

Criminal Justice Notes

In this month's edition of KLS Criminal Justice Notes:

- **The Supreme Court of India abolishes the patriarchal crime of adultery as part of its drive to rid the criminal law of India of some of its most outdated and reprehensible features.**
- **The Commission on the Future of Policing in Ireland proposes extensive reforms to enhance public confidence in policing which has been rocked by a relentless series of corruption scandals.**
- **The UK government announces an overhaul of the Code of Practice for Victims of Crime in England and Wales, together with further supports, in a new cross-government victims' strategy.**

Adultery

In a unanimous five judge decision in *Shine v India*, the Supreme Court of India overturned precedent to declare unconstitutional the colonial era offence of adultery.

Section 497 of the Penal Code of India made it a criminal offence for a man to commit adultery with a married woman. Under s.198 of the associated Code of Criminal Procedure, it was prosecutable only on the complaint of that married woman's husband. The wife of the adulterer had no standing to make a criminal complaint against him, and no offence was committed by the married woman who participated in the act of adultery. Significantly, no offence was committed where there was connivance between the adulterer and the married woman's husband. Equally, the offence did not reach an extra-marital relationship between a married man and an unmarried woman or a widow. In effect, the offence was an example of patriarchal criminal

law designating a married woman as the sexual and personal property of her husband. As said by Nariman J., "[w]hat is therefore punished as 'adultery' is not 'adultery' *per se* but the proprietary interest of a married man in his wife".

Article 21 of the Constitution of India expressly guarantees the right to life and personal liberty. It is interpreted as embracing the conceptual equality and dignity of a woman. Chief Justice Dipak Misra had no hesitation in finding that the adultery offence was in flagrant violation of that provision as it "treats the woman as a chattel. It treats her as the property of man and totally subservient to the will of the master." It also reflected "invidious distinctions based on gender stereotypes which creates a dent in the individual dignity of women." In the words of Chandrachud J., it "subordinates the woman to a position of inferiority", and "it is destructive of and deprives [her] of her autonomy, agency and dignity."

Accordingly, it could not survive scrutiny under Article 21.

The Court also found the offence to be in flagrant breach of Articles 14 and 15. The former guarantees equality before the law and equal protection of the laws, while the latter prohibits discrimination on the grounds of sex, among others. The Chief Justice denounced the offence as “absolutely and manifestly arbitrary as it does not even appear to be rational and it can be stated with emphasis that it confers a licence on the husband to deal with the wife as he likes which is extremely excessive and disproportionate.”

Chandrachud J. said that it “entrenches stereotypes and existing structures of discrimination and has no place in a constitutional order.”

The Court was also not persuaded that a criminal offence of adultery (stripped of its gender-based discriminatory features) would avoid constitutional infirmity. The Chief Justice considered that treating adultery as a crime reflected an unacceptable intrusion by the State into the private realm. In particular, it would constitute “an immense intrusion into the extreme privacy of the matrimonial sphere”. As such, it would offend two facets of Article 21, namely the dignity of husband and wife, and the privacy attaching to the relationship between the two.

The decision in *Shine* comes hard on the heels of the Supreme Court’s decision in *Navtej Singh Johar v India* which broadly decriminalised homosexual acts. Both reflect the broader mission of the Chief Justice to rid the criminal law of India of some of its the most outdated and reprehensible features before his retirement. In his judgment in *Shine*, he explained that: “[t]he law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must

reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable.” Currently, the Court is considering the constitutionality of the marital rape defence which still forms part of the criminal law in India.

Police Reform in Ireland

The report of the Commission on the Future of Policing in Ireland was published on the 18th September. The Commission, the first of its kind in the 93-year history of the force, was established in May 2017 following a relentless succession of policing scandals that resulted in the unprecedented resignation of the Minister for Justice and two successive Garda Commissioners. At the heart of the scandals were numerous high-profile allegations of serious Garda corruption, and concerns over an unhealthy close and mutually self-serving relationship between central government and senior Garda management.

In its report, the Commission draws heavily on familiar recommendations that have been made in one context or another in recent years, together with lessons from best international practice, to construct a roadmap for very necessary reforms in: recruitment, education and training, promotions, personnel development, internal management and organisation, inter-agency cooperation, community policing and the use technologies and social media, among others. If implemented fully, they offer the prospects of replacing the homogenous, hierarchical, inward-looking and hidebound Garda organisation with one that incorporates diversity, a confident and outward-looking

service mentality, investment in personnel development and a commitment to ethical and professional policing values suited to the challenges of the 21st century.

