article 2
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The *state* of the *rule of law* in *Asia*

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George Katsiaficas,
author of Asia's Unknown Uprising

* * *

"...that is quite a report, very interesting especially section on the stories of the victims and injured. Again, great work, it was a big undertaking and glad you managed to compile this valuable report (*Focus on Southeast Asia - Suppression of emerging protests in Cambodia, March 2014*)"

Naly Pilorge,
director, Cambodian League for the Promotion and Defense of Human Rights (LICADHO)

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"We have received 1 (one) exemplars Article 2 of the International Covenant on Civil and Political Rights (Vol. 12, No. 4-Vol. 13, No. 1. We are really grateful for receiving the article. It would become useful collection for our library"

Dr. Paripurna,
S.H., M. Hum., LL.M., *dean of the faculty of law, Universitas Gadjah Mada, Indonesia*

Contents

THE STATE OF RULE OF LAW IN ASIA

APPENDIX

Introduction:

Local perspectives on rule of law in Asia

Editorial Board, *article 2*

Tom Bingham (rule of law: Lord Bingham's Eight Principles) summed up the basic aspects of the rule of law (ROL). They are:

1. The law must be accessible and so far as possible intelligible, clear and predictable.

2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.

3. Laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.

4. Law must afford adequate protection of fundamental human rights.

5. Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide disputes which the parties themselves are unable to resolve.

6. Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and w/o exceeding the limit of such powers. (Judicial review)

7. Adjudicative procedures provided by the state should be fair. The ROL would seem to require no less.

8. ROL requires compliance by the state with its obligations in international law- the law which whether deriving from treaty or international custom and practice governs the conduct of nations.

In this issue of Article 2 we carry a summary of the views of participants at a conference held by the Asian Human Rights Commission at which the participants were asked to answer a set of questions on the eight principles mentioned above.

The answers given by the participants in terms of the countries could provide an insight into the state of the rule of law in their respective countries. The answers also helps in gaining an understanding of the problems faced in each of these countries in terms of the public institutions, and how far the functioning of these institutions are based on the principles of the rule of law.

The reader may find the information here, which may at first site be rather depressing. The participants have made stark revelations about the nature of the legal system under which they are living.

A closer look would reveal that the basic organisation of the system of governance and administration in these countries are not based on the rule of law principles. In fact, the systems are developed on principles which are in opposition to the rule of law.

This poses serious questions on the nature of governance in these countries. A democracy cannot function when the basic structures of governance and administration in a particular country is based on principles that oppose the rule of law.

Equally the protection and promotion of human rights also presupposed that the system of governance and administration is designed to function under the principles of rule of law. Where the design itself is based on the principles opposed to the rule of law, the very system is in conflict with the basic norms and standards set out in United Nations Conventions on human rights.

This actual reality is much more important than various public declarations the governments in these countries have made about the nature of their systems of governance and administration.

It is this difference between what is claimed and what is in fact is being practiced that has been revealed in this issue of *Article 2*.

We hope that these revelations could be a starting point into a proper assessment of what reforms are needed to take place if the liberties of the individuals living in these countries are to be protected.

Bangladesh: The people do not trust the judiciary

Md. Ashrafuzzaman, Asian Legal Resource Centre;
Abu Sufian, Online Bangla Dot Net;
Adilur Khan, Odhikar

1. Are all persons and authorities bound by the same laws?

No. Constitutionally, the President of Bangladesh is immune from any prosecution. Practically, it is impossible to register complaints against family members of the Prime Minister, ministers and the pro-ruling party activists who are known to be close to the Prime Minister. Besides, complaints cannot be registered against the officers of the Rapid Action Battalion (RAB) and military officers for criminal offences, except the complaints arising out of family related affairs such as domestic violence and dowry allegations.

2. Are all persons and authorities entitled to the benefits of all laws?

No. The ordinary people are systematically deprived from the benefits of all laws. Instead, the laws are used to suppress the ordinary poor and marginalized people, political opponents, and the dissenting voices. There is a law titled "Father of the Nation Bangabandhu Sheikh Mujibur Rahman's Family Members Security Act of 2009", which only benefits the family of the Prime Minister of Bangladesh.

3. Are all laws publicly made?

Not in all cases. Certain laws are not publicly made. The Government of Bangladesh headed by Sheikh Hasina enacted/ratified a number of laws in 2009 without declaring them in public. All those laws were originally imposed as ordinances by the military regime during 2007 and 2008. After election, the government ratified many of those draconian laws in the parliament without adequate information and public knowledge regarding the legislation. For example, the Anti-Terrorism Act 2009 was made without public knowledge.

4. Are all laws promulgated so that all persons can know what the laws are?

> "Government made laws without informing the people."

No. There are instances that the Government made laws without informing the people. For example, the 15th Amendment of the Constitution of Bangladesh was made only in less than 15 minutes without any debate in, and out of, the Parliament regarding the contents and intentions of the amended version of the Constitution. Besides, there are many laws that were introduced as 'Ordinances' through the office of the President of Bangladesh, although the actual draft is made in the Ministry of Law, Justice and Parliamentary Affairs at the wish of the Prime Minister, who wants the President to impose the ordinances as an 'announcer'. The people of Bangladesh remain in complete darkness about such laws.

5. Are all laws applied only prospectively?

No. All laws are not applied prospectively. For example, the International Crimes Tribunal Act, 1973, which was amended in 2009, 2012 and 2013 with retrospective effect to add 'death penalty' as the capital punishment after completing the trial of one of the alleged perpetrators for committing crimes against humanity in 1971.

6. Are all laws administered in the courts?

This principle is frequently violated in various ways. The powers of the courts have been limited by contradictory provisions. For example, the Speedy Trial Act, 2002, which has been amended in 2014, is used to prosecute perpetrators as determined by executive officers of the Ministry of Home Affairs, leading to capital punishments. The Mobile Court Act, 2009 is a law administered by the executive officers, who are shown to the public as 'Executive Magistrates', to punish people instantly with imprisonments and monetary penalties.

a. Is the investigative system under the police adequate to enable the courts to administer justice?

Not at all! Any form of investigation - be it a criminal, administrative, or civil matter – is subject to monetary corruption, politicization, nepotism (favoritism granted to politics and businesses due to family relations) and full of unscientific methods and inefficiency.

b. Is the prosecution system adequate to enable laws being administered by the courts?

Bangladesh has never had an independent and competent prosecution system. Rather, the country has a 'disposable' prosecution system. Every regime appoints a group of lawyers

of their choice to act as prosecutors or state attorneys. These lawyers get this opportunity because of their political loyalty, without any skill in the practical profession, and often by corrupt means. The prosecutors engage in rampant corruption, evidence of which is reflected in their subsequent lifestyle. Furthermore, the prosecutors do not delegate their responsibilities or share their knowledge with their successors. The transfer of prosecutorial responsibilities does not take place; once a regime assumes office, a new set of prosecutors start occupying the prosecutors' office, while their predecessors stop coming to the office when they understand their own party is no longer in power.

"Intervention on judicial matters or directly on the Courts is a way of life in Bangladesh."

c. Are the courts interfered with by the government or other political pressures or by pressure from powerful lobbies?

Intervention on judicial matters or directly on the Courts is a way of life in Bangladesh. This is mainly because historically, the Magistrate's Court was directly under the Ministry of Home Affairs, until October 2007. The executive officers of the state used to sit in the Courts to adjudicate criminal cases. All adjudications used to depend on administrative and political interferences. Since November 2007, the 'separation of judiciary' has taken place on paper only, although in practice the 'Judicial Magistrates' have replaced the 'administrative officers' to adjudicate matters.

d. Is there public confidence that the courts competently and impartially administer the law?

The reality, as explained in the above paragraphs, is that the people do not trust the judiciary. If they become part of any litigation, the popular perception is that it is an unfortunate blow in their life, which might be due to some misdeeds or sins committed by someone in the family.

e. Is the procedure for the appointment, promotion and dismissal of judges made through an objectively justifiable process that inspires public confidence?

The appointment, promotion and dismissal process has been greatly politicized and subject to corruption. The Ministry of Law, Justice and Parliamentary Affairs deals with the process of appointment, promotion and dismissal at its discretion, at the wish of the political regime. The Rules however, direct that such things should be done through 'consultation with the Chief Justice', who is also politically appointed; thus, normative standards have little meaning.

f. Are the positions of judges secure from any interference into the making of decisions, impartially and independently?

For reasons stated above the positions are not secure and political adventurism can damage the career of any judge by promoting the adventurer to the disadvantage of those who want maintain their integrity.

"All laws are not accessible to all the citizens."

g. Once the court makes a decision, is it guaranteed that the decision will be implemented?

There is no guarantee that a decision made by a court will be implemented.

h. Are the police, prosecution services and the courts provided with adequate resources to administer their services in a competent and efficient manner?

Absolutely not! The resources provided to administer the services of the police, prosecution, and the Courts are very inadequate.

i. Are all possibilities of corruption prevented?

Not at all! Rather, the possibilities of corruption are promoted, in reality. Due to the culture of impunity for State officers, the police and law-enforcing agents do not care about the quality of service they are legally obliged to render to the people. The police officers are not answerable to anyone for distortion of facts, evidence, and illegal arrests and detentions, due to the 'chain of corruption' replacing the 'chain of command' within the police department. In the prosecutorial affairs and in the adjudication process, corruption is entrenched within the system.

7. Are the laws accessible to all?

No. All laws are not accessible to all the citizens. The poor, targeted opposition activists, and persons who are allegedly perceived to be involved in political parties that are banned by the government, do not have access to all the laws or legal remedies.

8. Are the laws, so far as possible, intelligible, clear and predictable?

There are some recently-made laws that are hastily drafted and enacted to be used against political opponents and dissenting voices. These laws are not intelligible, clear and predictable. For example, the Information and Communication Technology Act, 2006, which has been amended in 2013, has vague definitions about the crime under this law, and attributes enormous power to the police to arrest and harass any citizen the state targets.

9. Are the questions of legal rights and liabilities ordinarily resolved by the application of the law and not through the exercise of discretion?

No. For instance, the closure of the Daily Amardesh, one of the pro-opposition newspapers, and the arrest and detention of its editor Mahmudur Rahman, is a glaring example where the laws are not applied without the discretion of the authorities. The newspaper still remains closed without any lawful grounds and the editor is arbitrarily detained without any trial for one year.

"The police never accept any complaint whenever the families of disappeared victims approach."

10. Do the laws of the land apply equally to all (save to the extent that objective differences justify a differentiation)?

No; politicized accusations and perspective while bringing charges against a person has become the key factor in applying laws.

11. Do the laws afford adequate protection of fundamental human rights?

Not at all! The unabated extrajudicial killings are one of many examples. The extrajudicial killings are shown investigated by 'Magistrates', who are actually executive officers of the government. These executive officers merely count how many bullets are spent in an alleged incident of 'encounter'. These so called investigations never try to find the truth relating to murder in custody, other than validating the acts and crimes committed by the police and the Rapid Action Battalion (RAB). Another example is the case of enforced disappearances. Normally, the police never accept any complaint whenever the families of disappeared victims approach police stations to register cases against state agents. The Magistrate Courts also do not accept complaints of disappearances. The only thing possible is to register complaints of abduction and missing of persons without accusing any state agency. If any aggrieved family can afford to go to the High Court Division of the Supreme Court with a habeas corpus (state detention of a prisoner is valid) writ application, the petition might be heard once, yielding a Rule from that particular Bench amidst vehement objections and denials by the state attorneys. Thereafter, that particular habeas corpus petition will be in limbo.

For example:

a. Do the laws adequately prevent any form of discrimination?

Not in all cases and in all laws of the land.

b. Do the laws prevent extrajudicial killings and disappearances and other methods of the extrajudicial deprivation of life?

"In reality torture and ill-treatment are not prevented by the State."

The situation is contradictory and complicated. For example, the Constitution of Bangladesh, in Article 32, prohibits 'deprivation of life'. But, the penal laws do not exactly criminalise 'disappearance', which has been used as one of the excuses when Bangladesh's Foreign Minister attacked human rights groups for raising the issue of enforced disappearance in the 16th Session of the Universal Periodic Review in April 2013.

On the other hand, the Torture and Custodial Death (Prohibition) Act, 2013, a Bill originally drafted by the AHRC in 2009, makes 'custodial death' a punishable crime. In reality, the law is not put into practice due to the unwillingness of the state and the imminent threats on the human rights defenders.

c. Is torture and ill-treatment prohibited and prevented?

Yes, the Constitution of Bangladesh, in Article 35 (5), prohibits torture and ill-treatment. The Torture and Custodial Death (Prohibition) Act, 2013 criminalises these acts. In reality however, torture and ill-treatment are not prevented by the state. Instead, these heinous (wicked and wrongful) crimes are patronized by the state by granting blatant impunity to the perpetrators and rewarding them with gallantry awards.

d. Is illegal arrest and detention prohibited and prevented?

Illegal arrests and arbitrary detentions are prohibited in the laws and jurisprudence. They are not, in reality, prevented however. Rather, illegal arrests and arbitrary detentions are the normal way of law-enforcement in Bangladesh.

e. Is fair trial guaranteed to everyone?

