

SESSION 2 - CRIME INVESTIGATION AND PROSECUTION

21 FEBRUARY 2021 | 9:00 AM TO 11:30 AM

PANELISTS:

1. Dr Jayaprakash Narayan, General Secretary, Foundation of Democratic Reforms
2. Shri C. Anjaneya Reddy, IPS, Retd.
3. Shri D.R. Kaarthikeyan, IPS, Retd.
4. Shri Justice M.L.Tahaliyani

CHAIR: Justice B.S. Chauhan, Chairman, 21st Law Commission of India.

ABSTRACT

This session focussed on the various issues that plague the process of crime investigation and prosecution. It was found out that a lack of resources and manpower greatly hinder this process of criminal justice and the panelists suggested various methods of reform for the same. The apathy on the part of the political executive to implement recommendations, the improper appointment of the public prosecutors and the mixing of investigation and general policing roles were identified as important problems by the panelists. The need to fix these issues and further prevent the politicisation of the police and judiciary was deemed as necessary for positive change.

Opening Remarks by Justice B.S. Chauhan, Chairman, 21st Law Commission

Justice B.S. Chauhan began his opening remarks by delving into the history of the Criminal Procedure Code, its purpose and evolution. He elaborated on the role played by the mutiny of 1857 in the constitution of various commissions for drafting laws. The Police Act was drafted keeping in mind its role as a paramilitary force and not as a body tasked with maintaining law and order. Justice Chauhan alerted us as to how the foundations of the colonial criminal justice system and subsequently that of independent India came to be rooted in doubt against the police. This was explained with various examples within the law such as S.157 of the CrPC which requires the police to immediately forward every FIR to the Magistrate concerned to prevent any manipulation of facts. Added to this is the fact that statements recorded by the police during investigation are inadmissible as evidence in a court of law.

The distrust against the police system has continued for many years and the panelist gave a few instances such as in 1902, when the first Police Commission Chairman Andrew Frazer commented that the police in India is meant only for oppression and suppression and in 1963, when the Allahabad High Court commented that the police was ‘the most organized gang of criminals’. The panelist remarked that there is a serious lack of will from the political executive to drive change. The government has failed to implement the recommendations made by multiple law commissions and committees towards addressing pressing concerns in the criminal justice system. Separation of crime investigation from regular law and order police at least in case of serious crimes is one such major recommendation. The Chair observed that such a reform is bound to remain unsuccessful in a situation where a large proportion of elected representatives across all states are facing one or more criminal proceedings.

Justice Chauhan proceeded to cite examples of the killings of former Bihar Chief Minister Lalith Narayan Mishra and Raja Man Singh of Bharatpur where it took 30 to 40 years for the investigation and trial to conclude. He spoke about problems that occur due to this slow pace of court proceedings including many of the accused not receiving a sentence in their lifetime and that some get default bail because the charge sheet is not filed in time. He opined that the vicious media trials interfere with the investigation, the court trials and affect the judgement and time taken.

According to the Chair, one of the most important challenges is associated with the appointment of public prosecutors. Most states have done away with the requirement of consultation with the Sessions Judge or High Court in appointment of public prosecutors as mandated under S.24 of the CrPC and as a result, persons with political patronage get the post, leading to inefficient and incompetent public prosecutors. The Chair pointed out that the Supreme Court had been, since 1991, suggesting various recommendations for the proper appointment of the public prosecutors but this has been ignored by the law-makers. S.25-A was inserted in the CrPC to provide for a regular cadre of prosecutors for the High Court and Sessions Courts through the establishment of a Directorate of Prosecution, headed by a Director of Prosecution. The eligibility criteria for appointment to the post of Director of Prosecution is the same as that of a High Court judge. The Chair noted that so far not a single state in the country has implemented this provision. He stressed that it therefore follows that improvements in crime investigation or prosecution necessitate suitable amendments in law on one hand and changes in the process of appointment to ensure competency on the other.

