact that

[25] The Committee echoes similar sentiments later in the report as well (see pages 186-187).

its own constitution and membership fails these standards.[26] That this Committee was addressing the entire criminal justice system (not just the IPC) should have made it more important that the Committee was widely representative. Let alone being that this Committee could not even find place for a single woman member![27]

Another aspect in which the question of representation is valid is in authorship of the "research papers" that the Committee appears to have commissioned from various 'experts'.[28] Six of the sixteen papers were written by serving or retired Police and other such agency officials.[29] Interestingly these included vital issues that are not normally associated with the police–"Burden of Proof", "Sentences and Sentencing", "Investigation and Prosecution", and also issues that are intrinsically political–"Terrorism–Organised Crime–Mafia Transcending State and National Boundaries–Threat

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[26] The members of the Committee were:
- Chairman - Dr. Justice V.S. Malimath, Formerly Chief Justice of Karnataka and Kerala High Courts; Chairman, Central Administrative Tribunal; Member National Human Rights Commission.

Members:
- S. Vardachary, IAS (Retd.)
- Amitabh Gupta, IPS (Retd.) Formerly, Director General of Police, Rajasthan
- Prof (Dr.) N.R Madhava Menon, Vice Chancellor West Bengal National University of Juridical Sciences.
- D.V Subba Rao, Advocate; Chairman, Bar Council of India.
- Member Secretary – Durgadas Gupta, Joint Secretary, Ministry of Home Affairs, Government of India.

[27] This was brought out strongly by Mohini Giri (former chairperson, National Commission of Women) in her brief presentation at the National Consultation on the recommendations of the Justice Malimath Committee Report, organised by the International Commission of Jurists, Geneva and Human Rights Law Network, New Delhi in New Delhi on 9 and 10 August 2003. (Hereinafter–National Consultation).

[28] For the entire list of research papers, see Appendix 8, page 369, Volume 2 of the Report.

[29] Authors from the Police included the serving Inspector General of Police, Rajasthan and the serving Director of the Central Bureau of Investigation. See Appendix 8, page 369, Volume 2 of the Report.

to Internal Security–Challenges to Criminal Justice System".[30] The remaining ten papers are covered by a spattering of legal academics and lawyers and judges. Once again the Committee fails to live up to its own set standards.

(i) The Methodology of the Malimath Committee

The Committee claims to have consulted broadly in drawing up its report and recommendations. However, concerns about the limited nature of its consultation process, have been widely expressed in India.[31] The Committee's report indicates that only a small number of government officials responded to the Committee's calls for input and the participation of non-state functionaries appears to have been extremely limited.[32] It is noticeable that there appears to have been little input from criminal lawyers dealing with cases within the criminal justice system on the ground. Members of the Committee visited France to examine the criminal justice system there and the Committee appears to have been given a detailed brief about aspects of the

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30 The research paper on terrorism, security and the criminal justice system is written by K.P.S Gill, during whose term as Director General of Police (DGP), Punjab, the Punjab Police has been accused of a range of human rights violations. See generally Ram Narayan Kumar et al., *Reduced to Ashes: The Insurgency and Human Rights in Punjab*, *Final Report–Volume 1*, SAFHR: Kathmandu, 2003.

31 Concerns were also expressed at the National Consultation. The Committee organised four seminars on specific issues and various members attended another eight seminars organised by different organisations. There is little in the Report however to indicate that the Committee drew from these limited discussions. Volume II of the Report of the Committee also contains a copy of a questionnaire sent to 3,164 individuals, along with an analysis of the 264 responses received. It is not clear though how many of the 264 responses to the questionnaire came from non-governmental individuals or groups. The Committee does not indicate which groups or members of civil society it made the questionnaire available to – the extended list provided lists largely government functionaries.

32 Although the committee distributed 3,164 questionnaires, the number of responses received was only 284. Out of 28 states, only seven state governments and only nine state police departments submitted responses.

criminal justice systems in the United States of America (USA) and the United Kingdom (UK).

Unfortunately the report itself does not provide the material on the basis of which the bulk of the recommendations appear to have been made.[33] Amnesty International India is concerned that recommendations appear to have been made without independent analysis of specific areas of the criminal justice system. For example, Amnesty International India is not aware of any independent study of the prosecution service on which the Committee's recommendations about the service are based. The Committee refers to the "poor performance" and "poor competence" of the current prosecution service but does not incorporate a thorough analysis of the problems, some of which have been highlighted by recent events in Gujarat. Its conclusion that appointing a senior police official as the head of prosecution services is the answer to the service's problems is not only of serious concern (see below, Part 3–Section Vii), but the rationale is not clearly explained.[34]

Similarly, the Committee recommends an increase in the number of summary trials and fast track courts in the country as a means of dealing with the backlog of criminal cases. However, Amnesty International India is not aware of any independent

[33] Volume II of the Report reproduces the reports of the various High Courts and State Governments. However Appendix 8 lists 16 reports that appear to be commissioned by the Committee. However even though it appears that these reports have been relied upon, they are not included in the Volume. Furthermore it is notable that the Report only refers to the various High Court and State Government reports in support of certain arguments and appears to ignore them in others.

[34] For example, the Committee states that in Uttar Pradesh and Orissa, where the changes have been made to the prosecution service along the lines of the Committee's recommendation (i.e. a Director General of Police is the head of the prosecution service), "it has been pointed out that the above modification has yielded good results and have brought about better coordination between the two weeks". However, the Committee does not refer to any material or source for this information.

studies of the operation of fast track courts or the processes in summary trials, particularly any studies focusing on whether they ensure human rights standards including those for fair trial.

The Committee appears to have been extremely selective in its reference to studies on the criminal justice system, which have been numerous. The report indicates that it has referred to a selected number of reports, which all appear to be those of government-appointed Committees, primarily looking at issues of national or internal security. Several commentators have pointed to numerous relevant reports by other bodies that have been inexplicably ignored.

Finally, Amnesty International India notes that the Committee has made several very broad and vague recommendations–for example recommending a witness protection scheme, tagging of pregnant women prisoners and the videoing of confessional statements made to police–without providing any detailed analysis of how such recommendations could be implemented, or in the latter case, setting out necessary safeguards which should accompany such recommendations.

II. The 'truth' about the Committee's 'Reforms' - Convictions not Justice

According to the Committee "quest for the truth shall be the foundation of the Criminal Justice System" (Page 266, (1)). This laudable philosophical goal is justified by an assertion that "For the common man truth and justice are synonymous" (Page 28).

The *truth* about the Committee however is that it is more concerned about convictions than about truth or justice. The Committee proceeds on the assumption that "….the system is in favour of the accused." (Page 27–2.15) And it is this assumption that informs the discussions and recommendations in the report.

> *"More specifically, the aim (of the criminal justice system) is to reduce the level of criminality in society by ensuring,*

> *maximum detection of reported crimes*, conviction of the accused persons without delay*, awarding appropriate punishments to the convicted to meet the ends of justice and to prevent recidivism."* (Page 21–1.40, emphasis added)

This is particularly telling since the Committee does not even acknowledge 'determination of guilt', let alone emphasize it as a vital aim of the criminal justice system.

The Committee then proceeds to recommend a series of measures to enable easier convictions; reduce the threshold of evidence, effectively remove the right to silence, reverse the burden of proof, make confessions made to police officers admissible as evidence and increase summary trials.

On the other hand the Committee has little or nothing to say about ensuring greater justice and so is silent on issues of excessive and wrongful arrest, torture and custodial violence, the large number of under-trials, impunity, endemic corruption in the criminal justice system, the crisis in legal aid, protecting the rights of the poor, *dalits*, minorities and other disadvantaged communities. These are all issues that Amnesty International and numerous Indian human rights organisations have raised over a number of years and which unless addressed, will perpetuate some fundamental shortcomings in the criminal justice system which have so far resulted in a failure to provide proper justice for all citizens.

III. Criminal Justice Reforms - For Whom?

The Report concludes the introduction to the Recommendations section with:

> *"The Committee, having given its utmost consideration to the grave problems facing the country, has made its recommendation in its final report, the salient features of which are given below."* (Page 265)

Though the Committee claims to have applied its mind to the "grave problems facing the country", there is little to suggest that it considered the grave problems facing the most vulnerable sections of Indian society vis-à-vis the criminal justice system. This is clearly reflected in the deafening silence in the report on the criminalisation of poverty, the crisis in legal aid and the abject failures of the criminal justice system in protecting the human rights of the poor, *dalits*, minorities and other vulnerable sections of society. By ignoring the enormous challenges and sufferings endured by the most vulnerable in seeking redress from the criminal justice system the Malimath Committee ignores the problems of not just at least 50 per cent of the 'people' of India, but also a large majority of those who enter the criminal justice system.

It is well known that the poor constitute a disproportionately large number of the criminal defendants going in and out of the criminal justice system.[35] A large percentage of the 2.7 lakh prisoners in India[36] belong to the economically weaker section of society, are by and large illiterate and unaware of the law or working of the legal system.[37]

The exclusions of the poor and the vulnerable are not accidental but are informed by certain assumptions that the Committee seems to make about the social, economic status of the people entering the criminal justice system.

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35 Report of the Expert Committee on Legal Aid: Processual justice to the People, Government of India, Ministry of Law, Justice and Company Affairs, 1973, page 70.

36 Prison Statistics India 1999, National Crime Records Bureau (2001), page iii.

37 A study by the NGO 'Prayas' in the Mumbai Central Prison and Kalyan District Prison revealed that nearly 75% of the women were illiterate, 65% of the men and 35% of the women were unrepresented in Court due to lack of legal resources. See Prayas, *Survey of the Need for Legal Aid for Women and Male Youth in Mumbai Central Prison*, (undated) (mimeo). See generally Upendra Baxi, *Crisis of the Indian Legal System,* Vikas Publishing House: New Delhi (1982) and Kumkum Chadha, *The Indian Jail: A Contemporary Document*, Vikas Publishing House: New Delhi (1983).

> *"The accused now-a-days are more educated and well informed and use sophisticated weapons and advance techniques to commit offences without leaving any trace of evidence"* (Page 19–1.33).
>
> *"The accused is normally represented by very competent lawyer of his choice"* (Page 19–1.34).
>
> *"In practice, the accused on whom the burden is very little hires a very competent lawyer, while the Prosecution, on whom the burden is heavy to prove the case beyond reasonable doubt, is very often represented by persons of poor competence"* (Page 125–8.1).

The Committee makes these statements as if they were axiomatic truths, not in need of any empirical evidence or basis, none being referred to in the report.[38] For instance the Committee completely ignores the fact that more than 70 per cent of those in jail are undertrials most of whom, if one goes by the Committee's assumption, should not have been languishing since they have competent legal defense.[39]

A brief illustrative discussion of the crisis in the criminal justice system in the areas of legal aid and caste and religious discrimination is sufficient to highlight the gravity of this exclusion.

