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article 2

2(3). Each State Party to the present Covenant undertakes:

a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

b) To ensure that any person claiming such a remedy shall have his right thereto 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 the possibilities of judicial remedy;

c) To ensure that the competent authorities shall enforce such remedies when granted.

of the International Covenant on Civil and Political Rights

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About *article 2*

article 2 aims at the practical implementation of human rights. In this it recalls article 2 of the International Covenant on Civil and Political Rights (ICCPR), which reads,

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
>
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
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> (b) To ensure that any person claiming such a remedy shall have his right thereto 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 the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

This is a neglected but integral article of the ICCPR. If a state signs up to an international treaty on human rights, it must implement those rights and ensure adequate remedies for persons whose rights have been violated. Mere talk of rights and formal ratification of international agreements has no meaning. Rights are given meaning when they are implemented locally.

Human rights are implemented via institutions of justice: the police, prosecutors and judiciary. If these are not functioning according to the rule of law, human rights cannot be realized. In most Asian countries, these institutions suffer from grave defects. These defects need to be studied carefully, as a means towards strategies for change.

Some persons may misunderstand this as legalism. Those from countries with developed democracies and functioning legal systems especially may be unable to grasp what it means to live in a society where 'institutions of justice' are in fact instruments to deny justice. As persons from such countries guide the global human rights movement, vital problems outside their experience do not receive necessary attention. For people in many countries, international human rights discourse then loses relevance.

After many years of work, the Asian Legal Resource Centre began publishing *article 2* to draw attention to this vital provision in international law, and to raise awareness of the need to implement human rights standards and provide effective remedies at the local level in Asia. Relevant submissions by interested persons and organisations are welcome.

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Tension between judicial independence and judicial accountability

Dato' Param Cumaraswamy,
Former UN Special Rapporteur on the independence of judges and lawyers

Since the early eighties, international non-governmental organisations of jurists have been involved in standard setting for the protection of judicial independence. They have relentlessly sought to create universal awareness of the importance of an independent judiciary and the legal profession for the protection of the rule of law and realization of human rights for sustainable development in a democracy. These standards later became the basis of the UN Basic Principles on the Independence of the Judiciary and the Role of Lawyers (hereafter, the Basic Principles) endorsed by the UN General Assembly in 1985 and 1990 respectively. The Basic Principles were a compromise bargain with the Eastern European states, then the communist bloc, which vehemently rejected the original text. Rather than not having any standards at all, the original text was considerably diluted and adopted. In 1990 the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders in Havana adopted the Guidelines on the Role of Prosecutors. These standards were reflected in paragraph 27 of the Vienna Declaration and Programme of Action, which reads:

> Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realisation of human rights and indispensable to the processes of democracy and sustainable development…

One hundred and seventy-seven nations assembled in Vienna adopted this Declaration. Practically all the sovereign states then in the Asia–Pacific were present there.

Text of a speech presented to the International Centre for Ethnic Studies—Sri Lanka on 17 October 2003. Reproduced with thanks to the Centre.

Following the adoption of the Basic Principles and the Vienna Declaration, the international community felt the need to monitor attacks on the independence of judges and lawyers. Hence in 1994 the Commission created the mandate on the Independence of Judges and Lawyers. The mandate is three-pronged. It has an investigatory, advisory and standard setting elements.

"Judicial accountability is not addressed in international and regional standards"

Unlike Europe, the Americas and Africa, where there are regional intergovernmental charters on human rights incorporating the principles of due process and providing for an independent judiciary to adjudicate, the Asia–Pacific has none. In Europe and the Americas there are also regional courts on human rights. However, the Asia–Pacific made history in 1995 when chief justices in the region gathered in Beijing for the Sixth Conference of Chief Justices of Asia and the Pacific. There they adopted the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region, commonly known now as the 'Beijing Principles'. It was history because in no other region have the heads of the judiciaries come together and agreed to a common set of standards for the promotion and protection of their judicial institutions. Moreover, that such consensus was reached in such a diverse region, having different legal systems—leaving alone other differences—was a significant achievement. Such a document emerging from the hands of the eminent chief justices could carry greater weight than an intergovernmental document.

In dealing with European states, the Council of Europe Standards are useful supplementary materials, particularly the 1998 European Charter on the Statute for Judges. The 1998 Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence is a welcome set of guidelines governing relations between the executive, parliament and the judiciary in the promotion of good governance, the rule of law and human rights in the Commonwealth. Yet technically the guidelines have not come into force, as they have not been approved by the Commonwealth heads of governments.

It is not my intention here to analyze the various standards or even to discuss the traditional and often spoken of principles of judicial independence, such as appointments, security of tenure and judicial salaries. There is already a wealth of materials on these principles. What I intend to do is to share some of my experiences in addressing concerns affecting judicial independence, and in particular judicial accountability, which is not addressed in international and regional standards. These concerns are regarding the

i) Independence of judicial officers in the lower judiciary;

ii) Role of chief justices and presidents of apex courts;

iii) Abuse of judicial independence; and,

iv) Parameters of judicial accountability.

Independence of judicial officers in the lower judiciary

> “In many countries, judicial officers in the lower judiciary are not perceived to be independent”

Very often principles of judicial independence are addressed to judges of the higher judiciary, namely in the high courts and the appellate courts. These principles are not often addressed at judicial officers like magistrates, session judges or district judges of the lower judiciary, though a very large proportion of cases—particularly criminal cases—are tried and disposed of before their courts. The Basic Principles do not make any distinction between these two categories. Though the word frequently used in the Basic Principles is ‘judge’, it should be read in the context of other terms like ‘independence of the judiciary’ and ‘judicial officer’. Nor do the Beijing Principles make such a distinction. National constitutions provide for an independent judiciary. However, the fact remains that in many countries, particularly in the Commonwealth, judicial officers in the lower judiciary are not perceived to be independent. Some provisions to protect the independence of the higher judiciary do not apply to these judicial officers.

This disparity is now gradually being challenged before the national courts. It was challenged before the Canadian Supreme Court in 1997, before the Court of Appeal of Scotland in 1999, the Supreme Court of Bangladesh in 2000, and the Constitutional Court of South Africa.[1]

These decisions of the apex courts on this very vexed issue are most welcome. I hope they will be disseminated widely for similar courts in other countries to follow, or for governments to take necessary legislative measures to insulate these judicial officers with independence, so that in their adjudicative process they are perceived by the consumers of justice to be independent and impartial.

The role of chief justices and presidents of the apex courts

Of late the position of chief justices or presidents of apex courts has come under criticism in some countries. Complaints have been largely regarding abuse of power and interference with adjudicative processes of junior judges, particularly those who await recommendations from the chief justice for promotions and so on. Chief justices and presidents are generally given the power to empanel sittings of the appellate courts. In such cases there have been allegations of ‘fixing’ in selective appeals.

The Basic Principles and the regional standards do not provide standards for chief justices or presidents, though principle 6 of the Beijing Principles regarding interference in the decision-making process must necessarily apply to chief justices. With regard to judicial appointments and promotions, national constitutions that do not provide an independent mechanism for selections and recommendations leave it to the chief justice to select and recommend. There have been allegations of favoritism, cronyism and nepotism.

Recent cases decided by the Supreme Court of India illustrate. The Constitution of India provides for the appointment of judges by the president after "consultation with the Chief Justice of India". In a 1993 case the court held that this 'consultation' must be genuine and not a sham. When there is a conflict between the opinion of the executive and that of the Chief Justice, the opinion of the Chief Justice should prevail. By this judicial interpretation, the Supreme Court in effect removed the power of judicial appointments from the executive and vested it in the Chief Justice.[2] Controversy arose thereafter as to whether the power can be vested in just one person like the Chief Justice or whether it should require consultation with a plurality of judges. In 1998 the President of India referred this and other doubts caused by the 1993 judgment back to a full bench of the Supreme Court without the Chief Justice. In a detailed decision the Court held that

> The primacy of the opinion of the Chief Justice of India in this context is, in effect, primacy of the opinion of the Chief Justice of India formed collectively, that is to say, after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of his opinion.[3]

Thus the Supreme Court, in its interpretation of the expression "consultation with the Chief Justice of India", read into the Constitution not only that the Chief Justice's opinion must be a collective opinion formed after taking the views of his senior colleagues but also that when that opinion conflicts with that of the executive the opinion of the judiciary "symbolised by the view of the Chief Justice of India" should have primacy.

Soon after the 1993 decision of the Supreme Court of India a similar issue arose before the Supreme Court of Pakistan. The Constitution of Pakistan too has such a provision for consultation. Following the 1993 Supreme Court decision in India, the Supreme Court in Pakistan wrested the power of judicial appointment from the executive. However, there was a difference. The Pakistan court held that if the executive refuses to accept the opinion of the Chief Justice then the executive should give its reasons in writing, thus calling for transparency.[4]

On this issue of judicial appointments and promotions, considerable executive involvement in the appointment procedure has resulted in the judiciary not being independent or perceived to be independent. Provisions for consultation or advice have also resulted in doubts and suspicions about whether such consultations are genuine or mere shams. Vesting this power in just one person like the chief justice too is fraught with difficulties. However eminent the chief justice may be, there is always the likelihood of abuse. Hence, the trend now in modern constitutions is to entrust the power of recommendations for judicial appointments to an independent council or commission. Such a council or commission is composed of representatives of institutions closely connected with the administration of justice. The council or commission then recommends suitable men and

"The trend in modern constitutions is to entrust the power of recommendations for judicial appointments to an independent council"

women for appointment by the government. Such a commission is now being proposed for England & Wales. A debate is very much alive there.

"It is essential that judicial appointments are perceived to be made independently and transparently"

A good example is the Philippines. In that republic, pursuant to the 1986 Constitution of the Philippines a Judicial and Bar Council for judicial appointments was created. This Council is composed of the Chief Justice, Minister for Justice, a representative of the bar association, a professor of law, a retired member of the Supreme Court and a representative of the private sector. This council advertises for judicial appointments, processes all applications, conducts interviews and selects suitable applicants based on proven competence, integrity, probity and independence, which are the criteria provided in the constitution. Whenever there is a vacancy in the Supreme Court or High Court, the Council submits to three names to the Executive President. The President selects one among the three on the list.

Similarly, the 1996 Constitution of South Africa provides for a Judicial Services Commission to recommend to the Executive President suitable appointees for judicial appointments.

The 1998 European Charter on the Statute of judges, referred to earlier, provides, inter alia,

> In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the Statute envisages the intervention of an *authority independent of the Executive and Legislative powers* within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representative of the judiciary (emphasis added).

Whatever form the selection and recommendatory mechanism may take, it is essential that judicial appointments are perceived to be made independently and transparently, based on merit and without improper considerations, political or otherwise.

In 2000–01 differences between the then Chief Justice and the executive Council of the Law Society in Fiji were of concern to me. I expressed my views to the Honourable Chief Justice and the Law Society on the incident. I told the Chief Justice that administratively barring some lawyers in the Law Society from appearing before him and another judge may be seen as a violation of principle 19 of the Basic Principles. Principle 19 provides that no court or administrative authority shall refuse to recognise the right of a lawyer to appear before it for his or her clients unless the lawyer has been disqualified in accordance with national law.

Similarly, I expressed to the government of Sri Lanka my concerns over the manner in which certain processes were handled by the present Chief Justice in light of proceedings against him before the Supreme Court, and subsequently when an impeachment petition was admitted in Parliament. These events not only called into question the impartiality and integrity of the judiciary but politicised the institution. Hence I was not

very surprised when I learnt that Justice Mark Fernando has sought early retirement from the Supreme Court. In view of the politics within the judiciary—and in particular the conduct of the Chief Justice—this early retirement is, I suppose, inevitable. Justice Mark Fernando is an independent, able and courageous judge. Obviously he does not wish to continue under present circumstances. He will be a loss to the Supreme Court of Sri Lanka.

