PROTECTION AND PARTICIPATION

SOUTH ASIA LEGAL REFORMS AND HUMAN RIGHTS

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UNREASONABLE DELAYS IN THE ADMINISTRATION OF JUSTICE CORRUPT DUE PROCESS AND SUBVERT PEOPLE'S FAITH IN THE JUSTICE SYSTEM

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Cover Pictures

Protests in Sri Lanka regarding enforced disappearances and extra judicial executions
Inset: street protests by Janasansadaya regarding justice reforms

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EDITORIAL

Delayed justice, judicial corruption and Human Rights protections

The elimination of corruption has never been treated as an integral part of the macro vision by South Asian States. The British colonial power that introduced the modern structure of the 'state' into these countries was, at the same time, engaged in what essentially, colonialism represents; the theft of the colony's resources.

For this reason, they did not have a vision of a society and a state which they might have envisioned for themselves in their mother country. While they communicated certain laws and practices which were borrowed from their country, the basic notion of society and state which they worked on was that of a colony. While the colonial power tried to introduce some discipline into the civil service, it also engaged in a policy of compromise with the local elite, whose cooperation was needed in order to rule without challenge.

The elite continued with their feudal mindset and prevented any break in the continuity of the corrupt practices and the abuse of power as practiced under the rule of kings. Thus, the same elite which were to become the political leaders of these countries at a later stage did not work towards a macro vision of a corruption free society where abuse of power for personal enrichment is curbed by effective legal machinery. Therefore, from their very inception, monitoring bribery and corruption was envisaged to be of limited significance and importance. As the years passed, though monitoring bodies in this regard were established by governments, they were not successful in dealing with the problem.

Currently, endemic bribery and corruption is prevalent at every stage in South Asia. No country has adequate machinery to investigate, prosecute, educate the public and eliminate corruption. The major weaknesses of the existing bodies are as follows; First, there is no attempt to develop the expertise of independent professionals in the elimination of corruption. In Sri Lanka, for example, the investigative personnel attached to the Bribery and Corruption Commission are seconded from the Sri Lankan police. A cardinal principle in any successful corruption control agency is that all of its operations should be under the control of persons who have been recruited from outside other government departments. This includes the police department. It is only a group of independent professionals that could evolve the commission into a successful agency that can deal with the complex problems of the elimination of corruption.

The elimination of corruption requires the evolution of principles and strategies that can address the complex policies and practices of those who want to benefit from corruption. It is a group of such professionals which might contribute to the permanence of an institution that can communicate its strategy to the people and win their confidence as a result of their integrity and seriousness in dealing with this problem.

To evolve professionals whose purpose in life is the elimination of bribery and corruption would

mean that from the very inception, such persons should be encouraged to opt for such a career. To be successful in this, a corruption control agency requires persons possessing the ability to convince such persons that they would have all necessary resources and powers to engage in this work and that their jobs will remain secure as long as they work within the discipline of their profession. A commission that cannot engage in such recruitment and give such assurances should do well to abdicate rather than to assist in perpetuating the false conception that it is engaged in the elimination of bribery and corruption.

Secondly, it is imperative that the elimination of corruption is made an integral part of the macro vision of society and the state. The extent to which the lives of people have been ruined by widespread corruption in South Asia is so grave that there is, today, wide protest by the ordinary folk, as well as the business community against the corruption that has reached levels of self destruction, both for the society and the state.

Thirdly, corruption control requires a strong component of education and the evolvement of popular cooperation. Successful corruption control cannot be achieved only by investigations and prosecutions. The experience from the more successful agencies, such as in Hong Kong demonstrates that what is important is a very strong component of continuous education which allows the people to participate actively in the elimination of corruption. Thus, an agency that is in charge of dealing with the corruption issue should have a very strong component for education. Once again, the issue is as to how professionals in this sphere can be created from within the agency. To do that it would be essential to recruit the right persons, to give them the assurances required for safeguarding their professional rights and duties, and to provide them with the necessary freedom to exercise their profession. Professional educators against corruption are an unavoidable condition for success. In the modern age where there are tremendous possibilities within the state, as well as the private media in spreading information and strategies for the elimination of corruption, such qualified and dedicated professionals can make a tremendous impact within a short time to convince society that it is possible to eliminate corruption. School education itself from the very early stage can include corruption elimination. To create a mindset that does not regard corruption as inevitable and in fact, believes that it can be defeated by collective effort needs the leadership of such dedicated professionals.

Fourthly, there must be effective civil society monitoring of efforts to eliminate corruption. Any corruption control agency that is seriously pursuing its mission would wish that civil society actively support it by being part of various monitoring groups. These groups may involve professionals from all walks of life, academics, natural leaders of various social groups, the media, students and the common person in the street. When such groups are formed all over the country, they will constantly observe as to what is happening in all sectors of life, they will collect information about all such happenings and they will raise their critical voices in order to blow the whistle at the right time and to keep continuous vigilance on this issue. Naturally an agency that is itself unsure of its mission and which is unable to offer anything other than apologies, will not take the necessary steps to involve civil society in such a monitoring mission. It is only an institution that believes in its own mission that can venture to seek such popular cooperation.

More than any other factor, the essential link between the negation of corruption and the implementation of the Rule of Law needs to be stressed. The various articles in this magazine emphasize this point and posit the battling of corruption as a human rights issue. This is indeed, how it should be.

In such bleak times where corruption rules and where the mindset of the people in all sectors of society in South Asia are bitter with frustration perhaps it is time for more decisive interventions to develop a comprehensive plan and strategy to eliminate corruption and find ways to implement it.

An Open Letter to Leandro Despouy, Special Rapporteur on the Independence of Judges and Lawyers by the Asian Human Rights Commission

September 22, 2007
ALRC-OL-030-2007
Dear Mr. Despouy,

WORLD: Unreasonable delays in administration of justice corrupt due process and subvert people's faith in the justice system

I am writing this letter to convey several basic concerns of a group of lawyers, judges and human rights defenders who met at Hong Kong from the 17th to the 21st September to discuss the impact of delays in the administration of justice on the lives of people and on the protection and promotion of human rights. The participants were from India, Sri Lanka, Bangladesh, Pakistan, Cambodia, China, the Philippines, Thailand, Indonesia, the Hong Kong SAR and South Korea.

The group is of the view that there are many alarming developments within the countries of the Asian region in this regard, except perhaps for South Korea and the Hong Kong SAR. The participants are also of the view that you, as the United Nations Rapporteur on the independence of judges and lawyers, should be made aware of such developments.

The participants of this consultation noted that the nature of delays that exist within many countries of the Asian region would be far beyond what would be considered a reasonable delay under Article 9 (3) and would constitute undue delay under Article 14 (3) of the International Covenant on Civil and Political Rights. It can be safely stated that the average time that is taken for the final disposal of a case may be anywhere between five to twenty years and on civil matters it may take even longer. The concerns that we are expressing in this letter are mainly related to criminal justice administration and the impact of such delays in negating due process itself, thereby frustrating attempts to protect and promote human rights.

When unreasonable and undue delays become a structural and systemic reality, it affects the independence of the judiciary and lawyers in a substantial manner. As such, widespread delays need to be identified and recorded. Concrete recommendations including provisions of advisory services or technical assistance may be recommended and provided to states to deal with this fundamental problem. This problem of delays needs also to be studied as an important and a topical question of principle with a view to protecting and enhancing the independence of judiciary and lawyers.

The delays in the administration of justice have the effect of subverting the entire process of justice and undermining or displacing the independence of the judiciary itself. Clear manipulation of the factors that give rise to such delays is resorted to, not only by unscrupulous litigants, but also by the executive, the legislature and even some members of the judiciary, for petty ends. This in turn results in the routine denial of justice. Such denial of justice alienates the people and as a result a colossal loss of faith in the administration of justice exists in the countries mentioned above.

The delays in the administration of justice have the effect of subverting the entire process of justice and undermining or displacing the independence of the judiciary itself. Clear manipulation of the factors that give rise to such delays is resorted to, not only by unscrupulous litigants, but also by the executive, the legislature and even some members of the judiciary, for petty ends.

This alienation is often manipulated by the executive to displace the due process of law and to introduce ideas of mediation and alternative dispute resolution into the criminal justice process itself. This leads to an enormous increase in corruption that affects all the elements of the criminal justice system including the police, the prosecutors, judges, lawyers and everyone else involved in playing some role in this process. A citizen that seeks justice with a just grievance has to face the nightmare of a completely subverted system and suffers the consequences of such subversion.

Among the worst sufferers of this system are the people who languish in jails for no justifiable reason, but who are unable to extricate themselves from their plight due, mostly, to their inability to protect themselves from the corrupted process. They often belong to the marginalized, oppressed and the poorer sections of society as the more affluent and powerful may find ways to manipulate the situation for their benefit. The victims of crime and human rights abuses who come to court as complainants to seek justice often end up frustrated and desperate due to such delays. Those persons who seek justice against the state officers, such as the police and military, who have abused their rights, also suffer greatly. The corrupted process guarantees

immunity to such officers. While this development denies the rights of the victims, it also results in many who should be charged with criminal offences remaining part of the law enforcement agencies. Naturally the very struggle to fight the delayed justice process contributes to strengthening the very same process and demoralising those who wish to fight against it.

Unreasonable and undue delays also make witness protection for such lengths of time, a practically unachievable goal. The result is the acquittal of the accused due to the absence of witnesses.

Failure to obtain justice leads to many taking the law into their own hands and seeking the assistance of criminal elements to settle private disputes. Within the law enforcement agencies themselves, there has been an alarming increase in the tendency to use extra judicial punishments in recent years. The killings of persons after arrest has increased and different explanations are being offered for such killings. In some places, these are called encounter killings or cross fire killings and in others, killings in self defense.

We find that the criminal investigation process can be completely undermined due to such delays. The officers that fail to investigate crimes and human rights abuses, as they are required to under the law, exploit the various delays and it becomes almost impossible to hold them accountable for their failures. We also note that the prosecutors and often judges themselves engage in practices leading to delays and thereby displace the attempts by the citizens to hold the system accountable to international norms and standards. Unfortunately, there are lawyers who also become clever manipulators of this process to achieve their own ends.

The most alarming fact regarding such manipulation of the process is when some sections of the higher judiciary itself manipulate such delays for unscrupulous purposes. It is at this point that the citizens cannot find any sort of redress against such abuses. Often, even at the level of the higher judiciary, unscrupulous practices have evolved which are incompatible with the due process of law. Judges dispose of cases without making orders at all or without making orders on the merits of the case. The appeal process itself can be subverted in this way, when for example appeals are disposed of even without a hearing. The worst of such manipulation is the abuse of the contempt of court proceedings, which does not leave any possibility of an appeal. Such proceedings are often used against lawyers and litigants who complain of the abuse of the process.

The appeal process itself can be subverted in this way, when for example appeals are disposed of even without a hearing. The worst of such manipulation is the abuse of the contempt of court proceedings, which does not leave any possibility of an appeal. Such proceedings are often used against lawyers and litigants who complain of the abuse of the process.

The ultimate result of such delays is to make human rights an objective that people cannot achieve in practical terms. Despite acceding to, and ratifying UN conventions and even bringing about constitutional and legal provisions in terms of human rights obligations of the state, in actual practice the implementation of these rights becomes almost a practical impossibility.

What we would like to draw your attention to is the fact that even within the United Nations discourse on the implementation of human rights, the issue of the delays of the administration of justice and its impact in negating basic human rights has not received adequate attention. We are not aware of any attempts by any of the UN agencies to deal with the issues mentioned above with the any of the state parties with a view to ensuring that they honour their obligations to ensure adequate remedies for violations of rights. Thus, States have not been held accountable for not taking steps to eliminate delays in the administration of justice.

We urge you to take up the issue of the fundamental importance of ending delays in the administration of justice as a core issue relating to ensuring independence of the judiciary and lawyers. We are hopeful that with your intervention, the question of eliminating delays in the administration of justice can be fashioned into a visible issue present in all discourses on human rights. When that happens, we are sure that the people that live in these countries will begin to treat human rights as a realistic objective and a treasured part of their actual existence.

The participants of this seminar assure you of their highest cooperation in dealing with this issue.

Thank you
Yours sincerely,
Basil Fernando
Executive Director
Asian Human Rights Commission

A full list of the participants is as follows:

1. Dr. **JAYANTHA** Pandukabaya de Almeida Guneratne – President's Counsel, Sri Lanka
2. Ms. **KISHALI** Ester Pinto-Jayawardena – Lawyer, Sri Lanka
3. Mr. **RANDOLPH** Parcasio – Lawyer, Philippines
4. Mr. **CARLOS** Isagani Zarate — Lawyer, Philippines
5. Justice **KHILJI** Arif Hussain – Judge, Sindh High Court, Pakistan
6. Ms. Atiwan – Lawyer, Thailand
7. Ms. Nittaya **WANGPAIBOON** — Lawyer, Thailand
8. Ms. **SOR** Rattanamanee Polkla — Lawyer, Thailand
9. Mr. **MEAS** Chanpyseth – Prosecutor, Cambodia
10. Mr. Phann **VANRATH** – Judge, Cambodia
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17. Mr. **SALAR** M. Ghan — Lawyer, India
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25. Mr. John Joseph **Clancey** – Solicitor, Hong Kong
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‘Laws Delays’: Some Perspectives

Frank de Silva *

Introduction

There is no doubt that abuse of the legal process resulting from ‘Laws Delays’ results in the denial of human rights. The ‘right’ involved in this context is the right to justice. Access to justice, (which amounts to a right to justice) is infringed if the process followed is seriously subverted in the deliverance of justice. People have an inherent right to justice as a basic human right. The right to justice is also a right that underlines each and every provision of our Constitution. Thus it is maintained that the sovereignty of the People includes the judicial power of the people. The judicial power of the People can be thwarted and this right denied by judicial action as well as by other action. Abuse of process and abuse of power means to deny or violate rights.[1]

The right to justice is also a right that underlines each and every provision of our Constitution. Thus it is maintained that the sovereignty of the People includes the judicial power of the people. The judicial power of the People can be thwarted and this right denied by judicial action as well as by other action. Abuse of process and abuse of power means to deny or violate rights.

Following from this argument, a commercialized process in delivering justice is, in essence, an abuse of process. A process for justice so faulted can hardly uphold rights. It brings in its wake a corruptive influence on the process, in denial or violation of rights. To that extent, abuse of process and power and their corruptive influence, is the violation of rights of the People. These aspects are often clouded over under the rubric of ‘Laws Delays’ in reviewing the workings of the law in courts. It is this aspect that will be discussed in the succeeding analysis.

‘Laws Delays’

‘Laws Delays’ is a term freely adopted to convey concerns in relation to the workings of the court system. Over the years, Committees of Inquiry have been appointed to look into this problem, designated as ‘Laws Delays’ and have made appropriate recommendations. The most recent Report is that submitted by a Committee under the Chairmanship of Justice Raja Fernando in 2006. The Committee was appointed by the Minister of Justice to ‘identify ways to minimize delays in the administration of justice.’ The purview of the Committee appeared to be limited to administration of justice in civil cases. The recommendations, classified under Pre-Trial Procedure etc. are of little relevance to criminal cases though the pertinence of alternate dispute resolution (which was confined in this report to civil cases) remains compelling to the present discussions as well.

Criminal cases

The purpose of this short analysis is to focus on the specific aspects of ‘Laws Delays’ in criminal cases. Delay in criminal court proceedings has a painful impact on the community. The process in the criminal courts is essentially one of attrition between the parties. The process has an abrasive effect on relationships within the community and contributes to disrupt harmony of such relationships. From the point of view of the community, the people involved are caught up in a harrowing process in courts, the end result of which is devastating. In sum, ‘Laws Delays’ as they feature in the criminal process, have a destabilizing effect on the community. Inquiries into ‘Laws Delays’ however limit the examination of ‘Laws Delays’ merely to a managerial context; one of the workload and insufficient resources. Recommendations follow accordingly relating to additional resources to ease the work load. The community perspective of the problem from ‘Laws Delays’ is never the standpoint of these inquiries. Yet examination of protracted criminal proceedings in terms of time and expense is essential to a discussion of ‘Laws Delays.’ This has a distressing effect on the parties to the litigation and works to the detriment of the community at large.

‘Laws Delays’ and Corruption

The negative aspects of ‘Laws Delays’ are manifold. Delay is the stuff of corruption. Postponement, differing action, procrastination and putting off what has to be done are the means for subverting the process for corrupt ends. Practiced delay is in effect abuse of process. Delay is the means when intent is otherwise than honest. Abuse of power and position therefore is inherent in such deviance of process. Expeditious action and efficiency on the other hand is the converse of calculated delay. Action with expedition and efficiency limits the prospect for corrupt practice. There are a few examples of ready disposal of cases in courts which allowed no ‘Laws Delays’. These are but exceptions to the general rule of delay in court proceedings.

Abuse of process

When the term ‘abuse of process’ is subjected to rigorous examination of its exact meaning, it becomes clear that abuse of process through delaying action is in fact the predominant feature in governmental activity. ‘Laws delays’ do not stand alone. Government institutions, including courts, tend to develop these negative practices during the course of time. These practices are soon insinuated into the system and continue unchecked. In course of time, these deviant practices assume larger proportions; they figure thereafter very much as a fact of life, acquiesced to initially, and soon projected as inevitable. The problem then erupts as aberrations in the system,

working into the vitals of the relevant organizations. Examples of this are many. In the medical field, such practices take the form of private practice; in the educational field, they emerge as the obnoxious resort to private tuition; these practices are ostensibly categorized as 'overtime' in the public service and as 'Laws Delays' in courts of law. Practices of NGO funded research in the universities are of the same order, apart from many other examples. The insidious aspect of these practices surfaces in the exploitation of official positions, in the abuse of process and in corrupt diversion (by those who engage in such practices), of official resources to further private interests.

Furtherance of private interests in any organization can only be at the expense of the vitality of the organization. Monetary incentives drive these deviant practices without which the practices cannot be sustained. However, in other instances, the thirst for recognition or for rewards in power and position may also be a driving influence and should be equally acknowledged as such. Yet these practices have the capacity to gain recognition in due course. Their adoption is then complete. The term 'Laws Delays' like all else gains official currency without demur, and is adopted freely with little reservation. The most recent examination of this problem under the Chairmanship of Justice Raja Fernando was just one more of these reviews which avoided the embarrassment of referring to the darker side of the problem.

Manipulation of the Process

Manipulation of the process is a consistent feature in all these questionable practices referred above. The manipulation of the criminal process is a specific feature of deviance in the court process. Lethargy and inefficiency *per se* may cause delay but these deficiencies are capable of rectification. On the other hand, manipulation of the process results in delay becoming entrenched and systemic. Remedy is then difficult. These practices are subsumed into the court process through its roots and tissues, its files and the records. Incentive and inducement sustain or nourish the abnormality as it grows. Delay earlier justifies more delay later. Inducement is further induced. Incentives add to incentive. The process now lives on itself in parasitic symbiosis. A remedial process is thus all the more daunting.

Divergence of Interests in the Court Process

Divergent interests interplay in this context. Inducement and incentive for 'Laws Delays' are equally the result of public and private interests playing themselves out in the court proceedings. In theory, the public interest is upheld by the judges while lawyers pursue their private interests. Private lawyers cannot seriously be expected to uphold public interests detrimental to their financial interests. 'Laws delays' are therefore, in the main, due to the private interests of private lawyers prevailing over the public interest to be upheld by judges. Private interests prevail only to the extent that they are permitted the space to drive their private interests, inducements and incentives. Public interests are willy-nilly weighed down by private interests to the extent they preponderate over the former. Evidence given in public at a Commission of Inquiry into the problem of law and order was, unreservedly, to the effect that 'no court house sits after 12-1pm on any day'. The Ministry of Justice responded that a circular has been issued to require judges to sit till 4.00 pm each day. Public interest, so ill disposed, can hardly assert itself over the private interest. Shortened hours serve the private interest. They may be acquiesced in by those upholding the public interest. Monetary incentives drive these interests. Delay is the result. Delay is remunerative.

'Laws Delays' induced by particular interests defy fair practices and plainly amounts to corruption of the process. Conflict of interest is a common feature of much of the phenomenon of 'Laws Delays.' Honourable lawyers who do not resort to this practice and judges who take harsh action against dilatory counsel are as rare as they are unpopular. There is then a structural dimension to the problem of 'Laws Delays', which any future Committee of Inquiry may take note of.

Laws delays induced by particular interests defy fair practices and plainly amounts to corruption of the process. Conflict of interest is a common feature of much of the phenomenon of 'laws delays.' Honourable lawyers who do not resort to this practice and judges who take harsh action against dilatory counsel are as rare as they are unpopular.

The Impact of 'Laws Delays' on Crime Control

Reverting to the problem stemming from 'Laws Delays' in criminal cases, it must be noted that delay hardly makes for effective law and order and for control of crime. 'Law' thus delayed has a negative effect on crime control and law and order. The criminal process, based on justice and punishment should be dispensed expeditiously. Delay tends to encourage an opposite result and inclines to a process both dilatory and desultory. Inevitably, this has a grievously negative impact on crime control. The maintenance of law and order is negated by delay. Time, effort and expense wear down the parties to litigation (particularly the complainant and witnesses). Monetary inducement to delay, to that extent, wears down the parties and renders the process even more abrasive among the parties *inter se*. Acrimony in relationships is the one sure result of a court process. These elements do not make for good law and order. The process is therefore subverted in its endeavour to deal with crime. The unchecked development of these dilatory practices is invidious; their consequences are grave.

The Question of Expediency in the Legal Process

Expediency rather than due process finds its way within this milieu of a questionable criminal process. Expediency works itself into the judicial system in the space within 'laws delay', vitiating the integrity of the judicial process. Expe-

diency manifests itself, for example, through disposal of cases 'otherwise', than through due process for conviction or acquittal. Statistically, conviction or acquittal through due process in cases amounts to a very low percentage. The disposal of cases through means otherwise than through due process, thus becomes the main means of concluding cases before court. Resort to 'otherwise disposing' of cases can be through the adoption of some expedient practices as reducing the charges, say, of theft to mischief etc. with the sole intent of concluding the case. Delay and expense over the long protracted period of attrition helps to impel that conclusion, of cases 'otherwise disposed'. Delay contrived long enough, months and years, to wear down the parties helps to bring them round to agreeing to their cases being otherwise disposed of. In other instances, this results in the victims taking the law into their own hands. Deviance in judicial process, in this manner, is then the grim reality. These devious practices hardly serve to inspire confidence of the community in the institutional process in respect of the dispensation of justice and the maintenance of law and order.

In this regard, it must be emphasized that 'laws delays' is more than a problem of workload. The problem in 'laws delays' is structural and systemic. Solutions are therefore not easy. There is no doubt that a serious and concerted effort should be made by the judiciary, the legal profession, law enforcement officers and concerned members of civil society in regard to restructuring the legal/ judicial process in order to address this vexed problem.

Conclusion

In regard to the less serious crimes, one remedy proposed has been the diversion of cases away from the formal courts. The remedy is not radical but only to the extent that it could alleviate some of the burdens. Diversion in some measure would avoid much of the harsh impact of court procedure in criminal cases on community relations. Mediation and conciliation between parties, (rather than adversarial adjudication with induced delay), appropriately, by the police, by the state prosecutors and also by courts may be a reasonable alternative. Relief to the ordinary litigant can be substantial.

These processes are surely not appropriate for the more serious cases but are eminently suitable for a range of minor cases. Minor cases possess the component of relatively less serious dispute which becomes more appropriate for resolution through mediation. In the more serious cases of crime, the offence is more against the State and the law which belongs in a different category altogether. In this regard, it must be emphasized that 'Laws Delays' is more than a problem of workload. The problem in 'Laws Delays' is structural and systemic. Solutions are therefore not easy. There is no doubt that a serious and concerted effort should be made by the judiciary, the legal profession, law enforcement officers and concerned members of civil society in regard to restructuring the legal/judicial process in order to address this vexed problem.

