JOURNAL OF THE INDIAN LAW INSTITUTE

VOLUME 22 JULY-SEPTEMBER 1980 NUMBER 3

PERSPECTIVES OF THE NEW BILL ON INDIAN PENAL CODE AND REFLECTIONS ON THE JOINT SELECT COMMITTEE REPORT—SOME COMMENTS

*Pramod Kumar**

THE PROBLEM of the extent to which criminal law is to be used for regulating behaviour at a vast scale required for social change in modern societies emphasising social justice is a raging contemporary controversy in the whole of the common law world. Issues like homosexuality in private, free permission of abortions, abolition of capital punishment and recent de-emphasising of *mens rea* and moral responsibility in the definition of crime are some well known issues being discussed and debated both in the national as well as international sectors. The debate can hardly ever be conclusive one way or the other because it involves complex issues of values about which differing views will always be voiced. Some of the reasons are discussed below:

1. The classification of law into civil and criminal has all along rested on the emphasis of moral factor and ethical considerations of responsibility of a wrong doer for his wrongful conduct. The de-emphasis on moral responsibility would tend to abolish the distinction and thus bring about vagueness and amorphousness in the concept of crime itself. It is possible that the emphasis on moral element is retained while defining a crime but it should be left out or softened while considering award of punishment to the accused. Modern thinking by criminologists is veering round this view. Dennis Lloyd[1] has made this suggestion and it has merit because it reconciles humanitarian and social defence perspectives while maintaining the necessity of clarity of definition of crime.

2. The range and coverage of modern criminal law in every state has increased so much that new and new behaviour, about the culpability of which reasonable debate is possible, are being recognised by the ruling elites without much thought and discussion because it helps to further the interests of their class. Nobody argues about the well accepted classical crimes. What is being argued about and discussed is the advisability of including new and doubtful areas which can be left to be regulated by morality and public opinion. This trend is evidenced by

* Lecturer, Faculty of Law, University of Lucknow.

1. Dennis Lloyd, *Idea of Law* (1973).

the controveries by Hart and Devlin[2] over enforcement of morals through criminal law and the issue raised by the *Ladies Directory* case.[3] Contemporary sociologists particularly those belonging to conflict-sociology have raised issues about extension of criminal sanction to doubtful areas and have said that criminal law is being used sporadically to further the interest of the group in power and prohibit behaviour which is likely to endanger their interest and power. They feel that criticism and behaviour voicing concern on policies of the ruling elite which they dub as deviant and criminal may even be necessary and supportable for genuine democracy to flourish and correct the excesses in the process of enforcement even of publicly accepted policy. In democracies with power of majority rule the only method by which the minority and other non-elite groups can make their demands felt is by pressures and modes of mobilisation of opinion which may often be considered by the elites as criminal. The dividing line, therefore, between the deviance which is supportable and necessary for democratic functioning, and deviant behaviour which is harmful to the social interest as a whole though difficult to draw has always to be drawn. For instance, Mahatma Gandhi's non-cooperation was deviant and criminal according to the law of the times but it was a deviance morally supportable and necessary for the freedom struggle. Although this type of behaviour cannot be supported in all cases after independence. Here one could illustrate the distinction between the morally unsupportable deviance of *Gheraos* on the one side and Jaya Prakash Narain's call for total revolution to preserve freedom and the democratic process on the other. It does not follow that all that was done by the followers of Jaya Prakash Narain was equally supportable. Obviously the issue of what is morally supportable deviance needed for participative democracy and what is unsupportable and socially harmful deviance cannot be clearly defined for all times to come. It is a dynamic concept and the balance though difficult to draw has necessarily to be drawn in a vigilant democracy. The point of importance is that each extension of criminal law to non-traditional areas must be fully discussed and debated before acceptance and its enforcement trends should be watched and examined by vigilant public opinion.

3. The difference between promulgation of a criminal law and the

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2. See Hart, *Law Liberty and Morality* (1963). An interesting literature has resulted from the debate over the principles of the *Wolfenden Report* (*Report of the Committee on Homosexual Offences and Prostitution*. In 1959 Patrick Devlin delivered his famous "Maccabaen Lecture" on "the Enforcement of Morals" in which he seriously questioned the premises of the *Wolfenden Report*. His arguments were answered by Richard Wollheim in crime, sin and Mr. Justice Devlin, *Encounter*, November 1959, pp. 34-40 and by Hart in *Law, Liberty and Morality*. Devlin replied to his critics and further developed his views in several lectures. See Devlin, (Ed.), *The Enforcement of Morals* (1965).