> "The guarantee of judicial independence is for the benefit of the judged, not the judges"

In Malaysia there were serious allegations that independent judges who did not toe the line of a previous Chief Justice were not promoted or were transferred out. A few junior judges who wanted to leapfrog senior judges for promotion would tailor their judgments to suit the needs of the Chief Justice. An allegation a couple of years ago by a High Court judge that the former Chief Justice attempted to interfere with his adjudicative process in an election petition is still being investigated. Integrity of the Malaysian judiciary has been a concern since 1988. Very recently, leapfrog promotions of three judges involved in the Anwar Ibrahim trials and appeals were perceived as rewards for having delivered what the Executive wanted. The Bar Council publicly protested and called for an extraordinary general meeting to adopt resolutions calling for disclosure of the criteria applied for the promotions and the setting up of an independent judicial services commission to select and recommend judicial appointments, promotions and transfers. Under the Constitution of Malaysia, the Chief Justice makes recommendations for judicial appointments and promotions to the Prime Minister, who in turn advises the King. The King must accept the advice. The extraordinary general meeting of the Bar Council had to be aborted, as the required quorum of 2222 could not be mustered.

As the office of the Chief Justice is the embodiment and reflection of the independence, impartiality and integrity of the judiciary in any democracy, it is therefore imperative that only those who can command that respect be appointed.

Abuse of judicial independence

Judges are conferred and clothed with independence in their adjudicative process so that they can dispense justice without fear or favour, in accordance with the facts, evidence and law presented to them. For this purpose many national constitutions provide for conditions with regard to the appointments, promotions, discipline, security of tenure and immunity to insulate judges. These conditions are prerequisites for protection of their independence. They are found in the international and regional standards. The guarantee of judicial independence is for the benefit of the judged, not the judges. There have been cases where judges are said to have abused this independence, sometimes as a shield against investigations of judicial misconduct, including investigations of corruption. Judges know that they cannot easily be removed, cannot be sued for their conduct or words uttered in the adjudicative process, and that their salaries cannot be reduced. The common complaint is

regarding the kind of terse and curt language some judges use against parties, witnesses, counsel, and even against others not in court. In some countries such conduct has triggered a public furore through the media, drawing the executive, supported by the public, to seek greater accountability from the judiciary.

"Judges are accountable to the extent of deciding the cases before them expeditiously, in public, fairly, promptly, and with reasons for their decisions"

Judicial accountability

Accountability and transparency are the very essence of democracy. Not one public institution, or for that matter even a private institution dealing with the public, is exempt from accountability. Hence, the judicial arm of the government too is accountable. In an interview with India Today in 1996 the former Chief Justice of India, Justice Verma, was asked his opinion regarding making the judiciary more accountable. The Chief Justice's reply was:

> It's long overdue. With the increase in judicial activism, there has been a corresponding increase in the need for judicial accountability. There is a perception that the people are doubting whether some of us in the higher judiciary satisfy the required standards of conduct. Since we are the ones laying down the rules of behaviour for everyone else, we have to show that the standard of our behaviour is at least as high as the highest by which we judge the others. We have to earn that moral authority and justify the faith the people have placed in us. One way of doing this is by codifying judicial ethics *and adhering to them* (emphasis added).

However, judicial accountability is not the same as the accountability of the executive or the legislature, or any other public institution. This is because the independence and impartiality expected of the judicial organ is different from other agencies. Judges are accountable to the extent of deciding the cases before them expeditiously, in public (unless for special reasons), fairly, promptly, and with reasons for their decisions. Their judgments are also subject to scrutiny by the appellate courts. No doubt legal scholars and the public—including the media—may comment on the judgment. If judges misconduct themselves, they are subject to discipline by the mechanisms provided under the law. Beyond these parameters, they should not be accountable for their judgments to any others. Judicial accountability stretched too far can seriously harm judicial independence.

It must be stressed that the constitutional role of judges is to decide on disputes before them fairly and to deliver their judgments in accordance with the law and the evidence presented before them. It is not their role to make disparaging remarks about parties and witnesses appearing before them or to send signals to society at large in intimidating and threatening terms, thereby undermining other basic freedoms like the freedom of expression. Another source of concern is the manner in which contempt of court powers are used to instill fear. When judges resort to such conduct, they lose their judicial decorum and eventually their guarantees of judicial independence. They open the door to public criticism of their conduct and bring disrepute to their institution that can lead to a loss of confidence in the

system of justice in general. Respect for the judiciary cannot be extracted by invoking coercive powers, except in extreme cases. The judiciary must earn respect by its performance and conduct.

> "Respect for the judiciary cannot be extracted by invoking coercive powers"

No doubt judges too have freedom of expression. The Basic Principles require judges to exercise their freedom of expression "in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary". Similarly, the Beijing Principles state that judges are entitled to freedom of expression "to the extent consistent with their duties as members of the judiciary". It follows that judges do not have the right to say anything at all, either in the adjudicating process or even in their extrajudicial capacities. Particularly in the adjudicating process they must be circumspect with their words, to maintain their objectivity and impartiality.

Let me give a few illustrations. In 1996 a Superior Court Judge of Quebec in Canada dealing with the sentencing of a woman found guilty of second degree murder in the death of her husband berated a jury and made insensitive remarks about women and Jews. The remarks were:

> When women ascend the scale of virtues, they reach higher than men [but] when they decide to degrade themselves, they sink to depths to which even the vilest men could not sink…
>
> Even Nazis did not eliminate millions of Jews in a painful or bloody manner; they died in the gas chamber without suffering.

Those remarks caused an enormous controversy in Quebec. Many including the media called for removal of the judge. Women's rights associations were in uproar. The judge did not resign. The matter went before the Canadian Judicial Council. By a majority of 4 to 1, the Inquiry Committee of the Council found the judge unfit for office. They went on to say that the judge undermined public confidence in him and strongly contributed to destroying public confidence in the judicial system. This recommendation went before the full Judicial Council headed by the Chief Justice. By a majority of 22-7 the Council recommended to the Minister to move Parliament for the removal of the judge. The judge eventually resigned.[5]

In another recent case, again in Canada, a judge of the New Brunswick Provincial Court was removed for derogatory comments about the residents of a particular district, while presiding over a sentencing hearing. The majority of the disciplinary panel found her comments incorrect, useless, insensitive, insulting, derogatory, aggressive and inappropriate. That they were made by a judge made them even more inappropriate and aggressive. The Supreme Court of Canada upheld the finding. Soon after the judge made those comments she apologized to the residents in open court during the proceedings on an unrelated matter. The apology did not mitigate the damage done.[6]

"The excessive use of coercive powers like contempt of court has been a concern in some countries"

In December 2001 the New South Wales Court of Appeal in Australia delivered a judgment criticizing the conduct of a District Court Judge as having fallen "far too short of acceptable judicial behaviour" that it might lead to an apprehension of bias.[7] The appeal judges added that her conduct was disturbing and "comments totally unnecessary", and that the judge "made little to maintain the proper decorum of either the court or herself". They described one of her statements as "disgraceful and totally unjudicial". The author of an opinion column in an Australian daily reporting on this case asked, "How on earth do people like the judge concerned get appointed to courts in this country?" It is not known whether any disciplinary action was taken against that judge.

In South Africa during October 1999, in sentencing a 54-year-old man to seven years imprisonment in the Cape Town Court for raping his 16-year-old daughter the judge said that while raping his daughter was "morally reprehensible" the act was "confined" to his daughter and that therefore the man did not pose a threat to society. He further said that the girl had a good chance of recovery. In a country where it is said that there is a rape committed every 36 seconds and where the law provides a minimum sentence of life imprisonment unless there are mitigating circumstances, these pronouncements unleashed a wave of anger from women's rights groups. The prosecutor instantly filed a notice of appeal. In the aftermath, newspapers reported that a Parliamentary Committee had summoned the judge to appear and explain himself over the sentence. This began a counter protest from judicial circles, as such action by Parliament would amount to encroachment onto judicial independence. The wisdom of the Minister of Justice in a public statement quelled the situation. He said, inter alia:

> In terms of our constitution, the judiciary is independent from both the legislative and the executive. The principle of separation of powers and the independence is strongly entrenched in our constitution.
>
> The judiciary as an organ of State had to be accountable in its actions, but this did not mean that judges should appear before a parliamentary committee to explain their judgments.

These are just a few recent instances where judges have been taken to task by disciplinary tribunals, appellate courts and the public when they abuse their judicial power and undermine public confidence in the justice system.

The excessive use of coercive powers like contempt of court has been a concern in some countries. It was a serious problem in Malaysia a few years ago, when lawyers were committed and sentenced. The manner in which this power was invoked summarily by the Supreme Court of Sri Lanka in the Michael Fernando case earlier this year brought the Court into severe criticism from various quarters, including myself. It obviously had a chilling effect on the public's access to justice and freedom of expression. It even intimidated the legal profession. I am glad that the government has responded to the concerns expressed

and has set up a committee to consider the need for legislation on the parameters of contempt of court. That an unrepresented lay litigant attempting to seek justice in the highest court of the land, however misconceived his grievance may have been, could be convicted and sent to prison for one year is beyond belief. The worst form of injustice in any civilized society is injustice perpetrated through the judicial process. It becomes aggravated when the court is the highest in the land, as there will be no further appeals and moreover it remains a dangerous precedent for lower courts. Another objectionable feature in that case was that the Chief Justice was a respondent to the petition. However ill conceived that move by the petitioner, as a matter of principle and in accordance with section 49 (3) of the Sri Lanka Judicature Act, the Chief Justice should have disqualified himself. It was his presence to which the petitioner seems to have objected. He was quite right.

"The worst form of injustice in any civilized society is injustice perpetrated through the judicial process"

The often-cited judgments of Lord Atkin from 1936 on a proper balance of the two competing interests, and that of Lord Denning in 1968 on how courts should exercise restraint in too readily invoking contempt powers, are worthy constant reminders to judges all over the Commonwealth. Lord Atkin said:

> The path of criticism is a public way: the wrongheaded are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.[8]

Lord Denning said:

> This is the first case, so far as I know, where this court has been called on to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us, but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter. Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticize us will remember that, from the nature of our office we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.

> So it comes to this. Mr Quintin Hogg has criticized the court, but in so doing he is exercising his undoubted right. The article contains an error, no doubt, but errors do not make it a contempt of court. We must uphold his right to the utmost.[9]

"Judges can no longer oppose calls for greater accountability on grounds that it will impinge on their independence"

I know of another case in the sixties when a lay litigant having lost her case threw her books at the three judges of the Court of Appeal of England & Wales. The books flew past the head of the presiding Judge, Lord Denning. All Lord Denning did was direct the usher to lead her out of the Court. She exclaimed, "I am surprised that your Lordships are so calm under fire". The conduct of Lord Denning in those circumstances demonstrated highest judicial integrity and compassion.

While the executive arm is often apprehensive of judicial independence, the judicial arm is often apprehensive of judicial accountability. I have in my reports observed that judicial accountability is not inimical to judicial independence. Though judicial accountability is not the same as accountability of the executive or legislative branches of the government, yet judicial accountability without impinging on judicial independence will enhance respect for judicial integrity. The Basic Principles do not provide for judicial accountability save for a provision on procedure for judicial discipline.

Over the last three years, in association with the Judicial Group on Strengthening Judicial Integrity, and in collaboration with the Consultative Council of European Judges of the Council of Europe and the American Bar Association and Central and European Law Initiative, we deliberated in the drafting of the Bangalore Principles of Judicial Conduct. The drafting was finalized and adopted in November last year at The Hague. At the last session of the UN Commission on Human Rights in April this year I presented these Principles for its consideration. There was unanimous support from member states. In a resolution the Commission noted these principles and called upon member states, relevant UN organs, intergovernmental organizations and non-governmental organisations to take them into consideration. In my report I observed that these principles would go some way—when adopted and applied in member states—to supporting the integrity of judicial systems and could be used to complement the Basic Principles to secure greater accountability. The Bangalore Principles are now available in the six official languages of the United Nations.

Judicial accountability is today the catch phrase in many countries. Judges can no longer oppose calls for greater accountability on grounds that it will impinge on their independence. Judicial independence and judicial accountability must be sufficiently balanced so as to strengthen judicial integrity for effective judicial impartiality. The establishment of a formal judicial complaint mechanism is therefore not inconsistent with judicial independence under international and regional

standards. Principles 23–28 of the Beijing Principles imply some guidelines for such a mechanism. In this regard, judges should take the initiative before it is forced upon them by politicians.

In South Africa, recently the judges themselves drafted legislation to provide for a judicial complaint commission. There was, however, a dispute between the executive and the judiciary as to the composition of the commission. The judges wanted the composition entirely of sitting judges. The executive felt that it should not be left entirely with the judges as that would negate transparency. I recommended to the government that the composition should be left entirely to the judges, and if necessary retired judges could be included. The judges who took the initiative to draft the legislation for this mechanism should be entrusted to self-regulate it for an initial period of at least seven years. Thereafter the effectiveness of the mechanism could be reviewed. I heard very recently that the government has conceded and the commission will be composed entirely of judges.