(Footnotes)

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[1] See '*Judicial Corruption in Sri Lanka*', Pinto-Jayawardena, Kishali and Weliamuna, JC in Transparency International Global Report, 2007

'Law's Delays': Some Further Perspectives….

Basil Fernando *

Introduction

The article, "*'Laws Delays': Some Perspectives*,' by retired Inspector General of Police, Frank de Silva is illuminating in many respects and deserves careful reading. Though one may join issue with him regarding his concluding comments concerning the relevance of mediation to the criminal process, the analysis contributes a great deal to the understanding of the problem.

The most important aspect of this analysis is the assertion by Mr. de Silva that delays are not just a matter of resources, but rather a matter arising out of structural causes; thus his comment that "it must be emphasized that laws delays is more than a problem of workload. The problem in 'laws delays' is structural and systemic." By saying this, Mr. Silva has gone far beyond the normal statements about laws delays which are attributed mainly to workload and limitations in resources.

Attributing delays to workload and limited resources is a factor that Supreme Court and Appeals Court judges often mention in their ceremonial speeches. Inadequate court houses, judges and financial resources of the courts and facilities are thus deemed to be the most important aspects affecting court delays. The Report of the Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts headed by former Solicitor General, (present Attorney General) C.R. de Silva on behalf of the Ministry of Justice in 2004 approached the problem of delay, mainly from the point of view of the limited resources of the courts, the limited number of prosecutors (attached to the Attorney General's Department) and the limited capacity of the policing system. However, in reality even the limitations caused by resource allocations are due to unresolved structural and

systemic problems. For many reasons these systemic and structural problems are not even being discussed seriously, let alone being addressed.

Private Interests vs the Public Interest

Mr. de Silva mentions many systemic problems. Among these are various conflicts of interest, for example public and private interests, such as those of lawyers and courts. The short sitting times of courts, for example, most courts do not sit after 12:00 or 1:00pm, is often a result of court adjournments due to lawyers seeking postponements. This is an issue that the Asian Human Rights Commission has also taken up many times and we have observed that speedy justice can only be ensured if the courts sit for the full duration of the official working hours. However, the reason for such postponements need not be conceived purely as private interests of the lawyers being pitted against the public interest as (theoretically) upheld by the judges. The conflict between private lawyers and the court is a problem that exists in all countries. In many jurisdictions, this is not accepted as a factor for the causing of delays, as proper guidelines have been developed and implemented by the courts for their proper functioning and no one is allowed to obstruct the judicial process. It is the function of courts to balance various interests and not to allow any party to undermine the administration of justice. It is the duty of the higher courts to give the necessary guidelines to all courts and to supervise their implementation.

This concept of command responsibility applies particularly to the Supreme Court. If courts fail to sit for the length of official working hours, this is a serious disciplinary issue and it is the Judicial Service Commission (headed by the Chief Justice and two superior court justices), which is empowered to deal with that issue. If those who command authority fail to carry out their obligations, that is a fundamental, structural and systemic issue. I am unaware of any inquiry or study examining the failure of the Judicial Service Commission to ensure that all courts sit during official working hours. The core issue of delays is time. If the time given for sittings of court is not utilized, is not an issue of resource limitations but one of discipline.

A further aspect relating to private interests is that it is not only the lawyers who obstruct the proper functioning by seeking dates etc. The Committee headed by former Solicitor General CR de Silva identified that one of the major causes of delays in criminal cases was the failure of the police to attend courts. The Committee proceeded to make recommendations in regard to the drafting of regulations and the education of judges to take firm action against police officers who refuse to attend court when duty requires them to do so. The relevant excerpt thus is, as follows;

1.2. a); 'Compulsory attendance: The Committee recognises the need to introduce administrative measures requiring Police Officers to attend Court on a compulsory basis, in view of the frequency with which Police Officers obtain leave and abstain from Court sittings, sighting inappropriate grounds, which has been observed to result in unnecessary disruption of Court proceedings in the recent past.'

This phenomenon of the police virtually defying the authority of courts was evidenced from 1971 when protection of 'security concerns' were perceived to override every other concern, including the obligations of police officers to attend legal proceedings. The result was that police officers who (for reasons of their own), did not wish to attend court made use of the perennial excuse of 'having to attend to serious matters.' Thus we see that the authority of the court system suffered greatly due to the acceptance of this practice. In recent times, ostensible concern for protection of national security has undermined concern for implementation of the rule of law. Among the most important structural questions that affect the court system is the undermining of the importance of the legal process and the independence of the institution of the judiciary. These are concerns that should receive the highest priority for attention.

If those who command authority fail to carry out their obligations, that is a fundamental, structural and systemic issue. I am unaware of any inquiry or study examining the failure of the Judicial Service Commission to ensure that all courts sit during official working hours.

'Laws Delays' as Judicial Corruption

Mr. Silva's article also makes many valuable points in regard to the element of corruption in the present phenomenon of 'laws delays.' Such frank criticism should receive foremost attention as this aspect affecting justice has not been discussed adequately. In all areas of criminal investigation and prosecution today, corruption plays a vital role. Often one of the very prominent reasons for torture is the fact that the police allow the actual criminals to escape and seek to put the blame for the crime on innocent people by creating a 'substitute accused' in place of those who have been allowed to escape. Many cases have come to public notice such as the case of Gerard Perera, who became a victim of this process when the police were investigating a triple murder.

In the course of looking for the perpetrator, the police ended up in arresting Mr. Perera and assaulted him to the extent that he suffered renal failure. Later on, while seeking justice before the High Court, he was assassinated. That is the extent to which the process now suffers from the infiltration of corruption into the system. No justice system can function if the basic structural issue of corruption is not pursued and resolved. If corruption supersedes the question of justice then there is no other solution to deal with that issue except by forsaking the justice system and resorting to extra legal means of combating injustice.

The Relevance of Mediation to Discussions on Crime Control

The possibility of mediation or settlement of criminal cases (rather than by taking these cases coming to court for trial) is however, that aspect of Mr. de Silva's analysis that I differ from. Advocating such a remedial measure begs the very question that he himself has very legitimately raised; thus, if corruption is so rampant then the encouragement of mediation and settlement can only contribute to greater corruption. It must be stressed that greater power being given to the police in the area of disputes must be discouraged in the absence of a substantive overhaul of the current policing system. In the present context, such power would only contribute to greater manipulation towards personal enrichment of corrupt police officers, rather than contribute towards the public interest. The recent family massacre at Delgoda and events thereafter starkly illustrate the dilemma of a community which has completely lost faith in the commonly accepted forms of law enforcement and dispute resolution. Indeed, what we see now is that the community fears the involvement of the police due to the fact that such involvement often leads to problems between parties *inter se,* being transformed into problems that are related to the deeper and more pervasive forms of corruption within society and the policing system itself.

We see today the manifestation of two strategies to deal with crime. One is the practice of mediation and settlement dealing with lesser crimes, while the other commonly evidenced phenomenon is extrajudicial punishment that is meted out in response to greater crimes.

A serious response to the questions raised by Mr. de Silva's article would be better framed by an extensive examination of the structural and systemic problems affecting the criminal justice system and by encouraging an open debate in this regard. Such frank discussions have not yet taken place in the public sphere though they form the common core of private discussions in Sri Lanka with enormous frustration being expressed by people from all walks of life.

The Relevance of the 'Malimath Committee' Deliberations to Sri Lanka

In India, the question of mediation, in the context of the criminal justice system, was discussed when the now infamous Malimath Committee report was introduced under the former BJP government. The crux of the Malimath Committee recommendations was to reduce criminal cases to civil disputes and pave the way for various types of mediations and settlements instead of criminal trials. This Committee went so far as to suggest that burden of proof in criminal trial should be on balance of probability rather than proof beyond reasonable doubt. The Committee members also called for the negation of basic principles of criminal law such as the presumption of innocence and the right to silence. The Committee's recommendations were shelved due to massive international and internal protests. However, there have been many attempts to bring these same recommendations through the 'back door' thereafter. Treating crimes as purely private disputes is not uncommon. The practice of accepting blood money for 'private' crimes in the Saudi Arabian legal system was developed conceptually on this same rationale. If the person who has suffered the loss due to the crime is paid by the accused, he/she may forgive the accused and thereafter the State has no right to deal with the issue. Consequently, the powerful become advantaged in such a system while the poor suffer punishment because they have no capacity to pay.

However, such systems create extremely terrible punishments as a necessary deterrent. Public beheadings in Saudi Arabia are commonly the manner in which crimes are dealt with within that system. A somewhat similar phenomenon is now taking place in many South Asian countries including Sri Lanka. A recent publication of a picture in an Indian television channel of a sub inspector in Bihar, seated on a motorbike dragging an alleged criminal along the road who was chained to the bike is one good illustration. He was trying to demonstrate to the people as to how justice is being done. A similar tendency has developed in allowing those identified by the police as hard core criminals to be extra judicially executed. In India, this phenomenon is known as encounter killings and in Sri Lanka, we see similar occurrences when criminals who are in the custody of the police allegedly try to harm policemen by trying to throw grenades or by other means consequent to which they are disposed of. Hundreds of such instances have been reported in recent times. In such a situation, the causing of forced disappearances of arrested persons, by their very custodians, is considered as a legitimate form of punishment.

We see today the manifestation of two strategies to deal with crime. One is the practice of mediation and settlement dealing with lesser crimes, while the other commonly evidenced phenomenon is extrajudicial punishment that is meted out in response to greater crimes. The result of both practices is to displace the due process of law and the notion of a reasoned process of criminal justice. What is lost along the way is a rational approach to deal with crime. In the past, such rational approaches were developed, not due to any sympathy directed towards criminals but due to the acknowledgement that the manner that a society deals with criminals has a profound impact on society itself. By defining certain acts as crimes, society recognises certain types of moral behaviour as a necessary pre-condition for its existence. While morality defines killings as being wrong, the law makes murder a serious crime. By means of criminalising certain activities, society was taught to avoid certain types of conduct as this conduct was deemed harmful to society. It is this acknowledgement that acts as a deterrent to crime and also holds

the society together. When such a reasoning process is abandoned, the fabric of society itself is affected and societal collapse takes place. The demonstration of such a collapse is quite visible in Sri Lanka in crimes such as abductions for money and killing of families purely over land disputes as what happened in Delgoda.

When due process fails, the system of policing fails, as does the system of prosecutions and the judiciary. The crux of 'laws delays' is that it results in destroying the capacity of the society to maintain due process as the only possible mechanism of dealing with crime. Perhaps the surest mechanism to deal with structural and systemic problems of 'laws delays' is through the development of an effective corruption control agency with similar powers and organisational structure as the Independent Commission against Corruption in Hong Kong. This corruption control agency is structured completely outside all government departments including that of the police. The professionals attached to the department work solely for the department and have no affiliation at all to any other department. Besides investigations and prosecutions, the agency also conducts extensive education for the prevention of corruption. On the issue of corruption, there is no compromise and there is no mediation. It is a serious crime and it is dealt with in that way. As a part of the elimination of corruption within society, corruption is also eliminated from the sphere of the administration of justice. Speed is an integral part of the efficiency of the administration of justice.

Contextual Problems Concerning Crime Prevention and 'Laws Delays'

Some time back, the Asian Human Rights Commission put forward a policy paper on crime prevention and policing in Sri Lanka[1] aspects of which are as follows,

Firstly, the police-criminal nexus is not only a reason for the increase in crime but also an encouragement to crime. The assassination of Colombo High Court judge, Sarath Ambepitiya disclosed the extremely close cooperation between some high ranking police officers and drug dealers; this is only a manifestation of a larger phenomenon that is wide-spread throughout the country. The criminal-police link has become deeply entrenched within the last thirty years. Today, this link has negatively affected the system of investigations into crime and in particular the administration of criminal justice. Above all, this nexus endangers the lives of investigators and witnesses. It also remains the source of an enormous extent of malpractice that defeats the purpose of fair trial such as tampering with statements made to the police and even the destruction of material evidence. As long as the people witness such a strong link between the police and criminal elements, they will not come forward to cooperate with the state agencies, even though they themselves may suffer a great deal due to crime. At present, people who become victims of crime once, suffer the second time the moment they begin to complain about the crime. Complaining about crimes can lead indeed to serious physical harm or assassination. Today, the lodging and pursuing of complaints against criminals has become a perilous lence against persons and property. State sponsored violence has spread into all parts of the country and claimed tens of thousands of lives. The basic fabric of the rule of law operating through the police, the prosecution system (Attorney General's Department) and the judiciary has collapsed. There is no attempt to restore the legal fabric of Sri Lankan society and to revitalize the functioning of the system of the administration of justice.

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In the first instance, the policing system (as it supposed to exist in terms of the law) does not exist in Sri Lanka. Instead, a parallel system has emerged in which extremely lawless elements in the police and criminal elements, mostly engaged in lucrative criminal activities such as drug dealing, illicit liquor and illegal forms of businesses, have combined to subvert the very foundation of a policing system functioning within the framework of the rule of law. Other institutions have been rendered powerless as a result of this extensive police-crime nexus. For example, the Department of the Attorney General, which is also the chief prosecuting department in Sri Lanka is at the mercy of the police in that, if the police fail to conduct criminal investigations, as they do most of the time, this department is powerless to do anything. The Attorney General's department then says, 'we cannot prosecute as we have no evidence.' In turn, the judicial system is powerless when the policing and prosecution systems are powerless. The police are able to subvert the entire process of justice by allowing the witness to be intimidated. Once the witnesses are intimidated, they do not attend court sittings or when they do attend, they deny previous statements. This they do in order to save their lives from criminal elements. Such witnesses are fully aware that the police cannot and will not protect them. Thus, the entire justice framework is in a state of serious crisis.

'Laws Delays' and the Legal Process

There is no doubt that the major defect of the justice system that contributes to the increase in crime is the delay in the administration of justice. With regard to crime, the investigations take too long and the reason often given is that there are insufficient qualified investigators and that the necessary equipment such as fingerprint examination facilities, communication facilities, transport facilities and education and training facilities are lacking. However, actual interest in crime prevention does not exist as a concrete

objective for many police officers or for prosecutors. There is another group that suffers from a sense of futility which affects the administration of justice. Those are the lawyers. A large section of lawyers have given up the practice of criminal law. They have realised that to survive in that practice you need to evolve corrupt practices. Meanwhile, the heavy workload in the courts creates long delays in adjudication. These delays result in the negation of the process of adjudication. People tend to settle their disputes in other ways than through the legal process such as by the assassination of opponents or severe intimidation, causing weaker parties to abandon their claims regardless of how legitimate such claims might be.

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Conclusion - Inquiry into Short-Term and Long-Term Programmes to Control Crime

There are two major questions that need to be dealt with immediately if crime is to be controlled in Sri Lanka.

a. Substantively address the issue of the police and criminal nexus. Without this first step there is no real possibility of combating crime;

b. Introduce a comprehensive witness protection law and provide a witness protection authority that could, in fact, provide witnesses with effective protection so that they could participate in the judicial process without fear;

c. Take steps to reduce delays in adjudication so that the process of every single case will happen within a time period that can be rationally accepted.

‘Laws Delays’ – Taking the Debate Further

Frank de Silva *

The Debate.

The question as to whether ‘Laws Delays’ is a matter of resources and overload or whether it is systemic and structural requires further discussion. Further perspectives have been advanced by Mr. Basil Fernando (Mr. BF) of the Asian Human Rights Commission, in response to ‘Perspectives on ‘Laws Delays’, an article submitted by me and published in the Law and Society Trust Review, Volume 17, Issue 236 June 2007. I am grateful for the observations of Mr. BF which in the main, amplifies the points made by me. The thrust of my article was that the matter of law’s delays needs to be seen in its correct perspective: that this problem is in essence, a systemic and structural problem. This view is acknowledged by Mr. BF. Such manner of analysis on this subject has not been apparent previously. ‘Laws Delays’ has been the subject of inquiry instituted at high levels of administration, over the years. These inquiries have been projected only from one perspective. Mr. BF commends a further perspective on this vexed question for examination. The purpose of this article is to add clarification to the issues arising and open the subject for further debate.

Mr. BF suggests an ‘extensive examination of the structural and systemic problems affecting the criminal justice system and to encourage an open debate in this regard’. The question also arises as to who is to conduct such inquiry on these lines. This may point to the structural nature of the problem. Since many agencies in the criminal justice system relate in some way to the problem, identifying an authority for inquiry which is sufficiently adequate to cope with the spectrum of the system will present the first problem. Past experience in regard to Boards of Inquiry on this question reflect that particular dimension to the problem, as emanating from the very composition of the Board itself. Such Boards adopt one perspective only.

One example is the most recently instituted Committee of Inquiry, in 2006, under the Chairmanship of Hon. Justice A.R.N. Fernando. Examination of the interim and final Report of this Committee submitted to the Ministry of Justice required to ‘identify ways to minimize delays in the administration of justice’ makes it clear that structural and systemic aspects of ‘Laws Delays’ found no place in the conventional framework. There was no analysis of aspects beyond the workload that agitated their concern. The crux of the problem therefore remains yet, undisturbed.

Systemic Problems.

Systemic problem afflict the integrity of the system in place for the administration of criminal justice. These problems arise from within the system as discussed below.

Private Interests v Public Interests

The interplay of contending interests within the system illustrates much of the problem of ‘Laws Delays.’ ‘Law’s Delays’ arises, in the main, through a conflict of interests, public and private, which vitiate the workings of the system. On this point however, there is dissent. In the view of Mr. BF, the conflict between private lawyers and the court is a problem that exists in all countries. In many jurisdictions, he says, this is not accepted as a factor for the causing of delays as proper guidelines have been developed

and implemented by the courts for their proper functioning and no one is allowed to obstruct the judicial process. It is the function of courts, Mr. BF states, to balance various interests and not to allow any party to defeat the administration of justice. It is the duty of the higher courts to give the necessary guidelines to all courts and to supervise their implementation. The critical point is then the balance between the conflicting interests. Balancing of contending interests is the task of courts.

In the other view now offered, it is maintained that the task of balancing interests may have seriously failed if postponement of cases due to conflict of interests is the order of the day. Due processing in the administration of the criminal law is undermined by delaying postponements. Law and order and control of crime cannot be the primary objective of the judicial exercise which is so desultory. Manoeuvere and manipulation of process for delay, through postponement of decision and conviction, plagues the whole system. The contending interests play out their energies. The balance of interests is upset in the dysfunction within the system brought on from within. Private interests then overwhelm the process. Public interests may have yielded to the compulsions of private interests, or even may have abdicated the required task. Guidelines for the functioning of courts are not absent. However, they are not practiced. Comparison with many foreign jurisdictions may be inapposite, if the reality here is different. The alternate view of systemic problems recognizes that there are notable exceptions, in the local scene, by judges who do not countenance delay. Before these few judges, 'postponement', such as it is termed, was hardly tolerated. Such exceptions are rare. Such judges are unpopular. These exceptions prove the rule, that delay is the order of the day. Postponement is, conversely, popular, taken much for granted. It is not clear as to how much of this situation obtains in other jurisdictions, neither is it clear as to how effective are the guidelines to contain this problem. This view bears examination; how far do private interests prevail over the public interest in those systems?

The extent to which private interests of lawyers prevails over the process might be tested against the guidelines for the role of lawyers, amongst others, set out in the case of *Rondel v. Worsley* [1969 1 AC 191]. The Court held that a 'barrister is acting as an officer of the court, to see justice done, and is not merely acting in his client's interests alone'. Where 'Laws Delays' and postponements are the prevailing order, a lawyer, induced by private interests, can hardly be an 'officer of court, to see justice done'. The problem of 'postponement' is worse compounded by the monetary incentive from fees paid despite postponement. There is no means for refund of fees paid for dates of postponement. Guidelines may have their differential effect in foreign jurisdictions from those in the country.

Working hours.

Courts in this country adopt limited working hours. Comparatively there may again be some difference in the working hours, here from those abroad. Mr. BF acknowledges the problem stemming from limited working hours and comments, 'I am unaware of any inquiry or study examining the failure of the Judicial Service Commission to ensure that all courts sit during official working hours. The core issue of delays is time. If the time given for sittings of court is not utilised that is not an issue of resource limitations but an issue of discipline'.

The matter of shortened working hours was mentioned before a Parliamentary Select Committee inquiring into the problem of law and order. The Secretary to the Ministry of Justice answered that a circular had been issued to require Judges to sit through the official working hours. The tenor of these instructions makes evident that the problem is one of discipline, as Mr. BF observes. The issue of a circular is also an indictment on the administrators of a system for justice. Shortened working hours, however, are not simply a matter of discipline. They are more as they serve private interests, inducing postponement and delay and reward. Postponements and short hours feed each other in symbiotic association giving the arrangement a systemic dimension. Short working hours in courts is then a systemic problem, as it is one of discipline.

Police Attendance

Failure of Police to attend courts as a cause for 'Laws Delays' is prominently evidenced. Mr. BF endorses the findings of a Committee of Inquiry, that police attendance in courts has been lax. The findings were of a Committee headed by former Solicitor General CR de Silva (currently Attorney General) which identified that 'one of the major causes of delays in criminal cases was the failure of the police to attend courts'. The relevant excerpt is, as follows: 1.2. a); 'Compulsory attendance: The Committee recognises the need to introduce administrative measures requiring Police Officers to attend Court on a compulsory basis, in view of the frequency with which Police Officers obtain leave and abstain from Court sittings, sighting inappropriate grounds, which has been observed to result in unnecessary disruption of Court proceedings in the recent past.'

Failure on the part of the Police is identified as one of the major problems at this official inquiry. No reference is made by the Committee to lawyers who in like manner, obstruct the course of justice. Else by inference, the negative effect of the action of lawyers, if at all, is less than major compared to the remiss of the Police. The different assessment of the Committee, of the contribution of the Police and of the lawyers, whether it was on the basis of evidence or sta-

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tistics, is not clear. The basis would make for competent determination by the Committee. The absence of the evidence and basis in the Committee findings would make such a balanced consideration questionable.

On the other hand the projection of the findings by the former Solicitor General (now AG) from just one angle may be calculated, to cast aside other problems for consideration. That viewpoint of the Committee may have been impelled to deflect from the systemic and structural problems which attend law's delay. Deflection is oft times strategic.

Probing this matter further, puts in issue other considerations. In point of fact, this finding that failure on the part of the Police was one of the major causes of law's delays is greatly exaggerated. Such may have been true at certain times, in 'the recent past' due to high security problems, as the Committee has observed. Failure to asses the evidential and statistical basis of police absence being a major problem goes to the competence of that finding.

The competence of the Committee's finding is questionable for yet another reason. There is no mention by the Committee of the matter of affidavit evidence which the Police might tender to court without personal attendance. The relevance of this legal procedure to court proceedings to avoid delay has not been considered by the Committee. It appears, in fact, that the provision for affidavit evidence of police officers has gone into desuetude. The failure of the Committee to advert to this point reflects the two aspects to the problem set out, one systemic and the other structural. The structural aspect will be discussed presently. The systemic aspect is posed through the question; why are these affidavit evidence provisions are not availed of by court? There is no indication that the court called for such evidence, even by notice of court. Neither is it mentioned that the police failed or defaulted to tender evidence by affidavit. Court practice has made these provisions for affidavit evidence, inoperative. Lawyers would not move for these affidavits. Plainly, these legal provisions to avoid delay have lapsed in effect; lapsed within the court process. Failure in this respect is therefore a systemic problem.

The Committee might have considered yet another aspect to the question of failure to attend court and delay. Delaying tactics, previously, were indulged by one party, within limits. Their ultimate result was not assured. The position is different with the amendment to the Criminal Procedure Code in 1995. This amendment gives the effect of an acquittal to a second discharge. Delay can now be contrived, to work towards an acquittal through a first and second discharge. Discharges are ordered mainly by reason of lapse of much time. Prolongation of the case over a few years and through many postponements, together with the absence of the prosecuting officer at some subsequent date, for reasons inappropriate or other, makes the ground ideal to move for discharge. Enacting the scene for delay can now be in concert, the defence is collusion with the prosecution!