Fair trial has been hampered by problems of the judicial process mentioned above. Incompetence of judicial officers, prosecutors and defence lawyers, absence of judicial mindsets among the professionals involved in the criminal justice system, and politicization (bring political power to favor) are major factors hampering fair trial. Besides, delays force many persons to not pursue cases and instead enter into compromises. The absence of witness protection puts many people's lives at risk if they pursue cases. Unprincipled practices of settlements and granting of suspended sentences by presidential clemency also hampers fair trial. Further corruption of the police, prosecution and the judiciary badly affect fair trial.

f. Is freedom of expression guaranteed?

Freedom of expression is one of the areas that has been violated severely. The killing and detaining of journalists,

closing of newspapers and other publications, threats to journalists, blocking of cyber space publications, various prosecutions against journalists, many forms of blackmailing journalists and media people including blackmail through the state media, severe propaganda through the public media against all dissident voices that criticize the government, the use of the intelligence services against journalists and media people, abductions and the private vehicle syndrome, late-night visits of intelligence agencies to the houses of government critics and many other forms of violations have been reported by international media agencies for a long period of time. The government refuses to take any action on any of these instances. Impunity prevails.

"The peoples' right to elect a government is severely restricted by making constitutional amendments."

g. Is the right to freedom of movement guaranteed?

There are restrictions on the freedom of movement on the main opposition political parties, perceived opponents of the government. There are bans on persons and organizations and also unofficial bans. Particularly opposition parties have been persecuted in an attempt to make them incapable of effectively contesting elections against the government. The one party concept prevails. There are severe restrictions on the NGOs who are often portrayed as traitors.

h. Are the freedoms of association and freedom of publication guaranteed?

Freedom of association is particularly curtailed for all those political parties who are opposed to the government. Similarly, it is curtailed for civil society organizations including NGOs. On the International Women's Day, on 8 March 2014 for instance, the government did not allow women's rights organizations to hold a rally on the street in the capital city of Dhaka. A prominent journalist's book publication ceremony was recently not allowed to be held at a five star hotel in Dhaka. Persons have been jailed for Facebook posts criticizing the Prime Minister. There are many methods by which such freedoms are denied.

i. Do people have the right to elect the government of their choice?

Not at all! The peoples' right to elect a government is severely restricted by making constitutional amendments (For example: the 15th Amendment of Constitution of Bangladesh removes the provision of Non-party Caretaker Government for holding general election in the country); by generating state-sponsored rigging participated by public officials, law-enforcement personnel and ruling party cadres; grabbing the polling centers and fake voting. The opposition parties have been prevented from participating in the election by making factions of political parties through intelligence agencies to

make those factions allies to the ruling regime. By persecuting these parties so that they are not in a position to explain their ideas to the people and to offer an alternative to the government, the government gets an unfair advantage at the election. Actually speaking, the only party really presenting itself before the people is that in the government coalition. Thus, the people do not really have a chance for a free and fair election.

"People who dare to contest cases face severe threats to their lives, liberty and property."

k. Are measures taken to prevent absolute power?

Instead of preventing absolute power the power of the government is protected in every possible way.

12. Are means provided for resolving, without prohibitive cost, or inordinate delay, bona fide disputes which parties themselves are unable to resolve?

Disputes cannot be resolved without interventions and supports from the ruling party's locally influential persons.

a. Is the cost of litigation prohibitive?

Yes, the litigation costs are prohibitive and there is no legal aid.

b. Are there inordinate delays?

Yes, there are inordinate delays where cases may go on for ten years or more.

c. Can people have recourse to courts without suffering the risks of physical harm and other attacks or threats to their life?

The people who dare to contest cases face severe threats to their lives, liberty and property.

d. Can a witness participate in court proceedings without incurring risk to their life and liberty?

There are no witness protection laws.

13. Do the ministers and public officers exercise their powers reasonably and in good faith, for the purpose for which the powers are conferred?

Not at all. The people do not even believe that the ministers and public officers are exercising their powers reasonably and in good faith due to the extreme form of politicization.

14. Do public ministers and public officers exceed the limit of their powers?

Yes, when it comes to political advantage.

15. Are the adjudicative processes provided by the state fair?

No.

a. Are decisions made behind closed doors?

Many decisions are made behind closed doors, particularly when opposition activists are the accused in fabricated cases. Due to corrupt practices and politicization, decisions are made behind closed doors.

b. Has the role of lawyers become an obstacle to fair practices in adjudication?

The role of lawyers is negative, and by and large lawyers have acted to their own advantage and not to the preservation of litigation practices under the rule of law.

16. Does the state comply with its international obligations?

No. For example, the government has not submitted its national reports to the main mandates and Committees of the UN Human Rights Council or the former Commission of Human Rights.

"Many decisions are made behind closed doors."

India: Prosecutorial division is one of the most corrupt

T. K Naveenachandran, Nervazhi; Bidyut Mohanty, SPREAD; Bijo Francis, Dr. Rajat Mitra, Shiv Karan Singh and Avinash Pandey, all from ALRC

1. Are all persons and authorities bound by the same laws?

No, there are statutory (controlled or determined by the law) exemptions for offices like that of the head of the state and government entities.

2. Are all persons and authorities entitled to the benefits of all laws?

No, for example, if an ordinary citizen defaults payment towards a loan, the system with the laws will throw the person out into the streets. Whereas, if the defaulter is a rich or a powerful person, the law and the system will not work against that person. If a person is tortured in custody, the law fails to protect the person, whereas it protects the perpetrator.

Besides, India has a culture of impunity, discrimination and non-accountability. The justice system functions in such a way where discrimination is possible at all levels that facilitates impunity and non-accountability. For instance, in a case of corruption, if the charge is against an ordinary civil servant, the person in all possibilities could face a trial and may be punished at the end. But if the charge is against a politician or a high-ranking bureaucrat, the chances are the trial will be delayed for two or three decades, by which time, the accused would have lived his life, dead and gone.

3. Are all laws publicly made?

No. Laws are not discussed and debated in a way comprehensible or accessible to the ordinary public. Rules that are addendums to Acts are often not debated in the parliament. In addition, most laws are not available even in official languages, for which the state has not allocated resources.

4. Are all laws promulgated so that all persons can know what the laws are?

No.

5. Are all laws applied only prospectively?

Yes, but in some monetary issues, the state has exercised its discretion.

6. Are all laws administered in the courts?

No. In the Criminal Procedure Code 1973 itself, executive officers of the state are empowered to administer law. The Indian Army Act, 1950 negates this principle.

a. Is the investigative system under the police adequate to enable the courts to administer justice?

Certainly not, there are many problems about the police. For example, the policy of the state is to not have reforms to INSTIL investigative capacity to the police.

b. Is the prosecution system adequate to enable laws being administered by the courts?

The prosecutorial division of the state is one of the most corrupt, least debated and inefficient to the core department.

c. Are the courts not interfered with by the government or other political pressures or by pressure from powerful lobbies?

There is no reason why the Indian judiciary should not be independent. However, judges themselves, and through them the institution subjugates (under domination or control/make someone under you) itself to political power.

d. Is there public confidence that the courts competently and impartially administer the law?

No.

e. Is the procedure for appointment, promotion and dismissal of judges made through an objectively justifiable process that inspires public confidence?

No. The collegium system of appointment and the internal process of discipline is not transparent and has hence resulted in corruption.

f. Are the positions of judges secure from any interference into the making of decisions, impartially and independently?

Same answer as in 'C'.

"Judges themselves, and through them, the institution subjugates to political power."

g. Once the court makes a decision, is it guaranteed that the decision will be implemented?

No, the state if required will go out of the way to legislate to defeat the judgment. In simpler cases, the executions of judgments are delayed due to the state failing to provide resources.

"Laws are applied differently to different persons."

h. Are the police, prosecution services and the courts provided with adequate resources to administer their services in a competent and efficient manner?

No.

i. Are all possibilities of corruption prevented?

Corruption is the norm. On the contrary, every possibility is encouraged.

7. Are the laws accessible to all?

Cost of litigation, delays, proximity of courts, absence of practical and reasonable legal aid, all prevents access to law.

8. Are the laws, so far as possible, intelligible, clear and predictable?

No. One example is the Land Acquisition Act that is so complex that amendments and the law itself is difficult for the judge and the lawyer to understand. This has facilitated corruption.

9. Are questions of legal rights and liabilities ordinarily resolved by the application of the law and not through the exercise of discretion?

In a country where even complaining of the violation of a right is difficult, application of law, subsequent to a complaint stands less chance.

10. Do the laws of the land apply equally to all? (save to the extent that objective differences justify a differentiation)?

Practical application: Laws are applied differently to different persons. For example, if an ordinary person commits a crime, chances are that the person will have to run through the process of law. Often this process is also exploitative. Whereas, if a powerful person, it could be a politician, bureaucrat or simply rich, commits a similar crime, they could beat the system, at all levels. Selective application of the law is the norm, to benefit people in power.

11. Do the laws afford adequate protection of fundamental human rights?

No. For example, FR jurisdiction is limited to what is known as the higher judiciary. These courts are inaccessible to the

ordinary people, by cost, proximity and its own process of self-screening, and linguistic issues.

For example:

a. Do the laws adequately prevent any form [all forms] of discrimination?

   No. Some laws made to accommodate vote bank politics discriminate against people based on religion. Legislations like the AFSPA discriminates the rights of the people in places where the AFSPA is enforced.

b. Do the laws prevent extrajudicial killings and disappearances and other methods of the extrajudicial deprivation of life?

   Generic criminal law provides protection. However, specific laws implemented with discrimination, negates this.

c. Is torture and ill-treatment prohibited and prevented?

   No.

d. Is illegal arrest and detention prohibited and prevented?

   Yes, in law, but not in practice.

e. Is fair trial guaranteed to everyone?

   No.

f. Is freedom of expression guaranteed?

   No.

g. Is the right to freedom of movement guaranteed?

   No.

h. Are the freedoms of association and freedom of publication guaranteed?

   No.

i. Do people have the right to elect the government of their choice?

   Yes, but election does not guarantee the rule of law.

k. Are measures taken to prevent absolute power?

   No.

12. Are means provided for resolving, without prohibitive cost, or inordinate delay, bona fide disputes which parties themselves are unable to resolve?

"Legislations like the AFSPA discriminates the rights of the people in places where the AFSPA is enforced."

No.

a. Is the cost of litigation prohibitive?

> "Adjudication processes are not fair."

Yes, the litigation costs are prohibitive since the beginning of the court system.

b. Are there inordinate delays?

Yes.

c. Can people have recourse to courts without suffering the risks of physical harm and other attacks or threats to their life?

The people who dare to contest cases face severe threats to their lives, liberty and property.

d. Can a witness participate in court proceedings without incurring risk to their life and liberty?

There are no witness protection laws.

13. Do the ministers and public officers exercise their powers reasonably and in good faith, for the purpose for which the powers are conferred?

Ministers and public officers act unfairly for political advantage.

a. Do public ministers and public officers exceed the limit of their powers?

Yes when it comes to political advantage.

14. Are the adjudicative processes provided by the state fair?

For the reasons stated above adjudication processes are not fair.

a. Are decisions made behind closed doors?

Although decisions are made in open court, due to corrupt practices and politicization, actual decisions are made behind closed doors.

b. Has the role of lawyers become an obstacle to fair practices in adjudication?

The role of lawyers is negative, and by and large lawyers have acted to their own advantage and not to the preservation of litigation practices under the rule of law.

15. Does the state comply with its international obligations?

No.

Indonesia: The investigation is based on confession

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Deddi Alparesi, LBH Padang

1. Are all persons and authorities bound by the same laws?

No. The military personnel are bound by a different criminal law and tried by a military court even though the crime committed is an 'ordinary crime'. For civil matters (marriage, inheritance, etc), the Muslims are bound by Islamic law, which is separate. In Indonesia, the law also gives privilege to six major religions in the country. Permit from the President is needed for the authorities to investigate and try the local authorities.

2. Are all persons and authorities entitled to the benefits of all laws?

No. The powerful and privileged people can access the protection of the law, whereas the disadvantaged and marginalized people cannot enjoy equal protection and guarantee of the normative laws. For instance, the guarantee to access to justice is simply not obtained by the underprivileged.

3. Are all laws publicly made?

Although legally speaking public participation in law-making has been guaranteed, there is no meaningful participation on the law-making process. Rather, participation simply becomes a rubber stamp to create the impression that the government has implemented the mandate of the law and the constitution.

4. Are all laws promulgated so that all persons can know what the laws are?

It is presumed that people know the existing laws. Although the law is included in the state gazette, the absence of the government's effort to disseminate the law into the most

remote and uneducated Indonesian society, results in the lack of awareness as well as of the knowledge of the people to the newly applicable laws.

> "Most judges are never willing to accept the application of international human rights treaties."

5. Are all laws applied only prospectively?

Yes, apart from the Human Rights Court Law which tries the crime of genocide and crimes against humanity.

6. Are all laws administered in the courts?

No. Most judges are never willing to accept the application of international human rights treaties that have been ratified by domestic legislation. The judges tend to use national legislations and never tried to formulate judgments using the international judgments or the constitution.

a. Is the investigative system under the police adequate to enable the courts to administer justice?

No. The investigation system commonly practiced by the police in uncovering crime is mostly based on the confession of the suspect, which in most cases involves torture. There is no adequate scientific investigation to obtain probable cause. With inadequate evidence, the judges carry on giving judgments, even disregarding the facts that may contradict evidence provided by the investigators as well as the prosecutors.

b. Is the prosecution system adequate to enable laws being administered by the courts?