(i) The Criminalisation of Poverty, the Poor and Legal Aid

The criminalisation of poverty coupled with the complete inability of the poor to negotiate the criminal justice system is a major human rights crisis. For instance, the laws relating to beggary and vagrancy and the bias against the poor render at least 200 million people across India, a large number of them being

[38] It is very interesting that the Committee makes these statements despite acknowledging in a few other places that most citizens are not aware of their rights, obligations or how the legal system works (for e.g. Page 124, 7.38.1).

[39] Justice A. N Mulla, Report of the All India Committee on Jail Reforms, 1980-83.

homeless or destitute, vulnerable to threats, harassment and outright criminalisation.[40]

Once the poor enter the criminal justice system the severe crisis in India's legal aid system ensures that they stay in there despite the right to legal aid enshrined in Article 39A of the Constitution. Even though the judiciary has read the right to legal aid as forming part of the fundamental right to life and used Article 39A to define its scope and content,[41] the access to quality legal aid has by and large remained a pipe dream for the poor and marginalised who enter the criminal justice system in large numbers.

Legal aid is a severely underdeveloped component of the Indian legal system and in dire need of reform. There is no system of legal counseling in police stations or prisons and the rules do not give the accused the choice of a lawyer or provide for a change of lawyer if the accused is not satisfied.[42] The fees provided for by most states are extremely low and never attract competent lawyers

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40 See http://www.actionaidindia.org/indiaforchange.htm (last accessed on 10 September 2003); See also Sudeshna Banerjee, *Delhi NGOs, Cops Lock Horns over Beggars*, November 19, 2002 *Indo-Asian News Service* www.eians.com (last accessed on 10 September 2003), and *Woes of Roofless*, The Hindu, 6 November 2001.

41 *M.H. Hoskot* v. *State of Maharashtra* (1978) 3 SCC 544.

42 In *re: Mohan* Unreported judgement dated 27 May 1997 of the Madras High Court in R.T no. 9/96 and Crl. Appeal Nos. 55-58 and 64/97, two of the accused declared by the committing magistrate to be indigent, repudiated the lawyers assigned to them at state expense expressing lack of confidence in the lawyers' ability. Initially they decided to conduct the trial on their own. Later, at the trial, they found it difficult to conduct the cross-examination of prosecution witnesses and hence made a request for a lawyer. This was declined by the High Court stating that since the two had already exercised their option, this was an abuse of process and a delaying tactic. The two accused were sentenced to death and lost their appeals to the High Court and the Supreme Court.

to offer their services.[43]

It also needs to be stressed that legal aid is an issue of extreme importance not just to the poor but also for other groups who are vulnerable such as undertrials, those in preventive detention, sex workers and the mentally ill, just to name a few.

(ii) Dalits and the Criminal Justice System

There is no substantive discussion anywhere in the Malimath Committee report on the challenges faced by *dalits* in ensuring that the criminal justice system works to protect their rights.[44] Institutional prejudices within the police and the judiciary or the problems with the implementation of the Schedules Castes/ Schedules Tribes (Prevention of) Atrocities Act or the working of the Special Courts and many other issues significant to the protection of *dalit* human rights are not of the least significance to the Malimath Committee.

Police inaction and even direct complicity and participation in atrocities against dalits is a major human rights concern. A large number of cases of torture and custodial violence, rape and sexual abuse, forced evictions, excessive use of force are reported on a regular basis.[45] In its report on caste violence, Human Rights

[43] Though fees vary from one High Court to another, they are largely inadequate. E.g. the fee prescribed by the Calcutta High Court is Rs. 60 per day for a senior lawyer and Rs. 30 per day to the junior for appearing in the sessions court. For districts outside Calcutta the fee is reduced to Rs. 40/ Rs. 20. It is also pertinent that the stated fees are for a 'full day' – where the case is heard for more than 3 hours. Where hearing falls short of 3 hours, half the fee is paid.

[44] This despite members of the Committee attending a symposium on Criminal Justice Administration and Dalits organised in Lucknow. This has been included in the list of eight meetings in which the Committee members "actively participated". See Page 8 of the Report.

[45] See National Campaign on Dalit Human Rights, *Dalit Human Rights Violations: Atrocities against Dalits in India – National Public hearing, Volume 1*, 2000; Dynamic Action Group, *From the Dalits of UP to citizens of India: A Report of the public hearing held in lucknow on October 5 and 6, 2001*. See generally www.dalits.org

Watch noted, "Laws designed to ensure that Dalits enjoy equal rights and protection have seldom been enforced. Instead, police refuse to register complaints about violations of the law and rarely prosecute those responsible for abuses that range from murder and rape to exploitative labor practices and forced displacement from Dalit lands and homes."[46]

In the reviewing of India's tenth to fourteenth periodic reports under the International Convention on the Elimination of all forms of Racial Discrimination, the Committee on the Elimination of Racial Discrimination (CERD) called on India to ensure effective investigation, prosecution and just and adequate reparation in cases of caste discrimination.[47] The CERD Committee specifically called for steps to make it "easier for individuals to seek from the courts just and adequate reparation or satisfaction for any damage suffered as a result of acts of racial discrimination, including acts of discrimination based on belonging to caste or a tribe."[48]

The extent of the failure of the criminal justice system to combat caste discrimination seems to have totally escaped the Malimath Committee.

(iii) Minorities and the Criminal Justice System

The failure to provide equal protection of the law to and safeguard the rights of minorities has been a major human rights issue dogging the criminal justice system for decades now. In light of the Committee's silence it is appropriate to recall some of India's worst kept secrets:[49]

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46 Human Rights Watch, *Broken People: Caste Violence Against India's "Untouchables*", New York (1999) page 3.

47 Consideration of Report by India to the Committee on the Elimination of Racial Discrimination, CERD/C/304/Add.13, September 17, 1996

48 *Ibid*.

49 Sabrang Communications, *Damning Verdict,* Sabrang, Mumbai (undated).

1970-71;

> *"The working of Special Investigation Squad is a study in communal discrimination. The officers of the squad set about systematically implicating as many Muslims and exculpating as many Hindus as possible irrespective of whether they were innocent or guilty."*
> Justice D.P. Madon Commission on the Bhiwandi, Jalgaon and Mahad riots of 1970.

> *"So far as the minorities are concerned, it is the feeling among them that they are not getting justice, that they are discriminated against in the matter of appointments in the Public Services, that they do not get equal protection of the law….It is of the greatest importance that appropriate steps are taken by the government to remove the cause for such feelings in minorities. There is so much truth in saying that if you want peace you must work justice."*
> Justice Joseph Vithyathil Commission on the Tellichery riots, 1971.

And 13 years later;

> *"The riots occurred broadly on account of the total passivity, callousness and indifference of the police in the matter of controlling the situation and protecting the Sikh community…"*
> Justice Ranganath Misra Commission on the 1984 Delhi riots.

And 10 years after;

> *"Police officers and men, particularly at the junior level, appeared to have an in-built bias against the Muslims which was evident in their treatment of the suspected Muslims and Muslim victims of riots. The treatment given was harsh and brutal and, on occasions, bordering on the inhuman."*
> Justice B.N. Srikrishna Commission on the Mumbai riots 1992-93.

In early 2002, while the Committee was contemplating the "grave problems facing the country" and engaged in drawing up "comprehensive criminal justice reforms" more than 2000 people, predominantly Muslims were massacred in Gujarat,[50] thanks in no small measure to a criminal justice system that seemed more criminal than just. The National Human Rights Commission (NHRC), among many others, detailed police inaction and even complicity that enabled the killings, rape, arson and destruction of Muslim homes and establishments.[51] The NHRC not only called for the most 'serious' cases to be investigated and prosecuted by the Central Bureau of Investigation, but also recently moved the Supreme Court to even try these cases outside of Gujarat.[52]

Despite the repeated failure of all arms of the criminal justice system in ensuring effective protection, investigation, prosecution and justice to victims and survivors of communal violence it is regrettable that the Committee finds no space in its report to discuss these concerns.[53]

The Committee's silence on the protection of the human rights of the poor, *dalits* and minorities are by no means the only ones. A "comprehensive reform" of the criminal justice system was an opportunity to overhaul the system in a manner that could also address major human rights concerns of other vulnerable groups. These include decriminalizing consensual same sex relations while

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50 Human Right Watch, *"We have no orders to save you": State Participation and Complicity in Communal Violence in Gujarat,* Vol. 14, No. 3 (c), 2002; Concerned Citizens Tribunal – Gujarat 2002, Crime against Humanity: An Inquiry into the Carnage in Gujarat- Findings and Recommendations, 2002.

51 NHRC, *Proceedings of the National Human Rights Commission on the situation in Gujarat 1 March – 1 July 2002.* For the NHRC's orders after 1 July 2002 see http://www.nhrc.nic.in/Gujarat.htm (last visited 10 September 2003).

52 See http://www.nhrc.nic.in/press_Jul_2003.htm#no1 (last visited 10 September 2003).

53 Instead the Report prefers to project communal violence as a phenomenon that is largely engineered by the ISI (Inter-services Intelligence, Pakistan's premier Intelligence Agency) and pro-Pakistani terrorist outfits (Page 218).

criminalizing child sexual abuse and addressing the serious challenges faced by the mentally ill,[54] all areas in which the prevailing standards are way behind internationally accepted standards of protection.

The preamble of the Constitution enjoins the state to secure social, economic and political justice to all its citizens. The Directive Principles of State Policy declare that the state should strive for a social order in which such justice shall inform all the institutions of national life (Art 38 (1)). This is elaborated by specifically adding that "The State shall secure that the operation of the legal system promotes justice... to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities" (Article 39A).

While interpreting this provision the Supreme Court has held in the case of *Babu v. Raghunathji*[55] that "social justice would include 'legal justice' which means that the system of administration of justice must provide a cheap, expeditious and effective instrument for realization of justice by all section of the people irrespective of their social or economic position or their financial resources."[56] Such commitments appear to have been ignored by the Committee.

IV. Criminal Justice Reforms - To what end: Security or Justice?

True to its Home Ministry parentage the Malimath Committee report seems dominated by concerns of security rather than justice. The Committee's report devotes three pages to the discussion of Pakistan and its role in promoting terrorism. The discussion on

[54] Even though the Committee had before it a report, "Mentally Ill and the Criminal Justice System" by Dr. Amita Dhanda, there is no discussion or recommendations on this subject in its report. See Appendix 8, Page 369, Vol. 2.

[55] AIR 1976 SC 1734.

[56] Videh Upadhay, *More cases, more judges, more courts*, www.indiatogether.org/opinions/vupadh/videh1102.htm (last visited on 10 September 2003).