Lastly, in respect of the judiciary, the Chair stated that the vacancies in judicial positions is a perpetual problem, continually ranging between 35% to 40% of judicial strength. However, the mindless filling up of judicial vacancies on the basis of eligibility and reservation, and not suitability is not a solution. Justice Chauhan opined on the importance of appointing suitable officials from all sections but posed a doubt as to whether such a proposal would be accepted by the

present political leadership and the public. There is a need to improve the service conditions of both prosecutors and judicial officers in order to attract the best talent to these posts.

Shri Justice M.L. Tahaliyani, Former Bombay High Court Judge

Shri Justice Tahaliyani opened his remarks by replying to some of the issues raised by Justice Chauhan and reaffirmed the existence of the police-criminal nexus and the growing trust deficit of the public in the police. Justice Tahaliyani opined that people do not like to go to the police station and lodge complaints because of the distrust and fear in the system. He also pointed out that people who join the force get accustomed to the environment of the station and the behaviour of their superiors and they conform to low standards, contributing to the continued distrust in the police force.

Justice Tahaliyani spoke at length about the need for the separation of investigation and law and order in the police force. He explained the process by which police officers get assigned to various departments so as to point out the flaws in the system. Initially, police officers are sent to Local Arms departments that deal with law and order and after a few years, they get posted in a police station where they learn about the investigation process. The panelist pointed out that investigative training received during the period of recruitment is lost and prime years are spent working in the law and order wing. He suggested that the effective method would be to select and train officers separately for each of the Law and Order and Investigation departments. He also added that there should be some criteria, examination or interview for an officer who wants to switch from Law & Order to Investigation which will allow for deserving officers to work in the latter department. On the other hand, in case of Sub-Inspectors who are directly recruited, there are the twin challenges of lack of motivation to learn the particular skills required for crime investigation on the part of the recruits and deficient training on the part of the administration. To re emphasis, he stated that separation of crime investigation from regular law and order police is the need of the hour. A separate cadre of police officers must be set-up for the independent crime investigation wing, with conditional transferability between the two wings. An officer may only be transferred to the crime

investigation wing upon either being specifically trained for it or upon clearing an examination conducted to test the suitability of the officers for crime investigation.

Justice Tahaliyani moved on to talk about the system of Public Prosecution. He clarified that a few states have established the office of Directorate of Prosecution. Presenting the example of Maharashtra, the panelist stated that prosecutors that appear in the courts of magistrates are appointed on a regular basis whereas those appearing in the Sessions Courts and High Courts are paid honorarium on an ad hoc basis. The Director of Prosecution has limited authority over those prosecutors that are appointed on a regular basis as they have no authority to hold them accountable. He said that sometimes, even police officers, with no training in prosecution are appointed to this post which reflects the extent to which the institution of prosecution is neglected. In addition to the problems of incompetency and political interference, prosecution faces a dire shortage of basic resources and infrastructure which severely inhibits the public prosecutors from effectively discharging their duties. He concluded by seeking for the enhancement of resources, pay scale and respect accorded to prosecutors along with structural changes in their appointment and accountability.

Dr. Jayaprakash Narayan, General Secretary, Foundation of Democratic Reforms

Dr Jayaprakash Narayan began his presentation by stating that the police have done a commendable job of maintaining public order in an extraordinarily diverse and fractious society like India with tremendous political polarization. He elaborated on two primary approaches to addressing justice delivery. The first, based on the mistrust of police, involves giving the police minimal power and expecting justice to be served using extrajudicial methods, which is dangerous. The second, and the democratic method, is to empower the police so that they can work independently but also hold them accountable using various checks and balances. The panelist further commented that the reason why the Prakash Singh verdict of the Supreme Court did not work is because the complete separation of the police from the government is not feasible.