3. *Shaw* v. *Director of Public Prosecutions*, (1961) 2 All E.R. 448.

nature and quality of its acceptance and enforcement by the people and the administration also raises important issues on the image of the validity of the legal process as a whole. The existence of a number of criminal statutes which are ignored both by the people and the administration may disparage the legal process itself and lessen its efficiency. It is common knowledge that both in India and abroad a lot of this type of legislation exists which could be divided from the point of view of its social effects and its impact on the images of the legal process into two classes. In one category is the legislation relating to prohibition, sexual immorality *etc.*, which is damaging to the image of the law because of lack of social recognition and enforcement gaps due to the reason that these areas are considered as generally the preserves of private and social morality into which law need not enter and if it enters it causes more damage than good because enforcement of positive morality cannot be the function of the law. In the other category are the legislations like the civil rights Acts in India and the United States and the law relating to prohibition of child marriages and bigamy. This type of legislation has a social-educational value and the purpose is not immediate enforcement. This is a kind of presentation by the ruling elite of the norms and values of the new egalitarian society which will get adapted in society gradually through growing awareness and through the spread of education. Thus, an important distinction exists between what social scientists call pro-active and reactive legislations. The second category as noted above belongs to the area of proactive legislation which in developing societies like ours is necessary as clarifying preferred values of future Indian society.

4. Most of the recent crimes both in developed and developing countries are not related to identifiable harm or injury to any individual or society but are based on the apprehension of possible or supposed harm to either the preferred values of society or the psychology of the individuals or groups. These are the crimes of status, victimless crimes and crimes of strict liability which render enforcement ambiguous and lead to opportunities of abuse of power corruption and personal vendetta. Their creation also rests upon intuitive and sociologically untested assumptions of the persons in power. This trend distracts the attention of the administration from their principal role of protecting person and property from present or future harm. Some contemporary criminologists hold that unless criminal law is confined to its traditional role of protecting person and property criminal justice administration will continue to remain amorphous, unreal and confused. They feel that society and its rulers must find other methods including growing use of media, educational and social reform processes to create awareness of harm in the individuals and groups to abstain from injurious behaviour in many areas of non-traditional crimes. The offence of drunkenness and drugs and to some measure sexual offences should be taken care of through these new methods. This will have an advantage of preventing recidivism which

generally arises when a person committing acts in these areas is labelled and treated as criminal thus becoming a social outcaste and tends to fall into the lap of confirmed criminals. Many of these so-called criminals are young persons and need to be handled with care and not to be labelled as criminals if they are to be brought back to the society as normal human beings. Arising out of this is the important question of dealing with organised crimes of smuggling, drug monopoly and running international prostitution and trafficking in women. It should be noted that these present a problem of money power with a lot of political pressurisation and as experience of last three or four decades has shown, cannot be handled by ordinary criminal law. The efficient handling of these requires political honesty, straightforwardness and persisting will on the part of the ruling elites since this class of persons in power is usually either hand in glove with the persons engaged in such crimes or finds itself incompetent to take measures. Criminal law which is dependent on the state power cannot be the instrument to control this growing menace. Thus, it follows that the class of new crimes suggested above should be decriminalised as they lead to recidivism in the young and are incapable of being handled by the state.

5. It is very essential to know the real impact on individuals and groups in society of criminal justice administration particularly with the tremendous increase of its width and coverage practically to include the whole of social life. It will help not only the process of creation of new crimes but also assist effective administration at various levels. The attitude of enforcing and prosecuting authorities, that of the legal profession and the magistracy toward different categories of crimes has also to be realistically determined, for instance, a number of studies including that of Marc Gallanter, on the enforcement of punitive sanction on anti-untouchability crimes have shown that even when the complainant or a particular group in society is keen on the enforcement of law for these crimes the indifference of the police and the magistracy greatly hinders administration of law in this area. Thus, what are called for are objective empirical studies with the assistance of social scientists of various levels of criminal administration of certain types of non-traditional crimes. A realistic picture is then likely to emerge assisting either appropriate enforcement or abandonment of certain types of crimes. It may be that the studies may disclose the need for appropriate sociologically conscious training of the personnel as well as the need to rationalise sentencing patterns.

It is clear that the task of creating new crimes and reforming the existing criminal law administration cannot be done without effective empirical research, competence, capacity and knowledge of social science standards and realistic assessment of the peoples' beliefs and attitudes. Even with this knowledge, as the efforts to reform American criminal law show, the decisions are not free from doubt and

debate[4] viewed in this light of the above discussion. The following brief comments on the Indian Penal Code Bill are therefore presented.

The suggestion of the Indian Penal Code (Amendment) Bill to include effigy burning and punishment to father or son for neglecting to support sons or parents as crimes may be considered. As regards effigy burning one is reminded of the judgment of Maurice Gwyer as Chief Justice of the Federal Court in the famous case of *Niharendu Dutt Majumdar*[5] where he observed that the criminal law of a country is not for the purpose of catering to the "wounded vanity" of important politicians or officers of state or a device to wreak vengance upon those who persist in criticising their policies and functioning. I consider effigy burning as an expression of impotent rage which should go unnoticed and should be treated with indifference, unless of course it leads to violence or the possibility of violence for which case provisions already exist in the Penal Code. It may be said that the emotions of the crowd should be allowed to be purged by the innocent act of effigy burning than creating situations for arson, looting and running riot. In a democracy as problematic and heterogenous as India, the mobilisation of persons in support of some genuine claims and demands will continue to occur. Persistence of those in power as an initial step will also be a recurrent feature. If the mob or a group of dissidents take recourse to effigy burning, without further complications, not much harm to society will be done. The excessive concern for a type of behaviour which may be a recurring feature in a society where distribution of wealth and resources is highly unequal and the exposure of newly won freedom through adult franchise, may lead to many occasions for frustrated groups to take recourse to mock funerals or effigy burning, whose violence and aggravated forms can be otherwise dealt with, is unwise and unstatesmanlike. The proposed section 507B should, therefore, be dropped.