Pakistan ranges from the activities of the ISI, the military, domestic politics, *jehad* and Bhutto's politics. Some of the references in this discussion are worth recalling:

> *"Pakistan has not given up on Kashmir because its very existence depends on keeping up a confrontation with India. It has accordingly, continued with the dispute one way or the other."* (Page 218)

Describing Pakistan as an epicenter of global terrorism the Report goes on to note:

> *"They train them as terrorists not only for infiltration into Kashmir and other parts of India but also for export of terrorism to other parts of the world in the name of "jehad"."* (Page 219)

The discussion on terrorism is almost entirely focussed on Pakistan in general and Islamic fundamentalism in particular. This part of the Malimath Committee's report reads like an extract from an Annual Report of the Home Ministry of the Government of India and less like an extract from a Committee mandated to go into the question of reforms of the criminal justice system in India.[57]

Needless to say, the Committee completely fails to reflect on the failure of a plethora of security and anti-terrorist legislation in dealing with terrorist crimes. Further, it also makes no attempt to assess the large volume of information and research available in India and worldwide indicating systematic abuses and failures of

[57] Not at all surprising, considering that the Committee was appointed not under the Law and Justice Ministry but instead under the aegis of the Home Ministry.

anti-terrorist and security legislation.[58] The Committee also completely ignores the NHRC's opinions and statements on this matter.[59]

Instead the Committee reaches the conclusion that the answer is more stringent legislation, 'special' procedures i.e. more powers to the police, lower standards of evidence, reversal of burden of proof, preventive detention and 'special' courts. The Malimath Report argues for not just more stringent anti-terrorist legislation but to actually mainstream several draconian provisions of the Prevention of Terrorism Act, 2002 (POTA) in the Criminal Procedure Code, 1973 (CrPC).

The Committee seems to reflect little understanding of the nature of terrorism. Even while acknowledging that terrorism is "prompted by a wide range of motives" and "prevailing political ideology," the Committee then proceeds to club terrorism with organised crime ignoring the clear ideological divisions between the two.

> *"The Committee has given deep consideration to the growth of organised crime, terrorism and their invisible corealtionship* (sic) *with the avowed objective to destroy secular and democratic fabric of the country. The Committee feels the time has come to sink political differences for better governance of the country and address the task of dealing with these measures. In the*

[58] Amnesty International, Briefing on POTO, AI Index: ASA 20/049/2001, published in November 2001. See also Amnesty International India, *Special 'Security' Legislation and Human Rights, A Report of Four Regional Workshops and a National Conference on 'Security' Legislation and Human Rights*, published in December 2002; Amnesty International India, *Repression in the Name of Security: A Compilation of Critiques of Anti-terrorist Legislation in the US, UK, EU and India*, November 2001; SAHRDC, *Prevention of Terrorism Ordinance 2001: Government Decides to Play Judge and Jury*, November 2001; PUDR, *Resist POTO*, November 2001, PUDR, *No More TADAs Please*, July 2000.

[59] See NHRC, Opinion on The Prevention of Terrorism Bill, 2000.

> *backdrop of the States' reluctance to share political power through legislatures, for enactment of federal law to deal with certain crimes, the Committee has made recommendations to deal with (a) organised crime (b) enactment of central law to tackle federal crimes and (c) terrorism."* (Page 292- 17, 18 & 19)

The discussions on security conclude with the Committee advocating more law and less politics, i.e. use the law as a means of rejecting contested meanings and divergent interests–which are now interpreted as security threats.

V. Conclusion

In its acknowledgements, the Committee expresses its gratitude to the Home Ministry's vision of "comprehensive reforms of the entire criminal justice system". The Committee notes that previous efforts were made "to reform only certain set of laws, or one particular functionary of the system in piecemeal". The Committee bemoans this "compartmental examination" and seems to suggest that it would undertake a holistic study of the criminal justice system.

Having set for itself such an ambitious agenda, the Committee falls woefully short of offering either a comprehensive examination or comprehensive reforms. The approach of the Committee and the premises and assumptions it rests on are not only faulty but also appear exclusionary and biased in nature. The nature of discussions on the problems facing the criminal justice system and the direction and content of the reforms recommended and, equally importantly, the silences in the Report suggest that the Committee is actually attempting to undermine the entire normative framework of the criminal justice system rather than address the real systemic problems facing the criminal justice system today.

What the Committee ends up doing is projecting the criminal justice system today as being too 'soft' and making several

prescriptions to render it 'hard'. In doing so the Committee seems to endorse specific political views rather than advance human rights standards. Amnesty International India believes that *irrespective* of the nature of specific recommendations, these grounds alone are sufficient for the human rights community to reject the Malimath Committee report.

PART III - IMPLICATIONS FOR HUMAN RIGHTS

The Malimath Recommendations: Rolling back Human Rights!

Amnesty International India's concerns with respect to the recommendations of the Malimath Committee focus particularly on the Committee's apparent failure to take into account international human rights standards which establish a framework of human rights for criminal justice systems throughout the world, as also a disregard for those human rights standards to which India is a party and which it is therefore bound to uphold. Several of the suggestions made in the Malimath Report, if implemented, would find India in violation of those standards, including Articles 7 and 14 of the International Covenant on Civil and Political Rights (ICCPR).

The Universal Declaration of Human Rights (UDHR) enshrines the principles of equality before the law, presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal. Moreover, a criminal justice system should ensure a proper balance between the rights of individual offenders, the rights of victims and the concern of society for public safety and crime prevention.[60] The Committee appears to demonstrate a preoccupation with speedy conviction as a means of crime control at the expense of due process and recognition of the rights of the accused.

The analysis in the following sections does not purport to represent a comprehensive study of the report and recommendations of the Malimath Committee. Each section contains observations on specific areas of the criminal justice system in which either Amnesty International India or Amnesty International has carried out research and has raised concerns with government authorities in India in the past:

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[60] UN Standard Minimum Rules for Non-Custodial Measures, known as the Tokyo Rules.

I. The weakening of safeguards for those in detention

II. The weakening of safeguards for fair trial

III. The normalisation of special legislation

IV. The weakening of protection of women's rights

V. Limited and dangerous reforms of criminal justice institutions

I. THE WEAKENING OF SAFEGUARDS FOR THOSE IN DETENTION

Amnesty International India is concerned about recommendations of the Committee to incorporate several provisions of the Prevention of Terrorism Ac, 2002 (POTA,) [which violate international human rights standards or which if implemented would lead to a heightened risk of human rights violations] in the ordinary criminal law in India, thereby making them permanent (POTA will expire in October 2004). The Committee's recommendations if implemented would place India in breach of its obligations under international human rights law, notably the ICCPR. Specifically, Amnesty International India fears that they would lead to an increased risk of torture or ill-treatment.

As a signatory to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment India has committed itself not to do anything which is inconsistent with its object and purpose.[61] The prohibition of torture is absolute and may not be suspended no matter how heinous the crime for which someone has been arrested. It is a right from which, under Article 4 of the ICCPR, the Government of India is not permitted to derogate, even in situations of emergency.

The Committee appears to ignore a significant body of evidence which indicates that police routinely abuse their powers of arrest and detention and that police and other members of criminal justice institutions, including members of the judiciary,

[61] India signed the Convention in October 1997 but has yet to ratify it.

routinely fail to implement safeguards in law designed to protect the human rights of both victims and the accused. Similarly, the Committee's discussion of powers of arrest appears to ignore the comprehensive review of the law relating to arrest issued by the Law Commission in recent years that attempted to limit these powers and increase safeguards against their abuse.[62] In another report, the Law Commission, referring to the guidelines on arrest and detention laid down by the Supreme Court in *DK Basu v State of West Bengal*, has recently stated:

> *One may ask the question as to in how many cases Police Officers in India are strictly following the rules laid down by the Supreme Court in D.K. Basu's case? In a pending public interest litigation in the Supreme Court, it was reported by the amicus very recently that, according to the information received from various States, it was clear that D.K Basu guidelines are not being followed in most of the States.*[63]

There is also evidence to indicate that judicial officers are failing in their responsibilities to monitor implementation of these guidelines and issue sanction against officials violating them. There are similar concerns about non-implementation of provisions designed to safeguard the rights of detainees contained in POTA referred to below. Despite this, the Committee fails to address the problem of non-implementation or refer to the importance of safeguards, while recommending the granting of increased powers to the police. Further comment on the Committee's recommendations relating to policing is provided in Section V of this report.

(i.) Increasing Periods of Police Remand

Section 167 of the Code of Criminal Procedure (CrPC) currently provides that if a person is arrested and detained in

[62] 177th report, Law Commission of India, December 2001.
[63] 180th report, Law Commission of India, May 2002.

custody and the investigation cannot be completed within a period of twenty-four hours, the person should be sent to appear before the nearest judicial magistrate who can remand that person for a period of police custody of not more than 15 days and beyond that can authorise further detention (not in police custody) for up to sixty or ninety days depending on the seriousness of the offence.

The Committee has recommended that the period of police remand be extended from 15 to 30 days for grave offences (where punishment is more than *five* years)[64], given that "It is not possible to fully investigate serious crimes having interstate ramifications in this limited period" (Page 120, Para 7.32.1) . The recommendation also allows the transfer of detainees from judicial custody back into police custody if further investigation is necessary. Amnesty International India is concerned that this extension of the time period from 15 to 30 days leaves detainees more vulnerable to torture or ill-treatment.

Amnesty International has observed that torture and other cruel, inhuman and degrading treatment continue to be endemic throughout India, denying human dignity to a large number of people. The organisation continues to receive numerous complaints of torture and ill-treatment from all states of India which indicate that Supreme Court orders, NHRC guidelines and official sanctions have not deterred officials from inflicting torture on individuals in their custody. Unfortunately the safeguards of records of detention, access to legal representation and prompt and regular judicial review of detention are widely abused, either through the use of illegal detention or through non-implementation.[65]

[64] However the Malimath Committee contradicts itself later noting that this provision would be used only in cases where punishment is more than *seven* years (Page 275, Para 29).

[65] Amnesty International's concerns and consequent recommendations for reform in this area are comprehensively set out in its report, *India – Words into action: recommendations for the prevention of torture*, January 2001, AI Index: ASA 20/003/2001.

The Supreme Court has observed that the essence of the provision lies in "individual liberty" and that the law "disfavours the detention of any person in the custody of police".[66] While the Supreme Court has recognized the inherent dangers of detention without charge and even reminded the Government to act keeping in mind the spirit of section 167,[67] the Malimath Committee ignores the problems faced with police custody and remand and instead recommends that the period be doubled.

(ii.) Making Confessions Admissible as Evidence

The Committee recommends that section 25 of the Indian Evidence Act should be amended on the lines of Section 32 of POTA to make a confession, recorded by a Superintendent of Police (or officer above him) which is also audio or video-recorded, admissible in Indian courts as evidence, subject to the condition that the accused was informed of his right to consult a lawyer.