The need for a separate complaint mechanism for judges is the subject of debate, I understand, in many countries, including the United Kingdom, New Zealand, Australia, Ireland and India. In some jurisdictions informal internal mechanisms have been set up. But these have been found to be unsatisfactory.

Another dimension of judicial accountability is judicial education. Often judges feel that they are appointed for their learning and therefore do not require further education while holding judicial office. This is a fallacy. Continued legal education for judges should be provided not only to keep them abreast of developments in the law and practice both domestically and internationally but also for them to receive what is sometimes described as “social context education” or “sensitivity training”. This is to enable them to be aware and better respond to the many social, cultural, economic and other differences that exist in society, particularly in pluralistic societies. Such education should include international human rights, humanitarian and refugee law. Another vexed question is whether such programmes should be compulsory. I have in one of my reports recommended compulsory attendance. More than anything, attendance at such programmes could improve judicial competency. However, the programmes should be structured and managed by the judiciary.

“Another dimension of judicial accountability is judicial education”

Conclusion

I have attempted here to highlight the prevailing tension between judicial independence and judicial accountability. When the international and regional standards on judicial independence were formulated the issue of judicial accountability was not apparent. Emphasis was all on securing judicial independence, to entrench the requisite protective insulation. No doubt it was implied in these standards that those appointed

to the high office of the judiciary would be men and women of the requisite qualities, and therefore their performance and conduct would be beyond question.

"Judges must remember that public confidence in the system is the ultimate safeguard of their independence"

Judges must also remember that the insulation provided to protect their independence and impartiality has been founded on public policy. Public policy can change with times. The discerning public of today, using fast improving information technology, has high expectations of the judiciary. If judges, by their performance and conduct, do not meet those expectations the insulation will slowly but surely be reduced, again via public policy.

Last year the Marga Institute conducted an inquiry into the judicial system of Sri Lanka, and published its findings in a book entitled *A system under siege*. On fairness and impartiality of the system the perceptions of court users were as follows:

> Almost 84% (83.98%) of all the respondents did not think that the Judicial System of Sri Lanka was always fair and impartial. In fact, one out of every five thought that it was never fair and impartial. Similarly 87% of the Court Users did not believe that the Judicial System was always fair and impartial. The Remand prisoners constituted the group among Court Users with the least amount of trust in the impartiality and fairness of the Judicial system of the country with 49% asserting that, it was never so.

On incorruptibility the perceptions of court users were:

> Among the respondents as a whole, the prevalent view (83.93%) was that the Judicial System of Sri Lanka was corruptible, with a mere 16.06% asserting that it is NEVER corruptible.

These figures must be of serious concern to the nation. However, among the stakeholders, the judges formed the single largest group that believed the system was always fair and impartial.

The independence of the judiciary is founded on public confidence—in essence, public trust. Without that confidence and trust, the system cannot command the respect and acceptance that are essential to its effective operations. It is therefore important that a court or tribunal should be perceived to be independent and impartial, and the test should include that perception. As said by a former Chief Justice of Canada, this is the lifeblood of constitutionalism in democratic societies.

It is not the confidence or perceptions of the judges that matters. The right to an independent tribunal is the right of the consumers of justice. It is the protective right of all human rights. It is neither a right nor a privilege of the judges. This must be made clear to judges. I have often heard judges asserting that they are independent and impartial. It is how the public perceives their performance and conduct that matters. Judges must remember that public confidence in the system is the ultimate safeguard of their independence. As Shimon Shestreet said in his classic work *Judges on trial* (at p. 392):

Written law if not supported by the community and constitutional practice, can be changed to meet political needs, or can be flagrantly disregarded. On the other hand, no executive or legislature can interfere with judicial independence contrary to popular opinion and survive.

Endnotes

[1] Canada: *Reference re. Remuneration of Judges of the Provincial Court of Prince Edward Island and Others* (1997) Vol. 150 DLR (4th) Series, p. 577; Scotland: *Starrs and Chalmers vs Procurator Fiscal (PF Linlithgow)* (1999) SCCR 1052; (2000) SLT 42; Bangladesh: *Govt. of Bangladesh & Others vs Md. Masdan Hossain & Others* (Supreme Court of Bangladesh) 52 DLR (AD) 82; South Africa: *Van Rooyen & Others vs The State and Others* (CCT 21/01). In the Bangladesh case, the government applied for review of the judgement by Civil Appeal No. 189 of 2000, but the application was dismissed by the Supreme Court on 18 June 2001.

[2] *Supreme Court Advocates on Record Association and Another v State of India*, JJ 1993 4 SC441.

[3] *Special Reference No. 1 of 1998*, JT 1998 5SC 304.

[4] *Al –Jehad Trust vs Federation of Pakistan PLD* (1996) SC 324.

[5] 'The Bienvanne Inquiry', *Canadian Judicial Council Annual Report 1996-97*, p. 30.

[6] *Moreau-Berube v New Brunswick (Judicial Council).*

[7] *Damjanovic v. Sharpe Hume & Co* (2002) NSWCA 407.

[8] *Ambard vs AG for Trinidad, Tobago* (1936) 1 704 PC.

[9] *RV Metropolitan Police Commission Exparte Blackburn* (No. 2) (1968) 2All ER 319 at 320.

A note on the law of contempt, with reference to the case of Michael Anthony Fernando

Justice H Suresh, Bombay High Court (retired), India

The source of the law of contempt is the Common Law concept of the English Courts and their decisions. Its origin can be traced to the monarchy. The judges derived their authority from the monarch, and if disrespect was shown to a judge it followed that the monarch had not been venerated, a serious matter calling for action in law. Perhaps it can be traced back to the Ecclesiastical Courts, when ethics and law were not essentially distinct from each other, and any attack on the courts would be considered as malicious and mischievous. In England this power has been enjoyed by the Superior Courts.

The power to commit summarily for contempt is considered necessary for the proper administration of justice. The English courts have held that the summary jurisdiction by way of contempt proceedings in which the court itself is attacked should be exercised with scrupulous care, and when the case is clear and beyond reasonable doubt.

If a judge is defamed in such a way as not to affect the administration of justice, he has the ordinary remedies for defamation if he should be impelled to use them. It is not that every criticism of the court becomes contempt of court:

> The path of criticism...is a public way. The wrong headed are permitted to err therein; provided that the members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism, and not acting in malice, or attempting to impair administration of justice, they are immune (Ambard vs. Att. Gen. for Trinidad & Tobago, *All India Reporter*, 1936 PC 141).

The law of contempt in India

There was no statutory law of contempt till 1926. Indian courts followed the English Common Law. In 1926, the government enacted the Contempt of Courts Act XII of 1926, whereby the High Courts were given power to punish for contempt of courts

"subordinate" to them. This was repealed and substituted by the Contempt of Courts Act XXXII of 1952, which has been replaced by the Contempt of Courts Act, No. 20 of 1971.

The courts have made a distinction between libel and contempt of court: One is a wrong done to the judge personally, while the other is a wrong done to the public. If a judge is defamed in such a way as not to affect the administration of justice, he has the ordinary remedies for defamation if he should feel impelled to use them. The general principle is that contempt jurisdiction should be sparingly used "with the greatest reluctance and the greatest anxiety on the part of judges".

"Often the courts have not been able to distinguish between the scandalising of a judge and the scandalising of the court"

Under Indian law, "contempt of court" has been divided into two categories: civil contempt and criminal contempt. Civil contempt means "willful disobedience to any judgment, decree, direction, order, writ, or other process of a Court, or willful breach of an undertaking given to a Court" (section 2.b). Criminal contempt means

> The publication (whether by words, spoken or written, or by signs, or by visible representations or otherwise) of any matter or the doing of any act whatsoever, which (i) scandalises or tends to scandalise or lowers or tends to lower the authority of, any court; or (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other matter (section 2.c).

Broadly, these are the two categories of contempt. It has always been held that the Supreme Court and the High Courts have inherent powers to punish anyone for contempt, for the purpose of safeguarding the dignity of the court (articles 129 & 215 of the Constitution of India).

A civil contempt is a failure to obey the court's order issued for the benefit of the opposing party. A criminal contempt is conduct that is directed against the dignity and authority of the court.

Criminal contempt

There is not much of a problem with regard to civil contempt, inasmuch as it is essentially a willful disobedience of the order of a court. However, in the case of criminal contempt, there has always been uncertainty with regard to "scandalising" the court. Often the courts have not been able to distinguish between the scandalising of a judge and the scandalising of the court.

Under Indian law, the following are not contempt:

a. Innocent publication and distribution of any matter by words, spoken or written, or by signs or visible representations, which may interfere, or tend to interfere with the administration of justice (section 3);

b. Fair and accurate reporting of judicial proceedings (section 4);

c. Fair criticism of a judicial act or any proceedings (section 5);

d. A complaint against the presiding officers of subordinate courts, made in good faith (section 6).

Principles of natural justice

In all cases of contempt, the principles of natural justice have to be observed before any one is held guilty. First, there should be a notice to show cause to be served on the person charged with contempt. Secondly, the notice must contain the affidavits and any other material relied on in support of the action initiated. Thirdly, the person charged with contempt has a right to file an affidavit in support of his defence, and also to produce such evidence as may be necessary. Fourthly, the court will then pass an order, after hearing both sides (section 17). Under the rules framed under the Act, such a person has a right to be defended by an advocate. In the case of subordinate courts, the High Court has power to punish for contempt.

"The contemnor has the right to apply to the court to have the charge against him tried by a judge other than the judge in whose presence the offence is alleged to have been committed"

There is a right of appeal from any order or decision of the High Court in the exercise of its jurisdiction to punish for contempt. If the order is of a single judge, the appeal is to a bench of not less than two judges. If the order is that of a bench, the appeal is to the Supreme Court (section 19).

In the case of criminal contempt, there are certain additional requirements. The cognisance of criminal contempt can only be taken on the motion made by the Advocate-General or by any other person with the consent in writing of the Advocate-General (section 15). If the court is satisfied it shall frame a charge, and thereafter the case proceeds like a criminal trial.

Powers of High Courts and the Supreme Court

Where the Supreme Court or a High Court are held in contempt, the court has the power to detain such a person in its custody before rising; but before proceeding the court shall

a. Cause him to be informed in writing of the contempt with which he is charged;

b. Afford him an opportunity to make his defence to the charge;

c. After taking such evidence as necessary, either forthwith determine the matter, or adjourn the matter and determine;

d. Thereafter make an order of punishment or discharge him.

Notwithstanding the above, the contemnor has the right to apply to the court to have the charge against him tried by a judge other than the judge or judges in whose presence or hearing the offence is alleged to have been committed. The court must then decide whether in the interests of proper administration of justice the application should be allowed or not. If the application is allowed, the proceedings shall thereafter proceed before the other judge (section 14).

I think that this is what applies in the case of Mr Michael Anthony Fernando (see Appendix for further details). If a judge of the Supreme Court considers that the behaviour or conduct of any one in his presence amounts to contempt, he can at most

detain him for the day, frame a charge against him, hold an inquiry—giving him an opportunity to defend—and only thereafter, if the judge thinks that he is guilty of contempt, punish him. If the matter is not over within that day itself, he may release the contemnor after taking a bond from him that he would appear on a day fixed for a hearing. Since the charge is akin to a criminal charge, it is proper that he should be offered a chance to have an advocate of his choice. It is also proper that if he applies for the matter to be heard by another judge, the same should be granted on the principle that no one can be a judge of his own cause.

"In my view, the imprisonment of Mr Michael Anthony Fernando ordered by the Chief Justice of Sri Lanka is without the authority of law; it is illegal"

Apology for contempt

It should be noted that in every contempt law there is a provision for tendering an 'apology'. If the contemnor tenders an apology to the court, he can be discharged or the punishment awarded may be remitted. Under Indian law, an apology shall not be rejected merely on the ground that it is qualified or conditional, if the accused makes it bona fide. Very often the matter gets worked out when the contemnor apologises. However, this should not mean that he has no right to defend himself.