Default in attendance is now evenly distributed, and alternatively, between the prosecution and the defence in collusion to make for postponement. This is not the general practice, but it does happen. The Magistrate is preempted in his decision; earlier he had control. Prior to that amendment then, collusion between the two was not feasible. Whatever the reasons for this amendment, the result is that these new provisions provide the space for systemic manipulation. This does not make for good law. When this matter was queried, the answer was that it was intended to stem police lethargy. Through manoeuvre, systemic 'Laws Delays' gain a further boost. There are many other devious practices, of an artful nature, enacted through court proceedings. These are similarly calculated but cannot be narrated within the scope of this article. These practices are hardly mentioned in open debate. Remiss on the part of the Police is however mentioned with little inhibition. The finding that non-attendance by Police in courts was the major problem in 'Laws Delays' is, in the light of all this background, lacks depth of inquiry. Competence is unlikely the problem. The one sided findings of the Committee reflects instead the limitations of the structural framework within which issues were framed.

Law and order and control of crime

The problem of 'Laws Delays' so contrived cannot have as its purpose, the objective of crime control, of law and order. Their cumulative effect has a negative effect on law and order and control of crime. Expeditious punishment for offences is essential for control of crime. Desultory and dilatory action brings the opposite effect, even of encouraging crime. Impunity for crime is the evident experience of the public through such indeterminate action. Delay and postponement are calculated expedients freely deployed in every day court proceedings. Delay is tactical. The strategy behind such manoeuvres is to wear down the participants over a long duration of the case, after which some indecisive result can be brought on. The purpose in delay is very much achieved. Thus, the low rate of convictions, the high rate of cases 'otherwise disposed of', and even the low rate of acquittals, bear testimony to the irregular process in court proceedings. There are other reasons for these results, no doubt.

But this systemic nature of the problem in 'Laws Delays' is the principal reason for these untoward results. Wearing down and attrition of the parties to litigation are the sure reason

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for these irregular practices. Such processes have other consequences. One is that this makes for the reluctance of witnesses to come before court. Animosity and acrimony between the contesting litigants are yet other consequence. These divisions involve their families and their community. The problem of acrimony is not just from delay, but of delay with considerable expense of money and time. The court proceedings have an abrasive because of the expense incurred. Disrupted relationships, spilling over generations by result of a single case so conducted, are again another clear result of the systemic problem from 'Laws Delays.' Resort to extra-judicial means of avenging their hurt is not extraordinary; they are a direct reflection on the ineffectiveness of the system. In this sense the term 'Laws Delays' is perhaps a euphemism covering many other sins but better suitable for official use.

Corruption

Corruption is freely arraigned against the Police, in the context of discussion on 'Laws Delays'. Allegations of corruption are not voiced against other agencies of the criminal justice system. But corruption connotes abuse of power and process, apart from simple bribery. The problem of corruption is then wide enough to catch up with all agencies of the criminal justice system. 'Laws Delays' is the cumulative effect of abuse of power, abuse of process and of position which attends all agencies of the criminal justice system. In that sense the problem is systemic. 'Laws Delays' is in essence, abuse of process. This statement bears repetition. Corruptive abuse of process is systemic. Trading accusations across the lines by different actors bears a structural dimension. The process of administration of criminal justice carries, in this analysis, neither the clarity nor the integrity of due process. To the extent of the validity of the adverse observations made above, the criminal process is much of a muddle; the flow is uncertain. The result is a mêlée of exigencies. These do not make for control of crime or for law and order. Where systemic problems, of the nature identified above, attend the administration of criminal justice, it is idle to speak of overload as the reason for 'Law's Delay'. The fact that, despite these systemic realities, resources and overload are freely adduced in explanation, would point to the structural aspects to the problem.

Structural problems

The second point relates to the structural aspect of the problem of 'Laws Delays'. Mr. BF draws attention to the mass killings at Delgoda. That incident reflects badly on the operation of law and order. There are other such incidents of concern at Avissawella, Pinwatte, Navagamuwa and elsewhere. These are recent instances which provoke comments relating to a state of lawlessness, of a collapse of the system. Foreign media too carried these disturbing comments. In this context, Mr. BF urges 'an extensive examination of the systemic and structural problems affecting the criminal justice system'. The collapse is of the criminal justice system. The collapse is structural if the system does not work as a whole to achieve the objective of crime control. The framework of the system is dismantled with disparate influences pulling its coherence apart. The state of lawlessness is engendered through the failure of the system. This subject surely requires an extensive inquiry, not possible within the scope of this article. Only a few observations can be made here to indicate the structural features underlying the problem.

Structural faults.

The collapse is of the criminal justice system, one instituted at much public expense to deal with these problems. The system comprises all the agencies instituted within the system, the Police, the State Prosecution, the Courts and the Correctional Services, which in the eyes of the community need to work towards a common objective, the objective of law and order and control of crime. Where the common objective of these instituted agencies fails in the eyes of the community, the public are dismayed. Failure in the system to muster the combined effort of all agencies working to that common objective prompts the consideration that the agencies work at cross purposes. Structural faults can cleave through the cohesion of the system. The vitality in the system is drained away through the cracks in the process. Resort to other means is inevitable when the instituted system for law and order does not deliver. The criminal justice system, itself, takes no responsibility. Some criticism is leveled against the Police. Little is said of the other agencies. In fact criticism follows the lines of the structural faults in the system. Thus 'Laws Delays', as a sign of collapse is seen differently from either side of the divide. Flaws in reportage of findings reflect these structural faults.

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Mediation

The proposition for mediation in less serious criminal cases goes to the structural root of the problem of 'Laws Delays.' For this reason, the proposal has not met with favour. Opposition to police mediation comes from one side of the divide. The opposing reasons are revealing. Thus Mr. BF says: 'Advocating such a remedial measure begs the very question that he himself has very legitimately raised; thus, if corruption is so rampant then the encouragement of mediation and settlement can only contribute to greater corruption. It must be stressed that greater powers being given to the police in the area of disputes must be discouraged in the absence of a substantive overhaul of the cur-

rent policing system'. Corruption is the stated reason that confronts the proposal, in this view. Posited thus, that view may not have considered that mediation is essentially based on consent of the two parties. Only on the basis of free consent can a mediated settlement take effect. Consensual mediation has considerable effect on the parties and on the community which is witness to the settlement. Such process would make for law and order which the instituted system fails to achieve. Assuming, yet, that the settlement was through coercion induced by corruption this would be known to the parties and to the community. The police cannot repeat such questionable exercise, the parties and the community will not accede to the police mediating initiative thereafter.

Therefore 'Laws Delays' involves rights. Rights of individuals are rights to justice, as to other rights. The Right to justice separated from other rights cannot be denied to the people. Constitutionally and in commonsense terms, people have a right to justice.

Opposition to the proposal for police mediation equally fails to consider that the same corruption would attend the regular statutory process for dealing with crime. The proposal for Police mediation is not only by Police directly but also through enlistment of village elders, even on a voluntary basis, to assist the Police. Prospect for corruption will surely be less then. The whole process of mediating in minor crime, outside the laid down criminal procedure, would thus have a cathartic effect on all concerned. Their beneficial effect is also on the courts which will be relieved somewhat of the overload to utilize the time to deal with the serious cases through the formal process. Mediation at the instance of Police is then an eminently commendable proposition. But opposition is firm. The only losers are the lawyers. Opposition springs from that source, standing on one side of the structural divide. Private interests are at stake on that side. The proposition is not only for mediation by the Police, but also for mediation by the State Prosecution and by the Courts, as appropriate and as feasible. Opposition to mediation is structural.

Consider the history of previous efforts in this regard. Conciliation Boards ran the gauntlet of opposing forces for twenty years. The demise of these conciliation efforts was politically impelled, its end brought about with a change of government in 1977. Mediation was yet compelling even thereafter, in the face of the 'collapse' of the system. Mediation Boards, basically the same as before but with a different name came in, yet against the same opposition. Opposition to mediation by Conciliation Boards was by lawyers. Their reason to oppose were other than the reasons openly stated. Opposition to Conciliation Boards was also by the Judiciary.

The Judiciary opposed on grounds that there was a usurpation of judicial power by these Boards, a power given exclusively to the Judiciary. The final Supreme Court decision affirming the role of Conciliation Boards was also on a divided basis. Forces against such process asserted themselves through political means which secured the disbanding of these Boards, with a change of government. The alignment of forces was then clear, their impulsions latent, irrespective of reasons given. It is significant these voices in opposition were silent when Mediation Boards were instituted later. In the configuration of these latent forces, it is an upsetting thought that Police Mediation should intrude into the scene. Opposition can be from the very same sources and for the very same reasons, as before. Reasons given now can be different, and perceived corruption of Police could yet echo that call in opposition in the present context.

Recently however some balance to the popular conception of corruption from one side is restored. No arm or organ of government has escaped. For current purposes, all agencies of the criminal justice system are indicted, (none absolved), on the charge of corruption. Random surveys seriously question the integrity of the criminal justice system. The quantum and effect of corruption may be debatable, but in perspective, corruption within the criminal justice system may be insignificant compared with the revelations of the COPE Report in Sri Lanka recently. All this needs to be stated to bring within due focus the matter of perceived corruption on the part of the Police and to assess the grounds of corruption for opposing mediation by Police. Simply put, the problem of 'Laws Delays' is structural. The proposition for mediation is to supplement the structured adjudication process for resolution of crime. Such proposals will not be countenanced because it goes to the radicle of the problem, the vested interests.

Denial of Rights

The third point is that in that 'Laws Delays', seen in its true perspective, involves rights, right to justice. Where the problem of 'Laws Delays' is systemic and structural, the element of abuse of power and of process is writ large over its face. Corruption inheres in that abuse. 'Laws Delays' projected only as a matter of resources and overload, avoids its sinister aspect. Corruptive abuse of power and position is intrinsic to 'Laws Delays' in its essential respect.

Therefore 'Laws Delays'involves rights. Rights of individuals are rights to justice, as to other rights. The Right to justice separated from other rights cannot be denied to the people. Constitutionally and in commonsense terms, people have a right to justice. Judicial power is the power of the people as Article 111 of the Constitution makes plain. Judicial power of the People is an aspect of the Sovereignty of the People. Judicial power of the People which does not secure the Peoples' right to justice is a grave denial. That constitutional provision would be rendered nugatory if the judicial system and process did not secure the peoples' right to justice. Denial of the right to justice through 'Laws Delays', results in the sovereign judicial power of the People becoming futile. Right to justice has to be secured in the main by the Judiciary. Where the judiciary fails to do so, violation of rights to justice is equally

placed with the failure of the legislature and the executive to secure rights. Where the right to justice is not secured by the judiciary and so by the government, citizens would seek other means to assert rights, as discussed above. Denial of right to justice is failure to secure the right to justice. There is then violation and infringement of rights. Duty inheres to rights, duty of whoever claims it and whoever secures it. Rights are secured as much as duty is owed. Thus, failure of duty would violate or infringe the rights of persons. Thus corruption is in essence, denies the duty owed. Corruption is abuse of process by which duty owed and by which rights are secured. Abuse of process fails such a duty and is in violation of rights. Failure of duty through corruptive abuse of process makes violation of rights graver. Lethargy and inefficiency may not be corruptive with intent to abuse. These do not involve rights. Bribery and corruption are essentially matters of abuse of position, abuse of power and abuse of process. Where this abuse is for private gain and so corruptively induced, the offence is complete. Rights are then denied through the process.

The right to justice is to be secured by the judiciary on behalf of the government. Denial of the right to justice would be at the hands of the judiciary. The Judiciary acts within a mandate. But abuse of this mandate can be the basis of denial of right to justice. This implies an abuse of power entrusted to judges. Abuse of power is necessarily at the expense of the other, an expense tantamount to violation of the right to justice. Delays in legal proceedings, manoeuvre through the process, manipulation of the means, all through devious practices are an abuse of power at the expense of those who have the right. Such deviance of process cannot have the perspective of rights in their pursuit. 'Laws Delays', such as it is, constitutes a violation and denial of rights through abuse of power, as it is a failure of mandate and community expectations and has therefore a dimension far beyond the superficial exercises that have preceded to examine 'Laws Delays.' Examination of this question has been a periodic and much publicised exercise. The periodicity of that exercise is strategic and expedient to allay concerns and to project, in renewed initiative, requirements for more power and resources. Such projections are calibrated periodically to gain some returns. Reference to systemic, to structural aspects of the problems, allusion to the problem of rights, can deflect the line of calculated and periodic clearing exercises.

'Law's Delay' has many dimensions to the problem. In the main 'Law's Delay' features an insidious development which has grown over the years unchecked. Future exercises inquiring into this problem would have to take these matters into account in order to arrive at a convincing determination.

Retired Inspector General of Police

'Laws Delays', such as it is, constitutes a violation and denial of rights through abuse of power, as it is a failure of mandate and community expectations and has therefore a dimension far beyond the superficial exercises that have preceded to examine 'Laws Delays.'

Further Rejoinder: Laws Delays - The Crux of the Matter

Basil Fernando *

This exchange of ideas has been very thought provoking. This rejoinder is only for the purpose of clarifying some issues that I have mentioned earlier that is, the role of judges in preventing delays and the issue of discipline. Both those issues are those of a systemic nature. A judge who allows personal interest of lawyers or others to override public interest is failing in his/her obligations. However professional obligations have a meaning only within an overall context of the state. If the state is unable to ensure that all its power holders in various branches of the state carry out their basic obligations, then whatever aspect of institutional life we discuss—laws delays or otherwise—will have very little meaning.

My reference to other jurisdiction was not on the issue of other cultures but on the issue of the ability of a system as a whole to ensure that its functionaries carryout their basic obligations in a satisfactory manner. Now the functionaries we are directly speaking of when talking about laws delays are the police, the prosecutors, lawyers, who represent clients and judiciary and the functionaries of Ministry of Justice who are supposed to provide the overall framework for the workings of the system.

Whether these functionaries carry out their obligations to an adequate degree depends on in modern times just on one issue; that is, whether the state has a machinery to successfully eradicate corruption. My reference to other jurisdictions is in a context of the development of adequate machinery to deal satisfactorily with the issue of corruption. The difference between Sri Lanka and these jurisdictions is that we have not developed such an institution as yet.

Judging from a successful model let us take for example Hong Kong's independent commission against corruption (ICAC) and compare it with Sri Lanka's Commission on Bribery and Corruption. There are some stark differences. The principle on which the ICAC was developed in 1974 was that this institution should be completely independent from all other government institutions including the police. What this simply means

is that the employees of ICAC belong to the ICAC only and their recruitment, promotions and disciplinary control are entirely is the responsibility of the ICAC. The investigating officers or any other officers are not taken on secondment basis. Even if a police officer is to be recruited to the ICAC, then it is done so after screening and he severs all connection with the police by joining the ICAC.

It is the ICAC that plays the key role in trying to develop guidelines preventing every sort of corrupt practice in both public and private institutions. When I referred to guidelines to be drawn and implemented to prevent 'Laws Delays' what I meant was not guidelines that either the higher judiciary or the ministry of justice developed to deal with the issue from time to time. What I meant was, guidelines based on the overall approach to dealing with corruption in all institutions of the state and also the private sector. The problem of discipline of a judicial officer from this point of view is not different from any other public officer. The judicial officer who is negligent or for any other reason allows personal interest to dominate over public interest is a public officer who violates his obligations. In that area a judicial officer should be subjected to the same criteria like any other public officer. (The issue of independence of the judiciary is not hampered by this at all. In fact, it is enhanced. The freedom from executive control and interference is not the same as allowing a judicial officer to act negligently and fail to perform his basic obligations.)

However, this type of approach of holding all officers responsible for carrying out their obligations depends on the existence of an independent and effective corruption control agency. It is this issue that is at the core of the problem of 'Laws Delays.' At present all parties to litigation—the police, prosecutors, lawyers, judges and justice department officials, act as parties in a scheme within which effective control of corruption is absent. This does not mean that all or most who are involved in that process are personally corrupt to an extent that there exists acceptance of various forms of gratification. It is the system that is corrupt in the sense it opposes efficiency and speedy actions as required by law in order to satisfy this or that personal interest. The system is susceptible to be manipulated to suit the personal interest.

The question as to whether there should be mediation or not, should also be placed within this overall problem of systemic corruption. It is true that mediation takes place by consent. However, what is consent within an overall corrupt system. If the mediator has power within the system to intimidate persons and to coerce various types of settlements on the basis of the personal interest of one party, how is the consent going to be the decisive factor in mediation? The attitudinal problems of treating 'respectable' persons in one way and ordinary folk in another way also affect the behaviour of those who mediate.

The question as to whether there should be mediation or not, should also be placed within this overall problem of systemic corruption. It is true that mediation takes place by consent. However, what is consent within an overall corrupt system. If the mediator has power within the system to intimidate persons and to coerce various types of settlements on the basis of the personal interest of one party, how is the consent going to be the decisive factor in mediation?

To cultivate a proper relationship on the basis of consent, both parties must be in fact be equal. Mere equality before law is not sufficient. This equality must exist as a practical reality. The very fact that personal interest can be the cause of 'Laws Delays' means that such an equality does not exist in fact. In all instances of delays, there is a losing party. More often than not, the losing party is the weaker party from the point of view of social equality. It is that party who will also suffer if mediation is to take place within a context where the powerful still have the ability to manipulate the mediators for their benefit. The very argument for mediation as against the judicial process is that the judicial process itself is being manipulated for personal interest. Where the judicial process is manipulated for personal interest, is it possible that some officer in charge of a police station or even an officer higher in rank is not going to be influenced by personal interest?

It is good to obtain a cross section of opinion as to the manner in which mediation takes place by various institutions even now. This includes even places which are generally thought to be more neutral like the Human Rights Commission of Sri Lanka. Those who have gone before these institutions with mediation powers know how much of pressure is exerted on the weak and the powerless sections of society. Sometimes, the pressure takes the form of very clever argumentations and manipulation, which the less educated is unable to properly comprehend or respond to. Often it goes far beyond this line and develops into various threats and also postponements directed towards forcing settlements. Thousands of cases documented by human rights organisations clearly demonstrate the types of speech and behaviour pattern that exist in dealing with the police with the average citizens, however polite they maybe in response to the more influential sectors of society.

It is true that the issue of the elimination of corruption is not a very popular topic in Sri Lanka. Resignation that corruption is going to stay with us whether we like it or not, is common. If that be that case, it is also better not to talk about 'Laws Delays.' This problem will also stay with us till we are able to develop a type of an institution that has the independence and the capacity to deal with every form of corruption that result in all social evils including 'Laws Delays.' Others have done it. There is no reason why our efforts should not be directed towards those ends.

(Footnotes)
*Executive Director, Asian Human Rights Commission.
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[1] see http;//www.ahrchk.net/statements.mainfilephp/2007 statements as well as statements made in 2004 and 2006 for further discussions in this context.
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Corruption Enhances

Human Rights Violations

Kishali Pinto Jayawardena *

Text of a speech made at a seminar on 'Corruption and Human Rights' organized by the Retired Senior Police Officers Association in collaboration with Transparency International Sri Lanka on August 23rd 2007 at the SLAAS, Colombo. The other panelists were Rienzie Wijetilleke, Chairman Hatton National Bank, parliamentarian and Presidents' Counsel Wijeyadasa Rajapakse, Executor Director, Transparency International Sri Lanka, J.C. Weliamuna and Director Investigations, Bribery and Corruption Commission, Neville Gamage. The discussions were chaired by retired Senior Superintendent of Police (SSP) Mr B.S.W. de Silva

Some Introductory Comments

In commencing this segment of the discussions, let me first look at the law in terms of which an act amounts to a corrupt act – the definition, as we can see, is very wide;

Section 70 of the Bribery Act (as amended) which is the relevant section applies to public officers who act with the intent or with the knowledge to;

a) cause wrongful or unlawful loss to the Government or

b) to confer a wrongful or unlawful benefit, favour or advantage on himself or any person and thereby

- acts or does not act in a manner which he or she is empowered to do by virtue of office;
- induces any other public officer to act or not to act in the same manner;
- uses any information coming to his/her knowledge or participates in the decision making by virtue of such office,
- induces any other person to act or not to act in such manner

Definition of Corruption and the Question of Rights

As is evident, the question of rights does not directly come into this provision. In contrast, other definitions of corruption have been different, such as the following;

"A corrupt act is an act done with an intent to gain some advantage inconsistent with official duty and the **rights** of others" Lectric law library lexicon

Implied Reference to Rights - My argument is however that, even if Sri Lanka's statutory definition of corruption does not include an express reference to rights, it does so impliedly. This is an obviously interlinking thread; each time that a public officer acts with the intent or knowledge to cause wrong or unlawful loss to any person or to confer an unlawful benefit or favour to himself/herself or any other person, (as Section 70 states) **an immediate infringement of rights occur**. In the first instance, the infringement occurs in relation to that person to whom the loss is caused and in the second instance, the infringement occurs in relation to all the other persons who are pushed aside while one person or a few wrongfully benefit

Application of the Definition to Practical Situations

Corruption on the part of the State

So let me now take this definition and apply it to a few practical instances in Sri Lanka today. First and foremost, Sri Lankans deserve to live in a corruption free society which means that the main components of the State, that is the executive, the legislature and the judiciary should be capable of corruption free governance. Where does this right to demand corruption free governance break down? In my view, it breaks down not only in the clear instance of any officer of the state accepting money to do any act or refrain from doing any act. Instead, the most damaging and troublesome aspects of this breakdown comes in far more indirect ways. I will take a few examples;

a) The Executive & the Legislature

(i) Where the executive and the legislature is concerned, the right of voters to live in a corruption free society would be infringed, for example, when there is wild squandering of public money to accommodate massive numbers of Cabinet Ministers and to maintain their ministries or where such moneys are freely expended on jaunts abroad with large delegations of ministers, their officials and their family members;

Where the executive and the legislature is concerned, the right of voters to live in a corruption free society would be infringed, for example, when there is wild squandering of public money to accommodate massive numbers of Cabinet Ministers and to maintain their ministries or where such moneys are freely expended on jaunts abroad with large delegations of ministers, their officials and their family members;

(ii) Indeed, this right is infringed in a most direct way when public resources are spent for the benefit of the party in power, as for example, would be the case when a direction goes out from the executive headquarters that unutilized funds in gov-

ernment departments or ministries should be used to build the party's headquarters.

(iii) Such a direction would infringe the most basic right of taxpayers and voters that their tax money which swells the public coffers, should not be used for the benefit of a particular political party alone. There are several judgments of the Supreme Court, (at a time when the Court was applying principles of law equally to a case regardless of political pressures) to affirm that whenever public money, public officers or public resources such as the state media, are used for the political propaganda of the government in power, this results in an infringement of rights

These are only two such examples;

b) The Judiciary

Undeniably, a corrupt judiciary is far more dangerous than corrupt political structures. I say this because, at least in Sri Lanka, one expects the politicians to be corrupt. I am sure that this is, more or less, the same in other countries though of course, the level and the sophistication of such corruption would vary. But when corruption seeps into the judiciary, then we are at a very fragile stage indeed. By corruption, I do not mean the ordinary example of a judge accepting bribes. To my mind, a far more pervasive danger is the political corruption of the judiciary –for example when the outcome of a case on a controversial political issue is dependant not upon the application of the law and legal precedent but whether the judge hearing the case, is (at that current moment in time) – to put it somewhat crudely, angry or friendly with the political executive. Whether a 'good' or 'bad' decision is given, what is important is that the decision should not be influenced by political factors.

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For example, even if a 'good' decision is given, if the reason for this is judicial petulance with the administration in power for personal or political agendas, then the 'goodness' of that decision is shorn of its positive flavour. The faith that the people can place in a judicial administration that is 'activist' only when it is angry with the political establishment for reasons that have nothing to do with the good administration of the law, is self evidently very little. This is not a brave assertion of the concept of independent judicial supervision of illegal executive or legislative acts but yet another step on the ladder of the political subversion of the institution of the judiciary.