Section 25 of the Indian Evidence Act currently provides that no confession made to a police officer shall be admissible in a court of law. The section is broadly worded and it absolutely excludes from evidence against the accused, a confession made by him to a police officer under any circumstances, while in custody or not. The reason for such exclusion is to avoid giving the police any benefit from resorting to threat and use of violence to extract a confession from the accused. The Courts too have observed this in a number of judgments. Thus in an early case, Mahmood, J noted, "The legislature had in view the malpractice of police officers in extorting confessions from accused persons in order to gain credit by securing convictions and those malpractices went to the length of positive torture."[68]

Yet, as indicated above, the use of torture remains widespread in India. Statistics published by the NHRC highlight the problem

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66 *Gauri Shankar v. State of Bihar*, AIR 1972 SC 711, at 715.
67 *Nimeon Sangma v. Govt. of Meghalaya*, 1979 CrLJ 941.
68 *R. v. Babulal*, 6 A 509, at 523.

of torture in custody despite the fact that presently confessions taken in police custody are not admissible as evidence.

Section 32 of POTA is similar to the previous section 15 of the Terrorist and Disruptive Activities (Prevention) Act [TADA] (1985) which lapsed in 1995. In its judgement on the constitutionality of TADA, *Kartar Singh v. State of Punjab* in 1994,[69] two out of five judges on the bench gave dissenting judgements in regard to section 15. K Ramaswamy, J. in this dissenting judgement was of the opinion that section 15 was unconstitutional on the grounds that it was violative of Article 14, 21 and 50 of the Constitution of India. While agreeing that the legislature could certainly enact a different procedure for dealing with "terrorists", he clarified that the procedure must still meet the test of Article 21 of the Constitution. The Judge noted that even the Superintendent of Police had an inherent interest in solving a crime and was liable to take all kinds of harsh measures. He observed further that if the police officer were entrusted with recording a confession, the appearance of objectivity in the discharge of his statutory duty would be suspect and would not inspire public confidence. Such erosion would be against the rule of law.[70]

The majority of the judges in the Kartar Singh case, even while upholding the constitutionality of section 15, recognized the danger inherent in this section of TADA. The Court observed:

> *Whatever may be said for or against the submission with regard to the admissibility of a confession before a police officer, we cannot avoid but saying that we… have frequently dealt with cases of atrocity and brutality practiced by some over zealous police officers resorting to inhuman, parabolic, archaic, and drastic methods of treating the suspects in their anxiety to collect evidence*

[69] 1994 3 SCC 569.

[70] Paras 398, 399 of the judgement. *Ibid.*

> *by hook or crook and wrenching a decision in their favour…*

The NHRC's opinion on the Prevention of Terrorism Bill, 2000 (which was a precursor to POTA - and included the same section) commenting on the provision of Section 32 noted:

> *… this would increase the possibility of coercion and torture in securing confessions and thus be inconsistent with Article 14(3) (g) of the ICCPR which requires that everyone shall be entitled to the guarantee of not being compelled to testify against himself or to confess guilt. This provision is consistent with Article 20(3) of the Constitution of India… It would also imperil respect for Article 7 of the ICCPR which categorically asserts 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment.'*[71]

Amnesty International's concerns about provisions of POTA, including section 32, are set out in its report, *Briefing on the Prevention of Terrorism Ordinance*, published in November 2001.[72] Its concerns appear to have been realised in practice. In Gujarat there have been several allegations made by detainees in court that confessions have been extracted forcibly from them. There is no evidence that any of the "safeguards" in section 32 were followed in these cases or that the allegations have been independently investigated as required under Articles 12 and 13 of the UN Convention against Torture. The UN Special Rapporteur on Torture has recommended that "where allegations of torture or other forms of ill-treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture or similar ill-treatment."[73]

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71 Para 6.8.2. The NHRC's opinion was issued in July 2000.

72 AI Index: ASA 20/049/2001.

73 Report of the Special Rapporteur's visit to Brazil, 30 March 2001, UN Doc E/CN.4/2001/66/Add.2, at page 56, para 169 (i).

Amnesty International is concerned that the Malimath Committee has ignored the fact that there is no provision for sanctions against police where "safeguards" contained in POTA are not complied with. This reflects what appears to be a consistent lack of concern by the Committee about abuses of human rights within the criminal justice system and impunity for those abuses.

The Supreme Court also laid down in *Kartar Singh* certain guidelines to ensure that confessions were in conformity with fundamental fairness. Some of these guidelines have been incorporated in section 32 of POTA as "safeguards".[74] There is little reference by the Malimath Committee to these safeguards and

[74] Section 32 of POTA reads as follows:
"…a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical or electronic device like cassettes, tapes or sound tracks from out of which sound or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or rules made thereunder.

(2) A police officer shall, before recording any confession made by a person under sub-section (1), explain to such person in writing that he is not bound to make a confession and that if he does so, it may be used against him:
Provided that where such person prefers to remain silent, the police officer shall not compel or induce him to make any confession.

(3) The confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes it.

(4) The person from whom a confession has been recorded under sub-section (1), shall be produced before the Court of a Chief Metropolitan Magistrate or the Court of a Chief Judicial Magistrate along with the original statement of confession, written or recorded on mechanical or electronic device within forty-eight hours.

(5) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate, shall, record the statement, if any, made by the person so produced and get his signature or thumb impression and if there is any complaint of torture, such person shall be directed to be produced for medical examination before a Medical Officer not lower in rank than an Assistant Civil Surgeon and thereafter, he shall be shall be sent to judicial custody.

they are not specifically mentioned in the recommendations section. Instead, there is passing reference to the requirement that the accused be informed of the right to consult a lawyer (see below) and the requirement that the confession be audio or video-recorded. With regard to the latter, Amnesty International is concerned that audio or video recording is not an answer to torture or ill-treatment, particularly in the absence of clear guidelines for its use or independent overview mechanisms to ensure against misuse or manipulation (both of which are absent from the Committee's recommendations).

The Assistance of a Lawyer

Amnesty International and AI India have been concerned for many years that despite Supreme Court jurisprudence requiring the presence of a lawyer during interrogation, this has not been included in legislation or implemented in practice.[75] It notes that the Malimath Committee comments, "The suspect has a right to counsel during interrogation and should be allowed to meet his counsel, but the counsel need not be present throughout the interrogation." (Page 62)

Referring to the "safeguard" of the accused being told about his right to consult a lawyer present in section 32 of POTA, the Law Commission has noted, "Can anybody assure that in India, the Police invariably would inform a person in detention that he has a right to call a lawyer at the time of his interrogation? Even if we introduce a rule to that effect and even if the Police record in their diary that such an opportunity was given, one cannot say how much credence can be given to such a noting in India".[76]

Amnesty International's research indicates that it is common practice for police to deny detainees access to lawyers while in police custody, particularly in the case of those detained under special legislation, and certainly during interrogation. This was also

[75] *Satpathy v P.L. Dani*, AIR 1978 SC 1025.
[76] 180th Report, Law Commission of India, May 2002.

underlined by practicing lawyers who attended the National Consultation on the Malimath Committee Recommendations held in New Delhi in August 2003. In addition, the legal aid system in India does not offer legal aid at the stage of police remand thereby ensuring that consultation with a lawyer for the majority of economically disadvantaged individuals is entirely unrealistic in the Indian context.

The UN Special Rapporteur on Torture has made clear that confessional statements are only valid if made before a competent judicial officer and in the presence of a person's lawyer. With respect to Brazil, he noted, "No statement or confession made by a person deprived of liberty, other than one made in the presence of a judge or a lawyer, should have probative value in court".[77] In the case of Mexico, the Special Rapporteur has observed, "Statements made by detainees should not be considered as having probative value unless made before a judge."[78] Principle 1 of the Basic Principles on the Role of Lawyers states "All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in *all stages* of criminal proceedings [emphasis added]." The UN Special Rapporteur on Torture has underlined this and with regard to Kenya noted that, "Confessions made to police without presence of a lawyer should not be admissible against the person."[79]

(iii.) Fingerprints / Saliva etc

The Committee recommends that the Identification of Prisoners Act 1920, be amended to authorize taking the accused's fingerprints, footprints, photographs, blood sample for DNA, fingerprinting, hair, saliva or semen along the lines of section 27 of POTA.

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77 Report of the Special Rapporteur's visit to Brazil, 30 March 2001, UN Doc E/CN.4/2001/66/Add.2. at para 169 (h).

78 Report of the Special Rapporteur's visit to Mexico, 1998, UN Doc. E/CN.4/1998/38/Add.2, at Para 88 (d).

79 Report of the Special Rapporteur's visit to Kenya, 2000, UN Doc. E/CN.4/2000/9/Add.4, at para 92 (g).

Section 27 of POTA provides that where such samples are refused by the accused, an adverse inference can be made against the accused. It also provides for such samples to be given by the accused person "through a medical practitioner or otherwise".

Amnesty International has placed on record its concern that section 27 should specify that the intervention of a medical officer or other person in order to collect such samples should take place only with the written consent of the accused, to avoid the possibility that torture or cruel, inhuman or degrading treatment is used to obtain samples. In addition, drawing adverse inference for refusal to provide samples further violates the accused's right to be presumed innocent enshrined in Article 14(2) of the ICCPR (see also below).

II. WEAKENING OF SAFEGUARDS FOR FAIR TRIAL

Amnesty International India is concerned that the recommendations of the Committee relating to trial processes - specifically those relating to the right to silence, admissibility of "bad character", standard of proof and burden of proof, together - are aimed at increasing convictions at the cost of internationally recognised standards for fair trial.

The Committee's solution to its perceived problem that "the guilty" are too often being acquitted is to reduce the rights of accused at trial, rather than to ensure proper and professional investigative and prosecution processes free from abuse, coupled with due process at trial which assures human rights. By increasing the burden of proof on the accused and compelling evidence against him/her self, while at the same time reducing the threshold of evidence required to be proven by the prosecution, the Committee is striking at the jurisprudential essence of criminal law.

This section does not provide a comprehensive response to the full impact of the Committee's recommendations on issues of trial. Notably, the Committee recommends that India adopt elements of

inquisitorial systems, blaming India's adversarial traditions for problems identified with the criminal justice system. However, some of the recommendations of the Committee discussed below suggest clearly an assault on internationally recognized standards of fair trial. Amnesty International India notes that several of the issues relating to fair trial contained in the Committee's report and recommendations have been elaborated on by the International Commission of Jurists (ICJ) in its review of the recommendations made by the Malimath Committee issued in August 2003.[80]

(i.) Speedy Justice and Release on Bail

The Malimath Committee recommends the amendment of section 167 CrPC so that the maximum period of 90 days to file charge-sheets against an accused be extended by another 90 days (Page 275, Para 29). Amnesty International India is concerned that the extension of police and judicial remand would be violative of India's obligations under Article 9(3) of the ICCPR. The article requires that all accused persons should be brought to trial "within a reasonable time" or be released. It also warns against making a general rule of holding persons awaiting trial in custody.

