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To,
The Committee for Reforms in Criminal Laws
National Law University, Delhi
Sector 14, Dwarka
New Delhi – 110078
India

Subject: Concerns about the composition and operation of the Committee for Reforms in Criminal Laws

Dear Committee Members,

- 1) We are writing to you as academics invested in the development of Indian law. Some of us have been proudly associated with earlier law reform processes and have publicly called for the reform of criminal laws, including, the repeal of the law of sedition, removal of the marital rape exception and the creation of stronger structures of accountability to curb police excesses. All of us have devoted a significant part of our professional lives to thinking about and engaging with Indian law and/or policy reform. For the reasons outlined below, we urge you to immediately suspend the working of the Committee for Reforms in Criminal Laws. We hope you will withdraw from the Committee's membership and join us in calling for this reform process to be carried out in a more transparent and inclusive manner, at a later point in time.
- 2) At the outset, we are concerned about the timing and manner of what is being attempted – the largest one-shot law reform exercise in the most populous democracy in the world in the middle of the worst pandemic in living memory. Although the Committee has, so far, not yielded to requests to publish its Terms of Reference, the Objectives, the 'Aim and Guiding Principles' and the messages on your website seem to suggest that the Committee's remit extends to every aspect of Indian criminal law.
- 3) We note that the Government of India has treated the pandemic as a "disaster" under the Disaster Management Act, 2005. The Supreme Court has also recognised the scale of the problem and intervened to alleviate the suffering of people, such as by ordering the government to cater to needs of stranded internal migrant workers. Central and state governments are struggling to secure the most basic healthcare, livelihood and educational needs of their citizens. Retired judges, senior advocates, parliamentarians, and civil society groups have called on you to suspend your functioning while

India and the world are in the grip of this disaster. It is neither humane, nor sensible that such serious changes to fundamental laws that define civil and political liberties be deliberated upon or rushed through during this humanitarian crisis.

- 4) This is not the first time that criminal law has been sought to be revised or re-written in independent India, but it is the first time that all three codes, namely the Indian Penal Code, 1860 (IPC), the Code of Criminal Procedure, 1973 (CrPC), and the Indian Evidence Act, 1872 (IEA), have been sought to be re-written in one go, in so short a time-span, and with so little preparation or rigour.
- 5) Indeed, demands to revise criminal law began simultaneously with the functioning of the Constituent Assembly itself and persisted although the IPC, IEA, and the Code of Criminal Procedure 1898 (that preceded the current CrPC) figured significantly in the deliberations of the Constituent Assembly during the Constitution's drafting process.
- 6) The First Law Commission of independent India was set up in response to a resolution moved in the Lok Sabha asking for the establishment of a commission to recommend revision and modernisation of laws, "...in particular the civil and criminal procedural codes and the Indian Penal code...". This was an 11-member commission chaired by M. C. Setalvad, the Attorney General for India, and included the Chief Justices of the Bombay and Rajasthan High Courts, two retired High Court judges, the Advocates General of Madras, Andhra Pradesh, Punjab; and advocates from Calcutta, Bombay, and Allahabad. The First Law Commission submitted a report on the Reform of Judicial Administration (its 14th report). The process followed by the First Law Commission in investigating and reporting on the Reform of Judicial Administration was settled at its inaugural meeting and is instructive. It decided that –
 - a) first, before considering remedial measures, the factual position to be dealt with had to be ascertained;
 - b) second, detailed information on the problems had to be collected from all possible sources;
 - c) third, after collecting all the information, a comprehensive questionnaire had to be addressed to all bodies and persons likely to assist with their knowledge and experience; and,
 - d) finally, the recommendations were to be decided only after all the replies to the question had been examined.
- 7) In the third stage, *i.e.*, collecting responses to questionnaires, the First Law Commission distributed more than 6000 copies of the questionnaires amongst individuals and organisations including High Courts, state

governments, bar associations, the Chamber of Commerce, lawyers and judicial officers. The Commission visited 14 High Courts and co-opted two members for each of the states visited – except for Madras where only one member was co-opted – and examined 473 witnesses in person. Before the Commission visited, High Courts and state governments were asked to suggest as witnesses, judicial officers, representatives of bar associations, representatives of the state Governments, heads of police departments, Chairpersons of the State Public Service Commissions, legal academics, those with experience of working with Village Panchayat Courts, representatives of legal aid organisations and lawyers. Publicity was given to the Commission’s visit in the press so that in addition to witnesses proposed by the High Courts and the state governments, other witnesses’ assistance could be included in the Commission’s deliberations.