Punishment

Under Indian law the maximum punishment is simple imprisonment not extending beyond six months, or a fine which may extend to two thousand rupees, or both. If Sri Lanka has no statute on contempt, I cannot understand how anyone can be punished for any period. The court may have an inherent power to detain a person till the rising of the court for the day. Any further detention can be ordered, if there is any statute providing for such detention. In my view, the imprisonment of Mr Michael Anthony Fernando ordered by the Chief Justice of Sri Lanka is without the authority of law. In short, it is illegal. The Chief Justice has no right to send any one to prison except in accordance with the law. Otherwise, he can only detain a person till the rising of the court.

Reconsidering the law of contempt

Personally, I am against this law of contempt. We do not require any such law for the administration of justice. If any order of the court is breached, it should have machinery to execute its order. The Civil Procedure Code and Criminal Procedure Code provide for the execution and enforcement of orders.

As regards criminal contempt, the courts have generally failed to distinguish between scandalising the judge as a person, and scandalising the court. If a judge is criticised and the contemnor wants to justify his criticism on the basis that his allegations are true, he is not allowed to do so. Our courts have held that truth is not a valid defence in an action for contempt. In an action for libel, truth and public good could be a valid defence, but not in an action for contempt. In the UK, the statutes have been amended on the recommendation of the Phillimore Committee

to provide for truth as a defence to a charge of contempt by scandalising. In the US the courts have evolved a more liberal standard of "clear and present danger" to the administration of justice. In many countries, such as Norway and Sweden, there is no contempt law. If a judge is "scandalised" it is for him individually to take action for libel or slander under the ordinary law. The dignity of the court is in no way affected by any comment on the judges. Judges earn their reputation not by what others say, but by their own utterance, by their acts of commission and omission.

"In an open justice system, no judge and no court can avoid criticism, fair or foul"

"Judge not lest ye be judged" is a Biblical maxim that should apply to judges as much as it applies to lay people. Just as judges have the right to judge litigants, litigants have the right to judge judges. They have a public interest to know how judges have conducted themselves in court, and in each case. In an open justice system, no judge and no court can avoid criticism, fair or foul. Lord Atkin once said, "Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men." To speak one's mind is a right that cannot be denied to any citizen. To suppress this in the name of scandalising the court is no guarantee that the respect and dignity of the court will be enhanced. As Lord Denning remarked (in Quintin Hogg's Case), "Let me say at once that we will never use this [contempt] jurisdiction as a means to uphold our own dignity. That must rest on surer foundations."

Appendix: Statements by the Asian Human Rights Commission

Regarding the torture and contempt of court case of Michael Anthony Fernando

(AS-04-2003, 21 February 2003)

The Asian Human Rights Commission (AHRC) has carefully studied the complaint of torture made by Michael Anthony Emmanuel Fernando on 16 February 2003, and the contempt of court case against him.

We reproduce below the full judgement of the Supreme Court of Sri Lanka on the contempt of court conviction that led to Mr Fernando being sentenced to one years' rigorous imprisonment.

> BEFORE
>
> S. N. SILVA C.J
> EDUSSURIYA A. J &
> YAPA J.
>
> Petitioner is present in person.
>
> The petitioner has been asked to show cause as to why he should not be dealt with for contempt of Court. [The] Court, accordingly, found him guilty for contempt of Court and sentences him to one year's rigorous imprisonment for contempt of Court.
>
> Registrar to inform the Prison Authorities to arrest him.
>
> Sgd.

While the brevity of the judgement itself is a matter for serious concern, AHRC holds that the said judgement is a clearly questionable on many grounds, including Sri Lanka's obligations under human rights treaties to which it is a state party. On the basis of the International Covenant on Civil and Political Rights (ICCPR), Mr Fernando has been denied a fair hearing, as he was entitled to but never obtained

1. A charge sheet clearly stating the offence and the possible punishment, so that he would have been informed of the serious consequences of the proceedings;
2. Legal advice, which he had no possibility to obtain prior to conviction;
3. Sufficient time to prepare his case; and,
4. A judgement containing the factual and legal basis on which it had been arrived at, giving a summary of the evidence against Mr Fernando.
5. Right to appeal the court's decision.

The reason for this outcome is that the fundamental norm that respondents and judges should not be same has been violated. The fact that one of the respondents to Mr Fernando's claim sat in judgement of him undermines judicial objectivity. It is a well-accepted norm that the judges should not only be impartial but also be seen to be impartial. The purpose of contempt of court proceedings is to enhance the prestige of the court. This particular judgement achieves the opposite.

AHRC has also studied the complaint of torture suffered by Mr Fernando and is satisfied that there exists a credible complaint that should be investigated by an impartial body. However, as Mr Fernando is in hospital under remand custody, and chained even there, it is virtually impossible for him to participate freely at such an inquiry. He is under enormous pressure. AHRC has also learnt that even proper clothing has not been provided to him. Despite officials' claims, the family still does not have proper access to Mr Fernando. Meanwhile, he has stated that attempts have been made to fabricate evidence and to deny that injuries to his spinal cord were due to an assault while he was being taken to prison.

AHRC urges

1. The Supreme Court of Sri Lanka to quash this judgement and hold a fresh inquiry guaranteeing the rights of the aggrieved party within Sri Lankan law and in accordance with international obligations;
2. That Mr. Fernando be freed from custody, so that he may be able to obtain the proper medical care of which he is in dire need due to the assault perpetrated on him;
3. That a credible and impartial investigating body be appointed to investigate his complaint in relation to torture and the conspiracy that may exist for the perpetration of this torture;
4. That the UN Special Rapporteurs on the independence of judges and lawyers, human rights defenders, and torture, international human rights organizations and international judicial organizations take up this case with the Government of Sri Lanka with the utmost urgency.

Senior judge's resignation a warning of deteriorating judicial independence and rule of law in Sri Lanka

(AS-30-2003, 28 August 2003)

The news that Justice Mark Fernando has decided to resign from the Supreme Court of Sri Lanka two and a half years early is of grave concern. Observers believe that Justice Fernando has been sidelined and unfairly treated within the Supreme Court. In recent years the Chief Justice has excluded him from hearings relating to the constitutionality of bills before the Parliament. This is the same Chief Justice who headed a bench that imprisoned the lay litigant Michael Anthony Fernando for

contempt of court. The UN Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy, referred to that decision as an "act of injustice". Under these circumstances Justice Fernando's resignation can be seen as an act of protest.

Justice Fernando has consistently upheld the rights of Sri Lankan citizens, especially those of the victims of human rights violations. Since joining the Supreme Court in 1988 he has observed the highest levels of independence and integrity, maintaining principles of impartiality, fairness and justice at all times.

Now, when the rule of law and administration of justice need thorough reforms, it is extremely important that judicial officers of Justice Fernando's calibre continue their work. His premature retirement can only have an adverse effect on the rule of law in Sri Lanka and may further diminish the citizens' trust in public institutions.

The Asian Human Rights Commission appeals to Justice Fernando to reconsider his decision to resign. His presence in the Supreme Court is desperately needed. The Government of Sri Lanka and other judges of the Supreme Court must assure Justice Fernando that he will be treated equally and will be given the opportunity to function fully in keeping with his role as a justice of the Supreme Court.

Editorial note: Michael Anthony Fernando was released from jail on 17 October 2003, to a hero's welcome. He was greeted by, among others, the former UN Special Rapporteur on the independence of judges and lawyers, Dato' Param Coomaraswamy. He gave a speech in defiance of the Chief Justice of the Supreme Court, which was reported on nationally. He was then presented the Asian Human Rights Commission's inaugural Human Rights Defenders Award. For more details, please see 'Asian Human Rights Commission presents inaugural Human Rights Defenders Award to Michael Anthony Fernando', [http://www.ahrchk.net/statements/mainfile.php/2003statement/126/].

The police, judiciary and rule of law in Asia

Basil Fernando, Executive Director,
Asian Legal Resource Centre

This paper is based on actual experiences of policing and the rule of law in Asia in recent times. The views expressed are based on extensive consultations that have been carried out by the Asian Legal Resource Centre (ALRC) in many parts of Asia, and that have brought together participants from most countries in the region. The discussion is also informed by the provisions in article 2 of the International Covenant on Civil and Political Rights (ICCPR). It is an attempt to place the discussion on policing in Asia within the framework of state parties' obligations under the ICCPR provisions.

The paper proceeds on the assumption that people in traditional democracies find it extremely difficult to understand what occurs in the name of the rule of law and policing in countries falling outside the category of traditional democracies. The difficulties in understanding suggest the experiential differences of people coming from these different backgrounds. It is presumed that these two experiences are fundamentally different and that serious difficulties in understanding are inevitable. A worthwhile discourse between people from these two backgrounds can take place only with an appreciation of these difficulties. The classification of "North" and "South" suggests a territorial division. The classification of "traditional democracies" and "others" suggests historical, social and political differences, pointing to the development of institutions for the rule of law, and policing in particular.

The reference above to "recent times" is intended to limit the discussion to the present day and avoid entering into other debates, such as that long before the rise of what are now known as traditional democracies, there had prevailed vibrant models of democracies in other places. For example, the political model of Asoka's time in India during the third century BCE is rightly

This is a revised version of 'Police and the rule of law in Asia', published in *Human rights and the police in transitional countries*, L Lindholt et al (eds), Kluwer Law International, Netherlands, 2003, pp. 29–49.

held to be a rich period of democracy under the conditions of that era. Without in any way undermining the importance of such discussions, this paper will concentrate on the realities that people in Asia are now experiencing in terms of the rule of law and policing.

A caution also needs to be made regarding the use of terms that, in these two contexts, may have different meanings.[1] For example, a police officer may be described as a law enforcement officer. However, a reference to law need not be part of the description of a policeman in some jurisdictions. For instance, in post-Pol Pot Cambodia, there is little law in existence by way of legal enactment.[2] Thus, the activities of police officers are not guided by laws. Police officers improvise their role and duties according to circumstances and the policy guidance given to them from above. Even in circumstances where comprehensive laws exist, as in Sri Lanka, these laws can be suspended without much difficulty. Police officers can be required to engage in massive killings, as when, for example, they were called upon to effect the disappearance of a large number of people (officially estimated at 30,000).[3] Moreover, in all Asian countries, police officers are expected to use coercion, including torture, in criminal investigations. Furthermore, the gap between definitions contained in legislation and the available possibilities of enforcement is often so wide that, if one goes by the legislation only, it can lead to serious difficulties.

In most instances, the concept of order is not understood as order according to the law, but rather as order with or without the law.[4] Thus, keeping Chia Thye Poh in detention for 26 years without trial was not considered illegal in Singapore.[5] Anwar Ibrahim of Malaysia is now in prison on the basis of a trial condemned as unfair all over the world. Such acts are justified on the basis of keeping order, and law enforcement officers have to carry out these orders irrespective of the legal issues involved. The military coup in Pakistan in 1999 was also justified on these grounds, and law enforcement officers are now expected to act on the basis of this assumption. The justification for torture in many Asian countries is also based on the view that it is necessary for maintaining order. What follows from this situation is that the rule of law is often sacrificed under the pretext of maintaining order. Police officers are thus seen more as order maintenance officers than as law enforcement officers.

Thus, I believe that the starting point for a meaningful discussion on the rule of law and policing must be the attempt to distinguish between order enforcement officers and law enforcement officers. The main differences are as follows:

1. The central issue in law enforcement under the rule of law is the criminal investigation: the effort to prove that crimes have been committed through the submission of evidence. Order enforcement, however, does not require investigations or proof according to the law. This distinction has huge implications for the understanding of policing functions.

"The starting point for a meaningful discussion on the rule of law and policing must be the attempt to distinguish between order enforcement officers and law enforcement officers"

2. Criminal investigations require training. Training requires basic education that makes participation in this training possible. Investigations also require facilities, such as forensic laboratories. However, these are not requirements when maintaining a police force to keep order by whatever means.

3. Through law enforcement under a system based on the rule of law, it is possible to eliminate the use of torture and degrading punishment. Among order-enforcers, this is not possible, and such officers have even been used for committing extrajudicial killings—sometimes on a large scale.[6]

4. In law enforcement under the rule of law, policing is a function subordinated and controlled by the judiciary and prosecutors. However, officers who are mobilized to maintain order are free from such controls.

5. The concept of an order enforcement officer is not derived from the concept of the rule of law. The concept of a law enforcement officer, on the other hand, is based on the concept of the rule of law.

6. Law enforcement under the rule of law presupposes the acceptance of equality before the law. Order enforcement does not need such a prerequisite; in fact, unequal treatment is inherent in the system of order enforcement.