Disregarding any possible allegation of torture or unlawful procedures of obtaining statements, information, or confessions, the prosecutors carry on with the prosecution. The prosecution system is not integrated with the investigation, and the prosecutors have limited capacity to instruct the police in conducting investigations.

c. Are the courts interfered with by the government or other political pressures or by pressure from powerful lobbies?

Even though the judiciary is separated from the executive (daily administration of the state), in practice, the selection process of the judges may affect their independence. Many judges are also involved in corruption. In some cases, crowds are deployed to attend hearings to intimidate judges and witnesses.

d. Is there public confidence that the courts competently and impartially administer the law?

No. The public even consider the courts 'terrifying', choosing

to settle their disputes outside the courts. As a result, people often take the law in their own hands in dealing with crimes.

e. Is the procedure for appointment, promotion and dismissal of judges made through an objectively justifiable process that inspires public confidence?

Corruption as well as nepotism play a role in the recruitment of district court judges. The recruitment at this stage has no oversight by any other independent mechanism. In the appointment of Supreme Court judges, there are political interests and corruption involved in practice. At the moment, the House of Representatives (attended by members of political parties) has the authority to appoint Supreme Court judges. The system of promotion and mutation of judges are not clear or transparent.

"The number of police, judges and prosecutors are not proportionate compared to the number of cases."

f. Are the positions of judges secure from any interference into the making of decisions, impartially and independently?

No. See above.

g. Once the court makes a decision, is it guaranteed that the decision will be implemented?

No. There are examples where the government disregards the final judgments of the court.

h. Are the police, prosecution services and the courts provided with adequate resources to administer their services in a competent and efficient manner?

The institutions are lacking in human resources, in terms of capacity and number. The number of police, judges, and prosecutors are not proportionate compared to the number of cases. They are also lacking in budget and infrastructure. The lack of budget is therefore used to justify illegal collection of money.

i. Are all possibilities of corruption prevented?

There is a war against corruption in Indonesia. However, it has not addressed corruption in the legal system. The war also focuses more on the punishment of the crime, instead of its prevention. In those cases, the perpetrators are mostly sentenced with light punishment, which does not provide any deterrent effect or shock therapy. The litigation fee is often marked-up by the courts' clerks, perhaps due to the manual system used by the court.

7. Are the laws accessible to all?

No. There are attempts of the government authorities to

publish the law on the internet, but many Indonesians living in remote areas as well as those who are poor cannot access the internet in the first place.

> "In Papua, individuals who have different political views and wish to separate Papua from Indonesia are arrested because the law allows it."

8. Are the laws, so far as possible, intelligible, clear and predictable?

No. In many instances the laws are not predictable due to the failure of the government to harmonise the laws and other regulations.

9. Do the laws afford adequate protection of fundamental human rights?

Not adequately. The law still has not criminalized torture, for instance.

a. Do the laws adequately prevent any form of discrimination?

We have the law on anti-racial and ethnic discrimination, but not on religious discrimination.

b. Do the laws prevent extrajudicial killings and disappearances and other methods of the extrajudicial deprivation of life?

There are no means, under the law, in which we can question or challenge the claim of the police or security officials that the killings of 'criminals' are 'inevitable because they were attacking or attempting to escape'.

c. Is torture and ill-treatment prohibited and prevented?

No.

d. Is illegal arrest and detention prohibited and prevented?

There is a way in which we can challenge our arrest and detention, but this does not stop illegal arrest and detention. Police officers who commit such illegal arrest and detention cannot be held criminally accountable, but only subjected to internal disciplinary mechanism under the police.

e. Is fair trial guaranteed to everyone?

On paper, yes.

f. Is freedom of expression guaranteed?

Not totally. In Papua, individuals who have different political views and wish to separate Papua from Indonesia are arrested because the law allows it. Freedom of expression is also violated by non-state actors (for instance, forced dispersal

of peaceful meetings by minorities) but they are hardly sentenced.

g. Is the right to freedom of movement guaranteed?

Yes.

h. Are the freedoms of association and freedom of publication guaranteed?

The freedoms are unreasonably limited. For instance, the government and the parliament enacted a law on mass organizations last year, which obliged all non-governmental organizations to 'report' to the government. Under the same law, such organizations may also be banned by the government if their activities or visions are not in accordance with the country's vague values such as 'sovereignty and territorial integrity'.

"The freedoms are unreasonably limited. The government and the parliament enacted a law on mass organizations."

i. Do people have the right to elect the government of their choice?

Yes.

k. Are measures taken to prevent absolute power?

After 1998, yes.

12. Are means provided for resolving, without prohibitive cost, or inordinate delay, bona fide disputes which parties themselves are unable to resolve?

a. Is the cost of litigation prohibitive?

In civil proceedings, yes.

b. Are there inordinate delays?

Yes, particularly in civil proceedings.

c. Can people have recourse to courts without suffering the risks of physical harm and other attacks or threats to their life?

Yes, but only if you have lawyers and if you have access to the media (thus you can expose the case and win the public's opinion).

d. Can a witness participate in court proceedings without incurring risk to their life and liberty?

Yes, but conditionally. If the witness's testimony will not harm any influential people or people with/in power then no.

10. Do the ministers and public officers exercise their powers reasonably and in good faith, for the purpose for which the powers are conferred?

"Adjudication processes are not fair."

a. Do public ministers and public officers exceed the limit of their powers?

No.

11. Are the adjudicative processes provided by the state fair?

For the reasons stated above, adjudication processes are not fair.

a. Are decisions made behind closed doors?

In political cases or cases involving 'important people', then yes.

b. Has the role of lawyers become an obstacle to fair practices in adjudication?

No.

12. Does the state comply with its international obligations?

No.

Nepal: The poor, marginalized and Dalits hardly benefit from laws

Prakash Mohara, ALRC;
Rem Bahadur Biswokarma, Jagaran Media Center

1. Are all persons and authorities bound by the same laws?

As per law, no one is above the law, as also guaranteed in the country's interim constitution 2007. But law does not apply to all persons. For example, there is no law to prosecute severe kinds of human rights violations. A person when committing a crime can be prosecuted, but human rights violations could not be prosecuted. In police torture cases, there is no law to investigate and prosecute. The same laws do not bind all persons and authorities. Ministers who were found to be involved in corruption were not investigated properly and prosecuted, despite enough evidence. Law is not practiced.

2. Are all persons and authorities entitled to the benefits of all laws?

No, persons involved in the practice of caste-based discrimination are hardly punished on the basis of law. The poor, marginalized and Dalits hardly benefit from existing laws. Many do not have knowledge of law, nor access to it. They are not aware about their rights. So how can they know that their rights have been violated and they can go for legal measures? The state systematically tries to block certain sections of society from becoming aware of their rights. The state also shows negligence in making the general public aware.

3. Are all laws publicly made?

Yes, laws are supposed to be made by legislators and approved by the parliament. But there is no real public discussion and debate before making it. Even if there is public debate and discussion, that will be cleverly played by the political parties and bureaucracy and they can change it overnight.

When laws come out, certain sentences and sections are kept to play upon. The law commission also publicizes it, but 95 percent of the citizens do not have access to it. For instance, the Torture Act. The government has never discussed this act in public, and the public does not know about its current status. There is biasness.

"Village officers are not aware about the existing laws."

4. Are all laws promulgated so that all persons can know what the laws are?

Generally it is shared with the public. But the sharing is very limited and people are unaware of available laws. Ignorance of law is no excuse. But in reality there is no environment where the public could know about it. Even if the law and constitution adopted it, the rights of the citizens to know about the available law are questionable, as there is no state policy and program where they circulate information about the laws to the citizens. At the village level, the village officers are not aware about the existing laws, so how can they inform general villagers. The civil society and Bar Association have recommended the government to appoint at least one lawyer at the VDC office, but the government has not started any steps for its implementation.

5. Are all laws applied only prospectively?

Yes, but there is a question of effective implementation. The law is implemented not according to the system, but according to the interest of the persons who have larger hold of the state mechanisms and political authority. For example, it has been found that in order to appoint or promote police officers, the police act and regulations have been amended many times. Many who are in influential positions change laws and acts for their personal benefits.

6. Are all laws administered in the courts?

Courts try to administer the law, but powerful elites and leaders violate it. A journalist was buried alive by five Maoist cadres in 2004 (Dekendra Thapa). When civil society and journalist groups spoke on this broad daylight murder, the Supreme Courts ordered for an investigation to be conducted and the killers to be brought into custody. The then Prime Minister Baburam Bhattarai and the Attorney General clearly obstructed the investigation into the murder. The police thus stopped their investigation and the process came to a halt. In another incident, Bal Krishna Dhungel, who was implicated by the District Court, Appeal Court and the Supreme Court, has been roaming free because of his political influence and position. This is an autocratic thought where they think that 'I am above the law'. Others have started following it.

There are laws, but they are not efficient due to the lack of professionalism of the police. According to the NHRC, there are over 11,500 trafficked persons as of 2011. Record shows this number of trafficked every year, but merely 180 have been prosecuted. So more than 10,000 of traffickers are scot free, so how can laws be administered in the courts. They are out of the court of law. There is no investigation at all.

"People do not believe in police and they do not believe in the justice system."

There are many reasons behind this. People do not believe in police and they do not believe in the justice system. The state cases act has given authority and responsibility to the government attorneys to prosecute cases, but practically it has not been effective due to corruption. Also, gross human rights violations have never been prosecuted. Often they say that there is no law and pretend they are not aware of international law. They are also not capable enough to address criminal cases related to drugs, human trafficking and so forth.

7. Are the laws accessible to all?

No, laws are not accessible to all. Dalits are largely denied access. It has been often found that even when Dalits try to register a case as per the caste based discrimination crime and punishment act 2011, it is often registered as cases of stealing, beating and arson. First there is no access in making the laws, no consultations in law making process. Even after the law has been made, there is no access for ordinary citizens. Access is often limited towards elite, politicians and bureaucrats, and business tycoons. There is systematic barring of access to the law for all. This is the ingrained mentality.

8. Are the laws, so far as possible, intelligible, clear and predictable?

No, they are not. Common people never understand what is written and available in the law. This is impossible in Nepalese context.

9. Are questions of legal rights and liabilities ordinarily resolved by the application of the law and not through the exercise of discretion?

No, issues and disputes are settled outside the courts and legal framework. The caste based discrimination and untouchability crime and punishment act provides 1-3 years of imprisonment and 25 thousand to 1 hundred thousand in fine. But in reality, judges use self-consciousness and give the verdict accordingly, less than what it is in law.

There is not a certain benchmark. Ones who have access to the law try to take benefits for personal interests. Then the

authorities take it for granted. For example, CDOs could decide certain cases, such as those regarding arms and ammunitions. They are not professionals, only administrators, without the necessary legal background. But they do it in influence and for personal benefits.

> "The society could not internalize the issues of discrimination."

10. Do the laws of the land apply equally to all? (save to the extent that objective differences justify a differentiation)?

No, caste, class and politics matter. There is a lot of discrimination. There are still practical flaws in the gender and caste based discrimination laws. The society could not internalize the issues of discrimination from the society, policy and overall sector of the state. There is no such policy and programs from the government, which helps the general public and society to feel that they are equal before the law.

11. Do the laws afford adequate protection of fundamental human rights?

The Constitution guarantees fundamental human rights. But it is merely a showpiece, which cannot be implemented. There should be laws made in order to implement it, but laws are never made. The constitution guarantees the right against torture and made torture punishable by law. But there are no laws against torture.

The use of torture in police investigation is a regular issue. There is no witness protection law. Human rights defenders and journalists are threatened and also killed. But perpetrators, even when identified, are not brought before the court of law due to pressure from political parties.

The Constitution guarantees no discrimination. But in practice, it is not implemented.

The government has not ratified the convention on disappearances. There is no fair trial. There is systematic practice of torture.

12. Are means provided for resolving, without prohibitive cost, or inordinate delay, bona fide disputes which parties themselves are unable to resolve?

No, delay is always there. With delays come rising expenses. There is a legal provision to provide legal aid for those who cannot afford the legal fees, but again it is a showpiece. Legal aid is not effective. There is also a question mark in the professionalism and capacity of government paid lawyers. These provisions are made for show, but when it comes to credibility, it does not help the parties seeking assistance.

Even for a trial, alleged accused have to stay in judicial custody for 6-7 years due to delay in their cases. Same is the situation of the SC. There are cases that are pending in the SC for over 12 years. For instance, the torture case of Hom Bahadur Bagale (2002) is still pending in the SC.

There is political meddling in cases. Victims and even witnesses face security risks after proceeding for justice.

"Decisions are made in closed party meetings and brought before the public."

13. Do the ministers and public officers exercise their powers reasonably and in good faith, for the purpose for which the powers are conferred?

No, there is high misuse of power for personal benefits. Also there is the issue of corruption. Even the CIAA has not given adequate attention on these issues.

There is no system and benchmark for making them professional. There is no authority and mechanism to monitor their performance. This makes them free to do as per their will and interest. There is no close monitoring. Even there is no clear mechanism to monitor who is responsible to whom.

14. Are the adjudicative processes provided by the state fair?

No, decisions are made in closed party meetings and brought before the public. The public learns of the decisions only after they are made. In most of the cases, the public does not come to know about it. Therefore it is not fair.

Even some lawyers have become hindrance towards it. Lawyer's council act can punish lawyers working against their profession, but those have never been punished. The process of appointing the AG is on a political basis, rather as political cadres. So when lawyers from the same political parties are found committing misdemeanours, they are not punished.

