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The Criminal Law Reform Committee

The New Old Thing

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Unless an attempt at reforming India's criminal laws questions the power imbalances in the system, the exercise will only end up beautifying the facades. This unfortunately is to be the fate once again of the 2020 iteration at reform of the colonial era laws.

The vintage of India's criminal process is a curious feature of its legal system. For those who may not know, the statutory triumvirate at the heart of the criminal process consists of the Indian Penal Code (IPC) that was drafted in 1860, the Indian Evidence Act of 1872, and the Criminal Procedure Code (CrPC) of 1973. (More on the colonial resonance of it later in the essay.) That a country retains penal laws and procedures drafted in the mid-19th century by its colonial rulers often strikes a discordant note, not the least because of how Indian society and its legal system have witnessed dramatic shifts in the intervening 150 years. At the same time, the very fact that a criminal justice architecture has imbibed over a century's worth of lived experience signals its longevity and resilience, and suggests to cautious administrators that it might just be safer to prolong the imperfect *status quo* rather than run headlong into the chaos of a brand-new setup. Sure, there are problems, but 'if it ain't broke don't fix it', right?

This conservative approach has not precluded attempts at reviewing the legal architecture governing criminal law in India and suggesting reforms. There have been several such attempts in the past, led by the Law Commission of India as well as other official committees such as the one headed by Justice Malimath (2003) and that headed by Justice Verma (2013), which have contributed to some amendments being made over time. Currently, we find ourselves in the midst of yet another such review exercise being conducted by the "Committee for Reforms in Criminal Laws" constituted by the home ministry.

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This most recent reform effort is the focus of my essay. It begins with a brief overview of the developments thus far, including the criticism that the entire exercise led by the committee has attracted. I then offer my own point of critique which pertains not to the committee's methods or its constitution, but to the sheer lack of imagination on display in this reform effort. My point is simple: The committee, like previous reform efforts, appears to be held captive by the institutional framework that it sets out to reform, which renders it improbable that this exercise will culminate in any credible agenda for reform or ruin. I conclude, therefore, that rather than any 'reforms' willing to interrogate the power relations that structure the system and re-imagine it from the ground up, we are likely to be lumped with a report that only seeks to beautify facades without touching the rotten core at the heart of the Indian criminal process.

Background to the committee

Soon into its second term, the National Democratic Alliance (NDA) government began to publicly trumpet the cause of criminal law reform in speeches by its ministers. Less than a year later, in May 2020 the first news reports declaring the constitution of the committee began coming in. We learnt that this committee would sit in New Delhi and had been given the objective to "recommend reforms in the criminal laws of the country in a principled, effective and efficient manner.." Unfortunately, the terms of reference for this committee were not made publicly available (and have not been made public yet). The lack of clarity about the committee's mandate, and its seemingly boundless scope of work, lent a rather nebulous air to this omnipotent body — a concern that was recently amplified when in October it also invited consultations on reforms to the Narcotics Drugs and Psychotropic Substances Act.

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The disproportionate impact wrought by criminal law upon marginalised populations is empirically established across countries, including India. Yet, the committee tasked with reforming criminal laws consisted of only persons belonging to the majority community

and from largely privileged backgrounds in terms of their socio-economic status. There was not a single Dalit or Muslim member nominated to it, even though the National Crime Records Bureau data confirms that members of these communities are disproportionately represented in prison statistics. Even more amazingly, all these persons on the committee were men. Thus, not only did the committee shut itself off from perspectives of the marginalised community but also from feminist critiques of criminal law and procedure.

The unknown mandate and unrepresentative character of the committee attracted staunch criticism from various quarters. What attracted the most criticism, though, was the methodology adopted by this committee — it sought to discharge its onerous mandate within six months. This was to be conducted by holding consultations through an online portal inviting word-limited responses to questionnaires in English over six weeks. All this, at a time when the country was struggling to combat the coronavirus pandemic. Consultations were arguably the method designed to secure the perspectives of those excluded from the committee. However, the official methodology adopted meant that this process itself was seeped in exclusivity.

