

## CRIMINAL JUSTICE UNDER STRESS: TRANSNATIONAL PERSPECTIVE

*H.R. Bhardwaj*\*

I deem it a great honour to address such a august gathering on the occasion of inauguration of the International Seminar on Criminal Justice Under Stress: Transnational Perspectives. Straight away my attention is drawn to two issues, first is the situation of criminal justice in our own country and the transactional perspective of criminal justice. You will all agree that those of us who belong to commonwealth nations, share a common judicial and legal system and the first two matters of stress were the delays and expenses involved in administration of justice. Our criminal justice system was codified by Lord Macaulay and his colleagues in the 19<sup>th</sup> Century and we have successfully conducted our trials and appeals under that system. And until not long ago, say about two decades ago, it was the most efficient system, I myself practiced criminal law for more than three decades. There was absolutely no stress of any kind but I would not hesitate to add, that with the failing of the institutions involved in criminal justice, the stress is devolved upon the courts. Added to this, the most difficult problem and challenging problem has been added to the criminal justice by terrorism of the organized kind. It has therefore become imperative that legislatures and policy makers strike up a debate as to what system of administration of justice would prove the most effective in reducing and possibly eliminating the menace of terrorism and related activities. Whether a restorative justice system or retributive system or transformative system would be appropriate in eliminating the menace of terrorism. This is an area of special problem and this is our anxiety. Terrorism brings with it certain other issues which require debate and examination in respect of new criminal justice system. A terrorist organization like any organization cannot survive without financial support as financial transactions are globally monitored by several financial regulators and law enforcement agencies. Terrorist organizations naturally seek funding from an underground economy. It is therefore important to tell the criminal justice system to deal with the practices such as money laundering in the context of terrorist activities.

There is no doubt crimes are constantly on the rise and they are bound to rise further on account of opening of the trade barriers and globalisation of economy. Crime increase is deeply related to the fall in ethical and moral values of a society. For example corruption and organized crime thrive on account of lack of integrity and probity in public life. These crimes pose a serious challenge to democratic institutions. Organized crime exists and are perpetuated for money making. The concept of greed and power that money in vast quantity assures is integral to the manifestation of serious organized crime. Indeed most criminological definitions of organized crime fasten on this particular facet. The product of crime is used to acquire possession, social standing, respectability, humanity and other opportunities. Most criminals are concerned sooner or later to acquire legitimacy and convert their welfare process, by obscuring their origin, into indices of standing and respect. The proliferation of organized crime has become a threat to the social stability of most of the countries. The nexus between the criminals and high-ups is another problem. In India in 1993 we had taken stock of available information on the activities of crime indicators and mafia organizations. A steering committee of the Home Secretary, Revenue Secretary, Intelligence Bureau, Director, Central Bureau of Investigation on the collected data came to the conclusion that there is a nexus between the underworld and powerful people in collusion.

---

\* Dr. H.R. Bhardwaj, Union Minister for Law and Justice, Government of India.

Now to deal with this we come to the question of Penal Law. Whatever view one holds about penal law none will question its importance in society. This is the law on which men place their ultimate reliance for protection against the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, Penal Law governs the strongest force that permits official agencies to bring to bear on individuals. It is promised as an instrument of safety and matched only by its power up to destroy. If Penal Law is weak or ineffective basic human interests are in jeopardy. If it is harsh or arbitrary in its impact it works a gross injustice on those caught within its hold. The law that carries such responsibility should surely be as rational, as just, as law can be. Nowhere in the legal field is more at stake for the community or for the individual.

We are all aware that there are only two kinds of criminal justice systems in the world. One is the adversarial system which we follow, the other is inquisitorial which is mostly prevalent in the continental countries. We inherited the common wealth system i.e. the adversarial system. There are institutions that play an important role, firstly it is the Police, the second is the Public Prosecutor then the Defence Council, Magistrates, Judges, Complainant, Witnesses, Officers of President, Remand Homes: they play their respective roles which are complementary and supplementary. The major role is that of the Police, they are charged with the duty to investigate the crime. It is therefore paramount that India has an efficient and reliable investigating agency at all levels. There is also a need to improve the forensic skills of detection of crime. I would like at this moment to quote what Lord Curzon in 1902 said, and it is relevant even today: "A Government that gives good laws, good education, wherewithal to live but places the preservation of internal order and detection, prevention, punishment of crime in soiled or incompetent hand cannot escape approach".

The urgency of improvement in detection and prevention of methods of police needs to be emphasised. The importance of the Police was highlighted by Lord Denning himself and I would like to quote a few words.

"I have no hesitation however in holding like that every Constable of the land, he should be and is independent on the executive. He is not subject to the orders of the Secretary of the State, I hold it to be the duty of the Commissioner of Police as it is of every Chief Constable to enforce the law of the land. He must take steps, so post his man, that crime may be detected and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted and if needed, bring the prosecution or see that it is brought. But in all things he is not the servant of anyone save the law itself. No Minister of crown can tell him that he should not prosecute this man or that, nor can any Police Authority tell him so. The responsibility of law enforcement lies on him. He is answerable to the law and to the law alone. This is the institution which has to be nourished".

It was so highlighted by our own Supreme Court in *Vineet Narain's* case (1998) 1 SSC 226. The importance of the institution of Public Prosecutor may also be emphasized. A Public Prosecutor represents the State in a criminal trial he acts *pro bono publico* to foster the ends of justice. He is an Officer of the Court ready to secure the ends of justice. In performing this duty, he has to act according to the law, with avowed commitment to administration of justice.

Courts are independent. I do not understand how they are responsible to monitor crime or control crime, can be given to the courts and if the courts fall into this trap they will lose their independence. They are the Arbiter of disputes between private parties and the State and the citizens. Everyday life of a citizen come in conflict real or apparent with guaranteed freedoms under the constitution not only under the criminal law but

the few articles of the Constitution that were added by our founding father namely Articles 20, 21, 22. The courts have been performing these duties efficiently and to the satisfaction of people, but if they are under stress due to lack of resources and judicial powers, it is the duty of the Government to solve these problems. There should be no other stress on the judiciary at all. All these areas have to be addressed by the respective institutions. Consensus exists among lawyers and judges all over the world about certain basic principles which are indispensable for a fair and reasonable trial. Our own Supreme Court expanded the meaning of Article 21 and said reasonable and fair trial is a part implicit in the ambit of Article 21. I would also like at this juncture (because most of the judges gathered here belong to the common wealth jurisdiction) to talk of one judgement which I remembered in my practicing days i.e. *Rumington's* case of Lord Chancellor of England - the presumption of innocence. I am one who believe in complete presumption of innocence and there should be no shifting of burden from prosecution to anyone else. Statutory presumption may be drafted but the presumption to prove a case always remain on the prosecution. Suspicion however grave can not take place the place of proof. Evidence must be produced by prosecution to prove a charge. The task of the prosecution to convince the court of the guilt of an accused is governed by rule of evidence called the burden of proof. The burden of proof lies on he who alleges the thing. Before I conclude I would like to add once again that there should be no stress on judiciary, the stress has to be shared by those institutions who are charged with the duty of administering the system of justice. But this stress can definitely be remedied by improving efficiency of these institutions which have been narrated by me earlier.