- 8) The Committee’s procedures are a stark contrast to the first Law Commission’s approach. The present Committee entirely bypasses the first and second of the four stages followed by the First Law Commission, skipping directly to the third, *i.e.*, the questionnaire-stage. As a result, the questionnaires are not backed by thorough empirical assessment and are crowded with issues that are not widely regarded by academics and practitioners as being in pressing need of reform. Whereas the first Law Commission examined 473 witnesses in person, visited 14 High Courts, co-opted members from each of those High Courts, called for and took representations from a wide selection of stakeholders, and made conscious arrangements for members of the public to engage, the present Committee’s contemplated public engagement is limited to web-administered questionnaires.
- 9) Although the 14th Report of the First Law Commission was a culmination of this detailed process, the report noted that a detailed revision of the procedural codes – the Code of Civil Procedure 1908 and the Code of Criminal Procedure 1898 – required “considerable time” and such a revision would have to be undertaken in the future.
- 10) In 1959, the Second Law Commission announced its intention to take up a revision of the IPC and the 1908 CrPC. It invited suggestions from the public. This, however, bore fruit only with the Fourth Law Commission that between 1963 and 1968 submitted four reports – 32nd 33rd, 35th and 36th – on problems arising out of specific provisions of the 1908 CrPC. In February 1968, the Fourth Law Commission submitted the 37th Law Commission Report – a comprehensive report on the first 14 chapters of the 1908 CrPC; it was still, however, unable to propose a revision of the complete procedural code.
- 11) Therefore, the Fifth Law Commission was constituted in March 1968 with four full-time members, apart from a fifth member from the Law Ministry. The Fifth Law Commission included two retired High Court judges and a Law

Secretary and when the same Law Secretary was subsequently appointed as a judge of the Allahabad High Court, a retired Chief Justice of the Patna High Court replaced him. Although the Fifth Law Commission already had the earlier Commission's comprehensive report on the first 14 chapters of the CrPC it visited eight High Courts for discussion and finally submitted its report in September 1969 bringing to a conclusion, in its own words, "one of the major tasks of revision undertaken by the Commission".

- 12) This – one of the major tasks of revision undertaken by the Commission – is equivalent to less than a third of what this Committee intends to investigate, and yet, it took the Law Commission ten years to complete it. It is not feasible that the Committee will be able to take apart and rewrite all of Indian criminal laws competently within the narrow timeframe of six months.
- 13) Further, the Committee's decision to release the questionnaires in separate tranches for the IPC, CrPC and the IEA is inexplicable. For those of us who work on criminal law, our teaching and research provides daily evidence of how substantive, procedural, and evidentiary laws interact with and shape each other. Calling for engagement with substantive law without any sense of what the procedural and evidentiary law might look like and *vice versa* guarantees dense confusion.
- 14) What the Committee envisages is not even comparable with what the Law Commission's website outlines as its usual process. As per the Law Commission's website, all its investigations begin by adopting different methodologies for collecting data and research appropriate to the reform proposal under consideration. This is then discussed at Commission meetings. These discussions help in focusing research and articulating the issues involved. The Commission then issues a Working Paper outlining the 'problem' and suggesting matters that need reform. The Working Paper is circulated among the public and concerned interest groups for reactions and suggestions, usually with a carefully prepared questionnaire. The Commission states that it attempts to consult the widest section of people in formulating law reform proposals and eliciting critical opinion on proposed strategies for reform. Towards this end, the Commission establishes partnerships with professional bodies and academic institutions and organises seminars and workshops in different parts of the country. After the data and the critical opinions are collected, the Commission's staff organises the information for the writing of the report. This draft report is then subjected to scrutiny by the full Commission before it is forwarded to the government. The present Committee, in contrast, has not undertaken any data collection or research that we know of; the Committee has no published Working Paper; the Committee has made no effort to consult a wide section of people or to elicit critical opinion; the Committee has established no partnerships with professional bodies or diverse academic institutions; and the Committee has organised no seminars or workshops.

15) Despite this carefully laid out and detailed process, the Law Commission has come under some justified criticism for not being adequately rigorous, and for its failure to adequately represent marginalised communities. There is, therefore, much to be learned from the attempts of other Law Commissions to ensure that the opinions of disempowered sections of society, on whom the legal process often places disproportionate burdens, are canvassed and given due regard. For example, the South African Law Commission's protocols for engaging as wide a swathe of society as possible, merits consideration.