Why rush through such a tremendous task with an all-male panel, and that too whilst the country is struggling with unprecedented circumstances? There was no real explanation, even though the sustained pressure led the committee to concede that six weeks was too little time to solicit consultations. The period for each tranche of consultations was extended from two weeks to four weeks instead, which meant the entire process lasted three months and ended this past October, and as of now nobody knows what will follow.

Of India's ersatz reform efforts

The efforts of the Committee have come under sustained criticism from a wide variety of sources — retired judges, women lawyers, prominent academics on these broad lines of its peculiar representation, its hesitation in disclosing the official mandate, and the unseemly rush to complete the job (a website for disbanding the committee has also been setup). These critiques have relied upon examples of past exercises such as the Law Commission's forays into reviewing criminal law, to demonstrate that the present effort is gravely flawed as a matter of process. Moreover, the questionnaires released by the committee have also prompted alarm as to the ideology, or lack thereof, guiding the process. Queries about enlarging the scope of sedition as an offence in one of the consultation questionnaires have prompted some to wonder whether the committee's end product will be 'reforms' that expand the state's coercive power of individuals, rather than ameliorate the oppressive imbalance of power.

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As someone personally and professionally invested in the subject of criminal law, I must confess that my initial reaction to hearing about the committee being constituted was one of excitement at the possibilities. This excitement morphed into frustration and trepidation and I joined in these critiques mentioned above. Now, having had more time to reflect, the anger has subsided and what is left is a deep dissatisfaction and a feeling of resignation, because the closer we look the more it is clear that this latest iteration of criminal law reform in India is just like all previous ones. We need not fear either reform or ruin at the hands of this committee, as all we are likely to get is a slightly modified version of the status quo.

As I mentioned at the outset, independent India decided to retain the legal architecture of criminal law crafted by colonial rule. Thus, we kept the Indian Penal Code of 1860, the Indian Evidence Act of 1872, and the Criminal Procedure Code of 1898. Not fiddling with the setup was a cautious choice, and this conservative streak has defined subsequent forays into all attempted reviews of this legal architecture. To demonstrate this point, let us look at the halcyon period for criminal law reform in the period between 1960 to 1977, when the subject was high on the agenda for the Law Commission, which produced voluminous reports reviewing all three primary statutes. The efforts in consulting a wide array of respondents in the process does indeed stand in stark contrast to the fast-food variant of law reform currently on display. But what about the end product? The reports ultimately published were content to recommend tweaks to the setup without ever seriously questioning the framework itself or the values that it espoused.

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The best example of this is the reform of criminal procedure that culminated in the Criminal Procedure Code of 1973. Criminal procedure is, arguably, that set of laws which has the most critical impact on questions of individual liberty. It is the charter that

regulates state power and gives it legitimacy. So, what did the 1973 code herald for citizens of independent India? An almost identical restatement of the same legal framework that governed the people when they were colonial subjects. There was no questioning of the institutional framework that conferred wide-ranging powers on the police to arrest and search without warrants, despite the recognition of a fundamental right to personal liberty. The faithfulness to existing institutional structures was so pronounced that the 1973 code did not even fully deliver on the Constitution's Directive Principle of State Policy to separate the executive and judiciary under Article 50, and retained oppressive provisions whereby executive-appointed magistrates could declare conduct as criminal for constituting a breach of the peace. Therefore, even today, executive magistrates can pass orders under Section 144 criminalising exercise of the freedom of speech and assembly, under threat of imprisonment.

The reform effort currently underway appeared to be conscious of the colonial baggage that the legal architecture has been saddled with since Independence, and also proclaimed that reducing this colonial influence and securing the "primacy of the constitution" was part of its objectives. Subsequent events have confirmed that regardless of these hoary declarations, the present committee remains just as faithful to this noble conservatism, even though it might be rushing through the motions a little.

