CONCORDANT AND DISCORDANT DEVELOPMENTS IN THE AREA OF INTERNATIONAL CRIMINAL LAW

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At the conceptual level the thinking within criminal law has undergone several significant shifts in the past few decades, such as (a) growing *internationalisation* of criminal law that is premised in locating commonalities in diverse criminal law systems and a movement towards a standardized system of criminal justice (b) increasing *a-moralisation* of crime and criminal law reflected in the weakening of the consensus way of thinking that views all crimes as evil or immoral and the eventual way of thinking that views crimes more neutrally as a set of power resource, neither evil nor good (c) *de-romanticisation* of criminal justice by shifting the focus away from punishment-oriented 'post-crime' to security oriented 'pre-crime' stages. The aforesaid shifts have produced profound impacts on the criminal justice systems of the sovereign states as well as on the international criminal law system. We would first explain the three significant shift trends described as *internationalisation, a-moralisation* and *de-romanticisation.*

I INTERNATIONALISATION OF CRIMINAL LAW

The phenomenon of internationalisation of criminal law is founded on an assumption that human needs and aspirations are more or less common everywhere and that all human beings require security, peace and order as a priority condition for survival. This in effect rejects the narrow particular society-centric or specific state-centric understanding of crimes and criminal justice system. Since each sovereign state claims to show commitment to its own criminal justice system, the degrees of internationalisation may vary from system to system.

Internationalisation of criminal law may be understood in three different senses. One, a particular crime system being influenced by another crime system. The best example of this is the common law crime system influencing the continental law crime system and *vice-versa.* Similarly, less developed criminal law systems may follow the pattern of emulating more developed criminal law systems. For example within the common law of crimes family many smaller commonwealth nations have developed their criminal law system on the lines of the British criminal law system. Two, the criminal law system of diverse nation states may agree to follow the guidelines formulated by the United Nations with a view to evolving criminal law systems in terms of commonly accepted standards. The best example of such standardization measures can be found in the U.N. Standard Minimum Rules for Prison Administration and the U.N. Standard Minimum Rules for Juvenile Justice Administration (the Beijing Rules). Similarly the initiatives taken by the governmental and non-governmental agencies such as the Asia Crime Prevention Foundation, Tokyo, in Formulating Draft Guidelines for the Protection of Environment, through Criminal Law (2000) and the ongoing exercise relating to Draft Guidelines for the Protection of Victims of Natural Disasters Through Criminal Law (2006) are pre-cursors of increasing U.N. role in the area of criminal law. Three, post- World War II has brought international humanitarian law closer to the human rights law with a view to protecting the humanity against barbarity in the course of wars and internal repressions, followed by deliberate denial of justice. This has ultimately led to the preparation and signing of the Rome Statute of the International Criminal Court in July 1998 and

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setting-up of the International Criminal Court in July, 2002. The setting-up of ICC is a positive step in the direction of evolution of a truly global rule of law that claims to establish a principle of universal accountability for every perpetrator of crime and rejection of the legal fiction of sovereignty to deny justice to the victim.

Thus, internationalisation in the first two senses may be conducive to strengthening the national criminal law systems by way of adopting best practices of other systems or rising up to commonly accepted standards, but internationalisation in the third sense implies the tacit acceptance of inability on the part of the national criminal law systems to curb extreme categories of deviance and bring the offenders to book. Therefore, though articles 1 and 17 of the Rome Statute incorporate the principle of complementarity that accords jurisdiction to ICC only where the matter in question is not being effectively addressed by the national courts, the principle of civilian inviolability often overrides the doctrine of domestic jurisdiction that consequently restricts the state sovereignty principle. In this way the developments in the direction of international criminal court are at the cost of the national criminal law system.

II Emergence of Alternative Way of Thinking about Crime and Criminal Law

'Crime' is often viewed as an evil and criminal law as 'good' and we rarely bother to even think about the other view point. Such a belief about 'wrongness' of crime and 'rightness' of all the measures against crime, be it the criminal code, the police, the prosecutor, the criminal courts, the prisons and even crime stereotyping is accepted as gospel truth by the society, by and large. The reasons for such unanimity, apart from our traditional acceptance of 'consensus', may lie in the 'harm' potential of the conduct or the imagined need for social solidarity that criminalisation provides. However, there always exists in every society a handful of non-confirmists for whom crime and criminal law are nothing more than a set of power resource that the dominant classes use for their benefit. This new way of thinking about crime is best reflected in the thinking of the American labelling theorists of the 1960s. Crime, according to labelling theorists, has no inherent attributes; it acquires meaning when it is labelled as a crime. Therefore, for every crime you would have two opposite perspectives of the labeller and that of the labelled. The trend of a-moralization of crime does challenge the traditional thinking about crime and criminal law, but its value for critical understanding of crime and criminal law system remains enormous, particularly for systems that are in the mode of change and reform.