7. Order enforcement is associated with impunity while law enforcement is not.

8. Law enforcement can be a transparent process, and the transparency can be maintained by procedural means, such as keeping the required records. Order enforcement does not have such a requirement. Indeed, often an order enforcement officer is discouraged from keeping records.

9. Communication between the hierarchy and subordinates in a law enforcement agency is usually based on written codes of ethics and discipline. Order enforcement does not require such codes, either written or unwritten.

Problems facing the rule of law: A few examples from Asia

India

A rule of law model exists, and a strong judiciary upholds it. However, this model is ineffective in dealing with violations against minorities, such as Dalits (a group consisting of 160 million people), indigenous people, and others. Also, in some states, such as Bihar, the rule of law has completely broken down.

Pakistan

A military regime holds power. The rule of law has broken down. In some major cities, a state of chaos exists.

Sri Lanka

Although, in the 1950s, Sri Lanka had a similar model to that of India, the rule of law has broken down in both the North and the South. Evidence includes: more than 30,000 disappearances, endemic torture, an enormous increase in crimes, a lack of accountability of the police and other agencies, and an ineffective system of prosecutions functioning under the auspices of the attorney general. The civil war, though aggravating the situation, is not the cause of this collapse of the rule of law.

Cambodia

A concept of the rule of law does not exist yet; laws are very few and often contradictory. There is policy-level opposition to the development of the law. Criminal investigation facilities hardly exist. There is no criminal investigation training. The quality of prosecutors and judges does not meet basic levels of competency. The monthly salaries of the police, prosecutors and judiciary are very low (US$20). Extrajudicial punishments, such as beating thieves to death in public places, are common.

China

During the last two decades, the theory of the "rule of law over the rule of man" has been commonly accepted. There is an increase in the body of law. However, the structural development of basic legal institutions is likely to take quite some time.

Thailand

The country accepts the rule-of-law approach and takes many measures to enforce it. Nevertheless, problems arising from the feudal past still exist. Impunity is preserved through attitudes that prevent an efficient enforcement of the law.

"The fundamental distinctions between police officers maintaining the law and security guards keeping order have been lost"

The preceding examples help in understanding some of the contemporary problems relating to the rule of law and policing in Asia. First of all, there is often resistance to development of the law. For example, in Cambodia even more than seven years after the UN-sponsored elections the country has no penal code or criminal procedure code. The reasons for this deficiency are more political than technical. Development of the law is seen as disruptive to the type of social order maintained in the country. Many activities carried out by the newly rich would become impossible if there were an expansion of the law and law-enforcement.

In the second case, in some countries, development of the law is confined to some areas, such as commerce, and restricted in regard to personal liberties. Malaysia and Singapore are good examples of this: economic and commercial development has not brought the people in those countries civil and political rights. In fact, in Malaysia the detention of political opponents to the current regime under the draconian Internal Security Act indicates how deteriorated the situation is there.

A third category is where very basic laws are suspended on the pretext that such laws are detrimental to order. In Sri Lanka, even laws relating to the reporting of deaths to the courts were suspended to allow the police to engage in acts of large-scale murder and the disposal of bodies. Moreover, the national and internal security laws of almost all Southeast Asian countries have resulted in the suspension of many laws that protect people from illegal arrest, detention, privacy, the protection of their living quarters, and other matters.

Another factor that militates against the rule of law is globalization. In Asia, multinational companies want a type of order in which local people cannot protest against the ill effects of their policies and actions. These companies want repressive regimes that protect their interests, rather than democracies in which people enjoy the rule of law. The more misery new economic developments bring to people, the less sympathy there is for the rule of law from those who wield political and economic power. Often, advocacy of the rule of law has become dangerous, and people who work for democracy are exposed to death threats and other risks.

All in all, the fundamental distinctions between police officers maintaining law and security guards keeping order have been lost. They have been lost to such an extent that from July to December 2000, in Cambodia's capital, Phnom Penh, "police officers" handed over at least 10 criminals to be beaten to death by mobs. In October 2000, at a detention centre in Sri Lanka known as the Bindunuwewa Rehabilitation Centre, at least 26 inmates were chopped to death while 60 policemen with guns were present and watched the gruesome massacre. And in almost all countries in Asia it is not that rare for special riot squads to attack people who engage in peaceful protest.

Actions to monitor police behaviour

With this background in mind, it is possible to discuss some of the suggestions that have been made to enforce the rule of law in Asia, and to define policing there in terms of the rule of law. One of the popular demands in Sri Lanka during recent times was for the appointment of an independent police commission to control the affairs of the police.[7] The protest in Sri Lanka is against political control of the police by politicians.[8] This is quite a common South Asian, and indeed, Asian phenomenon. Thus, there is a link between the concept of the police as enforcers of order and political control of the police. The assumption on which the call for an independent police force is based is detached from the issue of political control: the police will confine their duties to law enforcement under the rule of law. But in Singapore, there is no belief that the police will be independent from the ruling political party. This is also the case in Malaysia. In these situations, there are demands for comprehensive political reforms as preconditions for developing a police force that respects the rule of law.

However, others have pointed out that the mere independence of the police is insufficient, and that the function of investigations of the police must be more closely linked with the work of prosecutors. For example, when the police are left to conduct criminal investigations themselves, they often fail to fulfil their duties, particularly when they are involved in criminal activity. The police then claim that they do not have sufficient evidence to prosecute the criminals. Therefore, it has been suggested that, from the time they receive the first complaint, the police must report all serious crimes to the prosecutors, and that prosecutors must share responsibility for ensuring the satisfactory conduct of investigations. Thus, the established tendency of the police to neglect the law may be negated by the prosecutors' supervision, so that the "no evidence" excuse can be rejected. Control exercised by prosecutors over the police can also help to eliminate torture, degrading punishment and illegal detention. Ultimately, the principle to be established is that, while the police must be made independent of the politicians, they must also be made accountable to other legally established institutions.

There are three pillars on which the human rights system, as envisaged by the ICCPR, stands:

1. A functioning and independent judiciary;

2. A functioning police service obligated to enforce the law;

3. A functioning and independent system of prosecution.

The following questionnaire provides some indicators for testing the components of a justice system in terms of article 2 of the ICCPR.

Indicators regarding the existence of basic legal structures within which human rights can be implemented

The Judiciary

1. Do the following courts exist? (Yes/No)
    - Courts of First Instance
    - Appellate Courts
    - Courts with jurisdiction to hear complaints against state agencies
    - Courts with jurisdiction to hear human rights abuses
    - Courts for judicial review of legislation
2. What are the qualifications of judges as compared to a traditional democracy? (Similar/Below/Far below)
    - Courts of First Instance
    - Appellate Courts
    - Courts with jurisdiction to hear complaints against state agencies
    - Courts with jurisdiction to hear human rights abuses
    - Courts for judicial review of legislation
3. What are the educational qualifications of judicial officers? (University degree/High school certificate/Lower than high school certificate/Primary school certificate)
    - Higher ranks
    - Middle ranks
    - Lower ranks
4. Is there a defined procedure for appointment? (Yes/No)
    - Courts of First Instance
    - Appellate Courts
    - Courts with jurisdiction to hear complaints against state agencies
    - Courts with jurisdiction to hear human rights abuses
    - Courts for judicial review of legislation
5. Are the powers of courts defined? (Yes/No)
    - Courts of First Instance
    - Appellate Courts
    - Courts with jurisdiction to hear complaints against state agencies
    - Courts with jurisdiction to hear human rights abuses
    - Courts for judicial review of legislation

6. Is there a defined procedure for hearing cases? (Yes/No)

    Courts of First Instance

    Appellate Courts

    Courts with jurisdiction to hear complaints against state agencies

    Courts with jurisdiction to hear human rights abuses

    Courts for judicial review of legislation

7. What is the access to courts as compared to a traditional democracy? (Defined/Not defined; Easy/Not easy)

    Courts of First Instance

    Appellate Courts

    Courts with jurisdiction to hear complaints against state agencies

    Courts with jurisdiction to hear human rights abuses

    Courts for judicial review of legislation

8. What is the access to lawyers? (Defined/ Not defined; Easy/Not easy)

    At pre-trial stage

    At trial stage

The Police

1. Does a structure exist for police as separate from political structure? (Yes/No)

    In writing

    In practice

2. Are the functions of the highest officer in the force defined? (Yes/No)

    In writing

    In practice

3. Is the relationship between the highest officer and the next highest-ranking officers defined? (Yes/No)

    In writing

    In practice

4. Are the basic duties of all officers at all ranks defined? (Yes/No)

    In writing

    In practice

5. Does an adequate penal code exist? (Yes/No)

6. Does an adequate criminal procedure code exist? (Yes/No)

7. Are law and order functions and criminal investigation functions differentiated? (Yes/No)

8. Do the police engage in surveillance of civilians because of their legitimate political activities? (Yes/No/To some extent)

9. Are the police officers of higher ranks appointed on the basis of their political loyalties? (Yes/No/To some extent)

10. What is the relationship between the police and judiciary? (One of superiority/One of subordination; Police always obey judicial orders/Police obey only if they wish)

11. What are the educational qualifications of police officers? (University degree/High school certificate/Lower than high school certificate/Primary school certificate)

    Higher ranks

    Middle ranks

    Lower ranks

The Prosecution

1. Is the prosecution system defined? (Yes/No/Partially)

    In writing

    In practice

2. Are functions of the prosecution defined? (Yes/No/Partially)

    In writing

    In practice

3. Are there criteria for prosecutors in deciding to prosecute cases? (Yes/No)

    In writing

    In practice

4. As compared to the judiciary, what position do prosecutors enjoy? (Higher/Lower/Equal)

5. As compared to the defence lawyers, does the prosecutor stand in a higher position in the eyes of the court? (Yes/No)

6. Do prosecutors have pre-trial conferences with judges about cases? (Yes/No)

7. Do prosecutors guide enquiries into police activities? (Yes/No)

Special importance of the judiciary

Alongside the prosecution, the other institution that is most relied upon to ensure that the police act within the rule of law is the judiciary. In this regard, the Supreme Court of India has made the most positive contribution. In numerous cases, this court has intervened to prevent the use of the police for illegal purposes by certain governments. Of particular importance is the way in which the Supreme Court intervened to stifle the authoritarian manoeuvres attempted by the government of the late Indira Gandhi. It systematically opposed the use of emergency regulations, thereby establishing for itself a prestigious status as the guardian of human rights and the rule of law in India. Even on such everyday affairs as arrests and detention, it has intervened to ensure police discipline. One famous case is that of D K Basu vs. State of West Bengal.[9] In that case the court issued the following instructions, and also sought the assistance of the media to broadcast them repeatedly throughout India. In many public places in India, they are still exhibited. They are:

1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
2. The police officer carrying out the arrest shall prepare a memo at the time of arrest, and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.
3. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed as soon as practicable that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or relative of the arrestee.
4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the legal aid organisation in the district and the police station of the area concerned telegraphically within a period of eight to 12 hours after the arrest.
5. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose

the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officers in whose custody the arrestee is.

7. The arrestee should, where he so requests, be also examined at the time of his arrest, and major and minor injuries, if any are present on his/her body, must be recorded at that time. The "inspection memo" must be signed both by the arrestee and the police officer effecting the arrest, and its copy must be provided to the arrestee.

8. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody or by a doctor on the panel of approved doctors appointed by the director of health services of the concerned state or union territory. The director of health services should prepare such a panel for all provinces and districts as well.

9. Copies of all the documents, including the memo of arrest referred to above, should be sent to the magistrate for his record.

10. The arrestee may be permitted to meet his lawyer during interrogation.

11. A police central room should be provided in all districts and state headquarters where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest within 12 hours of effecting the arrest; and at the police central room, the information should be displayed on a conspicuous notice board.

"In many Asian countries there are no special provisions under which a violation of fundamental rights is justiciable under local laws"

In Sri Lanka too, the Supreme Court has tried to intervene in matters relating to violations of human rights by the police. Sri Lanka's constitutional provisions allow complaints against fundamental rights violations to be lodged before the Supreme Court.[10] This has become a popular form of litigation, and thousands of cases have been filed under these provisions. Most respondents to the cases are the police. In numerous instances, the courts have declared that citizens' rights have been violated and have ordered compensation. Despite many limitations placed on this form of legal redress, such as the time limit that is allowed for filing cases, this mode of litigation is a useful device that may be introduced elsewhere with suitable modifications. In many Asian countries—for example, Thailand, Cambodia, Singapore and Malaysia—there are no special provisions under which a violation of fundamental rights is justifiable under local laws. Singapore and Malaysia are not signatories to the ICCPR: thus, in these countries, there is no obligation under treaty law to protect human rights. Though Cambodia has ratified all UN conventions relating to human rights and recognized them in the Constitution itself, there is no legal provision for a citizen to come to court and complain against the state. In these countries, there are no known cases where citizens have sought redress from local courts, under treaty law or customary law, for human rights violations.