Dr Jayaprakash Narayan cited several examples of shoddy investigation, police inflicted torture, political control over investigation and extrajudicial killings including the Arushi Talwar murder,

Ashok Kumar and Gurugram schoolboy murder case, Hathras rape and murder, and the Disha case of Hyderabad. He proceeded to state statistics that point to alarming trends such as that India has the lowest conviction rates in the world, a comparatively low strength in investigating officers, the lowest public prosecutor - people ratio in the world. He added that not only are the number of prosecutors low, but they are under-resourced and not respected with little opportunity to grow, resulting in very perfunctory prosecution.

The panelist then presented a comparison between India and the US in the total number of serious crimes and unnatural deaths. While the total number of accidental deaths, suicides, homicides, deaths due to drug overdose, and rapes in 2018 was over 600,000 in India, it was over 400,000 in the US. This results in an enormous caseload of about 26 such cases per investigating officer and 68 cases per prosecutor in India every year! Officers in the US investigate about 4 such crimes per year and prosecutors handle 7-8 cases a year.

He reiterated the point raised by the earlier panelists that a major challenge is the undue political interference in crime investigation. However, he cautioned that law and order requires political oversight. Therefore, Dr Jayaprakash Narayan suggested the need to separate investigation of serious crimes above a certain threshold, say crimes punishable by more than 3 years of imprisonment, from other policing functions. He opined that this proposition may be more appealing to the political leaders. The purpose of a criminal investigation, under law, was to gather factual information and evidence against guilty persons, assure a conviction in such cases and be able to make a fair and objective determination of the situation, all of which is possible only with a clear separation in duties. As these are quasi judicial functions, the panelist called for the setting up of an independent Crime Investigation Wing. He recommended that minor offences categorized as those receiving upto three years of imprisonment in punishment, which form 80% of the total crimes in a year, would continue to be handled by the law and order wing while the more serious

cases would come under the ambit of the investigative wing. In this regard, Dr. Narayan suggested that the CB-CID in states must be strengthened with adequate personnel and infrastructure and made more professional, with an automatic jurisdiction of all cases above the said threshold. This can be insulated from political vagaries by the creation of an independent Investigation and Prosecution Board similar to the Lokayukta, headed by a retired Supreme Court judge or Chief Justice of the High Court. The members of the Board, apart from some ex-officio members like the current DGP of the state, may be appointed for a fixed tenure by a high powered collegium including the Chief Minister, panelist of the Assembly and the leader of the opposition.

Similarly, Dr. Narayan proposed that, while making Section 25A of the CrPC mandatory, a judge of the High Court must be brought in as Chief of Prosecution with complete authority of prosecution in the state, appointed by the Board of Investigation and Prosecution. In addition, drawing on the existing practice of appointing officers from the judiciary as Law Secretaries in Andhra Pradesh, Dr Jayaprakash Narayan recommended the appointment of a District Attorney of the rank of the Sessions Judge for a period of 5 years, provided the number of judges in the district is also increased. Such a prosecutor would have complete control over the technical and managerial control of investigations and prosecutions in the district. These District Attorneys will be completely independent, under the Chief of Prosecutions of the state and supervised by the Board of Investigation and Prosecution, and go back to the judiciary after their tenure. The panelist emphasized that it is also necessary to increase the crime investigation capacity with an independent, empowered, and accountable CB-CID with forensic capability, and a strong cadre of prosecutors. He concluded his presentation by reiterating the need to reconcile the interests of all stakeholders, especially the elected legislature. The law and order police, 95% of the police force and 80% of criminal caseload will remain as they are with improvements as directed by the Supreme Court.

In his closing remarks, Dr. Narayan quoted Gladstone, “the purpose of a government to make it easy to do good and difficult to do evil” and emphasized that if the criminal justice system fails,

society will be in peril. This is especially so, as that societal and family controls and low crime rate will not last as urbanization increases. There is a desperate need to inject efficiency, transparency, and accountability with adequate empowerment for rigorous investigation and prosecution leading to higher conviction rates. Creating a formula that is workable, giving due consideration to the legitimate political concerns of the elected representative, to make change happen is the only way forward in a democracy.

