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**CIVIL AND POLITICAL RIGHTS:  
INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION  
OF JUSTICE, IMPUNITY**

**Written statement\* submitted by the South Asia Human Rights Documentation Centre  
(SAHRDC), a non-governmental organization in special consultative status**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[31 January 2004]

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\* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

### **Proposed reform of India's criminal justice system**

The South Asia Human Rights Documentation Centre expresses grave concern at the proposed reforms to the criminal justice system of India contained in the Report of the Committee on Reforms of Criminal Justice System.

The Committee, headed by a former Chief Justice of two State High Courts and former member of the National Human Rights Commission of India, Justice V.S. Malimath, submitted its report to the Government of India in April 2003.

The report attempts to address the huge arrears of criminal cases, the inordinate delay in disposal of criminal cases and the low rate of conviction in cases involving serious crimes. Although the aim of rectifying recognised problems, such as judicial delay, is laudable, several of the Committee's recommendations, if implemented, will have a devastating impact on the administration of criminal justice in India.

The Committee makes a series of recommendations that seek to shift India's adversarial system of criminal justice toward an inquisitorial system modelled on continental European systems, particularly that of France. The Committee blames the adversarial system for "a large number of criminals...escaping justice" and seeks to selectively incorporate what it terms as the "good aspects" of the inquisitorial system.

In the context of the Committee's discussion of the French inquisitorial system, the Committee fails to demonstrate an in-depth understanding of the underlying ideology, structure, history and political context that produced the criminal justice system that exists in France today. Nor does the Committee acknowledge that the French criminal justice system has, in recent years, been the subject of reform as a consequence of the development of a European standard of human rights law.

The Committee seeks to selectively incorporate stereotypical aspects of the inquisitorial system without adequately considering the compatibility of those aspects with the criminal justice system existing in India today. Under the guise of making the "quest for truth" the very foundation of India's criminal justice, the Committee proposes to endow the courts with broad new powers, including the power to direct investigations.

At the same time, the Committee seeks to eviscerate the rights of the accused and undermine existing procedural safeguards within the criminal justice system. Despite the Committee's claimed concern that the accused receive a fair trial, it seeks to eviscerate the right to silence, do away with the presumption of innocence and lower the standard of proof.

Some of the Malimath Committee's most alarming proposals are as follows:

### **Adverse Inferences from Silence**

The Committee seeks to allow adverse inferences to be drawn from the silence of the accused at trial. This abolition of the right to silence will violate Article 14(3)(g) of the ICCPR, the Indian Constitution as well as fair-trial standards long established by Indian case law and by the Code of Criminal Procedure, 1973. The Committee fails to adequately address the definitive findings of the Law Commission of India, in its 180<sup>th</sup> report, that the drawing of adverse inferences from silence would contravene the Indian Constitution.

### **Defence Statement**

The Committee proposes a massive overhaul of the basic criminal trial procedure through the introduction of prosecution and defence statements. Under the proposed scheme, it will be compulsory for the accused to disclose, within a limited time period, his or her defence prior to trial in a written statement. The effect of a failure to do so will be an admission of guilt.

This is a discriminatory and unfair proposal, which will cause prejudice to poor, uneducated and unrepresented accused persons in India. This recommendation seeks to undermine the presumption of innocence, in violation of Article 14(2) of the ICCPR, and to shift the burden of proof away from the prosecution. As noted by the International Commission of Jurists, this recommendation represents an attempt to introduce a burden of proof that belongs to the contradictorial civil process, where the person relying on an alleged fact has to prove it.

### **Standard of Proof**

The Committee proposes do away with one of the fundamental principles of criminal justice by substituting the usual standard of proof of "beyond a reasonable doubt" for a lower standard of proof of "courts [sic] conviction that it is true." This lowering of the standard of proof will violate the presumption of innocence, as enshrined in Article 14(2) of the ICCPR.

### **Investigative Magistrate**

The Committee seeks involve the trial judge in the investigation by placing a duty on the court to direct the Investigating Officer to make further investigation to assist the court in the search for truth. Such a proposal may endanger the impartiality of the court and equality of arms between the parties.

### **Mainstreaming the prevention of terrorism act 2002**

The Committee also makes several recommendations that seek to incorporate provisions of the Prevention of Terrorism Act, 2002 (POTA) (extra-ordinary anti-terrorism legislation set to expire in October 2004) into the ordinary criminal law in India. These recommendations seek to

grant greater power to the police and increase the risk of human rights violations. The proposals include:

- Making confessions to police admissible as evidence. Such a proposal increases the risk of the use of torture by police to extract confessions, and is of particular concern given the recognised problem of police brutality and the use of torture as a routine method of policing in India;
- Increasing the length of police custody from 15 to 30 days, again increasing the risk of the use of torture against the accused; and
- Provisions for the interception of wire, electric or oral communications for prevention or detection of crime. Such a proposal increases the risk of arbitrary interference with a suspect's privacy.

### **Police as Prosecutors**

A further recommendation of the Committee is that the position of Director of Prosecution should be filled by police officers. This proposal violates the principle of separation of powers and is of particular concern given the problem of police corruption in India. Further, this proposal goes against the findings of the Supreme Court of India and the recommendations of the Law Commission of India in its 14<sup>th</sup>, 41<sup>st</sup> and 154<sup>th</sup> reports.

Given the crucial role played by prosecutors in the administration of justice and ensuring a fair trial for the accused, the position of Director of Prosecution should be filled by an independent and legally qualified judicial officer.

### **Plea-bargaining**

The Committee also recommends that a system of plea-bargaining be introduced into the criminal justice system of India to facilitate the speedy resolution of criminal cases. The Committee endorsed recommendations previously made by the Law Commission of India on the form that such a system of plea-bargaining should take.

In August 2003, the Criminal Law (Amendment) Bill 2003 was introduced in Parliament. The bill seeks to introduce a new chapter on plea-bargaining into the Code of Criminal Procedure, 1973, purportedly based on the recommendation by the Committee. The bill is likely to be brought again before the new Parliament later this year.

However, the bill does not introduce the concept of plea-bargaining recommended by the Law Commission of India, nor does it, therefore, implement the recommendations of the Committee. Instead, the bill contains a plea-bargaining scheme that will sacrifice justice in the name of the elimination of delay in the disposal of cases.

Some of the major flaws in the scheme proposed under the bill include the failure to provide the Court with a broad discretion to reject the plea-bargain, the failure to require the Court to ensure that the accused understands the implications of entering into a plea-bargain, involving the police and the victim in the bargaining process (thereby inviting coercion and corruption), involving the Court in the bargaining process (thereby bringing the Court's

impartiality into question) and the failure to make confidential any order passed by the Court rejecting an application (thereby prejudicing the accused).

The scheme proposed by the bill will inevitably undermine the public's confidence in the criminal justice system of India, and will lead to conviction of the innocent, inconsistent penalties for similar crimes and lighter penalties for the rich.

### **Conclusion**

The Committee does make a number of welcome recommendations in its report, suggesting, for example, that corruption and incompetence among the police, prosecution and judges be tackled by improving training, standards and accountability. The positive suggestions are, however, overshadowed by the large number of disquieting recommendations that have the potential to have a devastating impact of the fundamental rights of the accused, and on the administration of criminal justice in India. Given that the Committee comprised eminent names in Indian jurisprudence, it is appalling that certain issues were even taken up for discussion.

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