However, it must be said that one of the most interesting developments during the past few years has been the manner in which the judiciary itself has become the centre of public debate and discussion in this country. Whereas earlier, the 'politics of the judiciary' had been confined to the lecture rooms and the corridors of Hulftsdorp, there is now a transformation of these discussions to the more spirited arena of public debate. Whereas earlier, the law and the courts were thought to be the exclusive province of the lawyer or the judge and the celebrated (if not highly overrated) 'mystery of the law' allowed comment only from legal professionals, it is refreshing that thinkers not necessarily learned in the law, have begun to critically look at the role and function of the law and of the judge.

This is important for the simple reason that, as much as war is too crucial a task to be left to the politicians, the law is also too vital a function to be left to the lawyers and the judges, many of whom are motivated by pure and simple self interest. Perchance, it cannot be left to the academics as well, given the (general) lack of their active involvement in the pressing challenges that confronts the law and the judicial system today.

Corruption on the part of non-State actors

I have discussed above, the components of the State vis a vis the issue of corruption in the broad context of human rights protections. But corruption can break a country's spirit and facilitate human rights violations if 'watchdog' institutions such as the media and civil society stay quiet or are, in turn, corrupted. For example again, this country's independence of the judiciary would not be in such a parlous state today if the media and Sri Lanka's legal professionals together with the intellectual community had been genuinely concerned about the importance of a well functioning judicial system in recent years. Legal professionals in particular have drawn the condemnation of the public for their self serving role in regard to these issues. A study of letters written to the editor in the newspapers for example would indicate the rising tide of public anger against the legal profession in regard to issues as diverse as their responsibility for laws delays, their un-involvement in safeguarding the independence of the judiciary and so on. From a different perspective, we have not been able to pass a Contempt of Court Act or a Freedom of Information Act because there is a lack of sustained interest on these issues.

The question of the corruption of civil society is also close to my heart. The departure on the part of many non governmental organizations from upholding old values of democracy, human rights, the rule of law and social justice to a professionalized preoccupation with the 'peace' process has, in my mind, devalued the balance that civil society brought earlier to these discussions. We have seen the phenomenon of five star conferences being held on issues as varied as poverty alleviation and combating torture with absolutely no impact on the actual victims. My best examples are the activists who work closely with the people on issues of social justice and human rights sometimes voluntarily or with just a pittance. Their efforts are undermined by 'civil society leaders' who have no compunction to admitting their entitlement to 'expatriate salaries.' Equally, their efforts are undermined by 'intellectuals' whose involvement in these issues is highly superficial and limited to pronouncements at conference halls.

Interlinking of Corruption and the Gover-

nance process

This country is a good example where financial or political corruption has eaten into the very way in which we live our lives and allow ourselves to be governed. At each point of time, though we had small attempts to try and return the system of governance to a decent way of functioning, we have had this frustrated by the politicians. What has happened to the 17th Amendment to the Constitution is a classic illustration.

It is a useful question to see as to how this general and highly applauded consensus that brought the 17th Amendment into being, changed so much for the negative within the relatively short space of time from end 2001- end 2005. Did any of the constitutional commissions set up under the 17th Amendment trespass on their legitimate spheres of authority or act in such an aggressively independent way so as to justify such a drastic crippling of the primary constitutional provision as is evidenced now?

In Sri Lanka, there were instances where the Public Service Commission the National Police Commission (NPC) and the HRC (Human Rights Commission) stood their ground in response to arbitrary directions and actions by politicians including Ministers and the Executive Presidency. One notable instance was the NPC's preventing of politically inspired transfers of police officers in the pre elections period. However, there was no magnificent displaying of their authority beyond a point on the part of one or the other of these Commissions and certainly not a flinging down of the gauntlet to Parliament. None of these Commissions behaved in the manner that, for example, the Indian Elections Commission, under the chairmanship of Chief Elections commissioner T.N. Seshan, conducted itself. Seshan's Commission challenged the full limit and more of its powers, sometimes even drawing public criticism that it was going beyond its authority in pulling up politicians for alleged abuse of power.

But what happened thereafter was that this limited assertion of authority by these constitutional commissions in Sri Lanka was met with disproportionately harsh criticism. For example, it was maintained by some politicians that the Inspector General of Police (IGP) should be included within the NPC as one of its members. This was ridiculous. In the United Kingdom which has an independent police commission, you do not have the IGP as a member of the independent police commission. Thus, as we saw, even the small amount of activism that was attempted by the NPC at that time was met with the strongest resistance. Thus, it is clear that this current impasse on the part of Sri Lanka's politicians stemmed from a sheer rude disregard for constitutional imperatives and an arrogant assertion of absolute authority.

Thereafter in 2006 we had an ostensible dispute between the parliamentarians and the JVP insisting that they should have the right to nominate a member to the Constitutional Council whereas the Attorney General had unequivocally given an opinion that the JVP should not be included in that group that had the right to make the nomination. The Attorney General's advice was completely disregarded and the JVPs insistence was used as an excuse by parliament and the president to let the council lapse despite the fact that five nominations had been made and what remained was for the president to make the appointment, but he allowed the CC to lapse and he made his own appointments. And we have seen since then what has happened to the Human Rights Commission, and how absolutely ineffective it has become. There is currently a freeze on information by the HRC on human rights violations occurring in Jaffna and in areas of the northeast, and they have, through internal circular, stated that a complaint must be lodged in the HRC within three months of the incident, despite the fact that the HRC Act does not specify such a time limit, thereby clearly departing from the criteria laid down in the Act.

We had an astounding example a year back immediately after the current Commissioners were appointed where their inquiries to the 2000 disappearances coming over from the previous HRC they stopped all inquiries. When they were questioned as to why they said we cannot continue since we have to pay compensation to the victims. Unless the government instructs us we cannot go ahead with the inquiries. This led to a tremendous furore and ultimately the Minister of Human Rights was compelled very embarrassingly mind you to issue a statement saying that the HRC could operate without instructions from him. HRC then went back on their previous statement and said that they will now inquire. But one has no confidence in their inquiries.

So we see the way the commissions that were the independent monitors of governance process breaking down one by one. But where is the link in all these discussions with the question of anti-corruption? The linkage is quite clear; if the primary qualities of independence and integrity are stripped from the so called independent monitors of human rights in Sri Lanka, our anti corruption struggles come to naught. And what if this situation continues for long that it affects the new appointments to the Bribery and Corruption Commission? Once the term of the current members lapse would the new members also be directly appointed by the president, disregarding the pre condition of approval by the Constitutional Council? To what extent will these new members be beholden to the political executive who appoints them? Where does the question of constitutionality come into all this? How can you talk of governance when the very rulers who are governing us, act completely without any accountability and where the people themselves do not call them into account as strongly as they should?

I would have just one further thought; some good guiding examples in this regard are devel-

It is a useful question to see as to how this general and highly applauded consensus that brought the 17th Amendment into being, changed so much for the negative within the relatively short space of time from end 2001- end 2005. Did any of the constitutional commissions set up under the 17th Amendment trespass on their legitimate spheres of authority or act in such an aggressively independent way so as to justify such a drastic crippling of the primary constitutional provision as is evidenced now?

opments in this context in India and also Hong Kong. Now, one could see very clearly the link between the rule of law and the issue of anti corruption. Hong Kong's independent Commission against Corruption is one of the best examples in the entire world for commissions of this sort.

That did not come on its own- rather the anti corruption struggle was linked to the rule of law question in a very substantive manner. Later, we saw a magnificent flowering of the peoples' struggle in Hong Kong against attempts and efforts by mainland China to impose their will on Hong Kong after the takeover.

With the Independent Commission against Corruption being very proactive, we also saw the people of Hong Kong getting on to the streets and protesting against attempts made by mainland China to subvert their democratic rights. In India as well, you see the right to information campaign, the exposure of corruption in the judiciary and in the public service all being linked to broad issues of the importance of the rule of law and the protection of rights. Indisputably without one, you cannot have the other.

Concluding Comments

So my point has been and will always be that you cannot separate the question of battling corruption from the all encompassing question of implementation of the rule of law and the protection of human rights. These questions are both acutely and intensely interlinked. It is my fervent hope that in Sri Lanka we will have this acknowledgement, this recognition of the interlinking in order that people would be far more activists than they are now. We cannot leave law to the lawyers. We cannot leave the question of the rule of law or the legal process and indeed, the very question of what rights mean, to the judges or to the lawyers just as much as we cannot leave the art of governance to the politicians. Quite frankly they have all failed.

It is time that the people in Sri Lanka realised that there is something desperately wrong with the system of governance and we do something at least by voicing our protests publicly and collectively. Thank you Mr. Chairman.

We cannot leave law to the lawyers. We cannot leave the question of the rule of law or the legal process and indeed, the very question of what rights mean, to the judges or to the lawyers just as much as we cannot leave the art of governance to the politicians. Quite frankly they have all failed.

* lawyer/legal consultant, activist and author; Deputy Director, Law and Society Trust; Editorial (Legal) Consultant and columnist, The Sunday Times, Colombo

The Role of Lawyers in a Threatening Environment

Basil Fernando *

A paper prepared for a seminar organised by the Dutch Lawyers for Lawyers Foundation to be held on 15 November, 2007

I graduated from the Faculty of Law in 1972. At that time if someone were to ask me to talk about the role of lawyers I would have had little hesitation in setting out what role they should play. However, after so many years thereafter, being directly or indirectly involved in trying to play that role, I am no longer so sure about any easy answer as to what the lawyer's role is. Being confronted with many issues, not only in my own country but many other countries in Asia, due to the day-to-day work of the Asian Human Rights Commission, I find that in trying to address this issue one needs to also address many issues relating to the actual context within which such a problem needs to be discussed for it to be of practical value[1].

This of course is not to be taken as any slighting of the international norms and standards that are associated with the role of lawyers. However, these norms and standards need to be constantly articulated and given significance in all discussions irrespective of the difficult circumstances that may be faced in the practice of such norms and standards. The lawyer's role is a primary need of any civilised and decent society. Where lawyers are unable to play their expected role the citizens suffer gravely. In the modern world, the struggle for freedom and equality cannot be separated from the struggle to ensure the possibility of an independent legal profession that is able to play its role in all events related to law in the lives of people. The lawyer's role is very much intertwined with the very concept of citizenship and all essential notions of human rights.

Perhaps one of the most encouraging factors, even under extremely adverse circumstances is demonstrated by the acts of lawyers who have gone beyond their traditional role to defend their right to ensure justice and rule of law. A glaring example was the instance of the Chief Justice of Pakistan, Iftekhar M. Chaudhry, being suspended from his post on the 9th March, 2007. A self-assured General Musharraf, who has held power since a military coup in 1999, thought that he would not have much difficulty in intimidating and obtaining Mr. Chaudhry's resignation. However, the General miscalculated his move. The Chief Justice refused to resign, even despite of the fact that the general was able to get another Supreme Court judge to take oaths as the acting Chief Justice. What emerged was the way in which the bar association in Pakistan and the legal professionals in general throughout the country took to the street and kept up an ongoing protest, evoking one of the most remarkable world events in which the ordinary folk in Pakistan in their millions came forward to sup-

port the lawyers struggle to protect the Chief Justice and to safeguard the independence of the judiciary and the rule of law. The arrogant General suffered humiliation when the Supreme Court decided that the suspension of the Chief Justice was illegal and that he should be reinstated. Accordingly, that has now been done. The lawyers have called for a continuous struggle to bring back constitutional governance and the rule of law.[2]

This historic event in Pakistan brings to the fore, one important factor in the lawyers role in many parts of Asia, which I believe is also similar to many other areas of the world where liberal democracy has not been solidly entrenched and the functioning of institutions of justice are not intact. It has become an absolute precondition for playing the lawyers role that the lawyers themselves participate in rebuilding the very when are essential for an effective system of the administration of justice. In many places systems suffer fundamental problems and in some instances it can be said that the basic institutions have become dysfunctional. What is worse is instances where the basic notions of the independence of the judiciary and fair trial are not even acknowledged as valid ideas, and therefore, if the lawyers are to play their role they must first engage in a protracted struggle to have such notions accepted and to develop the basic institutions of justice, particularly the institutions of the police which play the role of criminal investigators, prosecutors and the judiciary, to function adequately. Here we have a situation in which the dancer has to make the stage on which he can dance, and the lawyer has to create the conditions within which the people can have the benefit of strong practices that lawyers adopt in order to ensure equality before the law for everyone.

An understanding of the role played by the lawyers in Pakistan in recent months and what it implies to others requires a realisation of the recent history of the administration of justice in the country. When Pakistan was separated from India in 1947, the constitution that was adopted was one of a liberal democracy where the separation of powers and the independence of the judiciary were entrenched. Under the British colonial rule, a common law system was introduced and some advances were made in the development of a modern system of the administration of justice. However, the impact of this legacy is sometimes exaggerated. The colonial power, while introducing a modern administration of justice system, still ruled the country mainly for its own benefit. Sufficient resources were not allocated to develop the administration of justice to take root in the same manner as in the mother country, the United Kingdom. Many of the problems of justice in the entire territory of India, including modern Pakistan and Bangladesh, are a legacy of an incomplete attempt to introduce the modern administration of justice. Some primary problems are that the equality before law was never seriously pursued and large sections of the Indian population did not have the benefits of a modern system of justice. Among the more glaring examples are the untouchables, who are now known as Dalits, women of all classes and the minorities. Some of the basic defects remaining as a result of the British legacy are courts overloaded with work that result in delays as long as 20 years or more. The Indian policeman is of the primitive type who uses torture as the main instrument of criminal investigation despite the fact that the evidence ordinance excludes the admissibility of confessions. The Indian prosecution system also did not develop in the manner that such institutions are developed in the liberal democracies of the first world. Legal aid and witness protection also did not develop to any adequate degree. Pakistan inherited this legacy at its inception.

However, Pakistan was to have much greater burdens. Field Marshal General Ayub Khan staged a coup and came to power in 1958 and brought the country under martial law until 1962. He ruled the country until March 1969. In that year another general Yaha Khan took power which he held until 1971. After a brief period of democracy in July, 1977 General Zia Ul Haq took power. He maintained martial law up to 1987 and held power until August 1988. Following 11 years of democratic rule General Pervez Musharraf took power in October 1999 and remains in power.

From 60 years after independence, many long years have been spent under military rule. What is the impact of military rule on the administration of justice? It affects every core aspect of the administration of justice. Military dictatorship and the separation of power are incompatible concepts. Thus, the independence of the judiciary was undermined in every possible way during these long periods of military rule. The careers of judges and lawyers were gravely affected. Besides this, all basic institutions relating to justice, such as policing, prosecution and the judiciary were also severely obstructed during such periods. What is worse is the manner in which such adverse historical events affect the memories of the people and their internal beliefs in the possibility of obtaining justice. To say that the impact of such developments on people was to diminish their confidence in the administration of justice is very much an understatement. It is difficult to fathom or express the vast psychological transformations that people go through when their basic institutions of justice are destroyed in this manner. We need also to remember that for countries like Pakistan, there had been nothing like a marshal plan to restore what was lost and to rebuild the foundations of a decent society.

Yet even within a society so battered, such a strong movement for the independence of the judiciary and the rule of law was to emerge and become a popular movement of great magnitude. It is this tremendous contradiction that we see in many countries in the region. Their systems of the administration of justice have been seriously battered for long periods of time. The very notions of constitutionalism have been given up in many places. Many a dictator has exhibited extraordinary ferocity in destroying all attempts to find jus-

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Thousands of cases of disappearances remain pending and the likelihood of prosecutions on these and other gross abuses of human rights are most unlikely except perhaps in a few selected cases. Impunity is guaranteed by the weaknesses of institutions and the dysfunctional system. Under these circumstances, the lawyers struggle in many ways to get the laws improved, institutions strengthened, legal education itself improved and the actual possibilities of redress to be improved.

tice or to challenge impunity. Just take the case of Indonesia under Suharto's regime for about 35 years. What a devastation of society, what destruction of the existing channels that were available to seek redress in law or justice! Yet despite all this, there is yet enormous resilience of the people that manifests itself in manifold ways. These manifestations are directed towards the reestablishment of their lives within stable conditions and to have respect for their dignity restored through functioning systems of justice. And in these places we have shining examples such as Munir Said Thalib, who is regarded as a martyr and a pioneer symbolizing the attempt to reassert the place of justice and the role of the lawyers. Munir also gives us some aspects about what a lawyer's role should represent under circumstances such as these. Like the lawyers of Pakistan, Munir and others dedicated themselves to rebuilding the administration of justice in their country. They have played not just the traditional role of lawyers that make representation within avenues that are available within the administration of justice, but they created new avenues within the system of such administration where they can play a stronger role.[3]

We see even a much worse situation as we take the example of **Cambodia**. The conflict of the '70s spread their malevolent influence on this isolated country and its innocent people. The overflow of the Vietnamese war into Cambodian territory followed by the Khmer Rouge regime devastated the country to such an extent that it can be said that the country was pushed back to the Stone Age. After many years of civil conflict which further added to the loss of life, to the over one million lost earlier, the country has been making an attempt to move towards a more stable society since around 1993. The obstacles it has to face are beyond description. Yet we saw within a very short time the emergence of a group of people who were initially called public defenders and who have now been referred to as lawyers. Here too, the people are struggling hard to recreate something of a decent society where justice is available. This is a long journey no doubt. Once again there are no marshal plans to help these people. But the determination to create for themselves a society with a viable administration of justice is very much present, despite all the obstacles imposed by the regime in power.[4]

In a similar way, we can also talk about **East Timor** and **Nepal**, both of which also had United Nations Peace Missions in the not-so-distant past. Both countries were able to overcome some long standing conflicts and to begin to have a legitimate form of government. However, from the point of view of the development of state institutions, both countries still live in primitive times. In East Timor, within the few years of the establishment of the new nation, there were conflicts that the local police were unable to handle. Assistance had to be obtained from outside, even for policing. Judicial institutions are being formed and many questions about the law and the practice are still to be determined. The lawyers of former times had to function within the Indonesian legal system which was reshaped during Suharto's military regime. The development of an independent legal profession is underway. Nepal on the other hand has had a long tradition of judicial institutions and the practice of the legal profession. However, long years of conflict have virtually left a large part of the country without functioning legal institutions. Though various agreements have lead to the recognition of national institutions everywhere, the actual strength of these institutions is very low. Besides this, there is rampant corruption within the police and the judiciary goes through its slow pace and is often unable to executive its writs due to powerful forces that conspire to make the judicial system ineffective. Thousands of cases of disappearances remain pending and the likelihood of prosecutions on these and other gross abuses of human rights are most unlikely except perhaps in a few selected cases. Impunity is guaranteed by the weaknesses of institutions and the dysfunctional system. Under these circumstances, the lawyers struggle in many ways to get the laws improved, institutions strengthened, legal education itself improved and the actual possibilities of redress to be improved.[5]

Now we may turn to a few countries which broadly speaking remain within the framework of democracy and rule of law but suffer from enormous defects in the institutional framework needed to ensure rule of law and the independence of the judiciary. We refer to countries such as the Philippines, Bangladesh, Sri Lanka and India. In the **Philippines** where externally, there is recognition of liberal democracy and rule of law, there are widespread disappearances. The normal mode of criminal investigations by the police is torture. The frightening effect that the torture has had on people is such that no one is willing to come forward to make complaints about torture and to pursue complaints against officers. All efforts in this direction by human rights organisations and even public defenders have not resulted in the change of a mindset which fears to complain against the country's police or the military. The level of intimidation that accompanies any attempts by victims of crime to find justice is reflected by the fact that even the public defenders have to take their own measures to protect themselves. According to the organisation of public defenders about 80% of the public defenders out of about 1,025 persons carry firearms for personal protection. Despite nominal witness protection laws, there is hardly any effective witness protection available. The cases can take very long both at the stage of investigation and at the trial and appeal stage. People often have to spend long years in jail despite of being innocent until their cases are finalised. It is under these circumstances that the lawyers in the Philippines have to work. There are powerful sections of Filipino society able to paralyze the legal system and prevent the realisation of equality before law.[6]

Thailand has been struggling to develop as a democracy for a long period of time in which many people have sacrificed their lives to end the mon-

archy and develop a form of constitutional monarchy. An important landmark in this regard was 1932 when the country recognised an elected parliament. The country's legal system is a mixture of civil law, common law and German law. However, the military in the country has held a very deep grip over all political and legal systems and the country's policing has been modeled on a military style. The concept of civilian policing is as yet unknown to Thailand. The country's courts reflect the rigid social stratification that exists within. Impunity is strongly prevalent. In 1997, the adoption of a new constitution was regarded as an important step in the direction of greater democratisation and expansion of the rights of the people. However, on September 19, 2006 the Thai military staged a coup and established military rule. Many years of achievements in democracy was thus, thrown away. This new setup created even more restrictions on lawyers than before. The insurgency in the south has also been exploited in order to impose strong limitations on the possibilities of investigations into human rights abuses including disappearances, extrajudicial killings and torture. The disappearance of the well known lawyer, Somchai Neelaphaijit on March 12, 2004[7] and the complete failure to ensure justice in his case is a clear example of the manner in which the lawyers, who work seriously to assert their role as lawyers are being treated within this system.[8]

Bangladesh separated from Pakistan in March, 1971. Its institutions of the administration of justice and the legal profession was formed during the period of the British colonial rule and continued within the Pakistan setting since the partition. The new nation had many qualified persons with legal background who had played quite a significant role in Pakistan. However, developing its own institutions within the new nation has been a difficult task. The failure to develop an efficient policing system has resulted in severe problems in terms of the protection of people's rights. Corruption has become endemic within the entire state structure and the policing system was made virtually dysfunctional due to the corruption. Until very recently, judges of lower courts were recruited from the civil service and they were not part of the judicial cadre. It is within this context that the lawyers of Bangladesh have to work. Litigation is a protracted process which may take even as much as 20 years. The people's trust in the system of the administration of justice is very low. For that reason the services that the lawyers can deliver to the people are also very low. Corruption in Bangladesh has been highlighted by the Transparency International Corruption Perception Index of 2005[9], when it was placed virtually at the top of the list as one of the most corrupt nations from 2001 to 2005. Endemic corruption has penetrated into all areas of the criminal justice system and in fact, the legal system in general. Human rights organisations have often expressed the view that over 50 % of the persons in Bangladeshi jails are innocent, manipulated by the police to admit to offences they have never committed. Most of these prisoners come from very poor backgrounds. The actual culprits escape by the payment of bribes.[10]

By the middle of the last century **Sri Lanka** was considered as the most promising of the south Asian nations from the point of view of democracy and the rule of law; the country's administration of justice, in the modern sense, started by the end of the 18th century. There was training for lawyers and judges over a long period of time, enactments of laws into almost all areas of life and the establishment of courts in all parts of the island. The development which took place in the latter part of the 20th century, however, undermined the independence of the judiciary and the role of lawyers. The country is now known for large scale disappearances in the south, north and the east and extreme forms of violence. Politicisation of the state institutions has virtually made way for a situation of impunity due to dysfunctional systems of policing, prosecution and the judiciary. The judiciary has been severely criticised as having succumbed to the executive and been unable to deal with the abuse of power in all areas of life. In these circumstances, the public perception of lawyers is that they have no room to achieve legal redress within the system. On the other hand, some sections of the higher judiciary itself have begun to openly attack the legal profession. The laws of contempt of court are being used extensively and the threat of the use of such laws has had a tremendously intimidating effect on the legal profession. They have been severe expressions of frustration and dissatisfaction on the part of the lawyers.[11]

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Perhaps the contradictions involved in the legal profession are best expressed in what may be called Asia's most unfortunate nation, **Burma**. At the time of preparing this article, one of the most significant political events of the recent decades is being staged in this country. Literally, over ten of thousands of Buddhist monks have taken to the streets in a protest that developed over the short space of a week. This protest is receiving enormous support from the people of the country. However, the military regime has acted aggressively against the protest and there are reports of indiscriminate shooting into the crowds. It is obvious that there is a huge crisis of power in Burma and it has been prevalent for a long time. The legitimately elected government of Aung San Suu Kyi was not allowed to take power and Aung San Suu Kyi herself, has been under house arrest for over 12 of the last 18 years. There is no avenue for lawyers in Burma to challenge the usurpation of power by the military by way of a constitutional law remedy or any other legal remedy. The entire judiciary is subordinated to the military regime. All that the lawyers can often do is to find some form of very small redress for their clients who suffer grave abuses of human rights. There are many in jail for acts such as writing a protest letter or being engaged in some small protest at the village level against some village functionary or the police. What then is the role of the lawyer in a context like this? Now with

the challenge posed by the monks and the people against the regime, the lawyers have become even a bigger target of military repression.[12]

In contrast to Burma, **Singapore** is an affluent nation. Yet the lawyers in Singapore who may be able to function as lawyers in a developed country on matters relating to trade and commerce, do not have any such liberty at all to deal with constitutional matters or matters of public law. Even in criminal law, their powers are limited. One party controls all the political affairs and all opposition is crushed through draconian laws. The unscrupulous use of bankruptcy laws may deprive persons from any form of political activism and even send persons to jail who attempt to visit an international conference at the cost of an invitation by the hosts on charges of violating bankruptcy orders as happened to Dr. Chee Soon Juan in March, 2006.[13] Here again, the lawyer's capacity to deal with matters that would normally come within the purview of a lawyer is in fact denied by the law and the way in which the system operates.