Shri D.R. Kaarthyayan, Former CBI Director

In his preliminary remarks, the panelist opened by stating that the entire criminal justice system is interconnected and one cannot separate investigation from prosecution. He stated that in the past 70 years, while crime rates have gone up, people's trust in the judiciary has gone down. If people lose faith in the system then street justice and law of the jungle will prevail, and the very concept of democracy will erode. Shri D.R Kaarthyayan opined that had the Supreme Court's directions on police reforms been implemented by all the states then the situation would have considerably improved by now.

The panelist listed that ineffective preventive actions, slow and inefficient investigation, slow and ineffective trials, outdated laws and procedures of investigation and trial, and lack of commitment and cooperation on the part of all concerned have led to the deterioration of the quality of justice system to an extent that commission of crime has become a low risk and high profit business. These factors have created a permissive environment in which crime can flourish. He emphasized that investigation of ordinary crime is significant because ordinary crime that goes unchecked creates a fertile ground for organized crime and terrorism to thrive. An unjust acquittal is as bad for society as an unjust conviction, because it sets an example that anybody can get away from a crime that they have committed. He added that until and unless the deficiencies in the system are fulfilled, lawlessness will prevail.

Elaborating on the inefficiencies in the system, Shri D.R. Kaarthikeyan cited the example of Rajiv Gandhi Assassination case to explain the inefficiency of Section 16 of TADA (Terrorist and Disruptive Activities Prevention Act). Section 16 of TADA talks about protection of witnesses and collection of evidence. He added that any case based solely on Section 16 of TADA, is inevitably dismissed, and evidence collected under Section 16 is only viable as corroborative and secondary evidence.

In agreement with the other panelists, the panelist said that criminalisation of politics and politicisation of police are also serious problems. He opined that hierarchy, by and large, does not exist, and it's rare to spot someone who looks up to the system because their loyalty keeps shifting on the basis of who appointed them in the position of power. The speaker urged that hierarchy must be restored and police must be held accountable, provided they are allowed to exercise their authority. He opined that a transparent system should be adopted to appoint officials such as the DIG of police or the officers of CBI, similar to the United States of America, where a public evaluation is done and one's past integrity and competency is evaluated after which an officer is appointed.

The panelist further stated that given the state of the system and the conditions under which the police operate, they deserve empathy rather than harsh criticism. He emphasised the need for fundamental change in the system, and insisted on demonstrating the issue to the public at large to force those in power to act.

Speaking on the inefficient prosecution system that prevails in our country, the panelist stated that even if an officer conducts a very efficient investigation, justice is not delivered if the prosecution fails. As the bridge between the court and the investigation, prosecutors play a pivotal role in any case and hence must be competent people with utmost integrity. He stated the need to reform the appointment of prosecutors from the current politicized process, wherein a prosecutor is a member or sympathizer of a political party.

Shri D.R. Kaarthikeyan concluded by saying that any change in the justice system including speedy investigation and speedy trial can be brought about only if there is a demand from the public, and therefore, it is imperative to create a mass public movement for this cause.

Shri C. Anjaneya Reddy, IPS, Retd.

Shri Anjaneya Reddy began by stating that the problem in hand is how to make investigating agencies autonomous as well as accountable. Crime currently is investigated at different levels; at the police station level, district level and CB-CID level. He highlighted the fact that in order to strengthen investigation, it is important to categorise cases that are to be solely handled by the investigation agencies. There should be a strong and efficient investigating division even within the existing system with exclusive cadre of detectives. Once a detective joins that department, he/she should not be transferred to the law and order wing. Additionally, promotions must be given within this cadre. The panelist mentioned that CB-CID should be strengthened from the very top to the district level and even further below, if possible. CB-CID must be given automatic jurisdiction of certain cases. This will enable easy transfer of cases without any complications such as seeking permission or orders from DGP or any other officials.