When cases are registered in the courts, many cases are dropped on the basis of political pressure. It has raised a culture of impunity where people turn to become political cadres in order to remain out of prosecution.

15. Does the state comply with its international obligations?

No, the government does not send reports to the UN Human Rights Council and UPR process for years. Nepal has not sent periodic reports on caste-based discrimination for six years now.

The recent comments received for the ICCPR and UPR recommendations present the government situation on its international obligations.

Pakistan: Laws are discriminatory to women, religious minorities

Baseer Naveed, ALRC;
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Zulfiqar Shah, Pakistan Institute of Labour Education and Research

1. Are all persons and authorities bound by the same laws?

No. Discrimination starts with Pakistan's supreme law (constitution) as it declares that non- Muslim(s) cannot become president and prime minister of Pakistan. There are also laws (Hudood Laws/ law of evidence) which clearly discriminate between men and women. In addition to this, there is a separate law for armed forces personnel and even in cases of civil matters such as corruption cases, military officers have not been prosecuted under common law.

2. Are all persons and authorities entitled to the benefits of all laws?

Except for the military which has separate laws and systems of benefits, in theory, the country's law is for the benefit of all persons and authorities. However, given the nature of the system and structures, only rich and influential people can benefit from laws.

3. Are all laws publicly made?

No. The general practice is to make laws by promulgating ordinances, a kind of decree issued by one man (president in case of civilian government). This is usually for three months and then the government takes it to the parliament and converts it into a law. This is because the government in power does not want to directly go in debate, but make a law first and then manipulate and then go to the parliament. Even in cases where law making process is taken directly to the parliament, there is little debate. Usually, the party in power would manipulate and make a law. Additionally, there is no public debate as hardly any law is taken for public debate.

4. Are all laws promulgated so that all persons can know what the laws are?

Yes. Laws are promulgated and made public through media and official gazette.

5. Are all laws applied only prospectively?

Not. Clear.

6. Are all laws administered in the courts?

Not at all. Technically, there is no restriction administering laws in courts. However, due to the lack of proper sensitization, absence of continued orientation of judges of particularly lower courts, they remain unaware of many laws. Add to the injury poorly trained police and prosecution, which remain unaware of many laws and book people under wrong laws resulting in poor prosecution. The conviction rate in Pakistan is very low.

a. Is the investigative system under the police adequate to enable the courts to administer justice?

No. Police investigation is poor both in terms of resources and human resource quality that they fail to provide any assistance to courts to deliver justice.

b. Is the prosecution system adequate to enable laws being administered by the courts?

No, the prosecution system is very poor. Often prosecutors are appointed on political basis and the quality of their work is so poor that it did not help courts to deliver justice in anyway.

c. Are the courts interfered with by the government or other political pressures or by pressure from powerful lobbies?

Yes. Courts are under pressure from both state and non state actors. There are many cases where judges refuse to hear cases because of pressure. Though pressure on judges is a common tool used in Pakistan to interfere in justice systems, in recent years, it has been obvious in cases where military persons and terrorists were involved.

d. Is there public confidence that the courts competently and impartially administer the law?

No. Public has lost hope in justice system. This is clear from the general practice that people do not go and register cases.

“Prosecutors are appointed on political basis and the quality of their work is so poor.”

e. Is the procedure for appointment, promotion and dismissal of judges made through an objectively justifiable process that inspires public confidence?

> "The justice system of Pakistan is considered very expensive."

Only in case of judges of higher courts. In case of judges of lower courts, appointments are based on political affiliation, influence from bar council and by paying heavy sums as bribes.

f. Are the positions of judges secure from any interference into the making of decisions, impartially and independently?

No. There are several pressures on judges.

g. Once the court makes the decision, is it guaranteed that the decision will be implemented?

No. A number of verdicts are not implemented mainly in cases involving influential persons and authorities and rich people.

h. Are the police, prosecution services and the courts provided with adequate resources to administer their services in a competent and efficient manner?

No. Both the institutions are poorly equipped and still using old methods and models which hinder their performance.

i. Are all possibilities of corruption prevented?

No. Corruption is a widespread and common practice. In courts, police stations and prosecution, nothing moves without paying bribes.

7. Are the laws accessible to all?

No. The justice system of Pakistan is considered very expensive. Only those who can afford it, can access the law. It's difficult for poor people, marginalized sections to access laws.

8. Are the laws, so far as possible, intelligible, clear and predictable?

No. A large number of Pakistani laws are confusing and unclear. For example there are over 150 labour laws which make it difficult to seek justice. These could have been simplified in five to six laws but no efforts have been taken to simplify them. There are also contradictions in laws. In case of many laws promulgated for years, rules and procedures have not been formulated.

9. Are questions of legal rights and liabilities ordinarily resolved by the application of the law and not through the exercise of discretion?

Technically yes. But in practice, particularly in business cases, courts use their discretion in asking to settle matters as out of court settlements. In addition to this, the President, PM, and chief ministers and heads of companies have many discretionary powers which clearly contradict with laws.

"The laws are discriminatory to women and religious minorities."

10. Do the laws of the land apply equally to all? (Save to the extent that objective differences justify a differentiation)?

No. As mentioned above, many laws discriminate against religious minorities and women.

11. Do the laws afford adequate protection of fundamental human rights?

a. Do the laws adequately prevent any form of discrimination?

No, the laws are discriminatory to women and religious minorities, for example in the case of the Ahmadis. The blasphemy laws are against the freedom of expression.

b. Do the laws prevent extrajudicial killings and disappearances and other methods of the extrajudicial deprivation of life?

No, the law enforcing agencies, like police, military, para military are involved in torture and extrajudicial killings; torture, and extrajudicial killings are not yet criminalized in Pakistan.

c. Is torture and ill-treatment prohibited and prevented?

No, the illegal arrest, detention, torture and ill treatment is neither prohibited nor prevented.

d. Is illegal arrest and detention prohibited and prevented?

No, the increase of cases of disappearances are the best examples.

e. Is fair trial guaranteed to everyone?

No. The right to fair trial is not a right in the real sense. Though CoP Article 10 (A) amendment made it, but the courts are denying the rights of fair trial, in the eyes of court, enough time is not provided to the lawyers for fair trial. At the lower level of the judicial courts, where the fair trial concept does not exist, the courts always rely on the prosecution and try to linger on the cases just to benefit the lawyers. The courts

remain under the influence of pressure groups and powerful sections of the society.

> **"It is inconceivable to have freedom of expression."**

In the cases of blasphemy (insult and showing lack of respect against religious deities) against religious minority communities, it is observed generally that courts have never applied the fair trial concept, and have always acted on the pressure of Muslim religious fundamentalists. In cases of forced conversion to Islam, the courts have behaved in the favour of the perpetrators who abducted and raped the girls from minority groups and even the higher courts have shown the gestures of happiness that minority girls are being converted to Islam. In cases of torture and arbitrary arrest, it is observed that courts never provide fair trial to the victims, and rarely has any perpetrator been punished purely on the basis of torture. Women hardly get fair trial because of the patriarchal and biased attitude of the judges.

f. Is freedom of expression guaranteed?

Being an Islamic country, it is inconceivable to have freedom of expression. Though the constitution guarantees the freedom of expression, at the same time many restrictions are put on that. Through the other articles in the constitution, the right of expression is limited. For example, on the matters related to religious matters, history, the matters related to judiciary and armed forces. A regulatory body with the name of PEMRA monitors all kinds of media and issues notices to follow the so called Islamic principles, Islamic ideology and respect for the armed forces.

g. Is the right to freedom of movement guaranteed?

Although it is guaranteed under the constitution, in practice this right is not guaranteed in the cases of bonded labor, peasants, women and forced labor, and sometimes on the political level. The Exit Control List is a tool in the hands of authorities; sometimes the courts also stop the freedom of movement. The right is also restricted in cases of visiting neighbouring countries, particularly India.

h. Are the freedoms of association and freedom of publication guaranteed?

No, the freedom of association is highly limited; in the cases of trade unions of workers, peasants and other professional organizations, the permissions are granted after the approval and permission of intelligence agencies and police.

As regards to the freedom of publication, it is highly restricted and Law Enforcement Agencies (LEAs) like police, intelligence agencies, army and other secret agencies have the right to confiscate printing presses, publications and to arrest.

These kinds of restrictions are visible in Baluchistan and KPK province. In the particular cases of religious minorities, such as the Ahmadis, they are not allowed to print their publications and they are not allowed to run printing presses. The same methods are applied to other religious minorities and groups like Hindus and Christians. Furthermore, the freedom of publication is conditioned, we have to take prior permission from law enforcement agencies.

"All efforts and practices are directed to obtain absolute power."

i. Do people have the right to elect the government of their choice?

No. The people generally go for their choice during the election but they are betrayed by the manipulation of establishment, consisted of intelligence agencies, military, bureaucracy and the right wing militant groups.

j. Are measures taken to prevent absolute power?

No, all efforts and practices are directed to obtain absolute power by the government. Even the so called independent judiciary does not respect the other institutions, and they have refused to submit their accounts before constitutional institutions like parliamentary committees, auditor general and the national accountability bureau.

12. Are means provided for resolving, without prohibitive cost, or inordinate delay, bona fide disputes which parties themselves are unable to resolve?

No, people don't have any means to resolve their disputes.

a. Is the cost of litigation prohibitive?

The cost of litigation is out of the reach of the people.

b. Are there inordinate delays?

Any criminal cases are not solved before seven years. Generally, cases take 20 to 25 years.

c. Can people have recourse to courts without suffering the risks of physical harm and other attacks or threats to their life?

No, people have no means for resolving disputes, social intolerance is at its peak through the formation of armed groups by the state itself, and state institutions also show their intolerance with the mindset of resolving disputes through force. Being a highly feudal and tribal society, there is always fighting and the promotion of intolerance between tribes and warlords; the parliament and the courts never interfere to end this.

The best example of the use of blasphemy laws is their being used against Muslims for not following state oriented ideologies.

> "There are no witness protection laws and witnesses are never protected."

In the education curriculum, intolerance against other ideologies start from class one, which has developed the mindset for not tolerating independent views, but to resolve conflict through the intolerant methods. This has generated incidents of lynching in the society.

b. Are there inordinate delays?

The cases are lingered on and take unnecessary delays; which cause further problems for the victims and their families.

c. Can people have recourse to courts without suffering the risks of physical harm and other attacks or threats to their life?

Generally, the victims and family members get harassed, physically tortured and even killed by LEAs.

d. Can a witness participate in court proceedings without incurring risk to their life and liberty?

There are no witness protection laws and witnesses are never protected. The courts don't provide any mechanisms for witness protection. In cases of terrorism, the family members are abducted or killed.

13. Do the ministers and public officers exercise their powers reasonably and in good faith, for the purpose for which the powers are conferred?

Ministers and public officers act unfairly for political advantage.

a. Do public ministers and public officers exceed the limit of their powers?

Yes, when it comes to political advantage. They frequently exceed their powers, abuse their authority, and use force.

15. Does the state comply with its international obligations?

No, the state ratifies the international laws with reservation on the important provisions; and is therefore always reluctant to submit reports. Also, these international laws are never into domestic laws.

Decisions in high profile cases are decided behind closed doors, and even judges of the supreme court have delayed their decisions until the GHQ of Army has confirmed their position.

Philippines: Rights are protected in theory, not in practice

Danilo Reyes, ALRC;
Daisy Arago, Center for Trade Union and Human Rights;
Abina Rombaoa, Moro Women's Center, Inc.

1. Are all persons and authorities bound by the same laws?

Yes and no. The President is immune from any lawsuit while in office. There are still Presidential Decrees and Executive Orders (both have effects of the law) that prohibit Cabinet members to testify on issues or in complaints related to the conduct of the Executive Department under the principle of Executive Privilege.

Yes, because theoretically, the legal system guarantees equal protection of the law and application of due process of law for everyone.

2. Are all persons and authorities entitled to the benefits of all laws?

NO. Although there are constitutional guarantees of fundamental rights and freedoms, there are national laws that legally deprive ordinary people from the benefits of the law. For example, the Human Security Act of 2007, which justifies arrest and prolonged detention of suspected terrorists for 72 hours without presenting the accused to the court and without the benefit of an inquest. This provision is more than what the Revised Penal Code prescribes, which is 36 hours for grave offenses. There are other national laws concerning labor, (RA 6715, RA 6727), farmers, indigenous peoples that directly attack the right to freedom of association, right to own land and (RA 10135 or the Cybercrime Prevention Act of 2012) the right to freedom of expression.

3. Are all laws publicly made?

Laws that are promulgated by Congress undergo a certain degree of public hearings and follow the regular process

of creating laws. There are instances however, that when political pressure often coming from the Palace are strong, lawmakers adopt midnight laws, i.e. laws which did not undergo regular process of consultation, deliberation etc that are often averse to the interests of the people and passed a day or few hours before the ban on promulgating laws takes effect due to national election.

"Nearly all national laws promulgated by Congress are often broad."

However, the Executive Branch, which has quasi judicial (powers resembling that of court and judge) and quasi-legislative (public administrator makes rules or acts) powers formulate, adopt and implement laws that the public are not aware of, until they are prosecuted under that particular law.

4. Are all laws promulgated so that all persons can know what the laws are?

No- answer same as above.