In the landmark *Hussainara Khatoon* judgment, the Supreme Court noted that "speedy trial" is an "integral and essential part of the fundamental right to life and liberty."[81] In another case the Court noted that delays would amount to "denial of justice."[82] In the *Maneka Gandhi* case the Apex Court once again read the right to speedy trial within the Constitution, noting, "there can be no doubt that speedy trial–and by speedy trial we mean a reasonably expeditious trial–is an integral and essential part of fundamental right to life and liberty enshrined in Article 21."[83] In this respect

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80 ICJ Position Paper submitted on the occasion of the National Consultation. Available at www.icj.org (last visited 10 September 2003).

81 *Hussainara Khatoon and others (1) v. Home Secretary, State of Bihar* (1980) 1 SCC 81.

82 *Hussainara Khatoon v. State of Bihar* AIR 1979 SC 1364.

83 *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

any move to delay further the charging of a detained person would be contrary to the spirit of the right to speedy trial.

Under the existing provision after the maximum period of detention (i.e. 90 days), the release on bail is referred to as an "order of default" by the Supreme Court.[84] Recognizing that the release on bail in such cases is an absolute right, the Courts have been stringent in maintaining the importance of awarding bail where charge sheets are not filed to avoid further harassment of the detained person.[85] It is evident that a further delay of 90 days in an already lengthy judicial process would amount to an "unreasonable" delay and violate the Supreme Court guidelines on speedy justice and India's obligations under the ICCPR.

(ii.) The Right to Silence

The Committee recommends that "the court should have the freedom to question the accused to elicit the relevant information and if he refuses to answer, to draw adverse inference against the accused" (Page 267).

The Committee is of the opinion that if this questioning is done "without duress", the right to silence available to the accused under Article 20(3) of the Constitution of India would be respected as would the procedural provision in the CrPC [section 161(2)].[86] In Para 3.40 of the Report, the Committee states that the drawing of adverse inference does not offend the right granted by Article 20(3), as "it does not involve testimonial compulsion."

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84 *Rajnikant Jeevanlal Patel v. Intelligence Officer, Narcotic Control Bureau, New Delhi*, AIR 1990 SC 71.

85 *Bhikan Charan Awasthi v. State of Orissa*, 2000 CrLJ 2842 (Ori); *Akhlak v. State of MP*, 2000 CrLJ 4899 (MP); *Ramesh Das v. State of Orissa*, 2000 CrLJ 2473 (Ori); *C Kamraj v. State*, 1996 (1) Crimes 324.

86 Article 20(3) of the Constitution lays down: "No person accused of any offence shall be compelled to be a witness against himself". Section 161(2) of the CrPC says that any person supposed to be acquainted with the facts of the case shall be bound to answer truly all questions relating to such case put to him by a police officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

As a state party to the ICCPR, India is obliged to respect Article 14(3)(g) which refers to various "minimum guarantees" and states that everyone has a right not to be compelled to testify against himself or to confess guilt. Similar provisions are also found in Principle 21 of the UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment and Article 61(1)(g) and 67(1)(g) of the Rome Statute of the International Criminal Court.

The prohibition against compelling an accused to testify or confess guilt is broad. It prohibits the authorities from engaging in any form of coercion, whether direct or indirect, physical or psychological. It prohibits torture and cruel, inhuman and degrading treatment. It prohibits treatment, which violates the right of detainees to be treated with respect for the inherent dignity of the human person. A leading commentator on the ICCPR observes that even the imposition of judicial sanctions to compel the accused to testify would be prohibited.[87]

Since at no time does the Committee seek to challenge the constitutional right, the issue thus remains as to what constitutes compulsion. The Committee's position that drawing adverse inference when the accused remains silent is not "compulsion" ignores the object of the right and undermines the spirit of the fundamental right to silence.

In its 180th report issued in May 2002, the Law Commission of India has stated unequivocally that any move to amend the provisions of the CrPC (in the manner that the Malimath Committee has suggested) would be "*ultra vires* of Article 20(3) and Article 21 of the Constitution of India". In its report, the Law Commission noted:

> *Apart from the above statutory consideration, there is a constitutional implication if we take into account the*

[87] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel (1993), at 264.

> *observations of the dissenting Judges in* Adamson vs. California *(1947) 332 US 46…If you cannot compel an accused to make a statement against himself, you cannot draw any inference against him because he remains silent, since that would obviously oblige him to speak, rather than remain silent.*
>
> *To draw an adverse inference from the refusal to testify is indeed to punish a person who seeks to exercise his right under Art. 20(3). Just as no inference of guilt can be made from the fact that the accused is invoking the protection of Art. 20(3), so no inference of guilt can be made from the mere fact that he refuses to answer or to make a statement.*[88]

The principle against self-incrimination and adverse inferences is considered a principle of fundamental justice in Canada and is protected by the 5th and 14th amendments of the US Constitution. Similar provisions also exist in New Zealand and South Africa. In Ireland the right to silence has been guaranteed in Article 38 of the Constitution. However there are limited exceptions in relation to certain offences against the state and drug trafficking. In order for such adverse inference to be authorized though, the accused must be warned at the time of questioning what the effect of such silence might be. In the UK, the right against adverse inferences has been eroded in practice.[89] However, it is still subject to stringent

[88] Law Commission of India, *180th Report on Article 20(3) of the Constitution of India and the Right to Silence*, May 2002, p.43.

[89] *Weissensteiner v. R* (1993) 178 CLR 217.

restrictions and the UK[90] has been criticized by UN human rights mechanisms in this regard.[91]

(iii.) The Presumption of Innocence

> *Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.*
> [Art. 11 (1), UDHR]

The Committee recommends that section 54 of the Evidence Act be amended to include the provision that "in criminal proceedings the fact that the accused has a bad character is relevant." It further explains that a previous conviction would be relevant as evidence of "bad character" (Page 267). The present law stipulates that previous bad character is not relevant, except in responding to cases in which evidence has been led to show good character of the accused.

The Committee has argued that since the accused has a right to give evidence of good character (s. 53 of the Evidence Act), it is only fair that the Prosecution be able to give evidence of bad character, even where evidence of good character has not been led.

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90 In *R v. Cowan* (Donald); *R v. Gayle* (Ricky); *R v. Ricciardi* (Carmine) [1995] 4 All ER 939 the Court of Appeal stated that it was essential that it should be made clear to the jury that:
a) the defendant has the right to remain silent;
b) before drawing an adverse inference from the defendant's silence they had to be satisfied that there was a case to answer of the prosecution evidence;
c) an adverse inference from failure to give evidence cannot on its own prove guilt; and
d) No adverse inference could be drawn unless the only sensible explanation for the defendant's silence was that he had no answer to the case against him, or none that could have stood up to cross-examination.

91 UN doc. CCPR/CO/73/UKOT, Concluding Observations of the Human Rights Committee: United Kingdom, 6 December 2001, para 17.

This superficial parity ignores the essence of the provision of presumption of innocence of the accused. The Committee's stated aim is to "neutralize" the "advantages" of the accused and move towards shifting the burden to the accused requiring him/her to prove their innocence.

The requirement that the accused be presumed innocent unless and until proved guilty in the course of a trial which meets all guarantees of fairness has enormous impact at a criminal trial. It means that the prosecution has to prove an accused person's guilt. It requires that judges and juries refrain from prejudging any case. It also applies to all other public officials, particularly prosecutors and police, who should not make statements about the guilt of an accused before or during the trial.[92]

Particular attention should be paid that no attributes of guilt are borne by the accused during the trial, which might impact on the presumption of their innocence. The reason why the discourses on criminal jurisprudence make the presumption of innocence so strong is to ensure that miscarriage of justice never takes place due to frivolous allegations against the accused. This is relevant in India where there are concerns about the use of politically, socially or communally motivated criminal charges filed against individuals as a means of harassment.[93]

Amnesty International believes that the presumption of innocence of the accused, as also the general principle of criminal law requires that an accused should not be judged on his past reputation and deeds but only on the matter that is before the court on its own merit. The argument has been made succinctly by Willes, J:

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[92] Human Rights Committee General Comment 13, Para 7.

[93] This was highlighted in relation to the harassment of human rights defenders throughout India in Amnesty International's report *India – Persecuted for challenging injustice: Human rights defenders in India*, AI Index: ASA 20/08/00, April 2000, Part II,1,e.

> *If the prosecution were allowed to go into such evidence, we should have the whole life of the prisoner ripped up, and, as has been witnessed elsewhere, upon a trial for murder you might begin by showing that when a boy at school the prisoner had robbed an orchard, and so on through the whole of his life; and the result would be that the man on his trial would be overwhelmed by prejudice, instead of being convicted by that affirmative evidence which the law of the country requires.*[94]

A leading commentator on the Law of Evidence notes: "When character is not in issue, to admit character evidence in proof or disproof of other issues would be to cause surprise and to create a prejudice or bias for or against a person."[95] The same has also been held in a series of landmark judgements before various courts Indian and British courts.[96] Provisions against admission of "bad character" in the first instance exist in the laws of the UK, USA, Australia and Canada. In Ireland and New Zealand admission of information about previous convictions is excluded in the first instance.

(iv.) The Burden of Proof

The Committee has recommended placing an increased burden on the defendant to defend him or herself early in the trial, with consequences if the defence is weak. For example, the Committee recommends the preparation of a statement of prosecution and a statement of defence. However it notes that where the reply of the defence is general, vague or devoid of material particulars, the Court *shall* deem that the allegation is not denied. Prior to this it

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[94] In *R v. Rowtron Leigh & Co.* 10 Cox CC 25: 34 LJMC 57.

[95] Sudipto Sarkar & VR Manohar, *Sarkar on Evidence*, (15th Edition) Wadhwa & Co: Nagpur (2003), p. 970.

[96] Evidence of bad character in the first instance by the prosecution instead of leading towards establishment of guilt; would only injure the accused creating a prejudice against him. For, a man's guilt is to be established by proof of the facts and not by proof of his character. – *R v. Turburfeild*, 10 Cox 1; *Amrita v. R*, 42 c 958, 1021.

may give the accused an opportunity to rectify the statement (para 9 vi of the Recommendations).

Once again the right of the accused to remain silent with regard to certain facts that may incriminate him/her self is in danger of being violated

The Committee also suggests, "on considering the prosecution and defence statements, the Court shall formulate the points of determination that arise for consideration" (para 10 i, Recommendations), and these points for determination shall indicate on whom the burden of proof lies (para 10 ii, Recommendations). This is an attempt to reverse the burden of proof and may require the accused to prove his innocence, violating a basic tenet of criminal law - that a person is innocent until proven guilty.