'Security' as New and Paramount Consideration in Globalised Economy

Writing in 1955 Edwin H. Sutherland and Donald Cressey[1] had described criminology as a body of knowledge regarding crime as a social phenomenon that: "includes within its scope the processes of making of laws, of breaking of laws and of reacting towards the breaking of laws." This made 'crime', 'criminal' and 'punishment' as the core concerns around which the discipline revolved. All this imparted a punishment-centric post-crime quality to criminal justice administration(CJA). The romance and drama involved in the criminal justice administration was mainly constituted by its ability to stigmatize and legitimise infliction of pain in the name of punishment. In the post-globalisation era the focus has shifted to 'pre-crime' stage. This is because the newly liberated economic interest and broader meanings acquired by economic freedoms require intervention much before commission of crime stage, the moment security is threatened. Thus, the CJA is being required to respond meaningfully to security concerns. This development not only broadens the ambit of CJA over-broadly, but also renders, the traditional post-crime pre-occupation of criminal law questionable.

[1] Edwin H. Sutherland and Doanld R. Cressery, *Principal of Criminology* (5th ed.) Philadelphia, J.B. Lippincott (1955).

The aforesaid three shifts in the criminal law thinking have been responsible for certain notable legislative and judicial initiatives that can be identified as developments which may be described as concordant and discordant. The term concordant as used here, relates to developments that mainly further the traditional criminal justice thinking, while discordant developments are those that go against the traditional thinking, either in terms of its elements or the basic premise. In the coming pages some of the notable developments are with a view to assessing critically the state of present day international criminal law, as follows:

(i) Movement away from 'punishment state', towards a 'security society'.

(ii) Failures in developing a general theory of criminal law.

(iii) Strengthening criminal law through new forms of due process and human rights advocacy.

III Movement away from 'Punishment-State' to 'Security-Society'

Not too long ago P.K. Dick wrote in his book *Minority Report* (London: Gollancz, 2002): "We do not have crimes, but have detention camps full of would be criminals." Dick's way of thinking forces us to accept the growing dichotomy between 'post-crime' and 'pre-crime'. The traditional criminal law remained pre-occupied with post-crime that depended upon proving elements of crime, determining guilt and imposing appropriate punishment, which became the hall-marks of a punishment-state. The punishment-state brand of criminal law came into action only after a criminal act was actually committed. Certain provisions did ordain preventive action, but they were only measures for reinforcing the post-crime state action. However, globalised economic considerations that are designed to strictly cut on cost of crime require action right from the pre-crime stage, right from the moment of perception of economic or physical insecurity. Such a new-grown concern for 'security' is the hall-mark of a security-society.

Such a shift of focus from 'punishment-state' to 'security-society', has been possible because of a two way transformation. First, through change in the construction of the concept of crime. Second through changes in the orientation of criminal justice administration.

Changes in the Construction of Concept of Crime

The rational choice theory of the economists that is premised on the principle of utility maximization is applied to understanding of crime concept as well, which transforms the traditional crime concept in the following notable ways:

(a) Crime is not a deviation from norms, but a normal social interaction for utility maximization.

(b) Crime is not a threat to our moral order, but a calculable cost.

(c) Orientation to costs entails a shift from the retrospective concern for the past of the crime to prospective concern for future offences.

(d) Economic analysis de-dramatizes crime and projects it as any other human activity.