Any doubts about this are quelled if we take a look at the questionnaires that formed the basis for consultations. Let me focus on the components for criminal procedure again. The rampant abuse by police of the powers of arrest and the often brutal methods adopted for interrogations are not myths but well established facets of the legal architecture that have been acknowledged even before the Supreme Court. It was only in June that the macabre spectacle of custodial deaths in Thoothukudi had grabbed national attention. Yet, remarkably, there is not a single question discussing these integral facets of criminal procedure in the 20-page long questionnaire. Rather than question the underlying assumptions — why should the police have such wide powers of arrest or search-and-seizure without warrants? — the focus is to simply try and regulate better by adding a new layer of scaffolding to the existing architecture, by asking us to suggest ways in which these processes could "account for the needs of sexual minorities."

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Besides police violence, another equally distressing problem plaguing the administration of criminal laws is the delay it takes to investigate and prosecute cases. There are more than 25 million pending criminal cases in trial courts across India. What is the level of engagement that the committee displays with this issue? The questionnaires on criminal procedure and the law of evidence ask respondents whether time limits should be in play at trials, and if so, what might be an appropriate limit. That's it. Might it have been worthwhile to more seriously re-examine the procedural setup devised in the 19th century for conducting trials, I wonder? If we consider that the rate of pendency has skyrocketed in the 50 years since the 1973 code was enacted, surely all of it cannot be down to insufficient judicial appointments. Some blame might be accrued by how the process is designed as well. Alas, going down that road would involve questioning the most basic of assumptions that the legal architecture rests upon, which this committee (much like its predecessors) is wont to do.

Lastly, what about prisons? While the committee's consultations did involve questions about sentencing theory, bail, and lengthy incarceration; it displayed a shocking lack of engagement with prisons and the conditions of a person's incarceration. Any conversation about sentencing theory and bail is woefully inadequate without a serious engagement about the condition of Indian prisons — which continue to operate over capacity — and the rights of prisoners. Reading the set of questionnaires, one is left wondering if prisons operated outside the framework of criminal law altogether.

A lament

Writing this essay thinking about the present exercise in criminal law reform and the earlier such endeavours in independent India, I am reminded of Gandhi's talisman that asked all of us to contemplate whether the step we will take makes any difference to the lives of the most vulnerable in society. It is uniquely relevant in this context given how the state's coercive power is disproportionately borne by the same vulnerable sections of society, and not the privileged members of the committee or the respondents to its online questionnaires who can engage in English. With this in mind, please take a look at the questionnaires and seriously ask yourself, will these proposed discussions make any meaningful difference and usher in any kind of meaningful *reform* to the current situation?

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The answer, I'm afraid, is no. For it is obvious to almost all onlookers that any real chance of reform requires reconsidering the very foundations of the existing legal architecture in place for administering criminal law in India, and not merely tinkering with it. If the most serious problem that afflicts the administration of criminal law in India is the imbalance of power at every level of the system—from the police station all the way till the prison—one would expect a reform effort to make this the fulcrum of its research. The available evidence in terms of the committee's consultation questionnaires suggests that this question is barely on its radar.

To give an example of the kind of in-depth review and reform needed for India's criminal laws, consider a four-volume exploration into the idea of a criminal trial that was carried out by a team of academics in the United Kingdom, called *The Trial on Trial*. This study was commissioned considering the dwindling number of trials being carried out in the country, which has witnessed a rise in the number of cases that are resolved by plea bargaining, much like what has been the case in the United State. In *The Trial on Trial*, the authors began not by *assuming* the relevance of a criminal trial in the 21st century, but by questioning it. This led to a collection of essays that explored the concept threadbare from almost every angle—legal, sociological, as well as political—and offered insightful conclusions. Such a level of engagement with different perspectives outside the law is imperative for any reform effort, perhaps uniquely in cases of criminal law reform where the dynamics of state power are at their most pronounced.

As I argued, the committee promised to attempt such a review, but thus far has been satisfied by merely reviewing the legal landscape and pin-pointing definitional quibbles to make things smoother. Such an exercise might be acceptable as part of a system of yearly reviews, but surely it cannot be the cornerstone of a reform agenda. If this does not change going forward, and the committee refuses to question the institutional setup at the heart of criminal law, I am afraid that the present exercise will amount to little more than a footnote in the long legal history of independent India that led to a few amendments but achieved little more than scratching the surface of the problem.

***Disclaimer**: As a sign of protest against the Committee and its unfair procedures, the author did not participate in the online consultations.*