During recent years, extrajudicial killings, known as encounter killings, (ie; killing as a result of shootings between law enforcement officers and others), have also increased. The view of human rights organisations is that the term 'encounter killing' is a misnomer and in most instances, it denotes killings by security authorities after arrest. When the system is taken as a whole it appears starkly clear that the possibilities of redress are limited. It is within that framework that the lawyers of India have to work and carry out their role.

India enjoys a reputation in the west of being a democracy; in fact it is the world's largest democracy and enjoys the reputation of having a strong system in regard to the administration of justice. The independence of the Supreme Court of India has often been praised. However, despite such a favourable international reputation, Indian justice administration suffers from extreme problems. The prolonged delays, as much as 20 years of so, has created a work overload in courts prompting a former government to attempt to rid itself of even the most basic notions as presumption of innocence, and proof beyond reasonable doubt, as a way of dealing with the delay. This attempt which was made through the Malimath Committee recommendations has been shelved due to enormous public protests. However, the system has not found a solution to the problems it is beset with. The Indian system has also not been able to achieve equality before law and huge portions of the population still remain outside the system and are unable to benefit from it. Added to all this is the nature of India's policing system which still uses torture as the main method of investigation. During recent years, extrajudicial killings, known as encounter killings, (ie; killing as a result of shootings between law enforcement officers and others), have also increased. The view of human rights organisations is that the term 'encounter killing' is a misnomer and in most instances, it denotes killings by security authorities after arrest. When the system is taken as a whole it appears starkly clear that the possibilities of redress are limited. It is within that framework that the lawyers of India have to work and carry out their role.[14]

How do the problems we have mentioned above effect actual cases and influence the very substance of justice? This is important in understanding what role lawyers can in fact play under those circumstances. I have chosen five stories written on the basis of cases that the Asian Human Rights Commission has been involved in for several years. The AHRC constantly contributes to the fighting of cases both by way of publicity campaigns such as urgent appeals and actual involvement in cases in courts. The AHRC is involved in this manner in several countries. The cases I have chosen illustrate our general experience of the type of issues that litigants face in the countries I have mentioned[15].

Dialectics of Justice – Five Sri Lankan Cases:

1. The Case of Amitha Priyanthi

When you meet Amitha Priyanthi, it is difficult at first to tell if you are in the presence of hope or bitterness. A woman of exceptional dignity and determination, Amitha's bearing—formal, measured, precise—betrays little of her inner life. This is by design, one senses. Amitha conveys the presence of powerful emotions precisely by withholding all emotion from view. Her assertions and explanations of things—events of the past, plans for the future—always reflect years of careful consideration. But this same feeling as she has pursued the cause of justice in the name of her late brother, and what she feels as she looks to the future, are not made available. One does not know, equally, whether to feel hope or bitterness oneself as Amitha tells her story. Only at the end, when Amitha brings events up to the present and explains the way forward, does the recognition come: Hope and bitterness are not separable in Sri Lanka. The pursuit of justice in Sri Lanka brings both, even in victory.

There are many deserters from the Sri Lankan army—a consequence of the long, senseless war in the North and East between government troops and the Liberation Tigers. And it is with an act of desertion that Amitha's story begins.

Her younger brother, Lasantha, was a soldier. He seems not to have held a strong view about the war, although he opposed it and did not wish to fight in it. Stronger were his feelings about his wife and newborn baby. In the spring of 2000, while serving in the north, near Jaffna, Lasantha was refused leave to see his family. Instead he was given a few days to travel to his village, then ordered to return to his unit. Lasantha went home but never returned.

"He was granted a short holiday," Amitha said when we discussed these events. "He had no intent to go back."

On June 12, 2000, the police arrested Lasantha in Payagala, the village south of Colombo where he lived. Eight days later he died in a hospital, still under remand, of injuries sustained while he was in police custody. The cause of death was acute renal failure: Lasantha's kidneys had been irreparably damaged when the police beat him with a wooden pole.

Seven years later, Amitha was still fighting for justice in the case of her brother. There had been victories and defeats. She had gone from police

station to police station, from court to court, from one session of the Sri Lankan Medical Council to the next. And there would be more to come.

In August 2003, a case she had pursued in the Supreme Court on behalf of her widowed sister-in-law ended successfully. It created a precedent regarding the rights of the next of kin to seek redress through an application to the Supreme Court based on the fundamental rights clause in the Sri Lankan constitution. The court held that the police were responsible for torturing her brother and granted compensation to the widow and child from their marriage.

Amitha also won a case in magistrate's court when a doctor testified that her brother's death was homicide—death by assault. Criminal charges—culpable homicide—were then filed against one police officer. But complications accumulated in this case. The non-summary inquiry into the homicide case took six years—until March of 2006. The case had gone to the high court, but by the summer of 2007 the Attorney General had yet to file an indictment. In the course of these delays, the officer charged absconded—disappeared, as Lasantha had done when he went on unauthorized leave.

In a district court, Amitha followed another strategy. She filed a civil claim against three police officers, the Inspector General of Police, the Attorney General and the Commissioner of Prisons. She also filed a further civil action against the Judicial Medical Officer (JMO), the Attorney General and the Administrative Secretary to the Ministry of Justice, whom she claimed were complicit in her brother's murder. A civil case such as this involves prolonged litigation; anything from 5 upto 20 years.

On July 26, 2007, Amitha had another breakthrough. This occurred when the Sri Lanka Medical Council ruled on the case of the doctor charged with examining Lasantha while he was in police custody. The council had been deliberating this case since October of 2001—nearly six years. It finally found the examining doctor guilty of eight offenses and suspended him from practice for three years.

Doctors of this kind are known as Judicial Medical Officers, and in this capacity they have quite specific responsibilities. This doctor's offenses as a J.M.O. in Lasantha's case are telling in themselves: They were mostly matters of omission. He had not asked Lasantha for his consent before examining him. He did not ask Lasantha the names of the police officers who assaulted him. He failed to give Lasantha a comprehensive examination—neglecting even to take his blood pressure. He failed to record any diagnosis nor to recommend hospital admission. In all, the doctor appears to have spent fifteen to twenty minutes with Lasantha. But we do not know, for that is by the doctor's account, and he made no record of his procedures.

One of the doctor's offenses involved what he did, not what he failed to do. He examined Lasantha in the presence of the police officers in the station where he had been tortured.

The facts of Lasantha's case and of Amitha's long search for justice, are matters of record now. And Amitha, as she pursues the cases still pending, will add more to these facts and records. What do we see when we look closely at them? What do the records tell us about the matter of justice in Sri Lanka?

There is, first, the question of time. And related to this is the question of care and carelessness as they exist side by side in Sri Lanka.

Lasantha was dead within eight days of his arrest in the spring of 2000. Whether or not a court would have found him guilty of an offense we will never know, because he never got that far. Guilty or not, he was deprived of justice. And we now know that the examining physician spent all of fifteen to twenty minutes (and quite possibly less) examining the patient. As the medical council concluded, a proper examination would very likely have saved Lasantha's life.

These facts stand against the seven years it has (so far) taken Amitha to bring justice to the case of her brother.

The medical council's ruling in the summer of 2007 is the most recent to be issued in Lasantha's case. When we read it, we cannot but be struck at the meticulous care taken in the council's deliberations over a period of several years, during which all efforts were made to provide the examining physician an opportunity to defend his conduct.

All Sri Lankans are due the amount of time that is required, however much, in the delivery of justice. All Sri Lankans deserve the attention to procedure the medical council brought to the case of the J.M.O. who examined Lasantha. But when this time and attention are placed next to the swiftness of Lasantha's torture and death and the carelessness with which the doctor handled his case, a paradox emerges: When time and attention to procedure are given to some and withheld from others, they stand as a perversity.

We must also recognize in the records the presence of what many civil society activists concerned with the judicial system term "the network." The network consists of judges, lawyers, police, and doctors who work in concert—not for the proper administration of justice, but for the benefit of one another. A judge will collude with the attorney who is supposed to represent a defendant. Or he will collude with the police. Or the lawyer for the defendant will collude with the police. Or (as in this case) a doctor will collude with the police in his official capacity as a J.M.O.

Note the doctor's evident attitude in Lasantha's case. The examination was cursory by any reasonable measure. The physician examined Lasantha in the presence of the police. He failed to recommend hospitalization because (as his counsel testi-

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fied) he assumed the police would continue to hold him. These attitudes, these assumptions, this kind of conduct—all are prevalent in the Sri Lankan system. It is how the network functions. The presence of the network is the reason many of Amitha's friends and acquaintances advised her not to embark on her search for justice in the first place.

But here we come to a question that is everywhere evident in the record even if it is nowhere stated. This concerns the power of the powerless. We must not overstate the present position. Abuses—police abuses, medical abuses, and judicial abuses—are thought by many to be increasing in Sri Lanka, not declining. Amitha is in many respects something other than typical. Many cases such as hers do not end in justice. But Amitha brought sufficient courage and determination—a certain hardness, we can say—to her search for justice. And she proved that the powerless can assume power over their lives and circumstances.

There is another way to put this: If Sri Lanka is to cure itself of its ills, Amitha represents the future, while the guilty in the death of her brother represent the past. Or still another way: In Amitha, a person of complex emotions but someone who is also in control of them, we find a certain kind of hope. It is the possibility of hope without bitterness.

2. The Case of Anthony Fernando.

The picture of Anthony Michael Fernando most commonly circulated shows a young, smiling man looking slightly down into the camera. So perhaps, one surmises, he is tall. He wears a sport shirt, open at the neck, and his hair is neatly trimmed. In the background are what appear to be Gothic windows: He is standing, perhaps, in front of a church facility, or a community center.

One searches this small snapshot in vain for some suggestion of the extraordinary fate that befell Tony Fernando, as he is known, when he entered the space of the Sri Lankan justice system. But there is none. So, in the end, it is the ordinariness of this man that bears interpretation. In Tony Fernando we find the tragic ordinariness of extraordinary injustice in Sri Lanka—its reach into everyday lives.

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Tony Fernando's story extends back many years now, for justice delayed is a considerable part of it. In 1997 he was employed as the Christian Emphasis Secretary of the Young Men's Christian Association in central Colombo. One day he fell and suffered injuries—a regrettable but common enough experience. Little that happened afterward was common, however—at least not by any reasonable standard. Tony Fernando fell at the Y.M.C.A., one might say, and did not stop falling until he landed in exile in Canada, where he now lives.

After his injury at the Y.M.C.A., Fernando filed a claim for workman's compensation. When the matter came before the Deputy Commissioner for Workmen's Compensation, an amount of offered which Fernando found unacceptable and his claim for compensation for a work-related injury was thereafter dismissed.

Legal motions followed—Fernando filed four of them. The first two alleged that the deputy commissioner's ruling violated his constitutional rights.

Time passed. In November of 2002 the Supreme Court considered the two motions jointly and dismissed them. Two months later Fernando filed a third motion relating to a legal point: He alleged that that the consolidation of the first two claims and their joint dismissal effectively denied him a fair trial. This motion was dismissed almost immediately. Fernando's fourth and most fateful motion followed in February of 2003. In it Fernando objected that the chief justice, Sarath Silva, and the two other judges who considered his third motion had no right to do so: They were the same judges who had dismissed the first two motions. This point would later receive the support of numerous legal experts, including the U.N.'s Special Rapporteur on the independence of judges and lawyers, Param Cumaraswamy.

But it is at this point that the substance of the case, one way or the other, is lost—or changes fundamentally in nature. From this point forward the question ceases to be Fernando's compensation claim and becomes the nature of justice (or injustice, more properly) in Sri Lanka. "I am not going into the merits of the case," Cumaraswamy would say later. "The question here is whether it is proper for the chief justice, after having been made a party to a case, to sit on the panel and adjudicate on the matter."

We mentioned that the fourth motion was fateful, and indeed it was. With it, a fall while on duty at the Y. M. C. A. became, perversely enough, an international cause célèbre.

Fernando filed his final motion on February 5th. The following day the motion was heard, and during the proceedings Chief Justice Silva, a man of wide and controversial repute, considered that Fernando spoke too loudly in addressing the court. Silva issued a summary judgment: Fernando was sentenced to a year's "rigorous imprisonment"—that is, hard labour—for contempt of court. He began serving his sentence that day.

Tony Fernando faced abuse almost as soon as he entered prison. He developed an asthma condition that went untreated. He was forced to sleep on the floor with his legs chained, which worsened his medical condition. On being transferred from a prison hospital back to his cell, he was repeatedly assaulted, which resulted in spinal injuries. In less than a week he was unable to get out of bed.

A month after his incarceration, Fernando filed a case alleging violation of his fundamental rights according to the Sri Lankan constitution. He also appealed Silva's contempt ruling. The rights case,

at writing, is still pending; the appeal on the contempt charge was dismissed in July of 2003, four months after it was filed.

Tony Fernando was released from prison eight months into his sentence, in October 2003. While in prison custody, he filed three legal complaints: one with the U. N. Human Rights Committee regarding the contempt charges and the torture that followed; one (noted above) with the Supreme Court alleging torture while he was imprisoned, and one a criminal case against two prison guards allegedly responsible for his torture. At the time of writing the fundamental rights case before the Supreme Court is still pending and the criminal charges against the two prison guards has not been pursued by the state and the United Nations Human Rights Committee has made its decision, holding that Sri Lanka as the state party has violated Tony Fernando's human rights by illegal detention, despite of the court decision to imprison him and requesting the government to pay compensation for the violations of his rights. The government has refused to pay the compensation on the basis that since the imprisonment was a result of a judgment of a domestic court it is not in a position to take any action on the matter.

Events unfolded swiftly at this point. In December of 2003 he received anonymous death threats by telephone, during which time he was told to withdraw all three cases. A month later the U. N. Human Rights Committee appealed to the Sri Lankan government for Fernando's protection. (None was forthcoming.) A month later there was an attempt on Fernando's life, when an unidentified man attacked him on a Colombo street and covered his mouth with a handkerchief containing a substance that proved nearly lethal.

On 30th August 2004, Tony Fernando appealed for asylum in Hong Kong. He left Sri Lanka on the 16th June 2004, and seven months later settled in Surrey, Canada where he now resides. His wife and children joined him in Surrey on the 16th December 2004. He still awaits two judgments.

There is a striking pettiness in the Tony Fernando case. Why did the Supreme Court act to turn such a minor matter into a case with international implications in the first place? A pettiness and a lack of all reasonable proportion. Sri Lanka, unlike India and numerous other jurisdictions, has no law covering contempt of court procedures. Judges can rule as they see fit and sentence defendants accordingly. It was in this circumstance that Tony Fernando received a year's hard labour (and then all the mistreatment that went with it) for the alleged offense of raising his voice in court. Again, the question is, "Why?"

Some fundamental features of Sri Lanka's critically dysfunctional judicial system are evident in the Fernando case. To understand them is to answer the above-noted questions. To understand them is also to recognize the fundamental problem of hierarchical consciousness in Sri Lanka and how it is manifest through a judicial system that is nominally based on modern procedure.

The most prominent of these characteristics is an obsession with form within the system. One finds among attorneys and judges alike in Sri Lanka an almost pathological preoccupation with rules and procedure. Form, in this sense, is ordinarily essential for the delivery and administration of equal justice. In the Sri Lankan case, form as we mean it here performs a different function. Its purpose is to mask what amounts to a near anarchy of injustice in Sri Lankan courts. So long as form is observed, practically anything goes.

Tony Fernando's true offense was to insist that law and procedure be applied as they were originally intended. This amounted to an attack on another of the core features of the Sri Lankan system: its impulse to preserve the prerogatives of arbitrary power. So we arrive at the essential contradiction exposed in the Fernando case—that is, behind the curtain of rules that the judiciary so carefully maintains, there are no rules.

The question of arbitrary power is related to another involving distance. Distance between ruler and ruled is, in essence, a feature of pre-modern political systems. It is by way of distance that arbitrary power is maintained. And it was another of Tony Fernando's offenses that he denied the judiciary's right to a distance it considered customary.

What is finally brought to light in the Fernando case is the problem of impunity and the judiciary's underlying desire to preserve it. The true tragedy of Tony Fernando's journey through the courts—even before it has ended—is that there is nothing out of the ordinary in it.

3. The Case of Lalith Rajapakse.

It is common, when making one's way among the many victims of official abuse and human rights violations in Sri Lanka, to find people who have been waiting for three, four, or five years for their cases to be decided. Injustice may arrive swiftly—without notice, within a few seconds, out of nowhere. Then the years go by as the victim seeks redress. It becomes, in the end, another form of victimization, another form of injustice, not unrelated to the matter of official impunity. One is made a victim of abuse, and then one is made a victim again in the course of seeking to rectify the wrong.

Lalith Rajapakse was nineteen on the night of April 18, 2002. He is, at this writing, twenty-four, physically impaired and psychologically traumatized and still awaiting justice in the events that ensued.

On the night in question, several police officers arrived at the door of a friend's house, wherein Lalith was sleeping. For no reason evident to him at the time he was awakened, arrested, and taken to the police station in Kandana, a town about 20 kilometers north of Colombo. The torture that was

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Justice delayed, as the age-old principle holds, is justice denied. Yet for many Sri Lankans, justice delayed is all there is in the best of outcomes: It is a rare case that is accepted at the U. N. or by any other international organization devoted to upholding the rule of law. Most of the time, the universe of the law ends at the national borders. Lalith's cases thus underscore a very uncomfortable truth in the struggle for justice in Sri Lanka: Even when cases of abuse and human-rights violations are taken up at the international level, the impunity with which the Sri Lankan authorities have long acted can still prevail.

to become central to his case began immediately: Lalith was beaten even in the jeep into which he was bundled outside his friend's house.

The U.N. Human Rights Committee later detailed Lalith's treatment at the police station: "He was forced to lie on a bench and beaten with a pole; held under water for prolonged periods; beaten on the soles of his feet with blunt instruments; and books were placed on his head which were then hit with blunt instruments."

These kinds of torture are familiar to those who study police practices in Sri Lanka. The last is intended to inflict internal injuries without leaving external marks. In Lalith's case, his grandfather eventually came to the police station and found him, slumped and lifeless, in a cell. He lay unconscious in a hospital for fifteen days afterward and was unable to speak coherently for nearly a month. He remained in treatment for another month; thereafter, the psychological stress prevented him from work. For two years Lalith lived in hiding, and he and his family survived on charity.

Three charges were filed against Lalith, and the torture was intended to extract a confession validating them. But none held up. There were two allegations of theft, which collapsed nearly a year and a half after they were filed, when it turned out the supposed victims of robbery had never claimed Lalith had stolen anything from them. The third charge was for allegedly obstructing the police in the discharge of their duties. It was not quite three years before a magistrate court acquitted Lalith of this charge.

Lalith took action on his own part. In May of 2002, just out of the hospital, he filed a case in the Sri Lankan Supreme Court charging that his fundamental rights, as guaranteed under the constitution, had been violated. His grandfather was a party to the case. A few months later the Attorney General, in apparent response to pressure from the U. N. Human Rights Committee, ordered an inquiry into the events that had led Lalith and his family into the courts. This led to a case in the High Court.

But the delays and irregularities have been many. Chief among them has been the pressure applied to force Lalith to withdraw from the legal process.

Threats against Lalith and his family have been more or less constant. And there are other details—bizarre, petty details that reflect certain routines the police often follow. A month after Lalith filed his fundamental rights case, a local fish trader (and a longtime acquaintance of Lalith's grandfather) was asked by the Kandana police to poison the fish the grandfather next bought. The fishmonger was also asked to let the police know where the grandfather liked to drink, so that his liquor, too, might be poisoned.

A few months later came threats to Lalith's life. These arrived by way of anonymous figures claiming to speak for the Kandana police—a claim the police denied. All the while, the police officers alleged to have tortured Lalith were permitted to continue serving in their customary posts. It was not until December of 2004 that Sub Inspector S.I. Peiris in Kandana and two other officers were barred from service and transferred. Sub Inspector Peiris was also indicted under the Torture Act of Sri Lanka.

Lalith's efforts to pursue justice have been more successful than those of many other Sri Lankans. And it is because of this partial success that his case affords us a particular window into the judicial system, its workings, and the limits of international authority.

In May of 2005, the U. N. Human Rights Committee accepted Lalith's appeal, overruling the objections of the Sri Lankan government as to the admissibility of the case on the grounds that his human rights were violated. A little more than a year later, the committee ruled in Laith's favour: "The delay in the disposal of the Supreme Court case and the criminal case amounted to an unreasonably prolonged delay," the committee noted in its decision.

This represented a significant victory for Lalith, for his family, and for those human- and legal-rights organizations that have supported Lalith since he first filed his cases. But at this writing, in September of 2007, neither the Supreme Court case nor the criminal case against Sub Inspector Peiris has been settled.

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Lalith's cases thus underscore a very uncomfortable truth in the struggle for justice in Sri Lanka: Even when cases of abuse and human-rights violations are taken up at the international level, the impunity with which the Sri Lankan authorities have long acted can still prevail.

In September of 2006, with Lalith's cases still pending (along with many others), Chief Justice Sarath Silva sought to elevate this impunity to the level of legal principle. Once again, the thought appeared to be that anything was permissible so long as it had the appearance of proper procedure.

Chief Justice Silva's ruling came in the case of a man charged with conspiracy to overthrow the government—a case connected with the war between the government and the Liberation Tigers. The defendant, having been sentenced to ten years of "R. I.," or rigorous imprisonment—that is, hard labour—successfully appealed to the U. N.'s Human Rights Committee. The committee ruled in the defendant's favour—a ruling Sri Lanka is legally committed to respecting. Silva, in an especially tortured instance of contorted legal reason-

ing, responded by invoking "the sovereignty of the People" to assert that Sri Lanka was, in fact, not bound to respect the U.N.'s rulings, despite being a signatory to the relevant covenants!

Among human-rights and legal-rights advocates and activists, the 2006 decision is considered a landmark in the all but complete corrosion of Sri Lankan justice.

4. The Case of Palitha Tissa Kumara.

Excess is a common feature of the Sri Lankan justice system. In one form or another one finds it in almost all the research one may conduct into the workings of the police, the lawyers, the judges, and the doctors. There is violence, there is abuse of a defendant's rights, there are threats and intimidation, there is false testimony, there are excessive sentences, there are unwarranted delays. Every so often we find a case that reminds us of the pathology underlying these forms of excess. At its root, the problem of injustice in Sri Lanka is a psychological problem. If we look at this carefully, there are suggestions that the contempt authority displays for ordinary citizens, are a form of self-contempt.