He opined that earlier, most of the grave cases were that of murder. These days, there are a variety of cases such as anti-corruption cases, enforcement cases etc. Therefore, all investigating agencies that deal with different types of crimes should be brought under an autonomous body outside of the government. This body will be accountable to a neutral agency headed by a senior civil servant, a senior judge, a police officer or any other official deemed to be fit for the job. This neutral agency should be a collegium agreed upon by both the ruling party and the opposition party.

Pointing out the plight of the Telangana police officials, where every aspect of an investigation faces excessive interference by political parties, he strongly opined that investigations that are a part of the police department must be separated from the main law and order keeping function.

The panelist also stated that the police are given uninhibited powers of arrest. Civilians do not want to approach any police station to meet investigating officers because they are scared of being arrested due to the arbitrary power that rests in the hands of police. According to him, this power must be taken away and the police should be able to investigate all cases and make arrests only when necessary. The panelist observed that the number of encounters have significantly risen because people have lost faith in the criminal investigation system and are not sure if cases will end in conviction.

The panelist also called for an overhaul of our colonial criminal justice system and mentioned that the Indian Evidence Act, the Code of Criminal Procedure and the Indian Penal Code must be revised in order to bring about a significant change in the current scenario. To buttress his argument, he gave the example of how unnecessarily, certain offences punishable under IPC are classified as non-cognizable. He mentioned that there have been discussions about classifying cases under which the police should be allowed to make arrests and cases which they should only investigate without making any arrests. According to him, this differentiation should be a substitute for cognizable and non-cognizable offences. He stated that the distinction of cognizable and non-cognizable offences must be done away with.

The panelist further added that the Malimath committee is the only committee that examined the situation in its entirety. Justice Malimath clearly pinpointed what is wrong with the system and proposed various recommendations which have not been implemented till date. To conclude, Shri Anjaneya Reddy stated the following:

1. There must be a separation of investigating agencies from law and order police, overseen by an autonomous yet accountable board outside the government

2. There must be a panel of prosecutors at the district level from which the complainant can chose his preference

3. If the complainant believes that his or her case is not being given the required amount of attention then he or she must have the right to appoint a lawyer of their preference to assist the public prosecutor

QUESTION AND ANSWER SESSION

The question and answer session began with a question regarding the pros and cons of having a judge serve as a prosecutor, to which Justice B.S. Chauhan answered by stating the example of the system in Germany, wherein law teachers become public prosecutors in trial courts and are trained as judges. Judges are also interchangeable with public prosecutors and after having served as prosecutors, they can come back as judges. In Germany, 50% of judges are academicians. From the beginning, they work as public prosecutors from magistrate court to the high court. Hence, they possess practical knowledge about the working and functioning of the court system. He suggested that such a system may be introduced in India and further added that a prosecutor must be a person with utmost integrity and should not be under any political pressure. The prosecution must be an autonomous body supervised by a person appointed by a competent authority.

Justice M.L. Tahaliyani stated that there are certain benefits to having a district judge head prosecution in a district as he/she would have a good understanding of the ground realities. However, he added that there will be problems if local district judges are appointed as district attorneys in their native districts. Justice B.S. Chauhan asked if a Chief Judicial Magistrate or Chief Metropolitan Magistrate with 15 years of experience working in courts would agree to work as a prosecutor. He mentioned that if a district judge is transferred as a district attorney, a person of a junior rank will be the district judge there, which might cause embarrassment to the

district attorney. Justice M.L. Tahaliyani agreed and stated that we should come up with another method to strengthen prosecution in the country. The panelist emphasised that prosecution can be strengthened by having a transparent method of appointing public prosecutors and government pleaders as district heads, managing all prosecutors that fall within their jurisdiction. Moreover, at the state level, the Director of Prosecution must be given more powers. Prosecutors should be trained properly and should be given adequate infrastructure and necessary amenities such as libraries. Just like training institutes for judges, there should be similar credible training institutes for prosecutors. According to the panelist, only the knowledge of law and impeccable integrity will make a competent prosecutor. Moreover, he stated that district prosecutors should be salaried and not paid on a 'per case' basis. He concluded by stating that having a district judge as a district attorney is not going to solve the problem. There should be a comprehensive plan to improve prosecution in the country.