Other important institutions

In addition to the judiciary, many other institutions have evolved in Asia for dealing with the violation of rights by the police. One such example is the Presidential Truth Commission on Suspicious Deaths in South Korea, which was inaugurated in August 2000. The following information about this institution may be relevant:

> The major functions of the commission outlined in the Special Act to Find the Truth on Suspicious Deaths and its Enforcement Decree (also known as the Presidential Decree) are as follows:
>
> - To select cases which merit investigation;
> - To investigate suspicious deaths;
> - To provide information and consultation related to suspicious deaths;
> - To receive and process applications related to suspicious deaths;
> - To take charge of matters related to restitution and compensation for victims whose death has been acknowledged by the commission as having been due to their involvement in the democratisation movement and having resulted from the abuse of power by the government in its attempt to suppress the movement;
> - To take charge of matters related to compensation and necessary assistance to people who testify about a suspicious death or who provide evidence or documentation;
> - To take charge of matters related to compilation and the announcement of reports on suspicious deaths at the end of the investigation;
> - To take charge of matters related to finding the truth about suspicious deaths.[11]

"In addition to the judiciary, many other institutions have evolved in Asia for dealing with the violation of rights by the police"

A similar institution was the Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in Sri Lanka.[12] In fact, three commissions were appointed, constituted according to geographical areas, and a fourth commission was later established to deal with the remaining cases. The commission's mandate was to inquire into (a) people who were involuntarily removed, allegedly by agents of the State (police, army, etc.) and paramilitary groups in collaboration with them, or by subversives or unknown persons, and who subsequently disappeared (in the sense that the present whereabouts of the person are unknown); (b) people allegedly held in detention in unauthorized army camps or police stations, and who subsequently disappeared (i.e., the present whereabouts of the person are unknown).

Another institution that has proved valuable in safeguarding human rights is the national human rights commission, which has become a common phenomenon in many Asian countries.[13] These commissions are mandated to inquire into and report on human rights violations. Thus, these bodies can become a means of monitoring the police's observance of the rule of law. In this regard, a notable development was the establishment of the Advisory Council of Jurists on 9 September 1998, at the third

annual meeting of the Asia-Pacific Forum of National Human Rights Institutions, in Jakarta, Indonesia. The council will advise the forum and its member national human rights institutions, at their request, on the interpretation and application of international human rights standards. In addition to developing regional jurisprudence on international human rights norms, the council will further strengthen the effectiveness and capacity of national human rights institutions in the region. The forum's secretariat will support the work of the council.

"It can be said without the slightest hesitation that all Asian states have failed to comply with article 2 of the ICCPR"

In addition, non-governmental organizations (NGOs) and other civil society actors have taken many initiatives to monitor human rights violations by the police, and to ensure that the rule of law is respected. In most Asian countries there are NGOs engaging in activities such as making legal representations on behalf of victims of human rights abuses, collecting documentation, maintaining databases, and providing humanitarian assistance. Regionally, there are also support groups. The AHRC Urgent Appeals programme provides a wide network for sharing information and pursuing joint actions on behalf of those who suffer abuse at the hands of law enforcement authorities.[14]

There are also education programmes for law enforcement officers about human rights. The Bangalore Law School programme in India is one noteworthy example. Many NGOs also have programmes for this purpose. A criticism levelled against these programmes, though, is that education is no substitute for reforms. Education can, at best, supplement needed reforms.

A review of actions to improve policing

The actions mentioned above, as well as many others, are taking place regularly. What is their impact? Given the massive deterioration of the rule of law in Asia and the dismal record of the police, it is difficult to conclude anything other than that the impact of the positive actions described above is very limited. These actions, effected with great effort and often much courage, nonetheless have failed to address the problem and, at best, have only peripheral effects.

It can be said without the slightest hesitation that all Asian states have failed to comply with article 2 of the ICCPR, which requires an effective remedy for the violation of rights, "Notwithstanding that the violation has been committed by persons acting in an official capacity."

In terms of article 2 of the ICCPR, the problem of policing in most Asian countries can be summed up as follows. The prosecution of crimes and human rights abuses fails when there is insufficient evidence to proceed. The gathering of evidence presupposes the existence of a functioning criminal investigation agency. The functioning of such an agency presupposes that the agency has the full legal powers to conduct these investigations, and that such powers are not suspended arbitrarily by the law or political interference or any other means that the agency is unable to overcome. The functioning of this agency also

presupposes that the agency has the human resources and technical capacity to function, and that it has a system of internal controls regarding its professional duties. Most Asian countries do not have a criminal investigation system in which all or most of these requirements for the proper functioning of a criminal investigation system exist to any satisfactory degree. Thus, most Asian countries do not have a functioning criminal investigation agency, which means that they do not have a policing system that meets the criteria for proper functioning. Another way of saying the same thing is that most Asian countries have a malfunctioning policing system.

A malfunctioning policing system is not only a deficiency in a society, but also a threat to that society. It encourages crimes and weakens and even destroys people's faith in the possibility of legal redress against criminals. It causes people to feel intimidated by criminals as well as by the police, and helps to build bridges between big crime and the police. It allows political revenge against people holding opposing views, encourages corruption and endangers free and fair elections, thus making the realization of the rights enshrined in the ICCPR very difficult, if not impossible, to be achieved. These numerous factors make any expectations about the rule of law unrealistic. In fact, in several Asian countries, the police are treated as a serious threat to the rule of law.

Article 2 of the ICCPR makes it obligatory for all state parties to provide an effective remedy for the violation of rights. The absence of a functioning police system indicates a failure to provide an effective remedy as required by article 2. The question is how can we address this problem?

The human rights model that exists today is not capable of dealing with this issue. It presumes the existence of a functioning police force, at least to a satisfactory degree. The mechanisms established to monitor the compliance of state parties, such as the UN Human Rights Committee, the UN Human Rights Commission and other bodies, examine the violations of rights and make recommendations for correction where violations have occurred. When these recommendations are made, it is presumed that the state party to which these recommendations are addressed possesses the legal mechanisms, including a functioning policing system, to put these recommendations into effect. As I have shown, for most Asian countries, such a presumption is baseless.

This presumption is based on the experience of traditional democracies, for the existing human rights model is based on their state structures and practices. While there are violations of rights in these democracies, a basic structure exists for dealing with these violations.

"It is more important to encourage the reform of law enforcement agencies than to provide them with human rights education"

Thus, the existing human rights model is insufficient to deal with the problems examined above, and therefore, the existing human rights model needs to be expanded. The following are some suggestions for the expansion of the existing human rights model, and for ways to achieve this aim:

1. The jurisprudence relating to article 2 of the ICCPR needs to be explored and developed;
2. The UN mechanism for human rights monitoring must scrutinize the performance of state parties regarding article 2 of the ICCPR;
3. Human rights educational institutes must change their education curriculum to include a more comprehensive exposition of the implications of article 2 of the ICCPR;
4. It is more important to encourage the reform of law enforcement agencies than to provide them with human rights education;
5. Human rights NGOs and civil society organizations must play an active role in exposing the limitations of the existing human rights model, and in exploring ways to initiate change. NGOs in traditional democracies must work in partnership with NGOs outside of their countries to achieve this objective;
6. International agencies should make financial resources available for the achievement of this objective; and
7. The Office of the UN High Commissioner for Human Rights should initiate activities and studies to promote this aim.

Endnotes

[1] The different understandings of common terms depending on one's experiences are elaborated on in Basil Fernando, 'Judicial and legal reform: Preparing the field', *Rule of law, human rights and legal aid in Southeast Asia and China: Report of the practitioners' forum*, International Human Rights Law Group & Asian Human Rights Commission, Hong Kong, 2000, pp. 1–5.
[2] Basil Fernando, *Problems facing the Cambodian legal system*, Asian Human Rights Commission, Hong Kong, 1998.
[3] *Sri Lanka: Disappearances and the collapse of the police system*, Asian Human Rights Commission, Hong Kong, 1999. For further details on disappearances, see [http://www.disappearances.org].
[4] Basil Fernando, 'Disappearances of persons and the disappearance of a system', in *Sri Lanka: Disappearances and the collapse of the police system*.
[5] 'Singaporeans demand repeal of ISA', *Human Rights Solidarity*, vol. 9, no. 1, January 1999. C S Juan, 'Looking into the past and struggling for the future: Prospects for democracy in Asia', *Human Rights Solidarity*, vol. 9, no. 10, October 1999, pp. 19–20.
[6] Most recently in Thailand, where over two thousand alleged drug dealers were killed with police complicity this year. See further the Asian Legal Resource Centre's special report, 'Extrajudicial killings of alleged drug dealers in Thailand', *article 2*, vol. 2, no. 3, June 2003.
[7] The independent National Police Commission was in fact

established in December 2002.

[8] *Suggestions for police reforms in Sri Lanka: Final statement of the consultation on police reforms in Sri Lanka*, Asian Human Rights Commission, Hong Kong, 1999.

[9] D K Basu vs. State of West Bengal, *All India Reporter*, 1997, 610 SC to 628 SC.

[10] Article 126 of the Constitution of Sri Lanka.

[11] For more information, see [http://www.truthfinder.go.kr].

[12] For a lengthy report on disappearances in Sri Lanka, see the Cyberspace Graveyard for Disappeared Persons at [http://www.disappearances.org].

[13] For details about commissions, see National Human Rights Institutions at [http://www.alrc.net].

[14] For details, see Urgent Appeals at [http://www.ahrchk.net/ua].

Genocide in Gujarat: Destruction without relief

Concerned Citizens Tribunal — Gujarat 2002

Extensive evidence recorded by the Tribunal points to the devastating loss of property by the Muslim community in the state. Relying on detailed tabulation of losses computed by community leaders at the village, city and district levels, independent groups estimated the total loss to the Muslim community at not less than Rs 38 billion [US$ 850 million].

The Muslim community in Gujarat was one of the most prosperous in the country and its contribution to the economy of the state, pivotal. The fact that the economy of this section of the population has been crippled suggests a sinister motive behind the destruction. In most of the cases, chemicals were used, apparently to generate very high temperatures and ensure complete destruction.

As many as 6700 workers belonging to the majority community have been rendered jobless due to the burning and arson by the fanatic militia. At least 20,000 workers in the hotel industry were rendered jobless and many are missing. Ironically, many of those who lost their jobs were non-Muslims, indicative of the long-term impact of destruction and terror on all sections of society, not just the 10 per cent strong Muslim minority that is the immediate target.

While ignoring the genuine and pressing relief and rehabilitation needs of the survivors, the sponsors of the carnage and their cadre have now resorted to a crippling economic boycott against Muslims in many parts of Gujarat. In Vadodara, there

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This is the third and final part in a series of edited excerpts from the *Crime against humanity* report of the Concerned Citizens Tribunal being published in *article 2*. The entire report is available online, at [http://www.sabrang.com/tribunal].

The Asian Legal Resource Centre is taking steps to highlight the report and the work of the Tribunal out of concern that the scale and horrendous nature of the massacre, combined with the extent of planning and state complicity, has not been adequately addressed regionally and internationally. The international community is now beholden to respond.

have been over two dozen instances of Muslims being told by their Hindu employers not to come to work. Though overt violence has ended, ethnic cleansing continues in the form of the economic decimation of the minority in Gujarat.

The Tribunal is particularly disturbed by the fact that it is not just the ordinary workers of the Sangh Parivar, but even state ministers and other Hindutva leaders are involved in instigating the economic boycott of Muslims from behind the scenes. Home minister Shri Gordhan Zadaphiya and revenue minister Shri Haren Pandya, ministers Shri Narayan Laloo Patel, Shri Niteen Patel, forest minister Shri Prabhatsinh Chauhan, minister of state for cottage industries, Shri Ranjitsinh Chawda, among many others, have been named by eyewitnesses.