The case of Palitha Thissa Kumara is such a case. There is no other way to explain some of its grosser excesses but by way of a psychological analysis.

Some of the facts in Palitha's case will by now be familiar in our brief readings of other cases. The case begins on February 3rd, 2004.

Palitha was a craftsman from Matugama in the district of Kalutara. He was skilled in the arts of painting and stone carving. On the morning of February 3rd, six police officers arrived at his home and asked him to come to the station in Welipenna, a nearby town to paint the police emblem on the stationhouse in preparation for Sri Lanka's celebration of its day of independence. Palitha agreed. Any aspect of Palitha's encounter with the local police end at this point in his story.

Before the officers and Palitha reached the jeep in which they were to drive to the station, one officer turned and, out of nowhere, pistol-whipped Palitha to the point of causing an open wound on his chin. The police thereupon threw Palitha to the ground and assaulted him further before piling him into their vehicle.

On the way to the station the police stopped to arrest another man, known as Galathaga Don Shantha Kumar. Don Shanta would soon become a prominent figure in Palitha's case. He, too, was tortured; he, too, was accused of plotting robberies.

At the police station, an all too predictable round of torture began. According to Palitha's account, the police officer who had pistol-whipped Palitha beat him with a cricket pole on his neck, arms, head, spine, and knees. He then began demanding—again, out of nowhere—that Palitha surrender the bombs and weapons in his possession—bombs and weapons he had planned to use in the armed robberies he had been plotting. Don Shantha was there. The police officer made it known that the same would be coming to him.

The torture continued for approximately two hours, according to Palitha's later testimony, during which time Palitha repeatedly denied any knowledge of bombs, weapons, or robbery plots. The abuse stopped only when about eight other officers intervened, one of them taking the wicket from the violent officer's hands.

The assaulting officer then brought another detainee into the room. His name was Thummaya Hakuru Sarath, and he suffered from tuberculosis. The officer then issued what must stand as one of the most grotesque orders in the long, often-grotesque history of police abuse in Sri Lanka. Sarath was to expectorate into Palitha's mouth so as to infect him. More than a year later, when the matter was in dispute, Sarath gave a statement confirming that he had been forced to act in a manner deliberately intended to contaminate Lalith. It also emerged the Sarath, too, had been beaten—a victim himself.

Unable to stand, in and out of consciousness, Palitha remained in a jail cell for several days, during which more torture ensued. He was finally taken to hospital—or, rather, hospitals, for there were two, both of which refused to admit him (one refusing twice) despite injuries that were by this time evident.

Back at the jail cell, the assaulting officer produced a grenade. Palitha was forced to leave his thumbprint in wax, whereupon the print was transferred to the grenade. The officer had already forced Palitha to sign a confession of guilt without reading it to him.

It is now the 6th of February, three days after Palitha was taken from his home. He is taken back to one of the hospitals that had refused him admission. There "a man wearing a pair of shorts," according to court documents, signed some papers. Palitha was then returned to the police station and later that day made a brief pass through a magistrate court before being admitted at a third hospital—a prison hospital in the town of Kalutara.

Palitha remained in prison until his release on bail on July 28, 2004, after four months and twenty five days in jail. But during that time, he had filed two cases. One was a fundamental rights case alleging that the police had violated his rights as guaranteed in the constitution. The other, filed by the Attorney General in High Court, charged Kaluwanhandi Garwin Premalal Silva, a sub-Inspector and Palitha's's principal assailant while in police custody, with causing torture by beating him with a pole and forcing a T.B. Patient to spit into his mouth.

Predictably enough, the threats against Palitha

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and his family began almost immediately. In mid-June he was offered five hundred thousand rupees, about five thousand American dollars, to withdraw his cases. In two separate incidents, he and his family received messages via third parties that his wife and child would be killed if he did not cooperate by dropping his complaints.

The court proceedings in Palitha's cases are excessive in their own right. The Supreme Court heard Palitha's fundamental rights case during several sessions in the course of 2005. The man in the shorts at the hospital, who had routinely signed police papers, turned out to be an assistant judicial medical officer, or A.J.M.O. His report on Palitha listed thirty-two separate injuries on all parts of the body, from scalp to feet. Among them were lacerations, multiple contusions, tinnitus in one ear, and a fractured anklebone. All but the fractures were judged "non-grievous." Yes, the doctor noted in his report, these injuries could have been sustained as the victim claimed they were.

The police presented an entirely different story. Palitha had been armed with a grenade when they arrived at his house, and it had been necessary to subdue him. The injuries sustained reflected the use of the minimum force required under the circumstances. There had been no torture; there had been no incident involving Sarath, the man with TB.

Palitha won a modest victory in his fundamental rights case. On February 17th, 2006, the Supreme Court ruled that, given the danger Palitha presented when he was arrested—meaning the grenade and the threat he would set it off—the violence at the time of his arrest was justified. The appearance in magistrate's court, although required by law within twenty-four hours of arrest, was lawful. However, the court accepted Palitha's account of torture at the police station and ruled that his constitutional rights had been violated. The judgment—excessive in its paucity, one might say—called for restitution in the amount of five thousand rupees from the police officer who assaulted Palitha—about fifty dollars—and twenty-five thousand rupees from the government as damages and compensation for costs.

Those supporting Palitha's case, despite its disproportionate award and the partial findings in the police officer's favor, counted the Supreme Court ruling an advance. But an unusual thing occurred some months later. On October of 2006 the High Court found in the police officer's favour. Sub-Inspector Silva was acquitted of all charges of torture—the judge ruling, in effect, that violence to the extent evident in Palitha's medical report was not excessive. The High Court judgment is, at this writing, on appeal.

We can but speculate, at this writing, as to Sub-Inspector Silva's motivations in his handling of Palitha's case. It may have been that a crime had been committed and he was desperate to find a perpetrator to demonstrate his efficiency. Such often occurs. But it is not clear in this case. What is clearer are aspects of the case that require no further evidence.

There is a pathology of disturbance in Palitha's case. The excess of violence—against three detainees, not only Palitha—is to be seen in numerous other instances. It is, indeed, not the worst case on record in this respect. The attempt to pass on a potentially lethal disease is another question. It indicates a depth of contempt that requires professional, clinical consideration.

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The problem of injustice in Sri Lanka is, of course, a legal matter. There are also clear questions of a political and sociological nature. A case such as Palitha Tissa Kumara's, however, urges the prominent inclusion a psychological perspective. The problems associated with a dysfunctional police apparatus and a similarly impaired judicial system cannot be solved without reference to questions such as contempt and self-contempt, the self and the "other" in Sri Lanka, and the consciousness of hierarchy that infuses every human relationship with a dimension of "above" and "below." It is such complexities of consciousness that lead police officers to act as Sub-Inspector Silva did—and judges to defend him as they did in two separate courts.

5. The Case of Angaline Roshana.

The laws of the country are too weak." This observation was not made by one of Sri Lanka's uncounted victims of police abuse or official torture. Nor did a lawyer defending a victim in court articulate the thought. The remark belongs to a police officer who was, at the very moment he made it, in the act of torturing an ordinary citizen. Weak laws were the reason Angaline Roshana, who was twenty-five at the time, had to be assaulted in police custody and deprived of her legal rights. This was a police inspector's reasoning on December 4, 2000, when Angaline was in police custody in the surburban town of Narahenpita, in the hub of central Colombo (zone 8). The law had to be broken to keep the law.

As it happened, in Angaline's case the law did not prove to be too weak. She eventually won a fundamental rights case in the Supreme Court and, much later, a High Court judgment against the officers charged with assaulting her. Her story, then, ends with justice being served. But it is a rare story, an exception in Sri Lanka that regrettably proves the rule.

Angeline was at home on the evening of December 3, 2000, when at around 7:30pm, a group of men in civilian clothes arrived in a private vehicle and forced her to accompany them to the police station. No reason was given. When Angaline's family protested, questioning the identity of the men, one of them (a man who later turned out to be the Officer in Charge (OIC) of the Narahenpita Police Station) threatened to break their teeth, and forced Angaline into the vehicle before speeding away.

The police station was not their immediate destination. Instead, Angaline was taken to the home of an affluent local woman for whom she had previously worked as a washerwoman. The woman had complained to the police that some jewelry had been stolen and had accused Angaline of the crime. Among the missing items was a watch, which the woman said was worth half a million rupees—about five thousand American dollars.

The woman accusing Angaline was a lawyer and appeared to be familiar with the police officers—perhaps by way of her legal work. While the woman, her family, and the police officers drank and socialized, Angaline was forced to search for the watch over a period of four to five hours.

Having denied any knowledge of the theft, and having failed to find the missing property, Angaline was then taken to the police station shortly after midnight. There she was detained overnight, severely tortured, and forced to sign a confession. Throughout the course of her detention, the police officers frequently threatened to hang her up and beat her; these threats were usually made when the Angaline's former employer visited the police station.

Mr. Sanjeewa, a lawyer from the Human Rights Institute, and Dr. Nali Swaris visited Angeline while in detention, and demanded that Angaline's legal rights be observed and that she be produced before the court without further delay. OIC Shelton Saley supposedly laughed sarcastically, and remarked; "the laws of the country are too weak. We are breaking the law to strengthen it."

The act of taking a person into custody, without showing any police identification or wearing the police uniform, amounts to kidnapping. Moreover, Roshana was not informed about the reasons for her kidnapping or arrest. Furthermore, she was tortured to obtain a confession, and she is still being illegally detained.

Only on the following day, December 5th, did Angaline appear in the magistrate court. On the magistrate's orders, the Judicial Medical Officer (JMO) conducted an official medical examination of Angaline's injuries. The JMO's formal report identified seven contusions; the left shoulder, left upper arm (front and back), right shoulder, left and right buttocks, and upper left thigh. The report also indicates that Angaline's injuries were two-four days old, and caused with a blunt object consistent with the assault. His report is dated 7th December 2000.

At the trial Roshana herself, and several other persons gave evidence. The police officer also gave evidence, accepting the arrest but denying that any torture had taken place. The trial was protracted and lasted for a period of almost six years. The High Court judge held that the charges were proved beyond reasonable doubt.

Having received legal assistance from the Asian Human Rights Commission from the time of her arrest onward, Angaline took her case to two courts. The Supreme Court ruled in June of 2002 that Saley, the OIC accused of her torture had violated Angaline's fundamental rights by way of torture and illegal detention; compensation of 100,000 rupees was awarded.

In apparent retaliation, the police subsequently charged Angaline with theft in the magistrate's court—a case that was dismissed for lack of any evidence. In July of 2007, the court found OIC Saley and police Constable, Stanley Tissera, guilty of committing a gross human rights violation against Angaline. It is believed to be only the third such conviction under the UN Convention against Torture (CAT) Act of 1994, to which Sri Lanka is a state party. The act calls for a mandatory sentence of seven years' "rigorous imprisonment," or hard labour. Both officers were so sentenced; an additional year was added for each officer in lieu of fines in the amount of ten thousand rupees.

Angaline Roshana and those who supported her can count her long ordeal a victory. What is the truth at the core of this outcome?

Angaline triumphed, in effect, by subverting what must be recognized as the existing order. She did this by upholding the law, not by breaking it. So does her case lead us to the paradox at the heart of the Sri Lankan legal system—a paradox perfectly captured in the police inspector's remark to Angaline's family friend while she was in detention.

The paradox is very simply this: Those charged with enforcing the law in Sri Lanka are the very people who least respect it. Those who are supposed to uphold the law are the very people who often, and dangerously, break it. At the core of their reasoning is a distinction between law and order that is not valid.

The convictions Angaline won under the CAT Act are to be welcomed. But given the established record of the nation's police and courts, three convictions under these laws over the period of thirteen years is simply not enough. The police inspector was wrong: Sri Lanka's laws require strengthening, certainly, but as Angaline demonstrated, they are sufficient to deliver justice. It is their enforcement that is critically weak.

The impact of the global campaign against terrorism

Perhaps there is an area in which the plight of lawyers in more developed countries and others find similarities. That is the area of new laws which are promulgated under the doctrine of the campaign against terrorism. Almost all the rules that were once held sacrosanct are now being challenged and even abandoned. The most obvious example is the relativisation of the principles relating to torture. The rank that the right against torture held in the human rights discourse has been undermined in many ways under the pretext that, in the pursuit of the elimination of terrorism, the

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considerations against the use of torture is no longer of the highest priority. Similarly, the rules relating to illegal arrest, illegal detention, searches of persons and premises and almost every other liberty is not being questioned when it comes to the issue of categorizing a problem under anti-terrorism. While in developed countries, these problems take the form of undermining these principles, what takes place in a less developed country is to evolve principles which are the very opposite of those enshrined in the Universal Declaration of Human Rights and other UN conventions.

It has become part of the doctrine of several states that killing of arrested persons, either by way of custodial death or disappearances is a legitimate means of dealing with someone suspected of terrorism. The criterion used for judging a terrorist or someone who aids and abets terrorism is also elastic. The normal processes of criminal investigations, prosecutions and trial by an independent judiciary are considered now, more and more, as rights that these persons are unworthy of having. Such changes of mentality achieved through tremendous amounts of propaganda work, has its impact on the actual practice of law before courts. The lawyers who undertake the work of the defense of such suspects themselves come under the suspicion of the community as well as the state. The tremendous attitudinal changes in the judiciary itself often makes it an uphill task for a lawyer to pursue even a very simple application on behalf of his clients who happen to be of this category. We are living in a time where a massive scale of political propaganda is displacing some of the most strongly held beliefs regarding equality before law and fair trial.

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The changes which take place in the process of pursuing suspected terrorists are extended into the normal criminal justice process without much difficulty. Restraint cultivated over long periods of time among the law enforcement officers break down within a very short time when they are encouraged to contravene principles of discipline in dealing with alleged terrorists. Once lost, these hardened habits of discipline do not come back easily. Experience shows that these habits are lost for a whole generation and as a result, a new generation of officers may have their training in a milieu in which the strong habits of restraint in the use of power is not cultivated at all. This same process has often been extended to the departments of prosecutors as well as to the judiciary. Thus, the rule of law and democracy may suffer greatly form the absence of system operators who have cultivated habits of more developed criminal justice practices. All this affects the role of the lawyer.

In countries where they have been long periods of the operation of anti-terrorism and emergency laws, there are deliberate attempts to absorb the lawyers also, into the network of corruption that develops in these times. Sadly the numbers of lawyers who fall into that trap are not only a few. These pressures have tremendous repercussions for those conscientious lawyers who intend to practice their profession with dignity and honour.

Trying to find solutions to the lawyer's problems

All these matters raised above pose questions to organisations such as Lawyers for Lawyers and the Asian Human Rights Commission as to how to engage with the lawyers who face such problems in order to develop various means to address them. While it is essential to help lawyers who face serious problems on a one-to-one basis, it is quite obvious that that alone is not sufficient to deal with the type of problems and obstructions that the lawyers face today, which were discussed to some extent above.

I venture to suggest a few initiatives that may be useful in trying to address them:

Cultivating understanding on problems faced by lawyers

So far there are no forums for ongoing discussion with a view to develop a better understanding of the problems faced by lawyers, particularly the type of problems mentioned above. While there are organisations such as the International Bar Association, and Law Asia, the approaches of such organisations are of a more conventional type and the space available for creating greater awareness of the basic threats to the very notions of working as a lawyer cannot be adequately addressed through available means. The living conditions of more developed countries, and the ones which may be called less developed countries are so vastly different, particularly in the area of legal systems and the protection of rights through the interventions of legal representation by lawyers. The understanding of the practical problems involved require greater knowledge about the ground realities and this cannot come about otherwise than through very deliberately designed ventures practiced over a considerable period of time. At the moment neither such knowledge nor such contact exists in a significant manner.

I believe that if studies and deliberations can take place with the close cooperation of lawyers who are placed in disadvantaged positions and others, we may be able to generate knowledge that could be taken to significant forums such as the United Nations, the European Union, universities and also to bar associations who may be able to play a greater role in finding ways to address these problems. Such a body of knowledge needs to be created by the efforts of some pioneers who would have to devote time and resources to evolve an adequate beginning in this work. It is in this area perhaps that some close consultation should be developed in a way that some difference can be created to the dismal situation faced by many lawyers in such countries.

Encouraging volunteer lawyers from developed countries to visit their counterparts in more disadvantaged circumstances to evolve forms of collaboration to strengthen their situation

The differences between the conditions under which the work of being a lawyer takes place in more developed countries and other is so very different that it may even be impossible to grasp these problems without such direct contacts and observations. Perhaps lawyers from more developed countries can be encouraged to visit others and to observe for themselves the difficulties faced by their counterparts. Their observations may play a complimentary role to the suggestion I have made above regarding the creation of a body of knowledge relating to these matters. Such volunteers can also develop forms of solidarity which may in the long run lead to the development of strategies in dealing with these problems in general as well as pertaining to individuals.

To make efforts to bring in the structural and system issues relating to legal systems into discourses on the rule of law, democracy and human rights

Relative strengths and weaknesses of legal systems themselves which create better or adverse circumstances for lawyers and litigants have not become a topic of significance in discussions relating to the rule of law, democracy and human rights. Words such as 'judges', 'prosecutors', 'police', 'court houses' are often used on the assumption that such words carry similar connotations under all legal systems. However, in reality these words may carry completely different meanings under different circumstances. In a developed democracy it would be hard to imagine that the word 'judge', may carry the connotation of a political stooge or a corrupt person. However, there are many countries in which people associate such connections with such a term. A prosecutor that makes his or her point in order not to prosecute may seem ridiculous to those who are used to working under a credibly functioning legal system. However, under different circumstances, the role of the prosecutor may be directed towards avoiding prosecuting persons for the causing of disappearances, torture, extrajudicial killings and even in regard to corruption. To the citizen and the lawyer who lives in these circumstances, the idea of a prosecutor may carry ambiguous meanings. What is even more complicated is the word 'policeman'. To many persons in the countries I have mentioned above, a policeman would mean a torturer, a person with extremely poor education and perhaps the most corrupt person within the state structure. In their psychology, avoidance of a policeman is of enormous concern like that of a boogeyman in child psychology. A court house may mean the messiest place with hardly any decent facilities where delays are most common and where nothing can be done without the passing of money from hand to hand. Thus, any assumption that the basic meanings of the words associated with rule of law carry similar meanings in all locations may be quite misleading.

When the enormous difference of meanings, due to structural and systemic factors is ignored, a meaningful discourse becomes almost impossible. This is one of the reasons that a discourse on rule of law, democracy and human rights is not given the due seriousness which it deserves very often, particularly in countries with less developed legal systems.

It should be the duty of those who are aware of these contradictions to bring them to light in order to develop new perspectives to evolve more meaningful discourses on these matters. At the moment, due to insufficient interventions of persons who are aware of these contradictions some of these discourses between the countries remain stagnant and sterile.

The Asian Human Rights Commission and its sister organisation the Asian Legal Resource Centre, which has realised these problems some time ago, started a bimonthly publication entitled Article 2 in 2001 and this has been regularly published since then. The purpose of this publication was to draw attention to the problems relating to the implementation of human rights, particularly with the obligations of the state to provide an effective remedy which can be determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state and to develop possibilities of judicial remedy. In our studies published in issues of Article 2 we have provided detailed information about structural and systemic issues which defy the attempts to improve rule of law and human rights in many countries. We have also pursued this same objective by the development of clinics in many countries to record, on a routine basis, the problems of implementation and we have given publicity to these problems by various forms of communications such as Urgent Appeals, statements, submissions to the United Nations and state authorities, articles to newspapers in various languages as well as oral and video interviews to the media.[16]

However, in our experience we have not seen any significant attempts to deal with structural and systemic issues in a systematic manner. We are also of the opinion that such efforts may not, in the near future, emerge from the efforts of the UN agencies due to various pressures by the state parties who try to confine such international efforts to individual violations and most limited interventions. Perhaps at this stage, it is from more independent organisations that efforts must be made to bring the structural and systemic aspects relating to rule of law, democracy and human rights to the forefront of the discussion.

Some improvements can also be made in the manner of helping lawyers facing special difficulties

When the enormous difference of meanings, due to structural and systemic factors is ignored, a meaningful discourse becomes almost impossible. This is one of the reasons that a discourse on rule of law, democracy and human rights is not given the due seriousness which it deserves very often, particularly in countries with less developed legal systems.

This is an area, as far as I am aware, that Lawyers for Lawyers have had a special interest in for a long time. This mode of assistance still remains quite important and such help could go a long way in terms of repression and attacks on human rights defenders that have been faced in many countries. Perhaps a special category of lawyers who need help are those who are subjected to contempt of court proceedings or other forms of punishments such as the withdrawal of their licenses to practice as lawyers, purely due to asserting their independence and their failure to comply with the demands to adjust to various compromises that the system, or sometimes, superior judges force on them. Often lawyers facing such problems become isolated as sometimes, even bar associations distance themselves due to the fact that the leaders of these associations fear repercussions into their own practice if, as a matter of principle, they were to support these lawyers. Sometimes solidarity does not germinate due to the fact that the lawyers often feel that, despite all protests, particular types of repression pursued by the superior court judges cannot be easily defeated. They find protests to be futile and often withdraw from their normal habits of fighting for a just cause. Under these circumstances, international solidarity can mean a lot. Perhaps one particular form of solidarity that can be devised is to develop ways to make thorough studies into such cases and to provide well documented studies for relevant organisations to act upon. Every time when one such lawyer faces such a difficulty is helped in a significant manner, it also liberates the others and improves the level of moral of the legal profession. Perhaps in this internet age, better networks need to be developed to obtain information faster and to assist more speedily.

The combination of the absence of the normal resorting to police interventions and the absence of the normal interventions of civil society has resulted in this grave crime.

Try to assist the UN Special Rapporteur on the independence of judges and lawyers to exercise his mandate successfully

It is well known that the mandates of the UN Rapporteurs as well as UN sub-committees are successful to the extent that independent organisations provide adequate information and other forms of technical support to such Rapporteurs and UN agencies. The UN Special Rapporteur on the independence of judges and lawyers is a relatively new mandate within the UN system. Perhaps organisations like Lawyers for Lawyers, the Asian Human Rights Commission and others must find ways to support this office by documenting relevant problems relating to the legal profession and submitting these to the Rapporteur. This may help the Rapporteur to improve his own understanding about the problems and also to take the matter up with the relevant states and the relevant UN bodies also. Perhaps we could contribute to a much greater output from this office through our collective and collaborative efforts. One example of such collaboration was an open letter written by a group consisting some judges, lawyers and human rights defenders under the auspices of the Asian Human Rights Commission which was sent to the Rapporteur on the adverse impact of unreasonable and undue delays of the administration of justice. This open letter is reproduced herewith as an annexure.*

Footnotes

* Executive Direcotor Asian Human Rights Commission

* Ed Note; this letter is already reproduced in this publication.

[1] This paper is based on direct information acquired by my organisation, the Asian Human Rights Commission, and my own personal exp erience. Much of what is talked about here has been documented earlier. For the last twelve years my organisation has been involved in routinely gathering and sharing information as part of our daily work. We have also devised various forms of actions on the basis of the routine information that we gather, mainly through our partners, and these actions themselves have generated further information on these issues.

[2] For details please see, Peoples' power calling for reforms, published jointly by the Asian Human Rights Commission and the Pakistan Bar Council (146 pages); you may also find this book online at http://www.ahrchk.net/pub/mainfile.php/books/250/.