Another purely impractical suggestion imminently likely to disturb family life is the provision to punish with three years imprisonment any person who fails without lawful excuse to provide, necessaries of life to persons dependent on him (section 318A). The avowed purpose of this section appears to be a concern for either the children or old parents who are likely to be neglected and treated with indifference sometimes even with negligence in a highly inflationary economy. The cultural tradition in India among all castes and groups has been and continues to be that the remedy for such neglect and indifference is social disapprobation as also appropriate upbringing and socialisation. Instead of remedying the evil the effect of this section will be to bring into the family fold the police and the magistracy which do not have a record

4. See Criminal Process in the Seventies, 41 *Law and Contemprory Problems*, No. 1 (1977).

5. *Niharendu Dutt Mazumdar* v. *Emperor*, A.I.R. 1942 F.C. 22.

of humanitarian approaches. Chances are that the police and the enforcement machinery will use this power for corruption and bribery by showing lip sympathy to errant children and doting parents. Much of the evil which this section is intended to remedy can be partially met by old age pension schemes as well as more efficient public schooling system where children are fed and taken care of supported by a special education cess. The Australian public school system is an illustration in this regard. Merely adding a provision in the Penal Code is an escape from responsibility superficially satisfying the sense of guilt that the ruling elite may feel, about an evil without caring to go into practical problems and realities in arriving at a solution by discussion, debate and research. Legislation of this type is neither supportable as an ideology-creating statute like the Sharda Act and the recent Hindu Law legislation, nor, as an effective practical measure for handling the evil in all its manifestations.

There are, however, many commendable features in the bill. The abolition of attempted suicide as a crime is welcome although the bill should have adopted the Law Commission's suggestion to punish instead a person who drives or compels any member of the family to commit suicide. Narrowing the area of capital punishment, the abolition of solitary confinement, special provisions for assault on children, hijacking of vehicles, punishing blackmail, punishing persons for initiating children in criminal activities and unlawful earnings, punishing men and women equally for adultery, punishing eaves dropping and unauthorised publication of photographs, coercion by threatening to go on fast, using or issuing false medical certificate, criminal negligence on the part of professionals under certain conditions and insult to the Constitution, national flag or emblem or the national anthem *etc.* are illustrations of a step forward.

In the area of meeting economic offences though the Bill makes a serious effort their commended punishment of public censor is not likely to succeed. It is common knowledge that in a society like India moneyed men, whatever their crimes or failings, suffer no social disparagement or boycott. In fact, they are not only tolerated but flattered in the hope of advantage or benefits. The popular image of some of the leading dacoits and robbers who occassionally helped poor is neither derogatory nor condemnatory. They are often held in esteem as saviours of the common man. Recent stories of the top smugglers supporting the families of their employees and spending time and money in the marriages of their daughters secured for them an image which could meet any amount of public censor by the state and yet make them hold a high head in society. As suggested earlier economic crimes or white collar crimes cannot be handled effectively by normal criminal justice administration unless their is a drive of honesty and commitment from the political leaders encouraging and rewarding honest officers who show initiative and drive in this regard. There are ample illustrations from the centre and the state of the sufferings and privations of honest officers who made some efforts to handle economic crimes effectively. Perhaps in a

society of economic starvations, mass illiteracy and caste considerations this type of crime needs to be handled by drives of social reform by national leaders assisted by non-political vigilant local committees.

What the criminal justice administration needs in this country is not so much tinkering with the body of criminal law and procedure as a new and continued emphasis on a new type of legal and criminal justice theory which emphasise the social consequences of the "act" and trains the personnel of the law in chosing an alternative for the most effective solution to the problem before them. What is being advocated here is a more rigid policy of limited admissions to law schools, continuing in-service training of the police and the judiciary through an increased awareness of social sciences. Legal process as a whole should be viewed not as rigidly compartmentalised—"Civil and Criminal"—but as a unified spectrum of remedies in which one remedy merges into another with freedom to the court to pick up such combinations of remedies as will provide effective solution to the case before it. Such a use of the legal process requires special manipulative skills drawing upon the law and the social sciences which the present system of legal education cannot provide. Effective reform of criminal justice administration therefore, is a complex societal problem requiring intense research and deep thought, willingness to change existing models and cannot be handled by mere legislations. Inspite of a long term debate, discussions and research the United States has still not been able to finalise the criminal process of the seventees. *Ad hoc* changes set in through the amending of the Penal Code may not answer the problems pervading the Indian society. Necessary changes will have to be brought in with the total conspectus of the values that the system wants to cherish and preserve. A serious debate for law reform, reckoning the needs and objectives, has to be intensified before any legislative intervention is sought for changes to be incorporated in the new Penal Code.