Changing Orientation of Criminal Justice Administration

Prospective orientation to crime control tends to emphasize on statistical calculation of probability and pro-active measures to reduce opportunity through situational crime prevention, target hardening, risk assessment, monitoring and surveillance etc. These new tools of control tend to replace the traditional tools of control along with the traditional agencies like the Police. The prospective-orientation to crime control introduces the

idea of *acturial* justice as a new penological idea that is concerned with techniques of identifying, classifying and managing groups associated by levels of dangerousness. Thus, both the economic analysis of crime, as well as the idea of actuarial justice tend to re-orient criminal justice around the idea of risk. Traditionally criminal justice and punishment have been the obligation and preserve of the state, but prevention of crime has never been understood as the sole concern of the state. Therefore, re-orienting criminal justice around risk is likely to produce its impact in three prominent ways:

First, state power is likely to move away from crime control function to more abstract function of facilitation of crime prevention. Second, the significant transformation or re-configuration of criminal justice, leading to emergence of 'new regulatory state' that would replace the traditional state. Third, increasing the stake of private initiative, particularly the corporate power and consequent gradual decline of the criminal justice state.

These changes within the body of CJA are the direct fall-out of the over zealous pursuit of security, in the modern eco-centric societies. These developments have the potential not only producing distortions in the criminal justice system, but also pose serious threat for individual liberty and rule of law notions. The need is not to ignore the growing concern for security, but to integrate the new concern, as far as possible, within the existing criminal justice theorization and subject it to normative framework of some kind.

IV Breakdowns in the Dream of a 'Grand' General Theory of the Criminal Law

R.A. Duff in his essay titled *Theorising Criminal Law: A 25th Anniversary Essay*, celebrating the first 25 years of the Oxford Journal of Legal Studies has, in 2005, elaborately traced the journey in the direction of construction and ultimate breakdown of a grand general theory of criminal law. Duff identifies the books of Michael Moore,[2] Braithwaite and Pettit[3] and Alan Norie[4] as building blocks for a general theory of criminal law. He adds to this trilogy of 'grand' theorists who assume some kind of principled rationality in the Criminal Law, the contributions of George Fletcher[5] whose work has picked the first holes in the general theory aspirations by exploring the possibilities of alternative models of criminal law, which might at times be opposed to each other. According to Duff, the core reason for the failure of 'grand' general theory of Criminal Law was that: "Traditional grand theory typically reflected a particular view of both the character and power of reason - of reason in general and of practical reason is particular. On this view, a rationally adequate normative theory of a human institution would involve identifying either a single aim or principle, or a coherent set of aims and principles, that the practice should serve, and showing those aims or principles to be rationally compelling in a way that was free from the contingencies of time and place".[6] This assumes that liability must always be grounded in choice, or that it must always be grounded in some defective character trait that the agent's conduct reveals. Duff instead seems to be in support of the Aristotelian alternative, which is more pluralist and particularist: "We must recognize the different kinds of structures of wrong doing that properly concern the criminal law; and that we should not even hope to develop a single theory of criminal liability, but must instead recognize that in different context liability and culpability will take different forms and display quite different logical structures."[7]

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2 Michael Moore's *Placing Blame: A General Theory of the Criminal Law*, Oxford, Oxfor University Press 1999).

3 Braithwaite and Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice*, Oxford, Oxford University Press (1990)

4 Alan Norie, *Crime, Reason and History* (2nd ed.), London, Lexis-Nexis,. (2001)

5 George Fletcher, *Rethinking Criminal Law*, Boston, Little, Brown (1978)

6 R.A. Duff, Theorising Criminal Law: A 25th Anniversary Essay 25 Oxford J. of Legal Studies 362 (2005).

7 *Id.* at 363.

Abandonment of a 'grand' general theory designs is a discordant development that undermines the possibilities of evolving a general theory of criminal law that can claim to have uniform content and universal character. This is a partial setback to Kantians for whom practical rationality was a matter of principle. A human practice or institution is rational in so far as it is structured and its particular elements and processes are governed by a discernible set of consistent and coherent general principles. This would certainly be counter to the developments at the international level initiatives of developing common standards for all the national criminal law systems, but it would encourage taking into account specific contexts and addressing the criminal law in action in the respective nation states.