Shri Anjaneya Reddy added to the discussion by stating that when the Directorate of Prosecution was started in Andhra Pradesh, the pay scales were put on par with judicial magistrates. The prosecutors could also be appointed as district judges. He emphasised that a judge's role is different from a prosecutor's role so seniority should not matter. He also gave an example of how in the Supreme Court, most of the lawyers are senior to judges on the bench.

Dr Jayaprakash Narayan added to the conversation by stating the 5 objectives that must be fulfilled: competence, stature of the prosecution, independence, public trust and coordination among all three agencies; the prosecutor, the investigator and the judiciary. As long as these 5 objectives are fulfilled, the methods do not matter. A follow up question was directed to Dr. Jayaprakash Narayan regarding the conflict of interest that might occur if such a system were to be adopted. He opined that there will be no conflict of interest as long as the functions are clearly separated and there is no political interference.

The next question was addressed to Shri D.R. Kaarthykeyan about how during the Rajiv Gandhi Assassination case, amidst such intense political pressure, he remained neutral and what

measures he took to ensure insulation of investigation from political interference. He stated that one must never seek a favour from anyone. According to him, there was more pressure defending the investigation trial from the political manipulation of political leaders than from the terrorists. He had to face two commissions of inquiry out of which one was manipulated by political personalities in order to forward their political interest. The political manipulations did not succeed because he had the courage to stand up for what was true and this principle should be followed by anyone and everyone.

The last question was for Shri Anjaneya Reddy regarding his proposition of an investigation agency with a separate cadre. The question inquired how he proposes the coordination between this investigation agency and the law and order police be maintained. The panelist stated that there is already a coordination with the CB-CID and that the CB-CID should not be answerable to the party in power. It should be autonomous and accountable to a committee outside the government. He further suggested that CB-CID could also be equipped to be independent like the CBI.

Shri D.R. Kaarthykeyan noted that in France, victims of crime are entitled to become parties to the proceedings from the stage of investigation itself, so that the investigator cannot manipulate proceedings nor can the prosecutor help the accused. The victims can conduct proceedings if the public prosecutor does not show diligence by supplementing evidence and putting forth their own arguments. Victim also has a right to be represented by an advocate of his choice and an advocate shall be provided by the state if the victim is unable to get a lawyer.

CONCLUSION

The panelists, with their wealth of experience, acknowledged various failures and drawbacks that are present in the criminal investigation and prosecution system and provided logical and insightful suggestions on how to bring about a change in the system by working from within the system.

Incompetence and lack of will can be found during an investigation as well and during the course of prosecution. Police-criminal nexus, the growing trust deficit of the public in the system, criminalisation of politics and politicisation of police, lack of autonomy and accountability among investigating agencies, slow and inefficient investigation and trials, outdated colonial laws, and high crime rates are the main reasons why crime investigation and prosecution are in this plight.

The need for separation of force for investigation and law and order was suggested. Creation of a new body of prosecutors whose constitution would be done in a hierarchical manner was suggested with improvement of resources, pay scale and respect accorded to public prosecutors along with structural changes in their appointment and accountability.

Colonial and outdated nature of the criminal justice system was extensively iterated and it was opined that the core of the Evidence Act, the Code of Criminal Procedure and the Indian Penal Code must be changed in order to bring about a significant change in the current scenario.

It was perceptible in the entire course of discussion that upliftment of the spirit of democracy and gaining public trust was of utmost importance and our esteemed panelists were keen on bringing about a change in our system, a change that is not merely concerned about an alternative but identifying the mistakes within the current framework and rectify them as quickly and as efficiently possible.