General Comment 13 of the Human Rights Committee on Article 14 of the ICCPR points out that in accordance with the presumption of innocence, the rules of evidence and conduct of a trial must ensure that the prosecution bears the burden of proof throughout a trial. Article 67 (1)(i) of the ICC Statute also lays down minimum guarantees to the accused including no imposition of "any reversal of the burden of proof or any onus of rebuttal".

The law in a number of countries, including the UK and the US, is similar to the existing law in India. In Australia, no adverse inferences will be drawn if the defendant does not make a statement. In New Zealand the defendant has no positive obligation to speak or to give evidence at any point in the proceedings, other than to plead guilty or not guilty at the preliminary hearing.

Para 143a of the Malimath recommendations also recommends, "presumption of burden of proof in the case of economic crimes should not be limited to explanation of the accused who must rebut charges conclusively". This too clearly violates the afore-mentioned Article 67(1)(i) of the ICC Statute.

The law in other common law countries including UK, Ireland, Canada, Australia and New Zealand does not differentiate economic crimes from other crimes.

(v.) Reduction of Standard of Proof

The Committee recommends that the standard of proof required presently in criminal law i.e. "beyond reasonable doubt", be reduced to a lower standard, described as "the courts conviction that it is true" (Page 269-270). Amnesty International India's concerns about this recommendation mirror those of the International Commission of Jurists (ICJ) which has commented that it "carries the risk of unhinging the whole criminal justice system of India, but also one of the fundamental universal values of criminal justice, in a national, international and comparative law perspective".[97]

The standard of proof lies as a corollary to the presumption of innocence. While the prosecution attempts to prove the guilt of the accused, if there is reasonable doubt, the accused must be found not guilty. The Law Commission of India in its 180th Report referred to earlier states that dilution of the basic principle that the prosecution has to prove the guilt against the accused beyond reasonable doubt "would be contrary to basic rights concerning liberty".

The Human Rights Committee has stated, "By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial."[98] Article 66(3) of the Statute of

[97] Position Paper of the ICJ on Criminal Justice Reform in India, submitted on the occasion of the National Consultation, p. 21.

[98] General Comment 13 on Article 14 of the ICCPR, Para 7.

the International Criminal Court (ICC) reads, "In order to convict the accused, the Court must be convinced of the guilt of the accused *beyond reasonable doubt*."

Amnesty International India is particularly concerned about the potential for an increase in wrongful convictions if such a reform was introduced. In addition, the organization is concerned about the scope for discrimination-present within institutions of the criminal justice system, including the judiciary-to impact on the rights of the accused.

(vi.) Increase in Summary Trials and Punishments

The Malimath Committee recommends that sections 262-264 of the CrPC be amended "to speed up the process" of summary cases (Page 282). The Committee recommends taking away the discretion of judges on whether a case should be tried as a summary case, thus clearly indicating its preference for summary trials. It significantly expands the number of cases which would be tried summarily. The Committee goes even further to recommend that the maximum punishment in such summary trials should be increased from 3 months to 3 years (Page 283).

The Malimath Committee also recommends amendment of section 344 CrPC to require a court to try a witness summarily where it is of the opinion that the witness has knowingly or willfully given false evidence of fabricated false evidence in a matter before the Court (at present the court has the discretion on whether to try the case summarily or not) (Page 285). The Committee blames the widespread prevalence of perjury as justification for such an amendment.

While summary trials are used in the UK, in Ireland and Australia, relevant provisions require that the defendant must consent to being tried summarily.[99] In New Zealand the defendant has a choice where punishment is more than three months

[99] Ireland Criminal Justice Act 1951, Section 2. Australian Summary Procedure Act 1921 Ss. 120-133 and Criminal Procedure Act 1986 Ss. 33A-33P.

imprisonment. In the US, summary trials exist only in admiralty law.[100]

Summarizing proceedings should never affect the guarantees of a fair trial and due process guaranteed in Article 14(3) of the ICCPR. Amnesty International is concerned that the proposed increase in summary proceedings for offences other than petty offences, where the majority of individuals facing summary trials could plead guilty, might adversely affect such right to fair trial.

III. THE NORMALISATION OF SPECIAL LEGISLATION

As noted above (Section I), the Malimath Committee recommends the inclusion of certain sections of POTA in the Evidence Act and CrPC and other legislation. The Committee claims that "provisions allegedly misused/likely to be misused are deleted from the new legislation [POTA]". The Committee refers here to widespread criticism of previous "anti-terrorist" legislation which led to the inclusion of some "safeguards" in POTA. As indicated above however, Amnesty International India believes that provisions of POTA continue to violate international human rights standards and that the "safeguards" remain ineffective and unimplemented.

TADA, POTA's predecessor, was withdrawn in 1995 after it was widely perceived to be a blot on India's democracy and its criminal justice system. In the period between 1987 and 1995 TADA was reportedly used to put 77,000 people in prison of which only 8,000 people were tried and an abysmally low 2 per cent convicted.[101] POTA today threatens to overtake its predecessor TADA in terms of notoriety.[102] State governments

100 33 U.S.C. §391.

101 Pamela Philipose, *Who needs law when there's POTA?* Indian Express, March 14, 2003.

102 Union Minister of State for Home, Harin Pathak, in a written reply in the Lok Sabha, (Lower House of the Indian Parliament) on 22 July 2003, said that 682 persons have been arrested under the Prevention of Terrorism Act (POTA) across the country since its enactment.

have used POTA to arrest and detain political opponents, particular communities and even minors.[103] POTA gives the police sweeping powers to arrest and detain anyone on mere apprehension. The Committee pays scant attention to the various complexities and problems in the implementation of POTA - often in cases that have nothing to do with "terrorism" and has also virtually ignored legal challenges to POTA, constituting mounting evidence of its misuse.[104]

The recommendation to include a "comprehensive and inclusive definition of terrorist acts, disruptive activities and organized crimes" in the Indian Penal Code is justified by the Committee on the grounds that such a provision would avoid a legal vacuum after the lapsing of special laws (to date legislation such as POTA has been temporary and has had to be renewed by parliament periodically). Amnesty International notes that the definitions of "terrorist", "terrorist activities" and "terrorist organizations" (and support and membership of the latter) under section 3 of POTA are extremely broad, and potentially dangerous. They are not in line with international law which prescribes that criminal offences must be clearly defined, free from ambiguities, and not extensively construed to an accused's detriment. The definitions are extremely susceptible to misuse.[105]

In addition to provisions focusing on "terrorism", Amnesty

[103] POTA has been invoked for political purposes in Jharkand (See Rakesh Sinha & Kavita Chowdhury, *POTA fact: Jharkhand has a lot more terror than J-K*, Indian Express, 28 March 2003) and has been selectively used against Muslims in Gujarat.

[104] In a series called *POTA's Terror* brought out in the months of March and April 2003, the Indian Express exposed how the draconian law has been misused in several Indian states.

[105] More detailed concerns about provisions of POTA are set out in Amnesty International's briefing, AI Index: ASA 20/049/2001, published in November 2001. See also *Special 'Security' Legislation and Human Rights, A Report of Four Regional Workshops and a National Conference on 'Security' Legislation and Human Rights*, published by Amnesty International India in December 2002, for discussions on the legislation and its misuse.

International India notes that the Committee is recommending enactment of Special Central Legislation to fight organized crime in the country, referring to legislation such as the Maharashtra Control of Organized Crime Act (1999). While neither Amnesty International India or Amnesty International has carried out an analysis of this legislation or research into its implementation, Amnesty International India notes concerns raised by several domestic human rights organisations about provisions in this legislation in various states and urges that their implementation be reviewed before any central legislation is considered.

IV. THE WEAKENING OF PROTECTION OF WOMEN'S RIGHTS

Amnesty International India is concerned about recommendations relating to the treatment of women in criminal law which demonstrate a lack of consultation with the women's movement in India and an insensitivity to current national and international debates on the protection of women's human rights through law - for example while recommending a redefinition of rape, the Committee rejects the criminalisation of marital rape.

Amnesty International India believes that the Committee would have also done well to examine recent debates on the Domestic Violence Bill as also the consultative process that was followed in the preparation of the Bill.

Amnesty International India recalls the UN General Assembly resolution urging Member States "to promote an active and visible policy of integrating a gender perspective into the development and implementation of all policies and programmes in the field of crime prevention and criminal justice which may assist in the elimination of violence against women so that, before decisions are taken, an analysis may be made to ensure that they entail no unfair gender bias".[106]

[106] Resolution 52/86 on Crime Prevention and Criminal Justice Measures to Eliminate Violence against Women, of 12 December 1997, para 3.

(i.) Weakening of the Law against Cruelty

The Committee has recommended that the offence of cruelty if committed by a husband or relative of a husband of a woman (section 498A IPC) be made compoundable[107] and bailable. Amnesty International India notes that this amendment has reportedly been included in legislation recently drafted by the Union Government and that an amendment along these lines has already been made to state legislation in Andhra Pradesh.[108]

The amendment has been recommended ostensibly to enable a woman who has filed a police complaint against her husband's family for cruelty and harassment to return to the house. The Committee notes that there is a "general complaint" that section 498A is subject to gross misuse and uses this as justification to amend the provision. It is pertinent to note that the Committee provides no data to indicate how frequently the section is being misused. It suggests that the Committee is acting upon rumour rather than research or independent study that either the Committee or any other party has conducted.

Amnesty International delegates visiting Rajasthan and Uttar Pradesh in December 2000 were concerned to hear of a large number of cases of violence against women which after the filing of an FIR were subsequently logged as found "false" after investigation. In fact, government officials explained that it usually meant that the victim had reached a compromise with the perpetrator of violence, witnesses had turned hostile or there were other reasons for withdrawing the complaint. The Rajasthan government indicated that 30% of all cases of crimes against women in the state had been found to be "false" after investigation. The Rajasthan government further told Amnesty International

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107 A compoundable offence is one which may be settled out of court. Only offences listed is Section 320 Cr PC can be compounded, by the person against whom the offence has taken place.

108 The Code of Criminal Procedure (Andhra Pradesh Amendment) Act, 2003 came into force on 1 August 2003.

delegates that around 40% of cases filed under section 498A result in "final reports" being filed. ("Final reports" indicate that a complainant has formally withdrawn a complaint.)

The labelling of these cases as "false" is itself a concern as it implies that women have falsely or maliciously filed the cases and plays into the hands of those who argue that legislation against domestic violence is misused by women. This unproven rumour of "misuse" is given further credence by statements by members of the police and the judiciary.[109]

The Committee's reasoning that the amendment is required to enable easier forgiveness of the husband and return of the woman to the matrimonial home and to ensure against the husband losing his job ignores the pressure under which women are placed in this situation. The Committee observes, "For the Indian woman marriage is a sacred bond and she tries her best not to break it (she is willing to suffer insults and harassment in silence). As this offence is non-bailable and non-compoundable it makes reconciliation and returning to marital home almost impossible" (Page 191, Para 16.4.2).