V Holding on to the 'Due Process' Values and Strengthening New Forms of Human Rights Advocacy

The onslaught of terrorism in the past two decades has put the due process values to most severe strain. As a consequence many states have come-up with quick-fix solutions of draconian laws that are inspired only by crime control and repressive considerations. Human rights achievements are constantly under threat of being undermined in the name of national security. As a consequence there is an increasing tendency of describing many day to day situations of social discontent and civil strife as near war-like conditions. But despite all these dismal developments there are certain signs of holding on to the due process values and ways of strengthening human rights advocacy. We may cite just two examples to bring home the point:

(a) The court of Appeal and House of Lords rulings such as *Bradley,*[8] *Hanson, Gilmore* and *Pickstone*[9] and *Secretary of State for the Home Department*[10] and A8 *Ors* v. *Secretary of State of the Home Department*[11] have expressed concerns about the plethora of criminal justice legislations in the wake of terrorism that adversely effects the traditional criminal justice system. In *A.* v. *Secretary of State for the Home Department*[12], the House of Lords held that the indefinite detention of foreign terrorist suspects without charge or trial, pending deportation, was unlawful. The appellants were detained under section 23.[13] Since their deportation was not possible because it would have been in derogation of article 3 of the European Convention of Human Rights, their detention were continued. Lord Hoffman held that the continued detention was unlawful and the power conferred under the Act 2001, "Was not compatible with our constitution. *The real threat to the life of a nation, in the sense of people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.* That is the true measure of what terrorism may achieve. It is for the Parliament to decide whether to give the terrorist such a victory". (Emphasis supplied).

(b) Two significant United Nations initiatives focused against torture in a traditional crime control society of China and post-terrorism repressive states like the United State are notable. The report of the Special Rapporteur on Torture in China and the Human Rights Day Statement of the U.N.

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8 R.v. *Bradley* (2005) EWCA Crim. 20; *A* v. *Secretary of State for the Home Department* (2004) U, KHL 56 and A8 *Ors* v. *Secretary of State of the Home Department* (2005) decided on Dec.9, 2005

9 (2005) EWCA Crim 824

10 *A* v. *Secretary of State of the Home Department* (2004), UKHL 56

11 *A8 Ors* v. *Secretary of State of the Home Department* (2005) decided on Dec.9, 2005

12 (2004) UKHL 56

13 S. 23 the Anti-Terrorism, Crime and Security Act, 2001 (UK).

High Commissioner for Human Rights are along similar lines in as much as recognizing torture as not only a grave violation of human rights but a crime against individual. They also deal with the need to enforce effective right to counsel, doing away with imprecise and sweeping definitions of crimes that confer sweeping powers of arrest and detention, need for ratification and effective implementation of Torture Convention. Particularly, notable is the Human Rights Day Statement of the Commissioner for Human Rights, titled: "On Terrorists and Torturers." It states:

"[t]he absolute ban on torture, a cornerstone of the international human rights edifice is under attack. The principle once believed to be unassailable - the inherent right to physical integrity and dignity of the person - is becoming a casualty of the so called "war on terror". ... Governments in a number of countries are claiming that established rules do not apply anymore; that we live in changed world and that there is a "new normal". They argue that this justifies a lowering of the bar as to what constitutes permissible treatment of detainees.... Torture is not simply unmoral and illegal; it is ineffective ... I therefore call on all Governments to reaffirm their commitment to the total prohibition of torture by:

Condemning torture and cruel, inhuman or degrading treatment and prohibiting it in national law;

Abiding by the principle of non-refoulment and refraining from returning persons to countries where they may face torture

Ensuring access to prisoners and abolishing secret detention

Prosecuting those responsible for torture and ill-treatment

Prohibiting the use of statements extracted under torture and cruel inhuman or degrading treatment, whether the interrogation has taken place at home or abroad".[14]

VI Conclusion

The international criminal law is caught between two almost opposite lines of thought in the matters of choice of criminal justice systems, one, that is premised on repression and the other, that is restitutive in character. The first model of criminal justice namely the crime control model is individual liberty inhibiting, while the second the due process oriented model is liberty enhancing; the first is enslaving while as the second is emancipatory in nature. We do appreciate that in the 21st century the criminal justice system must strive for efficiency but credibility of the system is a pre-condition for every thing else. What enhances the credibility of the criminal justice system is to be determined by the context and the mindset of the criminal justice functionaries. But the sad thing is that most of us look for quick solutions, without giving enough chance to the criminal justice system to establish its credibility and deal with fundamental social issues.

[14] *Available at* http://www.unher.ch/hurricane/hurricane.nsf/view01/3B9B202D5A6DCDBCC12570D00034CF83?open document, Last visited on 21.02.2007