5. Are all laws applied only prospectively?

Theoretically, criminal laws must be applied prospectively (happening in the future/likely expected to occur), but there are laws which are applied retroactively (something happening now that affects the past), such as in the cases relating to rebellion and subversion.

6. Are all laws administered in the courts?

In theory, all laws and administration of the law must be administered by the courts, but often the powers of the court (particularly lower courts or the regional trial court) are restricted when it comes to cases of heinous crimes (involving wealthy people /families, pro-administration politicians) and under special laws and treaties (Visiting Forces Agreement between the US and the Philippines) where courts are pressured to issue orders in favour of the accused without public trial.

7. Are the laws accessible to all?

No.

8. Are the laws, so far as possible, intelligible, clear and predictable?

No. Nearly all national laws promulgated by Congress are often broad and require implementing internal rules and regulations (IRR), wherein tasks are given to the Executive Branch. And every time it happens, the law becomes so incomprehensible and the only provisions that are clear are provisions that deal with penalties/or punishment to citizens for disobeying the law.

9. Are questions of legal rights and liabilities ordinarily resolved by the application of the law and not through the exercise of discretion?

Often, questions are resolved through the exercise of discretion (freedom to decide what should be done in a particular situation). However, there are instances, at least in the past, when mass movements exert public pressure on issues of national interests (such as corruption and accountability of public officials), and the application of the law is hence done according to what is legally right. At such times, the application of the principle that those who have less in life should have more in law is applied.

"When mass movements exert public pressure on issues of national interests, the application of the law is hence done."

10. Do the laws of the land apply equally to all? (save to the extent that objective differences justify a differentiation)?

No. The gap between what is written at least in the 1987 Constitution and other national laws, and practice has widened immeasurably, as implementing rules and regulations and amendments thereof, become so complex that it becomes so difficult to see the original intention of the law. In most cases, amendments and more amendments to the law pertaining to protection of the fundamental rights of the poor for instance, are made, under the pretext of national or economic development, virtually nullifying the law itself, and violating the fundamental rights and freedoms of the people.

11. Do the laws afford adequate protection of fundamental human rights?

Answer- same as above

12. Are means provided for resolving, without prohibitive cost, or inordinate delay, bona fide disputes which parties themselves are unable to resolve?

Access to justice by ordinary people is denied through various means, such as but not limited to, prohibitive cost of litigation, labyrinthine (confusing) process of prosecuting cases, threats (killings of) to witnesses and complainants and other retaliatory moves by the accused and state agents to the complainants and their family members while the case is being heard.

13. Do the ministers and public officers exercise their powers reasonably and in good faith, for the purpose for which the powers are conferred?

By and large, the answer is NO. Public officers exercise their functions not according to the law, but according to the interests they pursue.

14. Are the adjudicative processes provided by the state fair?

No. Apart from the prohibitive costs, cases in the Philippines, except in isolated circumstances, often outlive the complainants. Cases involving workers such as unjust dismissal or union busting can last for 10 years or more, which are still appealable to the Supreme Court.

15. Does the state comply with its international obligations?

The Philippines is a signatory to all international human rights treaties, UDHR, ICCPR, ICESCR, CAT-OPCAT, ILO 87, 98, CERD, CEDAW etc. but these obligations are not translated in national laws or even in practice. However, it must be noted that the Philippine government is very good at establishing mechanisms to address `violations' when pressure is up to make it appear in the international community that the Philippines is complying with its international obligations. These mechanisms are simply futile and meaningless, and a waste of people's money.

"The Philippines is a signatory to all international human rights treaties, but these obligations are not translated in national laws or even in practice."

Sri Lanka: No guarantee court decisions will be implemented

Basil Fernando, ALRC;
Chitral Perera, Janasansadaya;
Fr. Nandana Manatunga, Human Rights Office

1. Are all persons and authorities bound by the same laws?

No, the President of Sri Lanka is above the law and many other authorities function in his name. Therefore, there is a large area of public life in which many authorities find that they are above the law on the basis of the President being above the law. Also, national security agencies are given impunity (exemption from punishment) and therefore they too are not bound by the laws that others are bound by. Further, as investigations into offenses and prosecutions are done selectively, anyone can be outside the law and not be bound to observe the law. Therefore, there is a serious crisis about what is legal and what is illegal in Sri Lanka, and this ambiguity itself defeats the principle that everyone should be bound by the same law.

2. Are all persons and authorities entitled to the benefits of all laws?

No, impunity provides benefits to the government and also to the security authorities which are not available to others. Anyone can be exempted from punishment for violations of the law at the wish of the government.

3. Are all laws publicly made?

No, the constitution itself has provisions for the President to get laws approved by the Supreme Court on very short notice, thereby denying the public the right to participate in the debates before the passing of such laws. Such laws which are not passed publicly include amendments to the Constitution. Thus, the entire constitutional structure has been altered through laws which have not been made publicly. The prime

example is the 18th Amendment to the Constitution, which virtually nullified the powers of public institutions. Thus, the accountability process itself has been changed through laws which are not publicly made. Besides this, many laws which are not passed by the parliament have acquired the position of law. These include emergency regulations which can give wide powers to public security agencies. Many regulations are just made overnight and published through the gazette without any opportunity for public debate. As many laws are not made publicly, there is a great deal of confusion about what is law at any given time.

"The powers of the courts have been limited by many other clauses."

4. Are all laws promulgated (widely known/put into effect) so that all persons can know what the laws are?

No, for reasons stated in the above paragraph (3), as many laws are not made publicly there is no way for people to know about these laws. The methods usually adopted in the United Kingdom to make laws available to everyone by various means have never been followed in Sri Lanka.

5. Are all laws applied only prospectively (in the future/ likely to happen)?

Generally laws are only made prospectively. However, there are a few instances in which this rule has been violated.

6. Are all laws administered in the courts?

This principle is violated in many different ways. The powers of the courts have been limited by many other clauses (stripping courts of their supervisory judiciary powers) included in many laws. Besides that, there is enormous political influence and pressure exercised on the courts so as to prevent the courts administering laws against executive actions and actions by government agencies. By way of policy, the incumbent Chief Justice has publicly canvassed the view that lawyers should not bring cases to court but rather try to settle them through the relevant government agencies. Litigation has dropped severely due to these considerations.

Besides the perception of corruption becoming a deciding factor in cases, it has also undermined the court's role in administering all laws. Public security laws constitute a large part of the law in recent times, and these laws impose serious limitations on courts administering the law. There are some judgments where the court itself has decided that any matters relating to the work of parliament, including matters relating to the work of Parliamentary Select Committees, are outside the court's jurisdiction. Even the arbitrary dismissal of the Chief Justice done through the parliament by blatantly illegal methods was considered by the Supreme Court as legal, on the basis of a very broad interpretation given to the

sovereignty of parliament. Action by the executive president is also outside the administration of the courts. Thus, the legislative and executive actions are for the most part outside the jurisdiction of the courts. There are other factors also influencing the undermining of the courts administrating law; for example, the delays in adjudication. Many persons feel it is better to find other ways of settling cases than to go through court processes, which could take a long time. Third parties including criminal elements are resorted to for settling disputes, rather than relying on the courts. The President and the politicians also directly intervene in dealing with matters relating to cases, rather than leaving it to the courts.

“Administering laws in courts is officially considered a hindrance to development.”

Administering laws in courts is officially considered a hindrance to development. Due to the delays in the administration of justice, leaving the courts to administer justice relating to public affairs is perceived as succumbing to the delays and thereby delaying opportunities to bring about required changes. For example, when a highway is to be constructed, there may be some land owners who will object to their lands being taken for this purpose and may go to court to object. Delays in court may then be manipulated by lawyers, whereby the construction of the road may be delayed for a long time. Similarly, on insurance matters delays in courts may result in parties to accidents not being able to get their dues, with insurance company lawyers manipulating delays in order to force settlements to the disadvantage of the affected parties. A further example is where the government wants to take over some lands for purposes which the government thinks is useful, but this is objected to by people living there. The residents could go to the courts for the purpose of seeking justice. The government, perceiving this as a delay in the achievement of their purpose, will not want the courts to have jurisdiction on the matter. A related problem is the ejecting of residents by force without court orders. The gaining of court orders may require giving notice to the affected parties and the affected parties may thereafter object. And until these matters are settled, the government will not be able to eject the residents and proceed with their construction. To make matters easy, the government tries to find ways to oust the jurisdiction of the courts. Another large area where the same principle has been applied is dispute settlements through mediation instead of court processes. Mediation is presented as a much easier and quicker method of dealing with disputes than the court.

There are many other ways by which the idea of limiting or ousting the court’s jurisdiction is pursued for the purposes of development. However, the questions that are not discussed are why the government cannot undo the court delays by introducing necessary reforms and allocating resources. There are many countries in the world where undue and extraordinary delays have been overcome. A

related issue is that ousting the jurisdiction of the courts creates opportunities for corruption. The pretext of avoiding delays involved in court processes is often a pretext used to avoid the discussion on the vast possibilities available for corruption when the scrutiny (critical observation) of the courts has been removed. Many justice issues can be thus be suppressed under the pretext of development. It is also important to note that within modern development projects the possibilities of corruption are extraordinarily large and if the matters of dispute go through court processes, such corruption would be exposed. At the same time it needs to be stressed it is possible to create justification for corruption when quick results are possible as against the possibilities of justice accompanied only with extraordinary delays.

“In many cases politicians and powerful persons decide the outcome of cases rather than the legal process.”

Thus, the central issue to be dealt with is the issue of overcoming delays in the adjudication processes by necessary institutional reforms and the allocation of resources to achieve the objectives of such reforms.

a. Is the investigative system under the police adequate to enable the courts to administer justice?

Certainly not, there are many problems about the police. After 1978 the police powers have been severely disturbed, as command responsibility is disturbed by politicisation of the police and the attempt to use the police for political purposes. In many cases politicians and powerful persons decide the outcome of cases rather than the legal process. In any case the police are underfunded and poorly resourced. Their capacity development in terms of forensic science and the application of modern investigative techniques is also very limited. The capacity of the courts to control the police is also very limited. The perception of a police/criminal link is also quite strong and reports by international agencies such as Transparency International has ranked the police as the most corrupt institution in the country.

b. Is the prosecution (legal proceedings against someone in respect of a criminal charge) system adequate to enable laws being administered by the courts?

After 1978 the Attorney General’s Department was also brought under the control of the presidential system. The perception of the AG’s department being impartial and competent has been lost to a large extent. The function of the AG as a legal advisor to the government which earlier meant that he would advise the government on the position of the law regarding various matters has changed to the AG becoming the justifier of whatever the government does, including its illegal activities. The AG’s department has been complicit in the fabrication of charges against political opponents; on the other hand it has acquitted or discharged government

supporters against whom there was adequate evidence to proceed. The AG's department has also adopted compromising approaches in agreeing to give suspended sentences or minor punishments for serious crimes, due mostly to the difficulties involved in prosecuting cases due to various problems. In short, the idea of an independent and impartial prosecutor has been lost in Sri Lanka.

"There is no guarantee that a decision made by a court will be implemented."

c. Are the courts interfered with by the government or other political pressures or by pressure from powerful lobbies?

   As mentioned above, subjecting courts to political pressures has become a common feature. This also enabled other powerful persons to take advantage.

d. Is there public confidence that the courts competently and impartially administer the law?

   For the reasons stated above, public trust in the courts has been lost to a great extent.

e. Is the procedure for the appointment, promotion and dismissal of judges made through an objectively justifiable process that inspires public confidence?

   The appointment, promotion and dismissal process has been greatly politicized. The perception that judges with integrity will lose promotions and those with political loyalty will gain promotions is the commonly held view.

f. Are the positions of judges secure from any interference into the making of decisions, impartially and independently?

   For reasons stated above, the positions are not secure and political adventurism can damage the career of any judges by promoting the adventurer to the disadvantage of those who want to maintain their integrity.

g. Once the court makes a decision, is it guaranteed that the decision will be implemented?

   There is no guarantee that a decision made by a court will be implemented. For example, in the case of the dismissal of Chief Justice Bandaranayke, the Supreme Court issued a writ of certiorari (lower court to deliver its record to be reviewed by the higher court) to stop the Parliamentary Select Committee proceeding against her. This was ignored and months later another bench of the Supreme Court which was publicly seen as acting on the instructions of the government, declared that the appeal court's decision and the Supreme Court decision on which the appeal court acted, was illegal. In criminal cases where persons have been convicted by a High Court, the President has granted pardon on his own

initiative without any justification. There are many ways by which a court decision can be frustrated.

> "Corruption at the level of the police, the prosecuting department and the judiciary itself is more rampant than ever."

h. Are the police, prosecution services and the courts provided with adequate resources to administer their services in a competent and efficient manner?

There is gross inadequacy in resources to the police, the prosecuting department and the courts. The police do not even have adequate transport and communications facilities to deal with urgent situations. There is gross inadequacy of professional training, particularly in forensic science and such fields. On the other hand, there is a sense of pointlessness/uselessness in trying to obtain qualifications, as promotions and other rewards come due to political interference. There is a large body of policemen of lower ranks who have been recruited for political reasons and who do not perform any useful function. Equally, the AG's department has also complained in the past of not having adequate numbers of counsels to deal with their workload. There are delays in filing of indictments and proceedings into cases due to the inadequacy of personnel. However, more prominent reasons for not having adequately competent persons is the political interference which has created the impression that persons with integrity and competence will be victimized within the system. The courts also have serious inadequacies in the number of court houses, the inadequacy of staff such as clerks, stenographers and mudiliyars, in terms of equipment and training to use it and also inadequate facilities for education and training of judges themselves. In fact, higher qualifications and integrity are considered a disadvantage rather than an advantage in being a judge.

i. Are all possibilities of corruption prevented?