The Committee's insistence on reconciliation and compromise raises concern. While the prevalence of compromise in cases of domestic violence in India is overwhelming, this is perhaps due to the absence of choice for women trying to escape violent situations. Inevitably, a large percentage of women who approach the state or even non-governmental organizations for help are sent back into continuing violent situations following a process of

[109] Allegations of the "misuse" of section 498A have been consistently voiced by police and others over a number of years. In November 2000 the legal adviser to the Delhi Commissioner of Police prepared a report which made sweeping statements about the misuse by married women of section 498A. The recent Delhi High Court judgment recommending that section 498A be made bailable and compoundable fits within the same category and does not rely upon any statistical evidence. See *Take a relook on dowry laws: HC* , Indian Express, 22 May 2003.

"mediation" between husband and wife in which the woman is at a severe disadvantage because of the patriarchal nature of the process.

Amnesty International was concerned to hear from Rajasthan police officials that police officers are encouraged to seek a compromise between the two parties in cases under section 498A. In many cases the husband was called to a police station and a compromise agreed. In a study of domestic violence which involved study of the operations of the Delhi Crime Against Women Cell, it was found that in many cases police had closed files after compromises were apparently reached, husbands having given a statement that they would desist from abusing their wife.[110] However, in cases where mediation achieves such a result and the parties return home, there appears to be little follow-up action by police to ensure that the agreement is being adhered to by both parties. This places the woman in an extremely vulnerable position without protection. The Committee's recommendation would not only condone but encourage such "solutions".

In its report the Malimath Committee has completely ignored the above issue as also several other practical constraints that prevent women from obtaining justice through section 498A. Filing a case under this section does not protect a wife's right to the matrimonial home or offer her shelter or protection during court proceedings. Often the woman may have no choice but to withdraw a complaint against a violent husband as a precondition for a settlement or the husband's family may propose withdrawing the case as a precondition for an easy divorce.

Factors such as these ensure that the conviction rates under this law are very low. Analysis of court decisions in one particular district of Maharashtra, Yavatmal, for example, shows that only

[110] See Malavika Karlekar, "Breaking the Silence and Choosing to Hear: Perceptions of Violence Against Women (in India)" in *Breaking the Silence: Violence against Women in Asia*.

2.2 percent of the cases brought under 498A during the period of 1990-96 resulted in conviction.[111]

Amnesty International India is concerned that the Committee instead of strengthening the law has proposed to make it toothless, by suggesting that the offence be made compoundable and bailable.

Finally, issues relating to bail need careful consideration and the interests of the victim of violence and any dependents (i.e. children) need to be paramount. It is significant to note that countries like Australia and New Zealand that have legislations on domestic violence in place have made the offence non-bailable. In Australia the presumption in favour of bail is removed for most domestic violence offences.[112] The offence of cruelty or domestic violence is also not bailable in New Zealand[113].

The law on domestic violence (as it now stands) does have a strong, though limited, deterrent value. It is extremely important that the issue of domestic violence be brought into the public from the private sphere by stressing its criminal content instead of projecting it as an exclusively internal family matter. Amnesty International India notes that the Government of India being a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is obliged to respond with legitimate and significant legal strategies to fight domestic violence.[114]

(ii.) Women Judges

The Committee recommends that in areas where there are a number of trial courts, some courts should have women judges

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111 *Domestic Violence in India: A summary report of three studies*, International Centre for Research on Women, September 1999, page 22.

112 Bail Act 1978, s 9A.

113 Criminal Procedure Law, Para 79.

114 India ratified CEDAW in July 1993, thereby committing itself to amend or repeal laws inconsistent with the Convention and to ensure that discriminatory practices against women are brought to an end.

who would be assigned criminal cases relating to women. This recommendation risks leading to women judges being limited to only hearing cases relating to women, leading to 'ghettoisation' in the criminal justice system.

Concerns about 'ghettoisation' were previously raised when the National Commission for Women (NCW) proposed a separate criminal code for women in 1995-96. This was intended to make the trial less traumatic for women, speed up the criminal judicial process, and it was expected to raise the conviction rate. The proposals were shelved however due to widespread objections.[115]

Studies of all-women (*mahila*) police stations established in various parts of India illustrate the problem. Commenting on the All Women Police Stations (AWPS), one author notes, "women's issues are not seen by police officers as hard core police work and, hence, there is a tendency to dismiss the work of the AWPS as secondary."[116] The same report continues:

> *Opportunities for training and skill development are few, and, since there is limited interface between mainstream police officials and women who work in the Mahila Police Thanas, exposure to other aspects of policing is minimal. This is later held against policewomen in matters of promotion. Mahila police stations appear in fact to be seen as punishment postings, outside the ambit of real police work, both by male officials and female officials.*

Amnesty International India is concerned that the 'ghettoisation' of offences against women as a problem that only

[115] Usha Ramanathan, *Human Rights in India: A Mapping*, IELRC Working Paper No. 2001-3, at http://www.ielrc.org/Content/W01031T.html (last visited 10 September 2003).

[116] Nishi Sharma, 'Best Practices among Responses to Domestic Violence in Maharashtra and Madhya Pradesh' in *Domestic Violence in India: A Summary Report of Three Studies,* International Center for Research on Women: Washington: 1999, p. 26-38.

women can deal with sufficiently becomes an excuse to postpone gender sensitization of male officials. It can never be a substitute for effective gender sensitisation which is needed throughout all levels of the judiciary and other institutions of the criminal justice system. Further a significant assumption here is that women would treat other women differently. This assumption ignores women's position and the inherent role of power in any patriarchal set-up.

(iii.) Adultery

The recommendation of the Malimath Committee for amendment of section 497 IPC to punish for adultery a woman as well as a man for sexual intercourse with a spouse of any other person is ostensibly to maintain gender-parity in the law (as previously only men were liable for punishment for adultery). Amnesty International India however rejects this recommendation and calls for the de-criminalisation of sexual relations between consenting adults.

V. LIMITED AND DANGEROUS REFORMS OF CRIMINAL JUSTICE INSTITUTIONS

As indicated in the introduction to this report, Amnesty International India is concerned about the limited nature of the recommendations of the Committee as much as the potential human rights impact of several of the recommendations made. In particular, the organization seeks to underline the concerns of a number of delegates at the National Consultation on the Malimath Committee Recommendations[117] who commented on the fact that communal and other forms of discrimination which are present within institutions of the criminal justice system have not been addressed at all by the Committee.

In recent months, the issue of communalisation within institutions of the criminal justice system has been highlighted in

[117] Organized by Human Rights Law Network (New Delhi) and the International Commission on Jurists (Geneva) on 9-10 August 2003.

Gujarat, where police, prosecution services and the judiciary have been accused of exercising communal bias when investigating, prosecuting and presiding over trials of those accused of involvement in communal violence in the state in early 2001. Given such a situation, it is of some considerable concern that the Committee has not only failed to address this issue but that its recommendations seek increased powers for police to arrest, detain and interrogate suspects and to the judiciary to decide cases, and seek to weaken the independence of the prosecution services.

Similarly, in discussing problems within criminal justice institutions, the Committee has failed to address a raft of problems within the formal court system which discriminate against the most economically disadvantaged. In a paper presented on Alternative Dispute Resolution (ADR) highlighting the danger of introducing ADR mechanisms without addressing problems within the formal court system, Supreme Court Advocate Dr. S. Muralidhar has recently highlighted the "hidden and other costs" of justice for the majority of victims:

> *One disincentive for a person to engage with the legal system is the problem of uncompensated costs that have to be incurred. Apart from court fees, cost of legal representation, obtaining certified copies and the like, the system fails to acknowledge, and therefore compensate, bribes paid to court staff, the extra 'fees' to the legal aid lawyer, the cost of transport to the court, the bribes paid (in criminal cases) to the policemen for obtaining documents, copies of depositions and the like or to prison officials for small favours. In some instances, even legal aid beneficiaries may not get services for 'free' after all.*[118]

[118] International Conference on ADR, Conciliation, Mediation and Case Management, Organised by the Law Commission of India at New Delhi on 3-4 May 2003. Special Address by Dr S. Muralidhar.

While the Malimath Committee has to some extent addressed the "acknowledged" costs of the formal court system, recommending speedy payment of transport costs for victims and witnesses for example, it has ignored the hidden costs and impact of corruption.

The situation of witnesses within the criminal justice system in India too is an extremely complicated one. The Committee has raised important issues about the failure of the system to recognise the role played by witnesses, recommending adequate compensation for the time and effort incurred, and a reduction in the number of un-notified adjournments. The Committee has also raised the issue of the importance of protection for witnesses, although it has not suggested any concrete ideas for how to implement a protection scheme in practice.

Amnesty International is concerned that the Committee's recommendation to make it easier to try witnesses for perjury does not fully take into account the ground realities which include the harassment which witnesses often suffer to force them to provide false testimony and the practice of police using stock witnesses to testify to crimes.[119]

The following sections raise some specific concerns about what is present and what is missing from the recommendations of the Committee in relation to the core institutions of the criminal justice system: the police, the prosecution service and the judiciary.

(i.) The Police

Amnesty International India fully endorses the view of the Law Commission of India which has reiterated the growing demand for police reform in the face of official inaction, commenting "we must reiterate our view in this regard, so that the cause of personal liberty and other fundamental rights may not suffer, merely by reason of official lethargy or inaction."[120] From

[119] The latter issue was raised by lawyers at the National Consultation.

[120] Law Commission of India, 152nd report on Police Reform, 1994.

its experience in advocating human rights reforms, Amnesty International has argued that the first step towards changing from a culture that facilitates the violation of human rights into one that safeguards those rights is through the exercise of political will throughout the political hierarchy.

Amnesty International India is concerned however about some of the recommendations made by the Committee in relation to the police. The Committee appears to focus on the lack of resources of police rather than squarely addressing the problems of abuses within the policing system and acknowledging the strong stake that all those involved in policing have in maintaining the status quo, which has to date ensured against reform. No amount of resources - and Amnesty International India acknowledges that the policing system in India is in need of increased resources - will ensure a professional and effective police force if there are inherent abuses within the system. In this context, the importance of an independent oversight mechanism for policing is vital. However, the Committee appears to suggest that the police monitor their own impartiality.

While the Committee appears to a limited degree to endorse long-standing recommendations that the investigation and law and order aspects of policing should be separated, it goes on to recommend that "serious crimes" are placed in the domain of the "Crime Police" (trained in investigative techniques), but that "remaining crimes including crimes under most of the Special and Local laws" are handled by the Law and Order Police. This division appears arbitrary and would prevent the institutionalisation of professional investigative policing and the proper separation of police functions as a means of preventing abuses. Amnesty International India also endorses comments made by the International Commission of Jurists in its commentary on the Committee's report, that as important in preventing abuses is the separation of the investigation and detention aspects of policing.