- a) The South African Law Commission begins its process by conducting research to determine the existing legal position and identifying shortcomings or deficiencies. This research is then published in Issue Papers. The purpose of the Issue Paper is to announce the investigation, outline the problem in particular areas of the law, clarify the aim and extent of the investigation, suggest options available, and invite submissions. Issue Papers are designed to involve the community actively at an early stage of the law reform process and are not just widely distributed but workshopped to increase the number of people being engaged with as well as the depth of that engagement.
- b) Responses to the Issue Paper lead to further intensive research and the preparation of a Discussion Paper.
- c) Discussion Papers contain the Commission's preliminary research and, in most cases, draft legislation. Discussion Papers will include a statement of the existing legal position, its deficiencies, a comparative survey, and a range of possible solutions. Discussion Papers are meant to subject the solutions identified to public scrutiny and are made public through press releases and press conferences. They are also distributed to organisations and individuals whose views on the subject the Commission seeks.
- d) The Commission takes oral evidence in appropriate cases and responses to the provisional proposals are carefully studied before the final recommendation is made.

The secretariat of the South African Law Commission has 14 State Law Advisors deliberately drawn from diverse backgrounds whose task it is to conduct the necessary research under the Commission's supervision, consult with interested parties, compile Issue Papers, Discussion Papers, and draft reports.

16) Law reform must create conditions for genuine public deliberation in which oppressed communities have a significant say from the very inception, *i.e.*, from the constitution of the Committee/Commission that is to identify, frame and investigate the relevant issues. Such bodies must consciously

solicit and incorporate the life experiences of oppressed caste, gender, and religious groups, as well as disabled, rural and working-class communities (among others) in their deliberations. This is a crucial way of ensuring that law reform processes are not held hostage to the concerns of the elite. The lack of adequate representation on the Committee for India's several marginalised groups is a particularly striking omission, given that many of the areas of proposed reform will have a direct impact on these groups; for example, the proposed legal recognition of honour killings, marital rape, gender-neutral sexual offences and lynching.

- 17) Unfortunately, the damaging effects of the Committee's non-representative character are already manifesting in the procedures adopted by it so far. The Committee's methods appear engineered to exclude all but the most privileged from participating. The Committee is functioning entirely in English and participation in the Committee's processes is only possible through its website. A vast majority of the country's population does not speak or read English; current levels of internet penetration are low and dependent on material and other privileges. Further, the Committee seems oblivious to the disproportionate impact of the pandemic on people from historically oppressed groups, who are trying to cope with unimaginable hardship. In current circumstances, the priority for most such groups is simply survival. Where bare survival is in question, there can be no engagement.
- 18) University communities, students and academics are also in no position to carry out the kind of discussion and debate that must precede their effective engagement with the Committee. The pandemic has greatly disrupted the functioning of all higher education institutions, including the National Law University, Delhi (NLUD), in which the Committee is based. Law programmes in most National Law Universities have been suspended until the pandemic abates. Both the All India Law Entrance Test for admission to NLUD, and the Common Law Admission Test for admission to several other National Law Universities, have been postponed for several months from their original dates in May 2020. To reiterate, NLUD, which houses this Committee, has postponed its entrance examination and currently has no first-year intake because of the pandemic. The Common Law Admission Test, which is organised by a consortium of India's leading law schools – including one headed by a member of this Committee – has been deferred until September because of the pandemic. The Committee nonetheless refuses to defer its proposed re-writing of the three most fundamental criminal laws that guarantee political and civil liberty in India.
- 19) In the same vein, the pandemic has wrought havoc on justice dispensation. Already overburdened courts, including constitutional courts, are operating at a fraction of their capacity, where they are functioning at all. Practitioners who do not enjoy a cushion of savings are close to destitution and some lawyers have petitioned courts for the bar against advocates'

employment in other fields to be lifted during the pandemic. Despite the possibly deadly consequences of further outbreaks and spikes in infection rates, some District and State Bar Councils and Associations have sought the re-opening of courts due to the financial hardship facing lawyers. Most lawyers are separated from their chambers, offices and libraries and are in no position to research or attempt collective deliberation in order to engage with the Committee. It would be naïve for the Committee to expect effective participation from practitioners in this dire time.

- 20) To quote the Law Commission from another context, "The reform of the system is a matter of vital importance, not only to the lawyer and the judge but also to the state and the average citizen". The process of studying and suggesting law reform must be through open public deliberation and engagement conducted by a representative body with transparent, inclusive participatory procedures. In any event, a complete re-writing of criminal law cannot be carried out democratically in the middle of the pandemic, while hundreds of Indians are dying every day and many more are displaced and struggling to survive.
- 21) For these reasons, we urge you to immediately suspend the working of the Committee, withdraw from its membership and to join us in communicating to the Ministry of Home Affairs that this reform process must not proceed as presently contemplated.

In order to add your signature to this letter, please email academicemailstocommittee@gmail.com with your title, name, designation and institution.
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With thanks,

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