On the contrary, corruption at the level of the police, the prosecuting department and the judiciary itself is more rampant than ever. Public accusations of corruption are heavier than ever. The perception of politicization increases the perception of corruption.

7. Are the laws accessible to all?

Access to law is severely curtailed (reduced/restricted) by the poor being unable to afford the costs of litigation. Delays which go on for years aggravate this factor. There is no authentic and adequate legal aid system to help persons from lower income groups take advantage of the law. The powerful and the powerless are two categories that can be sharply seen in litigation processes. Now, added to that there is the politicization factor that brings advantages to those who have political connections and disadvantages to those who do not.

8. Are the laws, so far as possible, intelligible, clear and predictable?

The laws are generally quite intelligible and clear, but with politicization, there are many unpredictable laws that can come up at any time. This particularly applies to public security laws, but could also apply to other fields.

9. Are questions of legal rights and liabilities ordinarily resolved by the application of the law and not through the exercise of discretion?

Deciding cases by the application of the law has been undermined by heavy politicization. The Chief Justice himself is advocating settlement of cases, which leaves matters to the discretion of particular government agencies. Thus, the whole logical basis of relying on decisions being made on the application of laws has been greatly lost.

10. Do the laws of the land apply equally to all? (save to the extent that objective differences justify a differentiation)?

Regarding the application of the law equally, again, politicisation has made the principle mostly irrelevant. Besides this, the minorities in particular complain of unequal treatment. This factor is aggravated now due to the denial of access to areas controlled by the military and the fear factor which weighs heavily against the minorities. Under the political conditions such as those prevailing in Sri Lanka, the principle of equality before law has become mostly irrelevant.

11. Do the laws afford adequate protection of fundamental human rights?

The laws do not provide protection for fundamental rights particularly after the developments in 1978. See details below.

For example:

a. Do the laws adequately prevent any form of discrimination?

Under the 1978 Constitution, earlier provisions available under the 1948 Constitution were removed regarding the prevention of discrimination. The political conflicts of the last four decades have been around this issue. The minorities complain of every aspect of discrimination while the government and some extremist elements deny such discrimination. What aggravates the situation is that there is hardly any point in resorting to court for redress regarding discrimination.

b. Do the laws prevent extrajudicial killings and disappearances and other methods of the extrajudicial deprivation of life?

"Regarding the application of the law equally, politicisation has made the principle mostly irrelevant."

> **“Illegal arrest and detention take place on a large scale.”**

No, extrajudicial killings and disappearances have happened in large numbers and impunity prevails. The Sri Lankan government has refused to sign the convention against enforced disappearances. Those who complain of extrajudicial killings and disappearances are subjected to severe reprisals (punishment for the violation of law/international law). A fear factor exists in a very strong way in all parts of the country and particularly in areas where minorities live.

c. Is torture and ill-treatment prohibited and prevented?

Torture and ill-treatment are practiced routinely and this has been well documented. The AHRC's publication of 400 cases of torture last year was one of the examples of such documentation. The government fails to implement the laws such as Act No 22 of 1994 which criminalises torture. A huge impasse in law enforcement has been created due to impunity.

d. Is illegal arrest and detention prohibited and prevented?

Illegal arrest and detention take place on a large scale and this particularly happens under the prevention of terrorism act. Large numbers of persons have been detained for long periods of time. The PTA which makes such long detention possible is still in operation.

e. Is fair trial guaranteed to everyone?

Fair trial has been hampered by problems of the judicial process mentioned above. Politicization is a major factor hampering fair trial. Also, delays force many persons not to pursue cases and to enter into compromises. The absence of witness protection puts many people's lives at risk if they pursue cases. Unprincipled practices of settlements and granting of suspended sentences also hamper fair trial. Further corruption of the police, prosecution and the judiciary badly affect fair trial.

f. Is freedom of expression guaranteed?

The freedom of expression is one of the areas which have been violated severely. The killing of journalists, closing of newspapers and other publications, threats to journalists, blocking of cyber space publications, various prosecutions against journalists, many forms of blackmailing journalists and media people including blackmail through the state media, severe propaganda through the public media against all government opponents, the use of the intelligence services against journalists and media people, abductions and the white van syndrome and many other forms of violations have been reported by international media agencies for a long period of time. The government refuses to take any action on any of these instances. Impunity prevails.

g. Is the right to freedom of movement guaranteed?

There are restrictions on the freedom of movement on perceived opponents of the government. There are bans on persons and organisations and also unofficial bans. Particularly opposition parties have been persecuted in an attempt to make them incapable of effectively contesting elections against the government. One party concept prevails. There are severe restrictions on NGOs, who are often portrayed as traitors. There are also restrictions on some Tamil movements. Over 400 such organisations have recently been banned on the alleged basis that they are connected to the LTTE and their assets have been frozen. There are controls exercised through computerized lists of persons against whom restrictions are imposed and these lists are administered through airport control authorities.

“The peoples’ right to elect a government is severely restricted by preventing the emergence of opposition parties.”

h. Are the freedoms of association and freedom of publication guaranteed?

Freedom of association is particularly directed against all political parties who are opposed to the government. They also apply to civil society organisations including NGOs. There are many methods by which such freedoms are denied.

i. Do people have the right to elect the government of their choice?

The peoples’ right to elect a government is severely restricted by preventing the emergence of opposition parties. By persecuting these parties so that they are not in a position to explain their ideas to the people and to offer an alternative to the government, the government gets an unfair advantage at the election. Actually speaking, only one party is really presenting itself before the people, and that is the parties in the government coalition. Thus, the people do not really have a chance for a free and fair election.

k. Are measures taken to prevent absolute power?

Instead of preventing absolute power, the power of the government is protected in every possible way.

12. Are means provided for resolving, without prohibitive cost, or inordinate delay, bona fide disputes which parties themselves are unable to resolve?

For reasons stated above people do not have fair means of resolving disputes.

a. Is the cost of litigation prohibitive?

Yes the litigation costs are prohibitive and there is no legal aid.

b. Are there inordinate delays?

Yes there are inordinate delays where cases may go on for ten years or more.

> "Actual decisions are made behind closed doors."

c. Can people have recourse to courts without suffering the risks of physical harm and other attacks or threats to their life?

The people who dare to contest cases face severe threats to their lives, liberty and property.

d. Can a witness participate in court proceedings without incurring risk to their life and liberty?

There are no witness protection laws.

13. Do the ministers and public officers exercise their powers reasonably and in good faith, for the purpose for which the powers are conferred?

Ministers and public officers act unfairly for political advantage.

a. Do public ministers and public officers exceed the limit of their powers?

Yes, when it comes to political advantage.

14. Are the adjudicative processes provided by the state fair?

For the reasons stated above adjudication processes are not fair.

a. Are decisions made behind closed doors?

Although decisions are made in open court, due to corrupt practices and politicization, actual decisions are made behind closed doors.

b. Has the role of lawyers become an obstacle to fair practices in adjudication?

The role of lawyers is negative and by and large lawyers have acted to their own advantage and not to the preservation of litigation practices under the rule of law.

15. Does the state comply with its international obligations?

The state refuses to honour international obligations and this is seen by the government's opposition to the resolution passed by the Human Rights Council in its 25th session in March 2014.

On defying extremism: Gendered approaches to religious violence

Basil Fernando, Asian Human Rights Commission (AHRC)

Speech delivered during a regional consultation in Manila, the Philippines on February 16 to 19, 2015, on the rise of violent religious extremism and its impact on women and communities. The consultation was organized by Joan B. Kroc Institute for Peace and Justice at the University of San Diego, California.

The topic we are discussing can be viewed from many points of view, and it is, in fact, being viewed by many from many different perspectives. Perhaps no theme has recurred so often in the last few decades as this one.

For those in developed democracies, in the United States and European countries, the telling moment at which this theme entered their mind is 9/11 in 2001. However, for many others from many other parts of the world this theme became familiar much earlier.

I wish to approach all issues related to this through the experiences of three different places. In two of these places it can be said that the problem of extremism has to a great extent exhausted itself. The two places are: Sri Lanka, my own country; and Cambodia, where I had the privilege of working for about three years in the early 1990s.

Sri Lanka

The Sri Lankan story, in this regard, begins from around 1971, when a group of young people were in the process of learning or teaching themselves what they thought was the art of revolution, in what is called the Maoist or Che Guevara model. That was the first shift to what we may call an extremist approach to achieve change in Sri Lanka.

As usual, one form of extremism gave rise to responses in similar terms. The state itself responded with far greater extremism than the young rebels could ever have been capable of. In compensation

for a small number of security persons killed, the estimated number of Sri Lankan citizens killed by their government was over ten thousand. Most of those killed were young people.

"Long years of training that had gone to create disciplined officers suffered a great setback."

Disproportionate use of force, in order to deal with threats from extremists, became common practice. The result was disestablishment of the normally functioning legal and judicial system. Long years of training that had gone to create disciplined officers expected to carry out their functions within the framework of the rule of law, suffered a great setback. There were now, among the officers, those with direct experience of having illegally arrested, interrogated, tortured, and killed persons, and who, thereafter, disposed of bodies in secret.

We call this kind of thing – enforced disappearances. The meaning of this term, in fact, is the introduction of methods of dealing with suspects as enemies with a permissive attitude to use any kind of violence with the guarantee of impunity.

Thus, when the state partakes in acts of extremism, with these new experiences of impunity, the officers lose the conscientiousness they once had, to the effect that they were accountable for everything they did and had to answer to their superiors.

This first experience of extremism by one rebel group and its consequences proceeded to travel to others who also had grievances and who were looking for urgent solutions in Sri Lanka. In their mental calculations, they began to take account of harsh treatment on the part of the state officers were they to pursue their goals. The result of such calculations was the development of even more sophisticated forms extremism also known as terrorism.

The next wave of extremism in Sri Lanka came from a minority group who felt that their grievances were not being heard and redressed and that the only way to get a hearing was to resort to extremism. In deciding to engage in acts that would amount to violence they calculated that, judging by the earlier responses, the state agents would be equally or more violent. So, they calculated ways to "improve" their methods of violence, so as to be able to beat the violence of state agencies.

These developments, when practically carried out, ushered a period of extreme insecurity for the entire civilian population of Sri Lanka. As expected, the state response was many times worse; and the civilian population was at the receiving end of acts of violence of both sides.

Extremism does not merely consist of acts of violence. It also brings violence into all modes of speech, in every aspect of social life, including that of the media. The experts may call this psychological warfare. The result is that whole social discourse is transformed and what is called "normal times" disappears. And this endured in Sri Lanka for many decades.

As the violence between the state and these extremist groups representing the minorities was ongoing, there took place a second uprising which was even more fearsome, rootless, and unscrupulous in comparison to what had come before. Again, as expected, the state also reacted, trying to demonstrate that it was capable of being more violent than the extremists. The result was, among other things, enforced disappearances of over 30,000 persons and the virtual disappearance of the normal law enforcement habits.

"The fight between the extremist elements in the minority and the Sri Lankan state developed into war."

Meanwhile, the fight between the extremist elements in the minority and the Sri Lankan state developed into what began to be called a war. Entire populations were displaced, large number of persons were killed, and even up to date there is no agreement between the government and others who are making accusations about large-scale deaths and other forms of violence. Finally, in May 2009, the war was ended with extraordinary forms of violence used by the Sri Lankan State, in response to what was termed the extraordinary terrorism of the rebels. While the rebels were destroyed, the State lost the capacity to rule these areas within the normal framework of peace and the rule of law.

The result of all this violence was the growth of authoritarianism in the country and authoritarian rulers exploiting the nation's resources for their own personal benefits. Just recently, on the 8th of January 2015, by way of an election, the result of which surprised many, the people voted against the authoritarian government that came as a result of the war.

Now, both the state and the rebel groups have exhausted their capacities for extremism and the country is quite uncertain of how to find its way back to normalcy and peace. Violence has brought only destruction, both to the State and to the rebels, and also to the population as a whole. Having exhausted this violence, people now are looking for a way out.

The persons who best express the tragedy of extremism are the survivors of the families of both rebels as well as the soldiers, who lost their lives in the course of such violence. It is they who, by their very lives, pose questions about extremism, to the State and to the extremists. Among them, it is the women, more than others, who have to face the consequences of such destruction. The have to struggle in their lives, without the normal support from their families and also the state in normal times. They are now faced with abnormality in everything. And it is also they who have the sole responsibilities of caring for surviving children and the elderly. If we are to find the senselessness of extremism it is to them that we must listen. They are so many and they are usually silenced. Everyone is afraid of the truth they may reveal. Yet it is these surviving victims who are the most forceful spokespersons for the lost humanity as a result of such extremism.

Cambodia

> **"The educated and sophisticated sections of the population perished or fled."**

What we have learned about the outcome of extremism from Sri Lanka is magnified thousands of times in the experience of Cambodia. The actual tragedy of Cambodia under the extremism of Pol Pot and his Khmer Rouge regime lasted only four years, from 1975 to 1978. However, the catastrophe that was caused during those years destroyed one seventh of the entire population and also caused the loss of all its public institutions and the ways of life Cambodians were used to till then. The educated and sophisticated sections of the population perished or fled. When it was all over, there weren't even any teachers left for primary school children. In fact, it is futile to attempt to put into words the extent of this destruction and how long its consequences will last. In any studies of consequences of extremism, a study of Cambodia is a must.