[3] For further information please see Impunity vs. the rule of law in Indonesia, Article 2 Vol. 5, No. 1. http://www.article2.org/mainfile.php/0502/

[4] For further information please see Dr. Lao Mong Hay, Former Head, Legal Unit, Centre for Social Development, Cambodia – Institutions for the rule of law and human rights in Cambodia, Article 2 Vol. 5, No. 1. http://www.article2.org/mainfile.php/0501/223/

[5] For further information please see Nepal – Impunity for abuses remains as country undergoes political revolution. The State of Human Rights in Eleven Asian Nations – 2006 pg. 130-178 and Special Report: The mathematics of barbarity and zero rule of law in Nepal, Article 2 Vol. 3, No. 6 http://www.article2.org/mainfile.php/0306/.

[6] For further information please refer to Special Report – The criminal justice system of the Philippines is rotten. http://www.article2.org/mainfile.php/0601/

[7] For further information please see: http://campaigns.ahrchk.net/somchai/

[8] For further information please see: Special report: Extrajudicial killings of alleged drug dealers in Thailand, Article 2, Vol. 2 No. 3, http://www.article2.org/mainfile.php/0203/, Special Report: Rule of Law versus Rule of Lords in Thailand, Article 2 Vol. 4 No. 2, http://www.article2.org/mainfile.php/0402/, Thailand: The return of the military & the defiance of common sense, Article 2 Vol. 5, No. 5, http://www.article2.org/mainfile.php/0505/ and Special Edition: Thailand's struggle for constitutional survival, Article 2 Vol. 6 No. 3, http://www.article2.org/main file.php/0603/

[9] The Transparency International Corruption Perception index for the year 2005 may be found at http://www.transparency.org/news_room/in_focus/2005/cpi_2005#cpi

[10] For further information please see Special Report – Lawless law-enforcement & the parody of judiciary in Bangladesh. http://www.article2.org/mainfile.php/0504/

[11] For details please see Special Report on Torture Committed by the Police in Sri Lanka, Article 2 Vol. 1, No. 4 http://www.article2.org/mainfile.php/0104/, Second Special Report: Endemic torture and the collapse of policing in Sri Lanka, Article 2 Vol 3, No. 1, http://www.article2.org/mainfile.php/0301/, Focus, dysfunctional policing & subverted justice in Sri Lanka, Article 2 Vol. 6, No. 2, http://www.article2.org/mainfile.php/0602/, and An X-ray of the Sri Lankan policing system & torture of the poor, published by the AHRC. Please also see The Other Lanka, 184 pgs, published by the AHRC and UN Human Rights Committee decisions on communications from Sri Lanka, published by the Asian Legal Resource Centre in August 2005.

[12] For further information please see Milking the cow dry in Burma, Article 2, Vol. 6 No. 4 http://www.article2.org/mainfile.php/0604/294/ , Special Report: The Depayin massacre, Article 2 Vol 2, No. 6. http://www.article2.org/mainfile.php/0206/ and Burma, The myth of state stability & a system of injustice, The State of Human Rights in Eleven Asian Nations – 2006, published by the AHRC.

[13] SINGAPORE: Chee Soon Juan's appeal in OA case to be heard tomorrow http://www.ahrchk.net/statements/mainfile.php/2007statements/1186/

[14] For further information please see Special Edition – Militarisation &impunity in Manipur, Article 2 Vol. 5, No. 6 http://www.article2.org/mainfile.php/0506/, India, The lack of domestic remedies for human rights victims and the collapse of the rule of law, The State of Human Rights in Ten Asian Nations – 2005 published by the AHRC and India, discrimination and injustice remain major barriers in the world's largest democracy, The State of Human Rights in Eleven Asian Nations – 2006 published by the AHRC. Please also see Special Edition: Two people's tribunals on severe hunger & utter neglect in India, Article 2 Vol 4, No. 6. http://www.article2.org/mainfile.php/0406/

[15] Dialectics of Justice – Five Sri Lankan Cases was written by Patrick Lawrence on the basis of materials provided by the Asian Human Rights Commission. Patrick Lawrence is a reputed journalist. I have been personally involved in these cases from their inception. I know the individuals who are the heroes' in these stories and the hardships they have gone through all these years. I am also aware of the tremendous difficulties that the lawyers involved in these cases went through. [16] Kindly see www.ahrchk.net, and www.alrchk.net

A Quick Intervention - The Rizana Nafeek Case

AS-155-2007, July 6, 2007

A Statement by the Asian Human Rights Commission

WORLD: An appeal to Muslim scholars throughout the world

(The case of a teenage girl facing the death sentence in Saudi Arabia as the result of a tragedy being misunderstood as a crime)

The Asian Human Rights Commission is writing this appeal to all the Muslim scholars in the world regarding the case that the AHRC believes deserves the attention of all Muslim scholars.

This is a case where a teenage girl was in charge of bottle feeding a four-month old child her inexperience resulted in child choking. While she was desperately trying to help by way of soothing and stroking the chest/face and neck of the baby, a tragic death took place. These circumstances are explained below. However, due to a misunderstanding of the situation, this case was presented as the murder of a baby by strangulation and the teenager was sentenced to death by a court in Saudi Arabia on June, 16.

After careful consideration of all facts we are of the view that what has happened is an enormous tragedy but it can lead to, (if not prevented soon), a further tragedy of an innocent inexperienced teenager being executed.

We believe that this is a case in which scholarly considerations can help to make the necessary reflections distinguishing a tragedy from a crime and from such reflections interventions can be made to prevent a further tragedy taking place. We believe that the Muslim scholars, if they think it appropriate can communicate with this unfortunate family, faced with this situation to provide them with wise advise to help them deal with this issue.

Details of the relevant incidents:

This case concerns Naffeek Rizana who is facing the death sentence in Saudi Arabia, allegedly for the strangulation of a four month old baby. Through close study of the case, the Asian Human Rights Commission is satisfied that, in fact, what has taken place was the tragic death of a baby in the process of being fed by an inexperienced teenager.

Naffeek Rizana was born on February 4, 1988 and comes from a war-torn, impoverished village. Here, many families, including those of the Muslim community try to send their under aged children for employment outside the country, as their breadwinners. Some employment agencies exploit the situation of the impoverished families to recruit under aged girls for employment. For that purpose, they engage in obtaining passports by altering the dates of birth of these children to make it appear that they are older than they really are. In the case of Naffeek Rizana, the altered date, which is to be found in her passport now, is February 2, 1982. It was on the basis of this altered date that the employment agency fixed her employment in Saudi Arabia and she went there in May, 2005.

Later in 2007 she went to work at the house of Mr. Naif Jiziyan Khklafal Otaibi whose wife had a new-born baby boy. A short time after she started working for this family, she was assigned to bottle feed the infant who was by then four months old. Naffeek Rizana had no experience of any sort in caring for such a young infant. She was left alone when bottle feeding the child. While she was feeding the child, the boy started choking, as so often happens to babies and Naffeek Rizana panicked and while shouting for help tried to sooth the child by feeling the chest, neck and face, doing whatever she could to help him. At her shouting, the mother arrived but by that time the baby was either unconscious or dead. Unfortunately, misunderstanding the situation, the family members treated the teenager very harshly and handed her over to the police, accusing her of strangling the baby. At the police station also, she was very harshly handled and did not have the help of a translator or anyone else to whom she could explain what had happened. She was made to sign a confession and later charges were filed in court of murder by strangulation.

On her first appearance in court, she was sternly warned by the police to repeat her confession, which she did. However, later she was able to talk to an interpreter who was sent by the Sri Lankan embassy and she explained in her own language, the circumstances of what had happened as stated above. This version was also stated in court thereafter.

According to reports, the judges who heard the case requested the father of the child to use his prerogative to pardon the young girl. However, the father refused to grant such pardon. On that basis, the court sentenced her to death by beheading. This sentence was made on June 16, 2007.

There is a period of one month for the lodging of an appeal. However, an appeal has not yet been lodged. The initiative for lodging the appeal is with the Sri Lankan government. The AHRC also understands that the Sri Lankan authorities have sought the help of a legal firm which had initially demanded the equivalent of US$ 160,000. In the initially reports in the media there were different figures quoted. However, this matter has now been clarified. The Foreign Ministry in Colombo, Sri Lanka has not authorised such money and the family of Naffeek Rizana is of course unable to raise any funds for her appeal. This matter of legal assistance is being pursued with the government at the moment.

We believe that this is a case in which scholarly considerations can help to make the necessary reflections distinguishing a tragedy from a crime and from such reflections interventions can be made to prevent a further tragedy taking place. We believe that the Muslim scholars, if they think it appropriate can communicate with this unfortunate family, faced with this situation to provide them with wise advise to help them deal with this issue.

However, under Saudi Arabian law, it is the prerogative of the family of the victim, in this case the parents of the baby that has the right to pardon the teenaged, Naffeek Rizana. Such pardon will be valid in law under the Saudi Arabian legal system.

The Asian Human Rights Commission is of the view that was has happened is a tragedy and not a crime. At no stage was any allegation made of any animosity between the teenaged helper and the family. If such animosity existed it is very unlikely that a four month old infant would have been handed over to her care. The inexperience of the helper, as well as the difficulties of communication due to language problems have ended up in an extremely unfortunate situation being misunderstood as a crime. If the nature of this tragedy is not dealt with within a matter of days from now, there will be a further tragedy of a teenaged, inexperienced helper being subjected to capital punishment for a crime she did not commit or intend to commit.

SRI LANKA: Ms. Rizana Nafeek's appeal still pending at the Saudi Court

(Hong Kong, October 12, 2007)

According to the law firm Kateb Fahad Al-Shammari, the appeal filed on behalf of Ms. Rizana Nafeek who was sentenced to capital punishment by a Saudi Court is still pending and it will take some time before the appeal is heard. The firm is representing Ms. Rizana in the appeal.

The Asian Human Rights Commission (AHRC) was briefed by the law firm yesterday, October 11, 2007. Razina is a 17-year-old Sri Lankan who was sentenced for capital punishment in Saudi Arabia.

"The AHRC has contacted the lawyers in Saudi Arabia after being alerted about some false rumours spread by some persons in Sri Lanka about this case..." said Mr. Basil Fernando, the Executive Director of the AHRC.

The lawyers have made a detailed appeal with many grounds which they believe are very strong reasons for the lower court sentence to be reversed, he added.

"Several Muslim scholars who were contacted by the AHRC has also confirmed that even under the Sharia law, the death sentence is erroneous on many grounds. Many principles are available within the Shariah law to provide substantive and procedural justice of persons facing criminal trial..." Mr. Fernando said.

Rizana was sentenced to death by a Saudi Court due to some allegations of causing death of a four-month-old baby of her employer while in fact she was in no way responsible for the accidental death which has occurred while the baby was being bottle-fed. Many agencies have made several appeals to the Saudi authorities to exercise clemency and to pardon Rizana Nafeek.

Condemnation of the setting of a three month deadline for filing of complaints by the Human Rights Commission of Sri Lanka

July 19, 2007

A Statement by the Asian Human Rights Commission

SRI LANKA: AHRC condemns HRCSL's setting of a three month deadline for filing of complaints

The Board of the Human Rights Commission of Sri Lanka has decided to issue a circular prescribing a period of three months from the date of an incident for the receiving of petitions.

Internal Circular No. 7, dated 20.6.2007, addressed to all directors, regional coordinators, legal officers and investigation officers, signed by D.J.B. De Silva, Secretary, HRCSL, reads as follows:

"Period of prescription of receiving petitions

The Board at its meeting held on 18.6.2007, decided that the period of receiving petitions should be restricted to 3 (three) months from the date of incident of violation of Human Rights.

You are kindly requested to give publicity to this decision among the members of public and also abide by the above decision. The petitions already accepted should be inquired into irrespective of the date of incident.

Any exceptional matters should be referred to the Commission for decision."

This circular has not been publicized, nor has the HRCSL made any press statement about this matter in order to inform the public. It is only through private sources that human rights groups have been made aware of this circular. The general reaction has been that this is yet another example of a human rights commission, which was not appointed under the provisions of the Sri Lankan Constitution, trying to undermine the peoples' right to protection.

This circular has not been publicized, nor has the HRCSL made any press statement about this matter in order to inform the public. It is only through private sources that human rights groups have been made aware of this circular. The general reaction has been that this is yet another example of a human rights commission, which was not appointed under the provisions of the Sri Lankan Constitution, trying to undermine the peoples' right to protection.

This move is seen as an attempt to discourage people from having recourse to the Human Rights Commission and to eradicate any semblance of the idea of a proactive commission, willing to be engaged in the protection and promotion of human rights under the extremely difficult circumstances that the country is presently faced with.

One human rights activist commented, "If the HRCSL receives fewer complaints, then it can create an impression around the world that the human rights situation in the country has become better." International human rights groups place much reliance on the statistics given out by the HRCSL in trying to gauge the situation of human rights in the country.

The implication of this circular is that complaints regarding torture, extrajudicial killings, forced disappearances, gross violations of the rights of children and women, complaints relating to discrimination and violations of the provisions for equality before law, are all prescribed unless the complaints are made within three months.

The HRCSL is a statutory body created for the purpose of the protection and promotion of human rights and is expected to work within the framework of the Paris Principles relating to national institutions. However, the HRCSL in recent times has not in any way conformed to these principles, either regarding its independence, or on the implementation of international norms and standards relating to the observance of human rights by the state.

A national human rights commission is expected to monitor human rights violations and to make recommendations to all government bodies on the steps that need to be taken in order to better facilitate respect for human rights. This is a function that the HRCSL has failed to carry out, regardless of the extremely difficult circumstances relating to human rights faced by people throughout the country. Instead of monitoring human rights it is in fact, by its most inefficient methods of work, discouraging complainants who wish to pursue their rights. The advantage of such inaction goes to the perpetrators of the violations.

There is no basis for setting prescriptive time limits in regard to acts of torture, extrajudicial killings and forced disappearances. These are heinous crimes and gross violations of human rights. The Board of the HRCSL has acted in violation of the basic norms and standards for the protection of human rights in imposing a period of three months as a period of limitation for the acceptance of complaints by the Commission.

Given the situation of extreme alarm that prevails in the country today there is likely to be many persons who may not dare to make complaints immediately out of fear for their lives. The government had admitted the absence of witness protection in the country and its adverse consequences on all witnesses. In such circumstances, it is natural for people to wait for more secure conditions before they make a complaint. Individual complainants may want to ensure for themselves a place of safety before they make complaints relating to serious violations of rights. Also, particularly, people living in rural areas and more distant parts of the country, will find it difficult to keep to such a deadline. In conflict areas the situation can be even worse. How is it possible for refugees and other displaced persons who suffer the worst forms of human rights abuses to keep to such a deadline?

The AHRC urges all civil society organisations to critically examine the role that the HRCSL is playing now. Is it a watchdog for those violate human rights or has it any capacity and will to be the watchdog of the human rights of those who suffer violations? This particular circular should be condemned as an attempt to limit its services and to exclude many persons from making complaints about human rights violations.

The implication of this circular is that complaints regarding torture, extrajudicial killings, forced disappearances, gross violations of the rights of children and women, complaints relating to discrimination and violations of the provisions for equality before law, are all prescribed unless the complaints are made within three months.

Further Statements of the Asian Human Rights Commission on Issues of Concern in Asia

July 5, 2007

A Statement by the Asian Human Rights Commission

INDIA: Police Complaints Authority in Kerala is a good move, but that alone is not enough

The Government of Kerala has initiated action to establish a Police Complaints Authority in the state. The authority is expected to deal with complaints by and against the state police. The authority has been formed in accordance with the Kerala Police Act (Amendment) Ordinance, 2007 issued by the state government on February 12, 2007. The authority has been setup under the Chairmanship of the retired High Court Judge Mr K. K. Dineshan.

The establishment of this authority is a welcome move. As of now, there are no independent mechanisms in the state with power to entertain complaints against the police, independently investigate them and also enforce its findings. The Government of Kerala has set a model for the other state governments in India and also to the central government to follow.

The Supreme Court of India when deciding the Prakash Singh case has issued directions to the state and central governments calling for drastic changes in policing within India. A simple reading of the Ordinance issued by the Government of Kerala however raises an apprehension that whether the government is serious enough in complying with the directions of the Supreme Court. The Police Complaints Authority itself is an example.

For the Police Complaints Authority to be fully functional, the government must immediately appoint the remaining members at the state and the district level to the authority. The Asian Human Rights Commission (AHRC) expects that the Government of Kerala will further implement all the other directives of the court without any delay.

Considering the nature of complaints these authorities have to entertain, the access to these authorities must be possible through the simplest forms avoiding complex official formalities like formal plaints and complaints and the representation through legal practitioners. Anyone willing to complain to these authorities must be welcomed by the authorities with utmost confidence. This must be reflected in the rules of procedure to be formulated for these authorities rather than leaving it to the discretion of the persons chairing the state and district level authorities.

If the government is serious to in its intention to bring changes to the state police, a mere establishmentof the Police Complaints Authority alone is not enough. The government has to provide adequate infrastructure for the state and district level Police Complaints Authority to function and to serve its mandate. The Ordinance issued by the government, to meet the deadlines fixed by the Supreme Court has in fact watered down the Court's orders.

For example the AHRC has apprehensions regarding the enforceability of the findings of the state and district level authority. The direction of the Supreme Court is that the "*recommendations of the Complaints Authority, both at the district and state levels, for any action, departmental or criminal, against a delinquent police officer shall be* ***binding*** *on the concerned authority*".

In the Ordinance issued by the state government regarding the enforceability of the findings of the authorities the above direction of the court has been watered down by: "*recommendations of the Authority... against a delinquent police officer shall be binding in so far as* ***initiation of departmental proceedings or registration of a criminal case*** *is concerned. Such recommendation shall, however,* ***not prejudice the application of mind by the enquiry officer or the investigating officer*** *when he is conducting the departmental enquiry or criminal investigation, as the case may be*".

In a similar fashion, the Ordinance has reduced the power of the state and district level authorities to that similar to a civil court. The Supreme Court's direction is to provide the authorities independent investigative facilities to investigate a complaint as if in a scientific criminal investigation. Under the current Ordinance, no such provision is made.

There are several other instances where the directives of the Supreme Court are watered down by the state government through its Ordinance. This will be addressed in a separate statement by the AHRC.

Now that the state government has started setting up the Police Complaints Authority, the government must immediately ensure the following minimum requirements:

1. The remaining appointments to the state and district level authorities must be made with the least possible delay

2. The appointments to the district level authorities and the other members to the state authority must be made through an impartial and open process

3. The state and district level authorities must have enough facilities to investigate and inquire into complaints submitted to them

4. Considering the nature of complaints these authorities have to entertain, the access to these authorities must be possible through the simplest forms avoiding complex official formalities like formal plaints and complaints and the representation through legal practitioners. Anyone willing to complain to these authorities must be welcomed by the authorities with utmost confidence. This must be reflected in the rules of procedure to be formulated for these authorities rather than leaving it to the discretion of the persons chairing the state and district level authorities.

July 25, 2007

A Statement by the Asian Human Rights Commission

INDIA: Reform criminal justice systems to end apartheid in India

Caste based discrimination is the Indian variant of apartheid. For decades Indians have been separated and divided according to the caste hierarchy. In spite of several laws and even Constitutional guarantees India remains largely divided along caste lines.

Caste based discrimination is omnipresent in India. It is reflected across the societal spectrum. It is so evident that even a complete stranger could identify the inequalities practised openly in the society based on the caste. Caste based discrimination is reflected in the private and public life. Caste is the final denominator for everything in India. It has its influence in the politics, administration and even the economic growth of the country.

Though India is projecting itself to become a developed country by the year 2020, what has been ignored is that if the situation which is prevalent, continues, a major proportion of the country's population will not benefit from such progress. The state of Uttar Pradesh is an example. The state, considered to be the power centre of India, is now administered by a political party, the Bahujan Samaj Party (BSP) that came to power towing the caste line, particularly that of the Dalits. But what is the actual situation of the Dalits in this state?

The Dalits in Uttar Pradesh are extremely poor. Their counterparts, the Patels and Yadavs, otherwise known as the Other Backward Community (OBC), has liberated themselves from the servitude of the upper caste by making use of the window of opportunity provided to them by the former government, also led by a Yadav. In the process of self liberation, they not only ig-

nored the Dalits, but also forced them to continue under servitude. It has to be understood that this was a calculated move to exploit the economy of caste based discrimination.

The equation is simple; by the end of the day there need to be a source for free labour. To ensure free labour the neo Brahmins of the state - the Patels and Yadavs - forced the Dalits to remain under servitude. The Patels and Yadavs are also now known as the neo feudal of the state.

To control the Dalits, the age-old Brahmin policy of food deprivation and bonded labour is brutally enforced. Though bonded labour is prohibited by the Bonded Labour System (Abolition) Act, 1976, the law has little meaning for the Dalits. They are forced to bone-breaking work in the farms, quarries and kilns of the upper caste community. Food deprivation and poverty eradication, though sought to be prevented through several central and state government programmes like rationed distribution of food grains and oils through the Public Food Distribution System (PDS) shops and implementation of programmes like the Andyodaya and Annapoorna schemes along with the employment generating programmes like the Jawahar Rozgar Yogna never percolated into the Dalit community for their benefit. Dalits are deprived from accessing these programmes by the upper caste by corrupting the implementing element of these programmes.

All this is possible only because of a corrupt and fallen criminal justice delivery mechanism in Uttar Pradesh. The backbone of the criminal justice system is the policing in the state. Policing in Uttar Pradesh suffer from the impunity that the officers enjoy for their corrupt practices. Custodial torture and extra judicial killing is widely used to terrorise those who challenge the police in Uttar Pradesh. Even well known human rights groups are not immune to this terror.

Dr. Lenin Raghuvanshi, the Secretary of a people's movement, the Peoples' Vigilance Committee on Human Rights (PVCHR) and his wife Ms. Shruti and their activists, based in Varanasi who are fighting against the caste based discrimination in the state is targeted by the local police and the corrupt officials within the administration. Several threats have been made against the life of the activists associated with the PVCHR.

Illegal dealing of rationed articles is dominated by corrupt licensees, mostly from the upper caste, who had obtained licenses to run the PDS shops in villages. Some of them have been renewing their license for decades in spite of specific complaints filed against these licensees.

The district administrations, the license issuing authority on behalf of the state government, has thus far ignored these complaints and failed to properly investigate them. Even in cases where an investigation was ordered, it has been breached by corrupt police officers who rallied behind the upper caste under the influence of their money.

When mere complaining and campaigning was found ineffective, matters were taken to the local courts for intervention. The local courts which are equally corrupt and nepotic failed to intervene. Some of the judges in the lower judiciary and a few in the higher judiciary of the state are so prejudiced as a result of their caste sentiments that any issue concerning the lower caste is thrown out of the court without any consideration.

It is this insensitivity to these issues by the courts amplified by a corrupt police that sustains a broken administrative setup in Uttar Pradesh. The state is a showcase and a specimen for studying the current day practices of caste based discrimination in India. The state is now administered by a Chief Minister who has declared in public that her government is determined to rule out caste based prejudices in the state. This determination, if it is not a political hat trick, has to be reflected in what steps the current administration would take to check the deep rooted problems within the criminal justice mechanisms, particularly the police, within the state.

If caste based discrimination could be initially controlled and in due course totally eradicated from Uttar Pradesh, similar steps could be initiated in the rest of India. But what is required for this is the political will and determination to correct the injustices meted out against the Dalits by the upper caste through exploiting a fallen criminal justice system. India is yet to experience the benefits of a reasonably functioning criminal justice system. Without correcting this fatal mistake, India will never succeed in eliminating caste based discrimination which it will remain a blot in the modern history of India.

July 20, 2007

A Statement by the Asian Human Rights Commission

PAKISTAN: Historic verdict reinstates chief justice, challenges dictatorship

In a unanimous decision, the Supreme Court of Pakistan today 20 July 2007 declared the suspension of the Chief Justice of Pakistan, Iftekhar Choudry, by the president, General Pervez Musharaff, to be illegal and instructed that he be reappointed.

The Asian Human Rights Commission salutes the Supreme Court of Pakistan for this bold, upright and historic assertion of the independence of the judiciary, which sets an example for the whole of Asia.