In all, over 270 mosques and *dargahs* have been destroyed and defaced. When the Tribunal members visited and inspected some of the damaged shrines in May, they were still in their ramshackle state. One mosque, which was rebuilt through the efforts of a Muslim religious organisation, was pulled down in July by officials of the Ahmedabad Municipal Corporation, a body that is, ironically, controlled by the Congress Party of India.

Detailed evidence was recorded by us regarding the desecration of the tomb of Wali Gujarati, who is renowned as the founder of Urdu poetry. On March 1, his tomb, located not more than 10 metres from the office of Ahmedabad's commissioner of police (also the police headquarters) was demolished and a saffron flag hoisted on the site. It is believed that the shrine was torn down by marauding mobs under the directions of Gujarat's revenue minister, Shri Haren Pandya. This flag was removed on the night of March 2. On March 8, a tarred road was constructed at the site, leaving no trace whatsoever of the tomb that had stood there for nearly three centuries. It is shocking that a callous government and an unprincipled administration participated in the utter obliteration of this cultural monument and allowed a road to be constructed over it. Similarly, on the night of March 3, a 400-year-old mosque owned by the Wakf Board, and located near Anjali Cinema in Ahmedabad, was broken down in the presence of state ministers Shri Haren Pandya and Shri Amit Shah.

"It is shocking that a callous government and an unprincipled administration participated in the utter obliteration of a cultural monument and allowed a road to be constructed over it"

The Hague Convention of 1954, the 'Convention for the Protection of Cultural Property in the Event of Armed Conflict' stipulates that the preservation of "cultural heritage is of great importance for all peoples of the world" and that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind." India is a signatory to this Convention. In 1972, a protocol to this Convention was adopted, which identified "cultural heritage" as, among other things, "monuments, architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science." Every state that had acceded to the Hague Convention, it held,

recognised that "the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated on its territory, belongs primarily to that State".

"One of the most disturbing and sinister truths about the masterminds behind the Gujarat carnage is that many of them hailed from the medical profession"

At its general conference meeting in 2001, UNESCO adopted a resolution that sought to define the circumstances under which an act could be construed as a "crime against the common heritage of humanity". It reiterated the need for all member-states to accede to and observe the various conventions it had evolved over the years. And it authorised the director-general of the organisation to formulate for the next session of the general conference, a draft declaration that would define the circumstances under which the "Intentional Destruction of Cultural Heritage" could be deemed to have taken place.

Evidently, besides being guilty of crimes against humanity, the chief minister of Gujarat is also guilty of crimes against the common heritage of humanity. And in its reluctance or refusal to intervene, the BJP-led government at the centre stands charged with flagrant violation of international conventions to which India is a signatory.

Medical attention

One of the most disturbing and sinister truths about some prominent masterminds behind the Gujarat carnage is the fact that many of them hailed from the medical profession and, despite their professional allegiance to the Hippocratic oath, violated it to lead mobs to rape, pillage, maim and kill and that too, in the most barbaric ways.

Justice AP Ravani spoke of his personal acquaintance and knowledge of doctors being threatened and told not to treat Muslims. At least six injured persons rescued from Chamanpura (Gulberg society), testified before the Tribunal confirming that the VS Hospital had refused them treatment, demanding that a police statement be obtained first. This, from a group of persons who had been brutalised and traumatised, having been witness to 60–70 of their close relations or neighbours stripped, raped, cut into pieces, and burnt alive.

As bad as the perpetration of crimes by medical professionals during the Gujarat carnage, and the attempts to brutally communalise hospital spaces, were the attempt by the police in Ahmedabad and Vadodara to actually harass and stop ambulance services belonging to the minority community. At the height of the carnage, these ambulance services were the only ones to provide desperately needed medical support, saving groups, carrying mutilated bodies, etc. The fact that even they were stopped, as were trucks carrying relief, indicates the premeditation of the carnage at the very top levels, as also the genocidal nature of its entire execution.

A severe strain on community health services was evidenced during and after the carnage, with the state abdicating its primary role. In the numerous relief camps that sprung up across the city/state, there was a severe problem of clean drinking water, sanitation facilities and adequate food. Children were suffering from jaundice, a water-borne disease, diarrhoea and dehydration. The strain on small privately run hospitals increased.

> "There were well-organised and coordinated efforts to deny medical aid to the Muslim community"

It appears that there were well-organised and coordinated efforts to deny medical aid to the Muslim community. Since most of the Muslims, dead or injured, were being taken to VS Hospital, it was made the target of the mobs. Muslim drivers would be so scared that they would refuse to go there.

Muslims were also terrified to go to government run hospitals to claim their dead because systematic efforts were made to create an atmosphere of dread and terror there. Menacing groups of youths would stalk the casualty departments of hospitals, 50–60 at a time.

No relief

From the night of February 28, when brutal and systematic attacks against targeted sections of the Muslims population in Ahmedabad city began, distressed residents were shepherded out of their homes and localities, often in hired buses, in the dead of the night by community leaders. Overnight, relief camps came up in the city and by March 5 a staggering 98,000 refugees were housed there. Even by the admission of the district magistrate and collector of Ahmedabad, there were 66,000 refugees in these camps. In none of these efforts was any state presence visible.

The Tribunal is greatly concerned and outraged by the fact that only the leadership of the Muslim community was involved in the running of the relief camps because others did not come forward. Though some non-Muslim NGOs did contribute substantial amounts of aid to these relief camps right until August, the vast bulk of relief assistance to the refugees came from the community itself.

The government is under a constitutional obligation to protect the basic rights of every citizen and duty bound to start and run relief camps for the violence affected. Instead, for days and weeks, the Gujarat government adamantly refused even to recognise the existence of refugees (a direct consequence of the state sponsored carnage). It refused to register the relief camps and denied relief assistance — water, food, medical aid, sanitation — from state coffers. In fact, in the days following the first bout of brutal violence, agents of the state, notably the collectors/district magistrates, as also the officials of some police stations, obstructed truckloads of privately mobilised relief material — milk, foodgrains, etc. — from reaching the camps.

"An insignificant number of international aid agencies came forward to help the victims"

The Tribunal notes with concern and anguish that an insignificant number of international aid agencies came forward to help the victims. Given the scale of the state-perpetrated violence and given the response of international aid agencies to such carnages in other areas in the past, it was incumbent on the United Nations relief agencies, including the United Nations Development Programme (UNDP), the United Nations Children Fund (UNICEF), the World Food Programme (WFP), the World Health Organisation (WHO), and the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), as well as international humanitarian organisations, to provide relief and rehabilitation assistance to all those displaced and dispossessed by the communal carnage in Gujarat, without discrimination. That this did not happen speaks volumes about the political dimensions of aid and intervention by foreign countries when mass crimes of this kind occur.

Similarly, the fact that major national newspapers which, during such calamities in the past, have always set up independent relief funds, did not do so in this case speaks for the silence and complicity that surrounds relief and rehabilitation of the survivors of the Gujarat carnage. This bodes ill for India's polity.

On March 6, none less than Gujarat's minister for food and civil supplies, Shri Bharat Barot had the temerity to state in a much publicised interview that since Hindus in his constituency, living close to the Dariakhan Ghumbat camp in Ahmedabad, felt insecure with so many Muslims living in a camp nearby, the camp should be closed down. As recently as September 9, at Becharaji, Mehsana, none other than the chief minister made a shocking public declaration: "What should we do? Run relief camps for them? Do we want to open baby producing centres?"

Due to the callous attitude of the government and threats of penal action against individuals, a camp at Jahangirnagar, Vatwa, was forced to shut down on June 1. As a result, over 600 refugees were forced to reside under the open sky despite heavy rainfall. None of these refugees had until mid-May received any compensation for the destruction of their homes.

The actions of the state government and its agencies in coercively shutting down relief camps are malafide, given the abject refusal of the government of Gujarat and its chief executive, Shri Modi, to actively engage in any rehabilitation or reconciliatory measures. The reluctance of the Gujarat government to provide relief to the inmates of these camps (where even water and food grains had to be obtained through court orders), and its subsequent use of coercion to close them down, is intrinsically connected to an abject and crude refusal to concern itself with rehabilitation of its citizenry.

None will argue that life in a relief camp should continue forever. But the scale and brutality of the violence at a dozen places across the state of Gujarat requires relocation of the victim-survivors to more conducive surroundings, where life, liberty and security can be somewhat assured. Hence the attitude of the Gujarat government in coercively closing down camps, thus forcing victims to 'disappear', is shocking, to say the least. Moreover, it is linked to the refusal of the government to rehabilitate the victims of the carnage. Both are violations of the just and humane principles underlying Indian constitutional law and international covenants related to violence, refugees and state responsibility.

"The government has made it clear that it wishes to have nothing to do with the physical and psychological rehabilitation of its own people"

This brings us to the crucial issue of compensation for the enormous human and material loss during such mass man-made disasters and crimes. Can the amount of Rs 1.5 lakh [150,000] ever compensate for the loss of a life deliberately, cruelly and brutally taken away? What about when a family loses not one but over five family members, men and women, especially those who are in the prime of their lives, leaving bitter heirs behind? What about the loss of livelihood, dignity, a sense of family and security?

The Gujarat government showed itself in a crudely partisan and anti-constitutional light when it initially announced discriminatory amounts of compensation for the survivors of the Godhra tragedy and the post-Godhra carnage.

A measly Rs. 2500 is being given as dole to persons for loss of household goods and, though the Prime Minister had announced that Rs. 50,000 would be given for loss of homes, less than 10 per cent of those who have obtained home compensation from the Gujarat government (at least 25 per cent of the total affected have not received anything at all) have got more than Rs. 30,000 each. For most of the survivors of the Gujarat carnage, the state government has rubbed salt on the wounds already suffered, by giving them paltry amounts of Rs. 1200–2500 each or less.

Not only has no comprehensive rehabilitation package been declared even five months after the violence, no survey has been conducted. And by its behaviour and action, the government has made it clear that it wishes to have nothing to do with the physical and psychological rehabilitation of its own people, the Muslims of Gujarat.

Muslims who have returned to their battered homes have faced a strictly enforced economic boycott by the dominant castes and communities through their refusal to buy milk products from them, to hire them as labour on their fields, etc. A near permanent loss of livelihood, and therefore a reduction to penury, is an imminent and serious likelihood. The urgent need for intervention by central and state agencies is a must before this enforced destitution causes further alienation and marginalisation of these populations.

That only a fragile peace prevails in the state can be gauged from the fact that, with the slightest hint of fresh aggression or trouble, vulnerable sections of the Muslim population who have returned to their original or new places of residence rush back to the security of those camps that are still running.

The crimes against humanity that took place in the state of Gujarat after February 27, were all gross violations of basic human rights. The survivors were rendered destitute. All the homes, schools, cultural and religious places, that have been damaged or destroyed need to be rebuilt.

Broken-down prosecutors and neglected victims

Bijo Francis, Advocate, Kerala, India

The acquittal of the accused in the 'Best Bakery case' arising out of the Gujarat massacre epitomises the decline of the Indian judicial system. Recently while discussing this system with a scholar I found that despite its flaws and failures he was still genuinely optimistic about it. Yes, technically speaking it is indeed a marvel. However at the end of the day if it is unable to deliver justice, then it is necessary to subject it to more rigorous scrutiny.

In India, police criminal investigations often end up as miserable farces. This is because police authority is subject to massive nepotism, corruption and ignorance. When the investigators rely on the state to conduct enquiries into a criminal act and where the state itself has been instrumental in the criminal act then the result is obvious.

But where the prosecutor's office might act to mitigate the worst possible outcomes, in fact it serves to guarantee them. The prosecutor's office, though in spirit part of the judiciary, is technically a state organ. The appointment of prosecutors is the first priority of a state government when it assumes office. But the political godfathers who appoint these "professionals" to office do not want the best brains serving the state; they instead find whoever is expedient and malleable. They also pay them badly and do not give them adequate funds with which to do the work. A wealthy accused comes to court with expensive defense lawyers; the best in the profession meet mere government nominees neither worthy of the office nor the profession. The end result is that the victim is thrown out of court and the perpetrator walks free.

Over time, the prosecutor's office has lost all credibility. It often works in a mechanical fashion under self-imposed restrictions. For instance, if the charge and evidence from an investigation coming before a prosecutor is deficient, the prosecutor may instruct the police to reinvestigate. When the initial charge is placed before the prosecutor prior to trial; the prosecutor is vested with the authority to approve it, otherwise it cannot go for trial.