The few pictures that are produced here both from Sri Lanka and Cambodia speak more forcefully that any words that one could find.

I want to add to this reflection two stories, which I had one time narrated by way of two poems. These two poems are produced below:

Yet another incident in July 1983

Burying the dead
being an art well developed in our times
(Our psychoanalysts having helped us much
to keep balanced minds, whatever
that may mean)
there is no reason really
for this matter to remain so vivid
as if some rare occurrence. I assure you
I am not sentimental, never having
had a "break down", as they say.

I am as shy of my emotions
as you are. And I attend to my daily
tasks in a very matter-of-fact way.

Being prudent, too, when a government says:
"Forget!" I act accordingly.
My ability to forget
has never been doubted. I've never
had any adverse comments
on that score either. Yet I remember
the way they stopped that car,
the mob. There were four
in that car: a girl, a boy
(between four and five it seemed) and their

parents, I guessed, the man and the woman.
It was in the same way they stopped other cars.
I did not notice any marked
difference. A few questions
in a gay mood, not to make a mistake,
I suppose. Then they proceeded to
action. By then a routine. Pouring
petrol and all that stuff.

Then someone, noticing something odd,
as it were, opened the two left side
doors; took away the two children,
crying and resisting as they were moved
away from their parents.

Children's emotions have sometimes
to be ignored for their own good, he must have
thought. Someone practical
was quick, lighting a match
efficiently. An instant
fire followed, adding one more
to many around. Around
the fire they chattered
of some new adventure. A few
scattered. What the two inside
felt or thought was no matter.

Peace-loving people were hurrying
towards homes as in a procession.

Then, suddenly, the man inside,
breaking open the door, was
out, his shirt already on
fire and hair, too. Then, bending,
took his two children. Not even
looking around, as if executing a calculated
decision, he resolutely
re-entered the car.

Once inside, he closed the door
himself, I heard the noise
distinctly.

Still the ruined car
is there, by the roadside
with other such things. Maybe
the Municipality will remove it
one of these days
to the capital's
garbage pit. The cleanliness of the capital
receives Authority's top priority

How Gunadasa Died

Go, go, said he,
Laughing loud,
Smiling, his face radiating happiness.
He was a villager from Baddegama.
Though lawyer with a subtle mind
Capable of making clever arguments,
He had a rural soul
That had survived through centuries.
His name was Gunandasa Buddegama.

Yet one day
This man and his smile
Came to an end.

Having received a message
Of tragedy befalling
One of his brothers
Who walked
On a day the insurgents
Had declared a curfew.
He left hurriedly, he left for his for village.

When he went there,
What he saw
On the road,
Covered with a cloth -
A body cut into pieces.

It was a different man
That retuned.
Never was there a smile
On his face again,
Thinner he got each day.
His body shrunk
Like a lizard.
Some said "it's Cancer"
"There's no disease to be found,"
Said the doctors,
"There's no medicine for this,
Except a miracle,"

Said a professor.
Thinner and thinner he wasted away,
In a final defiance against the inhumanity
He witnessed.

A Contrast

In contrast to destructive consequences of extremism, we see a different example of exuberant and committed protest seeking

peaceful transformation for improvement of democracy and rule of law in Hong Kong.

When the students embarked on what the Occupy Central protests, the aim was fundamental changes to improve the quality of democracy in Hong Kong. The students sought the right for more effective use of the ballot to select the Chief Executive for Hong Kong.

“ Hong Kong authorities also reacted to the student protest within the same rule-of-law framework.”

Students occupied the streets for several months. They resorted to no violence and observed the highest levels of discipline and responsibility. The students wanted to rely on the rule of law tradition in Hong Kong and to work within that framework for expansion of their freedoms.

Despite some inconsistencies, Hong Kong authorities also reacted to the student protest within the same rule of law framework. The protest enhanced the critical capacity of the Hong Kong people as a whole to look into their future with greater concern and to demand changes within the framework of democracy and rule of law. The protesting students have learned their first lessons through their own efforts and sweat. These lessons will contribute to the way the young people will develop their perspective for the future.

Wiser counsel to the government, given by more moderate people, is to listen to the students and to find ways to accommodate their reasonable and just demands. This discourse between the government, the students, and the people will go on. Everyone has benefited from the experience and their future actions are likely to reflect the lessons learned.

A Few Critical Issues:

In terms of the reflections made above, a few critical comments are in order. Opposition to extremism does not imply an opposition to seek changes and even radical changes. Societies require changes and some societies are much in need of rather radical changes in order to ensure the basic rights for all the people living in such societies.

There are some differences between extremist and non-extremist approaches to change. The most important aspect relates to the use of force. The widely accepted mode of seeking change is by winning the consent of the people for such change. Winning such consent requires working towards convincing the people of the needed changes and the ways to achieve the same. Extremism, on the other hand, attempts to force change by use of violence and by methods tantamount to threatening the people. While acts of terrorism might be directed at the state, often it is the civilian population that suffers most. Opposition to extremism is, therefore, not an opposition to change; it opposes change being achieved through violence and coercion and espouses change through morally justifiable means.

It must be noted that extremism is practiced not only by the extremist but also by states. When states deviate from legitimate means of social control through democratic processes and resort to excessive and, therefore, illegitimate use of violence, they often create the conditions for violent response. Therefore, when discussing extremism, it is necessary to emphasize the duties of the state to ensure democratic space for achievement of change. The need for change arises from just grievance. Redress of grievances is an obligation of the state. The state redresses grievances through its legal mechanisms. Therefore, it is the duty of the state to ensure functional legal mechanisms, which people could utilize to seek redress for their grievances. In this regard, particularly in developing countries, states often fail to provide for genuinely functional legal mechanisms for redressing grievance and enabling meaningful change. Unfortunately, civil society activism in developing countries has not been able to intervene adequately to improve the legal systems in order that the avenues can remain open for redress and change through lawful non-violent means. In this regard, the democratic movements themselves need to critically consider whether they have discharged their obligations in order to ensure that all the peoples have legal avenues open to them to deal with their problems within a democratic framework.

"In developing countries, States often fail to provide for genuinely functional legal mechanisms for redressing grievance and enabling meaningful change."

There clearly appears to be lesser commitment to global developments in democracy in recent decades. Oliver Stone, a well-known film producer and critic, has, together with Peter Kuznick, raised this issue regarding United States, with particular regard to United States policies since the Second World War. In *Untold History of the United States*, the authors have tried to point that there has been a major drift away from commitment to democracy, something that was a part of the American heritage prior to the Second World War.

No critical review of extremism in its various forms – such as ethnic extremism, religious extremism, and the like – can be made without re-examining the global commitment to create a just world by creating the possibility of democracy in all countries of the world. The possibility of democracy also means the possibility of developed legal systems within which grievances can be dealt with by just legal processes and where ultimately any problem could be resolved through the expression of the consent of the people through their use of the ballot. Displacing the use of the bullet and enabling the possibilities of using the ballot to achieve change should, in fact, be central to any discussion on ways to displace extremism.

Appendix

UN Human Rights Committee's views on Ms. Misilin Nona Guneththige and Ms. Piyawathie Guneththige

Asian Legal Resource Centre

Human Rights Committee

Communication No. 2087/2011

Views adopted by the Committee at its 113th session (16 March–2 April 2015)

Submitted by:	Ms. Misilin Nona Guneththige and Ms. Piyawathie Guneththige (represented by the Asian Legal Resource Centre and Redress)
Alleged victim:	Mr. Thissera Sunil Hemachandra (the author's son and nephew respectively)
State party:	Sri Lanka
Date of communication:	20 July 2011 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 22 August 2011 (not issued in document form)
Date of adoption of Views:	30 March 2015
Subject matter:	Suspicious death in custody allegedly resulting from torture
Procedural issues:	Non-cooperation of State party.
Substantive issues:	Arbitrary deprivation of life; torture and ill-treatment; lack of proper investigation; right to an effective remedy; right to liberty and security of person; respect for the inherent dignity of the human person.

Articles of the Covenant:	Article 2, paragraph 3; article 6; article 7; article 9, paragraphs 1, 2 and 4; article 10, paragraph 1.
Articles of the Optional Protocol:	None

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (113th session)

concerning

Communication No. 2087/2011*

Submitted by:	Ms. Misilin Nona Guneththige and Ms. Piyawathie Guneththige (represented by the Asian Legal Resource Centre and Redress)
Alleged victims:	Mr. Thissera Sunil Hemachandra (author's son and nephew respectively)
State party:	Sri Lanka
Date of communication:	20 July 2011 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 2015,

Having concluded its consideration of communication No. 2087/2011, submitted to the Human Rights Committee on behalf of under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Ms. Misilin Nona Guneththige ("the first author") and Ms. Piyawathie Guneththige

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* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelic, Duncan Muhumuza Laki, Photini Pazartis, Mauro Politi, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabian Omar Salvioli, Dheerujlall B. Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

("the second author"). They submit the communication on behalf of their son and nephew (respectively), Mr. Thissera Sunil Hemachandra, born on 27 October 1969 and deceased on 26 July 2003 following head injuries sustained while in police custody. The authors claim that the author was the victim of violations of article 6, paragraph 1, 7, 9 (1), (2) and (4) and 10(1), alone and read in conjunction with article 2, paragraph 3 of the Covenant by the Democratic People's Republic of Sri Lanka ("Sri Lanka"). They also claim that the State party has breached their own rights under article 7, read in conjunction with article 2, paragraph 3. The authors are represented.

The facts as presented by the authors

2.1 Sunil Hemachandra ("Sunil") was a healthy and literate man with no criminal record. He was a daily paid labourer, mostly engaged in tapping rubber and climbing trees to pluck coconut and other fruits. Since 1979, he had been living with the family of his aunt, the second author, who is the sister of the first author (his mother).

2.2 On or about 28 June 2003, Sunil bought a lottery ticket, and learnt the day after that he had won more than three million rupees (approximately 25,000 USD). On the same day, a lottery sales agent called Lionel, described as "well connected to the police",[1] came to the second author's house with a police officer. They suggested that Sunil apply for police protection. Sunil declined the offer. As Sunil did not possess a national identity card at that moment, he used that of his aunt, the second author, to claim the lottery money. On 4 July 2003, Sunil, together with the second author and Lionel (the lottery sales agent), went to the Development Lotteries' Board in Colombo, and received the money against his lottery ticket, but in the name of the second author. The money was paid by a cheque issued by the Kollupitiya Branch of the Bank of Ceylon. On 7 July 2003, the cheque was paid into the bank account held by the second author. On the same day, Sunil withdrew 2,100,000.00 rupees (two millions and one hundred thousand rupees) from the second author's bank account, and purchased a van for 1,200,000.00 rupees, which was registered under the second author's name. On or around 14 July 2003, Sunil purchased a three-wheeler for the second author's granddaughter, and gave five thousand rupees to his nephew as a gift.

2.3 On or around 21 July 2003, a team of police officers from the Moragahahena police station (MPS) arrived at the second author's house, looking for Sunil. They asked the second author whether Sunil had spent the lottery money, and one of the police officers warned that his "happiness would not last long". The police requested that Sunil report to the MPS.

1 Affidavit of Chanaka Dinesh Kumara dated 21 August 2003.

2.4 On the same day, Sunil, accompanied by Chanaka Dinesh Kumara ("Chanaka"), an acquaintance whom Sunil had commissioned to drive his new van and son of Lionel (the lottery sales agent), reluctantly went to the MPS. At the station, one of the police officers (sub-inspector) requested Sunil to pay money as "support". Sunil replied that the money was with the second author, and declined to pay. The same policeman then insisted on the payment of 25,000 rupees "to cover the expenses of a procession of Vidyarathana temple in Horana". Sunil agreed to pay and was allowed to leave the station.

2.5 In the late evening of 22 July 2003, five police officers from the MPS arrived in a vehicle at the second author's house. After seeing Sunil sleeping in his room, and identifying him as being "the one who won the lottery", several police officers proceeded to beat him, including by hitting him on his head. The police officers then proceeded to arrest Sunil and Chanaka. Before loading them into a police jeep, and during the ride to the MPS, several police officers severely beat Sunil on his head and abdomen. Chanaka, who was seated facing Sunil, was hit in the face several times when he asked the officers to stop the beatings.

2.6 Sunil and Chanaka were taken to the MPS and placed in a cell of 5 by 8 feet, with several other detainees. On the morning of the following day (23 July 2003), Sunil was visibly unwell. He was bleeding from his nose and mouth, was not able to stand, and had to lie down. Chanaka alerted the police officers to Sunil' critical health condition. Instead of calling for medical assistance, the police officers asked Chanaka to take Sunil to the backyard to wipe the blood off his face. The bleeding however continued uninterrupted from his nose and mouth, and Sunil vomited blood clots. One of the police officers directed Chanaka to give Sunil an iron rod to hold, which is done in the case of epileptic attacks. The police officer seemingly believed, or wanted to give the impression that Sunil was suffering from epilepsy, which was not the case.