Amnesty International India notes that the Committee has indicated that the Police Act, 1861, with its colonial origins, is under review by the present government. Amnesty International India urges that any such review is open and inclusive and that human rights protection must be at the core of any efforts towards police reform. However, the absence of human rights protection at the core of the proposed reforms of the Malimath Committee gives some cause for concern about any ongoing police reforms. Amnesty International India takes this opportunity to reiterate its belief that reform of the police would provide an opportunity to ensure that a human rights culture is incorporated into police operations and its conviction that human rights are not an impediment to effective policing but, on the contrary, vital to its achievement.[121]

Given the need for wholesale reform of the police to ensure that safeguards against human rights violations are implemented, and the need to address impunity for those human rights violations, Amnesty International India is concerned that the Malimath Committee appears to believe that making a few very limited changes referred to above would justify giving them greater powers and trust.[122]

(ii.) The Prosecution Service

The Committee has dealt in some detail with the role of the Public Prosecutor. It recommends the creation of the post of Director of Prosecution which should be "filled up from among suitable police officers of the rank of Director General of Police". (Page 278, Para 62) Amnesty International India is extremely concerned about this regressive recommendation by which the Committee seeks to hand over the role of prosecution to the

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[121] See *India–Words into Action: Recommendations for the prevention of torture in India*, January 2001, AI Index: ASA 20/003/2001, Chapter 4.

[122] This has led former Chief Justice A.M. Ahmadi to label the Malimath Committee report a "pro-police report" (*Rights and criminal justice*, by Siddharth Narrain, Frontline, 31 August – 12 September 2003).

Police, who are not 'officers of the court' but an interested party in the criminal justice system. This retrograde step will adversely affect the perception of prosecutors and undermine public confidence in them.

Sections 24 and 25 of the CrPC provide for the offices, appointment, functions, powers and duties of the Public Prosecutor and the Assistant Public Prosecutor. The function of the Public Prosecutor relates to a public purpose entrusting the office with the responsibility of acting only in the interest of the administration of justice. The Public Prosecutor must be impartial since in India the Public Prosecutor is not a protagonist of any party though in theory he stands for the State in whose name all prosecutions are conducted.[123] The Public Prosecutor is appointed by the State or Central Government and the prosecution machinery is to be completely separated from the investigation agency. In 1995, the Supreme Court ordered in *SB Sahane v. State of Maharashtra* that the prosecution agency be autonomous, having a regular cadre of prosecuting officers.[124] Also on earlier occasions the Court has categorically laid down that the Public Prosecutor is not a part of the investigating agency, but is an independent statutory authority.[125] The Court has also noted that the duty of a Public Prosecutor is to represent not the police, but the State.[126]

In certain states (Bihar, Maharashtra, Kerala, Madhya Pradesh, Tamil Nadu, Andhra Pradesh, Orissa, Rajasthan and NCT of Delhi) the Directorate of Prosecution has been placed under the Home Department. In Haryana, Himachal Pradesh, Karnataka and Goa, the Law Department has administrative control over the Directorate. In some of the States, the Director of Prosecution is an officer belonging to the higher judicial service in the State. In

123 Justice Y.V. Chandrachud and V.R. Manohar, *Ratanlal & Dhirajlal's The Code of Criminal Procedure*, 16th ed Wadhwa, Nagpur (2002), p. 55.
124 AIR 1995 SC 1628.
125 *Hitendra Vishnu Thakur v. State of Maharashtra*, 1994 SCC (Cri.) 1087 (1114).
126 *Ram Ranjan Ray*, (1914) 42 Cal 422, 428.

Gujarat, there is no separate Directorate of Prosecutions and in Tamil Nadu and Uttar Pradesh police officers of the rank of Director General of Police/Inspector General of Police hold the post of Director of Prosecution.

While mechanisms to allow a better coordination between the work of the prosecution and the police are welcome, Amnesty International India is concerned that in certain states the demarcation between the two agencies is being blurred by appointment of senior police officials to head the prosecution. This demarcation to maintain independence of the prosecution is essential to ensure that the trial is not laden with biases that could go against the right to a fair trial of the accused. It is unfortunate that the State Governments of Tamil Nadu and Uttar Pradesh have ignored the various court judgments that have categorically stressed that the prosecution should be independent of the police.

In this light the recommendation of the Malimath Committee to further this process of blurring the distinction between the police and the prosecution raises great concern. The Committee apparently concurs with the view of "several police officers" that this would not affect the independence of the prosecutors, which, it admits, "is essential for ensuring fairness in prosecution" (Page 128, Para 8.10). It is clear that while the Committee agrees, in principle, that the prosecution should be independent of interference by the police, it is of the opinion that this independence would not be affected by it being headed by a senior police officer. While this faith in the police is consistent with the Committee's high opinion of the police in various respects, it ignores vast data on police abuse of power and the opinion of numerous police officers that the system of policing as it stands invites abuses.

Given that the political influence over the Police in India has been acknowledged from even amongst senior police officials, having the prosecution headed by the police would also leave scope for greater political pressure on the prosecution. Recent events in

relation to the trial of those accused of involvement in communal riots in Gujarat have led to concerns about the politicized nature of the prosecution in that state. Amnesty International India recommends a thorough and independent review of the prosecution service prior to any reforms being implemented and urges that any reforms be made in line with the UN Guidelines on the Role of Prosecutors.[127]

The law in England & Wales does not recognize the police as having prosecuting functions in criminal cases and the role of the police is purely investigative.[128] In various jurisdictions the head of the prosecutions are far removed from the police. Thus in New Zealand the director of prosecution is the Solicitor-General of the Ministry of Justice, who reports only to the Attorney General. Under Irish law the Director of Public Prosecutions is an independent government appointee and he/she must be a practicing barrister or solicitor. Similarly the Attorney General who is the head of prosecutions in Canada must be a lawyer. In South Africa too, the new Constitution creates a single national prosecuting authority led by the National Director of Public Prosecutions who is needs be "appropriately qualified." The first, and current, Director is a qualified lawyer. In the United States, the federal, local prosecution offices are independent of their equivalent police forces - Federal Bureau of Investigation (FBI), state and city police departments. Attorneys for the prosecution are independently hired and not supplied from the ranks of the police.

In a number of other jurisdictions, even though the police and

[127] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. For full document on the Guidelines see, http://193.194.138.190/html/menu3/b/h_comp45.htm (last visited on 10 September 2003).

[128] Keith Bryett & Peter Osborne, *Criminal Prosecution Procedure and Practice: International Perspectives*, Research Report 16 for the Review of the Criminal Justice System in Northern Ireland, March 2000, page 24.

the prosecution work in close cooperation, yet both are still able to maintain their independence. This has been achieved largely due to the prosecution playing a 'senior role' in the relationship. Thus in Scotland, the decision to prosecute is not one for the police and "… in relation to the investigation of offences the Chief Constable shall comply with such lawful instructions as he may receive from the appropriate prosecutor."[129] Under French law the investigative police are answerable to the prosecutor who directs their investigative activities. Similarly in The Netherlands prosecutors are responsible for the investigative outcomes of the police. As such, prosecutors have authority over the police with regards to criminal investigation. Police officers conduct criminal investigations under the supervision of the relevant public prosecutor. Belgian law too makes the prosecutor in charge of the judicial police for the purposes of conducting a criminal investigation. In effect, this means that prosecutors are very close to the investigative process since the police investigate criminal matters under the direction and supervision of a prosecutor.[130]

The above comparative law positions very clearly indicate the universal trend in the criminal justice systems of countries where there is a clear demarcation in the areas of work of the police and the prosecution. The need for such demarcation is to maintain independence of the prosecution so that investigation is not laden with biases that could go against the right to a fair trial of the accused.

(iii.) The Judiciary

Amnesty International India endorses the view that all levels of the judiciary should be intensively trained, not only to ensure against discrimination but so to ensure that they fulfil the extremely important role they play in protecting human rights.[131]

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[129] Sec. 17(3) of the Police (Scotland) Act 1967.

[130] For a detailed reading, see Bryett and Osborne, Northern Ireland Report *id.*

[131] In this connection, Amnesty International India has been concerned to hear from judicial officers that they are not always aware of judgments or amendments to law that affect human rights.

However Amnesty International India is concerned that beyond this the Committee restricts itself to broad generalisations and rhetoric rather than address judicial reforms comprehensively.

While the Committee's stress on enquiring into background and antecedents with respect to "proven integrity and character" may be valid, it falls short on other grounds. The Committee ignores the issue of ensuring broad social representation in the judiciary at all levels.

Further, discussing the appointment of judges, the Committee states that it is "more concerned in ensuring quality in appointment rather than who makes the appointment" (Page 134-9.4.1). Such an approach ignores completely the importance of making transparent appointments and ensuring accountability of judges. The Committee contends itself with merely stating the obvious, "There are other measures that can be taken to ensure accountability so far as proper discharge of judicial functions is concerned" (Page 140-9.9.6).

The Committee also fails to acknowledge the important role of civil society, and human rights organisations in respect of ensuring a representative, accountable and effective judiciary.[132]

VI. Conclusion

While on the face of it, it may appear that some of the Committee's conclusions and recommendations are harmless and indeed welcome, Amnesty International India is concerned that there is more to be feared than gained from the recommendations as a whole. The overall failure of the Committee to address fundamental systemic failings in the criminal justice system which affect human rights - perhaps most glaringly that of discrimination - rings alarm bells about the political commitment within the government which appointed this Committee to address these issues with the same zeal that it is addressing issues of internal and national security.

[132] The process in South Africa in this regard is significant and could have served as point of reference for the Committee.

The Committee's report is just one of a number of reports on the criminal justice system which have made recommendations for reform over a number of years. Few reforms however have been instituted. Despite this, Amnesty International India does not believe that this gives grounds for complacency about the recommendations of the Malimath Committee that, in general pose a serious threat to human rights protection. Since successive governments across India have shown an increasing tendency to ignore and undermine human rights obligations, Amnesty International India is concerned that the Malimath Committee's recommendations might well be taken seriously! It is therefore placing its concerns on record, as are several other domestic and international human rights organizations and individuals.

Amnesty International India is a human rights organisation whose mission is to conduct campaigning and public action, human rights education, research and documentation and advocacy to promote all human rights. Amnesty International India is a part of Amnesty International (AI), a global movement for the protection of human rights.

AI India addresses governments and non-government actors and works independently and in co-operation with other concerned individuals and organisations and also through individual members who may also be a part of affiliated networks and groups. AI India seeks to be a space for all concerned people willing to act in defence of human rights.

AI India is independent of any government, political persuasion or religious creed and is non-partisan. AI India does not support or oppose any particular government or political system or the views of those whose rights it seeks to protect. In keeping with AI's founding principle of international solidarity AI India also works extensively on behalf of individual victims from countries other than India whose rights to physical and mental integrity, freedom of conscience and expression and freedom from discrimination are violated.

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