Pakistan now again has a legitimate head to its judiciary. It is now his duty to carry the

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Dictatorship has today been rejected as a viable form of government in Pakistan. But while the Supreme Court judgment must be celebrated, the task now falls to all serious-minded persons to think and act together and build upon this achievement. There remains much to be restored which has been lost under this military regime. The wisdom expressed in the streets and courts of Pakistan in the last few months, culminating in this judgment, must now give rise to a vision for a new Pakistan where democracy and the rule of law will wholly replace tyranny and injustice. Let us all work towards this goal.

leadership that he has shown in these last few months back into his role as chief justice, in the intense struggle to uphold the rule of law and protect the rights of his people under extraordinarily difficult circumstances.

During the last few months the world has seen the courage of lawyers and judges in Pakistan, who have risked everything to defend the integrity of their institutions and professional credibility, in the interests of the entire public there. Their stamina and determination will remain indelibly marked upon our memory. They have truly earned the victory that has come today.

The Asian Human Rights Commission sincerely believes that the enormous trust vested in the chief justice by people throughout Pakistan, actively demonstrated in thousands risking and some losing their lives, will be reciprocated by the upholding of the highest traditions of the courts and legal values. There is no alternative. They have made clear that they want their judiciary to be separate from the executive. They will not tolerate the military bulldozing over every other institution in their country. They insist upon institutions for the rule of law and government through real, not fraudulent, legislative power.

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August, 14, 2007

A Statement by the Asian Human Rights Commission

PAKISTAN: Independence is betrayed in the name of militarism, pseudo nationalism and fundamentalism

Today, August 14, 2007 the Islamic Republic of Pakistan celebrates the 60th anniversary of its independence from the British empire and separation from India. For more than half of Pakistan's existence as an independent homeland it has been ruled by the armed forces who have worked to undermine the evolution of the political system in the country. A nation without direction from its birth, the State has become a rogue because of the continuous interference from the army.

While Pakistan is celebrating its independence it does so in the knowledge that the United States of America has threatened to defy its air space and strike at suspected 'terrorist' targets along the border with Afghanistan. Apart from the threat from the USA, NATO forces have also threatened to follow the 'terrorists' into Pakistan. Despite the fact that Pakistan is a sovereign state, as stated by the government, American President, George Bush has not ruled out military strikes on Pakistani soil. It is the country's foreign debt that makes it so vulnerable to the influence and pressure of external powers. It is said that every unborn child will have to pay Rs 1,500/= as a fine before coming to into the world in payment of the interest of the country's loans.

Up until July 20, 2007 there was a good nexus among the Armed forces, lead by the Pakistan army, and the civil servants, generally known as bureaucrats and the judiciary. However, this nexus opposed the civilian set up in the country whenever the political forces and peoples' movements tried to assert themselves. A political class, from feudal and tribal background, served this nexus to sabotage the fundamental rights of the people and take control of the national resources. After July 20, 2007, the judiciary and legal community asserted themselves and won a major victory over military and bureaucratic powers. However, even after the heroic struggle of the lawyers' which lead to the restoration of Chief Justice, Mr. Iftikhar M. Chaudhry, the complete restoration of democracy and fundamental human rights, supremacy of the rule of law and judiciary, abolition of black laws and reforms in policing system have a long road to travel.

Therefore, Pakistan is celebrating its Independence Day at a time when there is still a strong military rule, in which a general, who has been ruling the country for eight years after dismissing the civilian government, is insisting on another five years in office and the right to wear his military uniform. Though fundamental rights have been restored with the restoration of parliament, these rights are denied by the powerful ruling elite. Policy decisions are made by a group of five star generals, known as the Corps Commanders and the cabinet has little choice but to approve these decisions. The parliament, National Assembly and Senate, are virtually rubber stamp institutions that generally approve the Ordinances which are issued by the military dressed president in the absence of parliamentary sessions.

Pakistan is celebrating its Independence Day despite the fact that a military operation has been going on since 2001 in the southern province of Balochistan. The army and air force are bombarding the civilian population and have, to-date, killed more than 3000 people along with several political activists including a former chief minister and tribal leader, Mr. Akbar Bugti. More than 5,000 people have been arrested in-

cluding another former chief minister, Mr. Akhter Mengal. Several hundred people are missing after their arrest by the state intelligence agencies. The civilian government has no control over the province and Balochistan is controlled by Quetta Cantonment (military installation), situated in capital city of the province. Instead it is the army who has their check posts on all the highways that control the area and ensure that the natural resources are out of the reach of the local population and even the local government.

Pakistan celebrates its Independence Day at a time when the war on terror has made every citizen a suspected terrorist. In the northern part of the province, the North West Frontier Province (NWFP), people are being arrested, disappeared and killed through massive military actions on the pretext of the war on terror. Disappearances after arrests have become a common phenomenon after the 9/11 incident of 2001 throughout the country. More than 4000 persons have been disappeared or kept incommunicado, their whereabouts remain unknown. The state agencies particularly ISI and Military intelligence have the power to arrest without producing anyone before a court of law. Every city has cantonment installations where there are torture cells and persons arrested by the military go through these torture cells.

Torture in custody is increasing every year. People generally do not report torture by the police because of police brutality. In 2005 about 1,200 cases of torture were report ed, in 2006, 1,319 cases were reported and during the 1st half of 2007, 1,100 cases have already been reported. Torture in custody to obtain confessions has become a common practice. However, these figures are only the reported cases and it is believed that the actual figure is probably twice as high. Sadly, the lower judiciary works in connivance with the police to extract money on the basis of confessional statements. There are cases of torture where the penis of a detainee was severed, in another lime water was poured into a man's anus and in yet another eight arrested persons were forced to act like dogs and bite each other.

Pakistan celebrates its Independence Day at a time when women remain the more vulnerable group in society and do not have equal rights; they are still threatened by the Hadood Law. Nothing changed after the introduction of a new family law by the General's government in November 2006 and more than 1,000 women have been killed on the pretext of honor killing. Instance's of rape remains high and more than 3,000 cases, including gang rape have been reported throughout the country. No equal opportunity of employment is provided. Religious violence is also endemic in the country and there is a struggle for the creation of a separate Islamic home land. Sectarian violence accounts for more than 500 deaths a year, mainly Shia and Sunni and also those who base their beliefs on the Brelvi and Deubandi schools of thought. Bomb attacks on mosques of different sects are also very common and happen on religious dates.

Pakistan celebrates its Independence Day despite the fact that the minorities, who have always claimed equal rights as citizens of Pakistan, do not even have the right to perform their religious duties. They also do not have equal right in the election process. They number among the highest victims of the Blasphemy laws, the use of which has instilled insecurity and fear among the religious minority groups. Christians, Hindus and other groups are denied of equal wages and job opportunities. Even the Ahmedi sect of Islam is denied the right to bury their loved ones in the common graveyard.

Pakistan celebrates its Independence Day despite the fact that more than half of its population lives in shanty towns and slums without drinking water, sanitation, access to health care and education. Every year more than one million people are displaced without any compensation from their homes or threatened with displacement. The old villages are also demolished on the pretext of construction of mega projects despite the fact that the inhabitants have been living in them for more than a century.

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The gap between the rich and the poor is widening day by day. According to the State Bank of Pakistan, more than 34 percent of the population is living below the poverty line, whereas independent sources claim that the figure is closer to 42 percent. Prices of essential items are almost 300 percent higher than October 1999 when the Pakistan Army took over control of the country. Due to privatisation at large scale without any transparency, unemployment figures have increased treme ndously and the working hours for those fortunate enough to have jobs have been increased from eight to twelve hours a day. The government's statistics about unemployment is generally believed to be incorrect but there is no method at official level to check. It is because of unemployment and job insecurity that cases of suicide have increased.

It is in this atmosphere that the Pakistani elite and ruling classes are celebrating Independence Day with enthusiasm and fervor. The media is projecting more about freedom and independence than it is about the truth of how a nation is being betrayed in the name of nationalism and Islam. Independence Day celebrations run from the 1st day of August to the 15th and during this fortnight so much of the country's wealth is rolled out to propagate militarism, pseudo nationalism and fundamentalism.

Memorial for K. C. Kamalasabeyson, PC, former Attorney General of Sri Lanka

August 13, 2007

A Statement by the Asian Human Rights Commission

SRI LANKA: In memory of Mr. K. C. Kamalasabeyson, PC, former Attorney General

The Asian Human Rights Commission pays tribute to the former Attorney General, Mr. K. C. Kamalasabeyson, PC whose passing away in India was reported in the newspapers today.

Mr. Kamalasabeyson, during his tenure contributed to the introduction of prosecutions on torture cases. On many occasions he also tried to take an independent stance on some issues which were of national importance, such as the issues relating to the 17th Amendment. He often had difficulties relating to serious prosecutions such as those on forced disappearances cases, the prosecution of which he did not contribute to very much. From two of his immediate predecessors, he inherited a department in which there had been much degeneration in upholding the highest traditions of a prosecutor's office. He went some way to recover the lost ground but he was constantly faced with enormous difficulties.

From two of his immediate predecessors, he inherited a department in which there had been much degeneration in upholding the highest traditions of a prosecutor's office. He went some way to recover the lost ground but he was constantly faced with enormous difficulties.

In a public lecture delivered in December, 2003 he spoke of some of the problems facing the rule of law in Sri Lanka. He particularly criticised the failure of the state to provide sufficient funds for the administration of justice. We reproduce below his lecture which is still of relevance today.

Balancing rights of the accused with rights of the victim

The 13th Kanchana Abhayapala Memorial Lecture by Attorney General K. C. Kamlasabayson, P.C.at the BMICH on Dec. 02 from the Island 5 December 2003

Today we pay tribute to the memory of late Kanchana Abhayapala, who was snatched from our midst during the darkest period of our recent history, so suddenly and so brutally. The senseless killing of this young man not only shocked the legal profession to which he belonged but also the conscience of the entire nation. I have known Kanchana both as a student, unassuming, quiet and studious, and as a young lawyer who had the courage to accuse the State agencies of abuse of per and violence. He represented the underprivileged and the poorer segments of the society who were victims of such abuse and violence and sought justice on their behalf in our Courts. It was an era when many lawyers were reluctant, through fear, to undertake such tasks. As an Attorney he feared none. Though, a junior at the bar, he was never intimidated by the trappings and formalities of our Courts. He was always conscious of his role as the defender of human rights in an environment of lawlessness and addressed court in his usual quiet and dignified manner with that degree of thoroughness which always characterized his short life. His was an irreparable loss, yet let us remember him with gratitude as one who has clearly demonstrated the need for men and women to stand up against the ills of the society.

It is my privilege to deliver the Kanchana Abhayapala memorial lecture 2003. Although, I cannot match the intellect of many of the eminent speakers who have delivered the said lecture in the past, I accepted with humility the invitation extended to me by Sarvodaya, not only because the suggested topic was something that appealed to me as an extremely important one, particularly in today's context, but also because I could not refuse the request that was made by an organization which has always espoused the cause of justice and fair play. May I therefore take this opportunity to thank the organizers for their kind invitation.

As a lawyer, it is only natural that my presentation should be based on law. However, I also wish to approach it on a broader basis, i.e from the point of view of the society in which we live and the practical realities that surround our criminal justice system.

I must emphasize that the views I express today are personal to me and I do so, prompted by the increasing in the crime rate and the lack of sufficient and effective provisions in our law in relation to victims of crimes.

I do not consider it necessary or relevant to bring out the legal distinction between a suspect and an accused. Suffice to say that whenever reference is made to either of these persons there is invariably a victim.

A person who is suspected or accused of a crime enjoys several constitutional and legal protections. These are contained in Chapter III of our Constitution and several other legislative enactment including the Code of Criminal Procedure Act. No. 15 of 1979.

In Chapter III of the Constitution which deals

with fundamental rights, Article 13 provides that no person shall be arrested except according to procedure established by law and that such person shall be informed of the reason for his arrest. It further provides that any person held in custody or detained shall be brought before the Judge of the nearest competent Court and shall not be further held in custody except upon and in terms of the Order of such Judge. A person charged with an offence shall be heard in person or by an Attorney-at-law at a fair trial by competent Court. This Article also sets out that every person shall be presumed innocent until he is proved guilty.

On the other hand the Code of Criminal Procedure Act contains several safeguards accorded to the Accused commencing from his arrest to the conclusion of the trial. In this process the law also contains several provisions that would ensure a fair trial for the accused. In other words in the context of the provisions both in the Constitution and the Code of Criminal Procedure Act, a fair trial would mean a trial often tilted more in favour of the accused than the victim.

A victim means a person who has suffered harm, including physical or mental injury emotional suffering, or economic loss through acts or emissions in violation of the criminal laws. This definition was formulated at the 1985 UN Declaration of Basic Principles of Justice for victims of crime and abuse of power. This definition when expanded would include a multi-victim perspective. That is to say where appropriate it includes the immediate family members or dependent of the direct victims and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

Today I wishn to deal with the direct or immediate victims and those who suffered as a result of their intervention. In our system the criminal justice process involving the arrest, trail, conviction and punishment of the accused have little relevance to the victim. Action is taken in the name of the State and not on behalf of the victim. There are no enforceable provisions in the Constitution that are designed to effectively protect a victim of crime.

In this background when one embarks on balancing the rights of the accused with the rights of the victim in the administration of justice, one could see an imbalance with the scales titled more in favour of the accused than the victim.

The study of victimology involves both the study of the victim and of the offender. There is much work being done in this field by many organizations. But there is still much doubt as to the extent to which it has helped or assisted the victim in many jurisdictions. I was intrigued by the fact that the word "victimology" does not appear in the Oxford English Dictionary or in the Encyclopedia nether did I find this word in the modern Encarta. Perhaps this reflects the negative attitude of the State organizations towards victims of crime.

Let us examine the rights of a victim

It is the responsibility of the State to protect and safeguard the property and persons of every citizen. Where a crime is committed against a citizen, it could be said that the State has failed in effectively discharging its responsibility. The rights of a victim must naturally flow from this failure. It is in this context that the State has a greater responsibility towards such a victim.

The victim has the right to demand from the State that the offender be punished and the State must ensure that there is an effective and efficient mechanism to meet this end. This cannot be achieved by merely enacting laws. Today a victim is reluctant to visit the Police Station. There are complaints that when an offence is reported prompt action is not taken by the police.

The victim has the right to demand from the State that the offender be punished and the State must ensure that there is an effective and efficient mechanism to meet this end. This cannot be achieved by merely enacting laws. Today a victim is reluctant to visit the Police Station. There are complaints that when an offence is reported prompt action is not taken by the police.

Investigations at times do not proceed in the correct direction. I am personally aware of an instant where the investigators persuaded the father of the deceased who was murdered to consult a soothsayer to ascertain the description of the murderer. No amount of law could remedy this situation. The mere passing of laws and opening or maintaining of police stations are not sufficient. The system itself has to be refined and fine tuned at all levels. In our country, we have a overloaded Court system and it is to the credit of our Judges that the system has not short circuited and exploded due to the overload. The overload is clearly due to the increase in the crime rate, correspondingly the increase in the crime rate is due to the shortcomings in the law enforcement system of the country. There is a total erosion of the Rule of the Law. It is this system that requires to be refurbished.

It is the right of the victim to see that there is speedy justice but I have pointed out that our Courts are overworked. It is almost impossible to provide for speedy justice.

These are some of the general observations. They all clearly point towards the pathetic plight of a victim of crime. Often he is victimized at two stages. First in the hands of the offender and then in the hands of the State Agencies. This agony continues when he repeatedly visits the Court. There are several postponements. In the witness box he is often harassed by the Counsel. His suffering continues unabated. Having suffered in the hands of the principle offender, the victim instead of being comforted and protected by the State machinery, is in fact harassed. This feature makes the balancing exercise difficult if not impossible. In this background, one could identify a clear duty on the part of the State to ensure that there is no sec-

ondary victimization. How could this be achieved?

Let me repeat the proverbial golden thread that runs through the fabric of our legal system. The accused is presumed to be innocent until proven guilty. By this rule, the law focuses its attention on the accused whilst placing a heavy burden on the prosecution to prove its case beyond reasonable doubt. The law in its wisdom has concluded that even though many who are guilty may be freed, no innocent person should be wrongly convicted. Thus, the presumption of innocence. Yet, this presumption in its application, if not properly approached, could lead to injustice, not for the offender, but for the victim. By saying this I am not for a moment seeking to dilute a finer principle of law for the sake of securing a conviction at all cost. What I wish to demonstrate is that this principle of law with no corresponding rights for the victim to seek effective justice for the wrong done to him, has invariably resulted in miscarriage of justice.

We often speak of the police force. One must not loose sight of the fact that it is a service and not a force. I am aware that there are guidelines. But this is not enough. The officers concerned must consciously believe that it is their duty to protect and safeguard the interest of the victim.

Law and order are integral parts of a civilized society. The victim plays a vital role in the administration of justice. His role is two fold. (a) It is personal, for the reason that it is the victim who had suffered in the hands of the offender and is therefore entitled to seek justice for the wrong done to him. (b) The victim, by exposing the wrong done to him through the established mechanism helps the State to perform its duties of maintaining law and order.

When a crime is reported, the State in the discharge of its duty becomes the party whilst the victim assumes the role of a witness. Official action taken against the criminal by the State is taken on behalf of the Republic not the victim. A person whose interests are damaged by a criminal must initiate a civil suit to recover damages. A New York Times book "Crime & Criminal Justice" explains this as follows:-"If I am hit on the head by a robber, or if my television set is stolen in a burglary of my home, the fine, imprisonment or other punishment imposed on the offender only satisfies my vague need for revenge and for social order. So far as getting my doctors bill and hospital expenses paid, or getting a new television set, the State's officials action is irrelevant."

In our adversarial system a victim passes through four stages. Firstly, a crime is committed against him. Secondly, he reports the crime to the Police. Thirdly, the crime is investigated and fourthly if there is evidence the offender is prosecuted. At all these stages the victim has a role to play.

At the first stage the victim is exposed to the crime and is normally pushed to the second stage where he or some other person is required to make a statement to the police. The investigations commence thereafter. Let us pause at this stage. As I have already pointed out, criminal investigations are governed by the Code of Criminal Procedure Act. The victim is invariably the complainant. It is he who activates the legal process. Investigations are carried out by the police. There is unfortunately a perception, often justified, that the secondary victimization of the victim commences at the stage he visits the police station to make a complaint.

What is important is that not only his complaint should be recorded promptly but the investigations should commence without undue delay. It is in this context that the State must take remedial steps to enhance the competence and skills of the police officers in the field of investigations. Furthermore, the scientific and technical developments should be introduced into our system. Very often we hear delays in the Government Analyst's Department. This department is overburdened and requires to be better equipped. Above all, it is important that the law enforcement agencies involved in criminal investigation understand and appreciate the role of a victim and his/her sufferings.

We often speak of the police force. One must not loose sight of the fact that it is a service and not a force. I am aware that there are guidelines. But this is not enough. The officers concerned must consciously believe that it is their duty to protect and safeguard the interest of the victim.

Victims of torture in the hands of law enforcement authorities often find it difficult to take their cases forward. There is an increase in the incidence of torture and is something that must necessarily be dealt with effectively by the State. Investigations into such allegations should be left in the hands of a specialized and independent unit and every endeavour must be made to ensure speedy trial.

There are several unsolved crimes. I do not for a moment contend that every crime that is committed could be solved. A clever criminal may not leave any evidence and unsolved crimes are nothing new in the society. But what is alarming is the increase in the number of such cases. From a layman's point of view, some of the crimes, particularly murders, that remain unsolved could have been solved. This is not being done either due to the ineffectiveness of the investigators or other reasons best known to them. It is in such instances, that the society loses faith in the system.

Once the investigations are concluded, depending on the gravity of the crime, the case is referred to the Attorney-General's Department. Here again there is a backlog and a further delay. My several attempts to increase the cadre have consistently failed. But this excuse is of no consolation to a victim who has suffered.

We are seeking to overcome logistical problems by periodically assessing the workload and the disposal rate and by establishing specialized units to expedite at least certain categories of cases.

I do not consider it necessary to frame laws to remedy the defects that I just pointed out. The remedy lies in the hands of the law enforcement authorities and the State. It is extremely necessary that steps are taken to ensure that our investigators acquire the required skills and techniques and above all realize importance of their role in civil society.

The final stage is where the offender is prosecuted. As I have already pointed out, our Courts are overworked. At another forum I expressed the view that unless there is a drastic increase in the number of Judges, the secondary victimization of the victim would continue unabated. Today, there are literally hundreds of cases that come up everyday in a Magistrate's Court. On the other hand there are High Courts where cases are postponed by ten to twelve months. No amount of legal reform could remedy this situation. What is important is to ensure speedy justice by establishing more Courts. The Constitution provides for the appointment of Commissioners of High Court as a temporary measure. This is an important provision which should be invoked to meet the present crisis. It may also be appropriate to invoke this provision for the purposes of expeditiously disposing cases of torture and sexual offences.

Legal ethics demands that the prosecutors should not meet and discuss their cases with the Complainant. The Complainant and the other lay witnesses are not permitted to peruse the statements made by them to the Police. Whilst I see the danger in witnesses being coached, in view of the delays that are experienced in our Courts, provision should be made to enable the witnesses to refresh their memories by perusing the statements made by them.

This may not appeal to the defence lawyers. Yet, in the present context, where it takes years for a trial to come up in Court there does not appear to be a viable alternative. Surely, an offender cannot benefit through the lapse of time and in may event on witness should be put to a memory test for the purposes of securing an acquittal.

An aggrieved party including a victim is permitted legal representation in a Court of law. This was confirmed by the Supreme Court. However, in a criminal trial the victim's representative plays a minimal role and merely assists the prosecutor. It may well be that if an active role is granted to the Counsel of the victim, the victim's Counsel and the prosecution could be at cross purposes. However, in my view, the victim's Counsel should be permitted, as of right, to make submissions on the question of sentence.

It is the right of the victim to give evidence without fear. Our Court have always protected this right whenever complaints are made. However, it is the responsibility of the state to further this right by providing adequate legal provision for examination and cross examination of victims of sexual abuse through modern methods. This has proved to be very effective in the west where in child abuse and rape cases, victims are not physically present in Court but are examined through electronic and multimedia. This has become necessary for the reason that despite the safeguards contained in the Evidence Ordinace, complainants, mainly victims of sexual abuse and rape, are often harassed by the defence lawyers in cross examination.

Very often the accused is acquitted due to lack of evidence and the law says that he cannot be charged again for the same offence. An attempt is being made in England through the Criminal Justices Bill 2002 to enable the appellate Courts to review such cases, provided that there is new and compelling evidence and that in all the circumstances, in the interest of justice, the Court considers that a re-trial should be ordered. We too should seriously consider enacting similar provisions so that an accused does not get away merely due to initial lapses in the investigations.

Another important feature that requires consideration is the need for an efficient witness protection scheme, that would ensure that witnesses are not intimated and threatened. No doubt this would involve heavy expenses for the State and amendments to the law. I will only pose a simple question. Is it more important in a civilized society to build roads to match with international standards spending literally millions of dollars rather than to have a peaceful and law abiding society where the rule of law prevails?

In my presentation, I have in no way sought to diminish the rights of the offender. Criminal justice is permeated by the notion of balance. The system is meant to ensure that an innocent suspect is not unfairly prosecuted or convicted. On the other hand, it is designed to strike a balance, in that the interest of the victim in having the perpetrator prosecuted and punished is protected. What I wish to emphasize is that unless the object of our criminal justice system is properly translated into reality, viz in that the actual offender is expeditiously tried and punished, there could never be a just society in which law and order could prevail.

In conclusion, I wish to once again thank the organizers for having given me the opportunity to express my views. I also wish to congratulate the Sarvodaya legal services movement for having effectively reached the rural poor with the laudable object of improving their daily lives through legal empowerment.

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