> “Prosecutors in India typically work mechanically and unthinkingly”

A prudent prosecutor can foresee difficulties and guide police to fill the gaps in their work. However, prosecutors in India typically work mechanically and unthinkingly. As a result, both the prosecutor and police cut poor figures in court. In criminal trials the sight of an investigating officer staring blankly at cross-examining defense counsel, unable to give any credible answer to contradictions and omissions in the evidence, is common.

It is also common for witnesses to turn hostile to the prosecution case at the time of trial. This is what happened in the Best Bakery case. The reasons why witnesses turn hostile may vary and are often not examined. Some witnesses change their position due to out-of-court settlements. On other occasions, problems may arise because the investigating agency produced a false case or recorded statements in a careless manner.

In the Best Bakery case a witness turned hostile because of threats to her life. To threaten a witness is an offence and if a witness complains of being threatened by the accused or someone outside the trial acting in favour of the accused, the bail bond for the accused may be cancelled. It is also a duty of the state to protect the witness. However, in this case the state neither protected the interests of the victims nor sincerely sought to render justice. What else can be expected when the violence in Gujarat was itself state-sponsored? What else can be expected when the prosecution is employed by the state? This situation makes a mockery of the system and delivery of justice.

Happily, the Supreme Court has recently risen to the occasion and attacked the state and its functionaries over its handling of the Best Bakery case. While in this instance gratitude is owed to the Supreme Court, its role in such cases needs to be seen pragmatically. In a country of some one billion people, can a single court be expected to intervene in every case of miscarriage of justice due to state involvement in the crime?

Clearly, the prosecution’s office is in need of overhaul. To begin, prosecutors should be appointed on grounds of merit, not political allegiances and ineptitude. Entry level screening by way of rigorous written examinations and interviews would ensure that only those with a minimum level of professional competence would be considered for the office. The selection process should be transparent and under the supervision of the respective high courts of the state. A competent and independent authority should assess the office and its work periodically. The duration of the office should also be fixed, perhaps at seven years, rather than be subject to the whims of the ministry. Prosecutor’s salaries must be competitive, and legal provisions made to ensure that the prosecutor’s office is well funded and at least on a par with any of the top legal firms. If these conditions were met, and with a strong prosecutor performing the duties of the office according to its mandate, the investigators would have no choice but to begin improving the standard of their work.

Policing India in the new millenium, or old?

Meryam Dabhoiwala, Human Rights School desk,
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There is a lot of talk these days about the Indian police force, and much literature attesting to the corruption and brutality of Indian police. A recent publication, *Policing India in the new millenium* (P J Alexander [ed.], Allied Publishers, New Delhi, 2002), offers a range of opinions on the current and future state of India's police. As the government of India has recently promised to pursue the recommendations of the Committee on Reforms of the Criminal Justice System (the Malimath Committee), including several that would give the police more power over both victims and prosecutors, a brief review of these authors' ideas is timely.

The past in the present

To understand the present, it is necessary to recall that India's police force emerged during the colonial period, "To protect and perpetuate the interests of the empire."[1] According to Manoje Nath, the police force had been "conceived in the immediate aftermath of the 'mutiny [of 1857–58]'", and as such, "The more anti-people the police was, the more it endeared itself to its masters."[2] The 1861 Police Act, which to this day is the guiding legislation over the Indian police force, is an entirely authoritarian instrument devised to suit the specific needs of the colonisers at the time of legislating. Nath writes that,

> It was not for the police to question the rights or wrongs of [the Act]. They were obliged to quell dissent and enforce obedience whatever the costs. [The] basic duty was to provide an ambience of peace and tranquility for the single-minded exploitation of the enormous resources of raw materials and a captive market.[3]

Why this century-old act is still on the books in a post-colonial, democratic nation, is an enigma. The answer as suggested by J Prabash, lies in the 'personalist-centralized politics' found in India, which are not conducive to nation building. Rather, such politics rely on the use of "force instead of policies to confront political dissent and popular movements, [which] results in excessive dependence of the state on the administrative

apparatus, particularly the police."[4] Thus, the state confers arbitrary power to the police on the pretext of maintaining law and order, thereby legitimizing human rights violations. It follows that there would seem to be little difference between the motives giving birth to the Indian police 150 years ago, and present-day motives for using it to maintain the status quo.

"India has no history of human rights discourse"

No human rights talk; no human rights walk

India has no history of human rights discourse. For thousands of years, the Law of Manu predominated, with its rigid social laws and immovable caste system.[5] Although the British brought western notions of law and justice with them, for the most part these were not implemented unless in regard to British or European citizens. Most Indians were never exposed or educated in contemporary law, and would not have known their rights under such law. They would also not have known that at Independence the Constitutional Assembly agreed that the human rights violations that occurred under British rule should not be repeated in independent India.

India possesses a wealth of laws and provisions to guarantee its citizens' human rights, and even its Constitution makes way for their primacy. The presumption of innocence, due process, right to freedom from unwanted arrest, right to bail, right to protection from unlawful search and seizure, and right to public and speedy trial are all encompassed within India's various laws and amendments.[6] India is also a party to several international covenants protecting human rights, such as the International Covenant on Civil and Political Rights (ICCPR). However, these laws and mandates are poorly implemented, and today remain just as unknown as were such laws a century ago. A human rights discourse does not properly exist in India, and therefore human rights are not guaranteed. Far too little has been done to ensure that the rights promised in the Constitution have been implemented. Only recently have human rights groups and NGOs begun to make their voices heard.

The Law of Manu permitted—indeed, obliged—that certain social groups, such as low castes and women, be treated with contempt via explicit social sanctions. Such sanctions still exist, and are perpetrated by all state institutions, most significantly, the police. For instance, Indian police refuse to register complaints brought by Dalits ('outcastes'), or cause needless delays. For this reason, Dalits do not lodge many complaints with the police, and are further apprehensive of threats, grudges and more atrocities against them.[7] When the police feel they have no choice but to register a case brought by a Dalit, they change the nature of the offence so that it can be tried under the Indian Penal Code, rather than the Protection of Civil Rights Act; between the two, the IPC offers lesser punishments.[8] Such tactics point to patent subversion, abuse and double standards.

S K Verma states that,

> [Violations of] human rights at the hands of the police... take many forms, from non-registration of cases to fake encounters. In the matter of non-registration of cases, besides outright non-registration, there could be acceptance of the report but entry into some unofficial register, thereby giving the complainant an erroneous impression that the case had been registered.[9]

Verma also quotes the National Police Commission in saying that almost 60 per cent of all arrests made by the police are "unnecessary and as such unjustified".[10]

A large number of human rights abuses committed by the police are custodial. While 35 custodial deaths were reported in 1995, the figure increased to 46 by 1998. The conviction rate for such deaths however, dropped from 60 percent in 1995 to 36.4 per cent in 1998, while the conviction rate for custodial rape remained at zero.[11] Custodial torture is another major problem. The number of torture cases in 1995 was 36,592, and in 1998, 35,275. The Law Commission of India has recommended a new provision that provides "for the prosecution of a police officer for the alleged offence of having caused bodily injury to a person in custody".[12] To date, however, this amendment has not yet become part of statutory law. One reason for the delay may be because India has yet to ratify the Convention against Torture. Although it signed the Convention in October 1997, without ratification its provisions do not translate into domestic law. Thus torture in India is not yet acknowledged as a crime subject to serious punishment. The National Human Rights Commission of India, as well as various other human rights activists, has urged the Indian government to ratify the Convention to no avail.

"The Indian police force is a largely unaccountable body, born in a bygone era, lacking respect for human rights and the rule of law"

Conclusion

The Indian police force is a largely unaccountable body, born in a bygone era, lacking respect for human rights and the rule of law. Police training, then, needs to inculcate a sense of responsibility for these principles. Institutions must be established to monitor the police force and ensure that these principles find their way into practice.

In light of the above, the recommendation of the Committee on Reforms of the Criminal Justice System to increase police power in relation to victims and accused persons seems rather despotic and militant. The Committee was set up to suggest improvements to the Indian criminal system. If this were in fact its aim it would do better to suggest ways to curb police human rights abuses, rather than increasing police power to ensure speedy case closures. The Committee should be urging the government to respect its obligations under the ICCPR, not to mention those under the national Constitution, to provide and protect fundamental human rights, rather than undermine these commitments. It should also pressure the government to ratify the Convention against Torture, and undertake the necessary steps to implement the provisions of the Convention. These steps

would by no means solve the immense and complex systemic problems facing India's police force, however, they would be a good start.

Endnotes

[1] T N Dhar, 'Governance, policing and human rights', *Policing India in the new millennium*, P J Alexander (ed.), Allied Publishers, New Delhi, 2002, p. 336.
[2] Manoje Nath, 'Human rights and the police', *Policing India in the new millennium*, P J Alexander (ed.), Allied Publishers, New Delhi, 2002, p. 462.
[3] Nath, 'Human rights and the police', p. 463.
[4] J Prabash, 'Police and human rights violations in India', *Policing India in the new millennium*, P J Alexander (ed.), Allied Publishers, New Delhi, 2002, p. 398.
[5] For further discussion see, for instance, W J Basil Fernando, 'An examination of caste discrimination in India', *Discrimination and toleration*, K Hastrup & G Ulrich (eds), Kluwer Law International, pp. 141–63.
[6] See S Subramanian, 'Police and human rights in criminal justice administration', *Policing India in the new millennium*, P J Alexander (ed.), Allied Publishers, New Delhi, 2002, pp. 379-90.
[7] Mumtaz Ali Khan, 'Legal enactments and the status of Dalits', *Policing India in the new millennium*, P J Alexander (ed.), Allied Publishers, New Delhi, 2002, p. 503.
[8] Khan, 'Legal enactments and the status of Dalits', p. 502.
[9] S K Verma, 'Police and human rights', *Policing India in the new millennium*, P J Alexander (ed.), Allied Publishers, New Delhi, 2002, p. 363.
[10] Verma, 'Police and human rights', p. 364.
[11] Verma, 'Police and human rights', p. 362.
[12] Verma, 'Police and human rights', p. 369.

The Asian Human Rights Charter on enforcement of rights and the machinery for enforcement (www.ahrchk.net/charter)

15.1 Many Asian states have guarantees of human rights in their constitutions, and many of them have ratified international instruments on human rights. However, there continues to be a wide gap between rights enshrined in these documents and the abject reality that denies people their rights. Asian states must take urgent action to implement the human rights of their citizens and residents.

15.4.a The judiciary is a major means for the protection of rights. It has the power to receive complaints of the violation of rights, to hear evidence, and to provide redress for violations, including punishment for violators. The judiciary can only perform this function if the legal system is strong and well-organized. The members of the judiciary should be competent, experienced and have a commitment to human rights, dignity and justice. They should be independent of the legislature and the executive by vesting the power of their appointment in a judicial service commission and by constitutional safeguards of their tenure. Judicial institutions should fairly reflect the character of the different sections of the people by religion, region, gender and social class. This means that there must be a restructuring of the judiciary and the investigative machinery. More women, more under-privileged categories and more of the Pariahs of society must by deliberate State action be lifted out of the mire and instilled in judicial positions with necessary training. Only such a measure will command the confidence of the weaker sector whose human rights are ordinarily ignored in the traditional societies of Asia.

15.4.b The legal profession should be independent. Legal aid should be provided for those who are unable to afford the services of lawyers or have access to courts, for the protection of their rights. Rules which unduly restrict access to courts should be reformed to provide a broad access. Social and welfare organizations should be authorised to bring legal action on behalf of individuals and groups who are unable to utilize the courts.

15.4.c All states should establish Human Rights Commissions and specialized institutions for the protection of rights, particularly of vulnerable members of society. They can provide easy, friendly and inexpensive access to justice for victims of human rights violations. These bodies can supplement the role of the judiciary. They enjoy special advantages: they can help establish standards for the implementation of human rights norms; they can disseminate information about human rights; they can investigate allegations of violation of rights; they can promote conciliation and mediation; and they can seek to enforce human rights through administrative or judicial means. They can act on their own initiative as well on complaints from members of the public.

15.4.d Civil society institutions can help to enforce rights through the organization of People's Tribunals, which can touch the conscience of the government and the public. The establishment of People's Tribunals emphasizes that the responsibility for the protection of rights is wide, and not a preserve of the state. They are not confined to legal rules in their adjudication and can consequently help to uncover the moral and spiritual foundations of human rights.

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