Commendably the report foregrounds the importance of human rights in policing. It calls for them to be “a central concern and an informing principle when police policies and strategies are being developed, when operations are planned and executed, and when cases are brought to a conclusion.” It also advocates an injection of clarity and transparency to police powers, including the adoption of codes of practice on how some powers should be exercised. Equally commendable are the proposals to address the notorious failures of the Garda complaints procedure by strengthening the status, powers and resources of a renamed independent complaints body.

Less impressive are the Commission's recommendations on the key areas of democratic scrutiny and State security. They envisage a significant reconfiguration in the governance structures which will give central government and senior Garda management even deeper control over policing, at the expense of more broad-based democratic scrutiny and greater transparency. Moreover, the Commission's proposals on the State security remit of the Garda will see it placed at the centre of a significantly expanded State security apparatus. Inevitably, this will dilute its civil policing service remit and further undermine its exposure to democratic scrutiny and transparency.

Whether the Commission's report will have any impact in practice depends almost wholly on the government's commitment to the implementation of its recommendations over the next few years. Unfortunately, both government and the Garda have a long track record of frustrating proposed

reforms either by quietly shelving them, or implementing the appearance of reform without the substance. Another concern is the strength of the government's resolve to resist self-serving lobbying behind the scenes from institutional and vested interests, most notably within the Department of Justice and in the Garda organisation itself. The only certainty is that this subject will not go away anytime soon.

Former KLS colleague, Prof. Vicky Conway was a member of the Commission.

Crime Victims Strategy

The status and needs of victims of crime has moved towards centre stage in criminal justice in recent years. In 2015, the UK government published the current Code of Practice for Victims of Crime in England and Wales, as mandated by s.32 of the Domestic Violence, Crime and Victims Act 2004. It reflects the government's obligations under EU Directive 2012/29/EU on minimum standards on the rights, support and protection of victims of crime, EU Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children, and EU Directive 2011/36/EU on preventing and combating the trafficking of human beings.

The government is currently spending about £200 million per annum on support services for victims of crime. It has now announced an overhaul of supports with the publication of a new cross-government victims' strategy. This will include a review of the entire Criminal Injuries Compensation Scheme with a view to ensuring that it reflects the changing nature of crime; especially around applications relating to child sexual abuse and terrorism. The government is already committed to

abolishing the Scheme's "arbitrary and unfair" pre-1979 'same roof rule', whereby a victim is ineligible for compensation if he or she was living with their assailant as members of the same family at the time of the offence. The Court of Appeal declared this rule discriminatory and in breach of the ECHR in July in *JT v First Tier Tribunal*. In that case, the applicant had been denied compensation for sustained sexual abuse by her step-father when she was a child.

The government will also consider further reform of the Scheme's eligibility criteria, including factors such as: the two-year time limit on applications; the current exclusion of applicants who have an unspent conviction that resulted in a specified sentence; and whether the definition of a 'crime of violence' should be broadened to include sexual exploitative behaviour such as 'grooming'.

As part of its new overall strategy, the government will improve communication and support for victims of crime through the parole process. The Victim Contact Scheme will be simplified, and the quality of communication improved. Equally, Victim Personal Statements will be allowed at parole hearings, and revised training for Victim Liaison officers will be rolled out. These aspects might be interpreted as part of the response to the public concern that was generated by the Parole Board's premature granting of parole for the serial rapist John Worboys.

The strategy also sets out details of a consultation process on a revision of the Victims' Code to ensure that entitlements better reflect the needs of victims and the changing crime environment. A further consultation on a Victims' law to underpin the Code, which will include strengthening the Victims' Commissioner's powers, will be

announced in 2019. In addition, the government will consult on the establishment of an Independent Public Advocate to help bereaved families following a disaster. An Advocate will help guide families through an investigative process, ensure that their voices are heard at inquests and ensure that they are directed to appropriate support services. Although the government announcement does not expressly mention Hillsborough or Grenfell-type situations as coming within the remit of an Advocate, they would seem to have clear resonance for it.

Other features signalled in the new strategy include: improving court environments, with new victim-friendly waiting areas; a focus on better enforcement of the Victims' Code, with increased responsibility for Police and Crime Commissioners in monitoring the delivery of services; and considering an extension to the 'unduly lenient sentence scheme' so that victims and the public can have sentences reconsidered by the Court of Appeal.