2.7 On the same morning, around 8 am, the second author came to the MPS and found Sunil lying on the floor of the cell, bleeding from his nose and mouth. She alerted the police officers to Sunil's serious condition, but was chased away by them. The police officer told her that Sunil's condition resulted from epilepsy. It is only around 10 am on the same day that Sunil was finally taken to the Horana Base hospital in a police jeep. The second author, who visited him, was told by Sunil that he had been brutally assaulted by the police officers. He was in severe pain and his face was reddened and swollen.

2.8 Later on the same day (23 July 2003), two MPS officers arrived at the hospital to record a statement from Sunil. Although the latter only managed to name himself, the police officers wrote something on two lists of paper while talking to each other. They then obtained two impressions of Sunil's left thumb in lieu of his signature, although Sunil was capable of signing his name.

2.9 On 24 July 2003, the authors learnt by chance that Sunil had been transferred to the National hospital in Colombo, where he had undergone brain surgery, and was being treated in intensive care. On 26 July 2003, the second author was informed by staff at the National hospital that Sunil had passed away earlier that day.

2.10 The authors detail their efforts to bring the victim's case to the attention of the State party's authorities: On 23 July 2003, the second author went to the office of the assistant Superintendent of the police of Horana, and attempted to complain about Sunil's arrest and torture, but her complaint was not recorded and the Superintendent did not receive her. On 26 July 2003, the authors and Chanaka –who had been released from detention on 23 July 2003- visited the MPS, and reported Sunil's death. Their statements were recorded by the assistant Superintendent of the Police of Horana.

2.11 On 23 July 2003, the second author contacted the non-governmental human rights organization *Janasansadaya*, which helped her to complain to the National Human Rights Commission (NHRC). The authors also lodged a fundamental rights petition before the Supreme Court of Sri Lanka on 8 September 2003, in which a number of officials and institutions were cited as respondents.[2] The authors' complaint before the NHRC remained unanswered until 21 August 2008, when the second author was informed that the procedure had been suspended as the same matter was pending before the Supreme Court (sic). The authors add that the NHRC has not been in contact with them since, and that there is no realistic prospect that it will reopen the inquiry following the dismissal of the case by the Supreme Court, as the NHRC' stated policy is that it is barred from further handling of the case by a dismissal of the fundamental rights' petition to the Supreme Court.

2.12 On 27 July 2003, the Additional Magistrate of the Colombo Chief Magistrate's Court opened an inquiry into Sunil Hemachandra's death. He heard the second author and Chanaka for this purpose. On 27 July 2003, the Additional Magistrate reported that in the police report from the MPS, "there [was] no entry whatsoever revealing the reason for which [Sunil] had been arrested by the police". On 28 July 2003, the Magistrate observed the victim's body in the mortuary, and noticed, among other injuries, "an injury of about one inch slightly above the buttocks, on the left side of the back". The procedure was then adjourned, at the request of the MPS, until 31 July 2003.

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2 Police constable Muthubanda (who led Sunil and Chanaka's arrests on 22 July 2003); police officer Maheepala (officer in charge of the MPS); police constable Wijemanna (who warned the second author that the victim's happiness "would not last long", see para. 2.3 above); the Inspector General of the police, and the Attorney General of Sri Lanka.

2.13 On 29 July 2003, a Consultant judicial medical officer from Colombo conducted a post mortem examination, and produced a report which was subsequently relied upon in the proceedings before the Supreme Court. The report documented ten pre-mortal injuries: four contusions, four abrasions, one peri-orbital hematoma ("black eye") around the left eye, and one surgical incision, but not the injury on the left side of the back observed the day before by the Additional Magistrate of Colombo. The direct cause of Sunil's death was identified as "acute sub-dural hemorrhage following a head injury caused by blunt trauma".[3] The report identified four possible origins for the fatal hemorrhage: A heavy blow to the back of the victim with a weapon or a kick with boots on; a fall due to being pushed; an accidental fall; or a fit due to alcohol withdrawal or epilepsy.[4] The report concluded that it was "possible" that the cause of death was a fall following alcohol withdrawal, a finding seemingly derived solely from the discovery of an "enlarged and fatty liver" in the deceased's body.

2.14 On 31 July 2003, the Additional Magistrate of Colombo heard further witnesses brought to the court in police vehicles, which was criticized by the lawyer of the authors as possibly resulting in undue influence of witnesses by the police. The Magistrate overruled the exception and decided to accept the witnesses' testimonies.

2.15 On 8 August 2003, the Magistrate of Horana, to whom the inquiry was transferred from the Additional Magistrate of Colombo, directed the Senior Superintendent of Panadura police to investigate and produce the suspects before court, as the circumstances surrounding the victim's death seemed suspicious.

2.16 On 29 April 2004, the Attorney General decided that no charges would be filed in connection with Sunil Hemachandra's death, as there was no evidence of any assault against the victim. On 19 November 2004, the Magistrate removed the case from the roll with the sole reference to the Attorney General's decision of 29 April 2004.[5]

2.17 The authors' petition filed before the Supreme Court in September 2003 was only decided on 6 August 2010. The Supreme Court considered several grounds which might have served as a basis for Sunil Hemachandra's arrest: his attempt to assault the police; his consumption of liquor; his alleged assertion that he would commit suicide if the police arrest Chanaka. Regarding the cause of death, the Supreme Court dismissed the application, based on the conclusion that it "the fall being due to a fit following alcohol withdrawal [was] highly probable", thereby endorsing the conclusion of the forensic report, and discarding the possibility

3 Report available on file.

4 The authors claim that there is no medical record showing that Sunil suffered from epilepsy.

5 Decision in file.

of assault, for lack of conclusive evidence such as an injury.

2.18 The authors claim that they have no further remedy available. The criminal investigation led to the decision of the Attorney General of 29 April 2004 not to press charges, while the judgment rendered by the Supreme Court on 6 August 2010 was a final decision. The authors further stress that the proceedings lasted for over seven years, and were unduly prolonged.

The complaint

3.1 The authors submit that the State party has failed to carry out an adequate investigation into the unlawful and arbitrary arrest and detention, torture, cruel, inhumane and degrading treatment of Sunil and his death, in violation of articles 6, para. 1; article 7; article 9, paragraphs 1, 2 and 4; and article 10 of the Covenant, read alone and in conjunction with article 2, paragraph 3 of the Covenant.

3.2 Regarding article 6, the authors stress that Sunil Hemachandra was arbitrarily deprived of his life by the State party. They submit that in cases of custodial death, there is a presumption of State responsibility. This presumption applies equally where, as in the present case, the victim died in hospital following a transfer from police custody, and as a result of injuries sustained in detention. The authors stress that the direct medical cause of Sunil's death is not clear. The report of the Consultant judicial medical officer (par. 2.13) concluded that the cause of death could be a fall in a state of alcohol withdrawal; however the report is poor and inconclusive, as it does not explain which examinations were carried out, and also failed to detect the injury which was identified by the Additional Magistrate (par. 2.12). A second independent opinion[6] revealed several defects in the forensic examination report, including the absence of appropriate additional examinations such as histological and toxicological, inter alia to confirm the hypothesis of alcohol abuse, and to discard the possibility of torture, which was not even considered. In any event, even if the conclusions of the report of the judicial medical officer, relied upon by the Supreme Court, were to be accepted, four possibilities were evoked, which could have triggered Sunil's death. Only that of alcohol withdrawal was considered. No further measures, such as identifying the police officers involved, taking their testimony, or examining the scene of the alleged violation, were undertaken to investigate possible causes of death other than alcohol withdrawal. The authors thus invite the Committee to draw the inference that the victim's death was a direct consequence of his ill-treatment, specifically, being severely beaten up on his head and abdomen by the police during, and immediately after his arrest.

6 Commissioned by Redress. Report available in file.

3.3 The authors submit, subsidiarily, that the State party's authorities failed to take the requisite steps to protect Sunil Hemachandra's health and life while in detention. No medical examination was carried out upon his admission to the MPS detention facility in order to establish whether he had any condition (intoxication, epilepsy, mental instability). Instead, he was placed in a very small cell with other detainees, with no medical supervision. When it was found that he was severely bleeding, no medical assistance was provided to him in the course of at least three hours. Sunil Hemachandra only started receiving medical treatment after his belated transportation to the hospital. This lack of prompt action in the situation of a life-threatening injury on a detainee was by itself in violation of the State party's obligations under article 6, paragraph 1 of the Covenant.

3.4 The author's further claim that Sunil Hemachandra was subjected to torture, cruel, inhumane or degrading treatment, in violation of article 7 of the Covenant. The MPS police officers subjected him to severe beatings during the course of his arrest, in particular on the head. Beatings continued in the police jeep during Sunil Hemachandra and Chanaka's transfer to the MPS, particularly in the form of beatings on Sunil's head and abdomen. Sunil Hemachandra died four days later. It has never been disputed, in particular throughout the Supreme Court proceedings, that his injuries were sustained while in police custody, although versions concerning the origin of the injuries varied. The authors submit that the burden of proof should be shifted to the State party when injuries were sustained in police custody. It should thus be presumed that the injuries found on Sunil Hemachandra's body we inflicted by beatings by the MPS police officers.

3.5 The authors add that under article 10, paragraph 1, the State party had a duty to guarantee proper medical care to Sunil Hemachandra while in detention. On 23 July 2003, the State party authorities were informed that Sunil was bleeding severely and was in a critical condition. Such serious and potentially life-threatening situation required immediate medical treatment, including transfer to a hospital, given that adequate treatment could not be provided in situ. The actual response, however, was clearly inadequate: the co-detainee Chanaka was ordered to wipe the blood off, wash his face, and give him an iron rod. Even if this measure was taken out of the genuine belief that the victim was epileptic, the police officer should not have relied on his personal assessment and should have sought prompt medical advice. It took more than three hours for Sunil Hemachandra to be transferred to hospital. The authors conclude that rights of Sunil Hemachandra under article 7 and 10, paragraph 1 of the Covenant were violated.

3.6 The authors also submit that the State party has breached article 7 in their respect, by refusing to conduct an investigation into their son and nephew's death, leaving them in continuous

suffering as to the causes of his death. More than eight years after Sunil Hemachandra's death, both authors still do not know the exact circumstances surrounding the event, and the State party has yet to indict, prosecute or bring to justice anyone in connection with their relative's custodial death.

3.7 With respect to article 9, paragraph 1, 2, and 4, the authors submit that Sunil Hemachandra was not informed, at the time of the arrest, of the reasons for such arrest. Furthermore, the unacknowledged character of his arrest and detention effectively deprived him of any meaningful possibility to take proceedings before a court, in order to challenge the legality of his detention. There is no objective evidence to substantiate any of the allegations considered by the Supreme Court as reasons for his arrest (par. 2.17). The authors also stress that the practice of fabricating charges and to deter complaints against the police is well documented.[7]

3.8 The allegation that the victim was drunk at the time of arrest was also not supported by any evidence. No medical examination was conducted upon his admission to the MPS, and there are no hospital records to this effect. Even if this assertion was true, detention on this ground was unnecessary and unreasonable in the circumstances of the present case. With respect to the alleged ground for arrest, according to which the victim had threatened to commit suicide, the authors submit that there is no evidence in support of this allegation. The fact that Sunil Hemachandra was placed in a small cell, shared with other detainees, and without any medical or psychological assistance is irreconcilable with the suggestion that he was detained to prevent self-harm. The victim's family was not informed about the place of detention, and he was not provided with an opportunity to contact his relatives, and had no legal representation. The authors add that the facts of the present case should be viewed in the context of the well-documented practice of police corruption in Sri Lanka, which has resulted in a series of cases involving extortion and ill-treatment. The authors conclude that Sunil Hemachandra's arrest and detention were unlawful and arbitrary.

3.9 Concerning article 2, paragraph 3, the authors submit that there were serious flaws in the investigation in the present case. The investigation was carried out by the same police force members (MPS) as those implicated in the victim's death; MPS officers conducted all important investigative actions: they took Sunil Hemachandra's statements on 23 July 2003 and the statements from the authors and Chanaka on 26 July 2003; none of the officers involved in the alleged violation was suspended or re-assigned pending the inquiry; nor was the case referred to the special investigation unit.

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7 The authors refer to reports from the Asian Human Rights Commission (Cases of torture and ill-treatment in Sri Lanka in 2006-2010) and from Redress (Responses to human rights violations: the implementation of the right to reparation for torture in India, Nepal and Sri Lanka).

3.10 As for the judicial process, the magistrates limited the scope of their inquiry to the circumstances of Sunil Hemachandra's death. They had to rely on the evidence collected by the police officers who lacked requisite impartiality and independence. The Attorney General refused to inquire into the matter, despite the express order to do so from the Magistrate in Horana (para. 2.15 and 2.16). The Supreme Court did not order any further investigative action, or a full separate investigation. The authorities failed to take prompt and effective action capable of establishing the truth about the circumstances surrounding the arrest, detention, torture and death of Sunil Hemachandra. Although the second author had complained about Sunil's torture three days prior to his death, that is on 23 July 2003, no forensic medical examination was ordered; no police officers involved in his arrest and detention were identified. Chanaka, who was arrested along with the victim, was only interrogated after Sunil Hemachandra's death, and by the MPS police officers. Similarly, the second author, who was an eye witness of the victim's arrest and beating in her house, was only interrogated after the victim's death by the same police officers. The only prompt measure undertaken was to visit Sunil Hemachandra in the hospital, while his was in a critical condition, with the view to obtaining a false statement.

3.11 The authors add that the Supreme Court did not address these shortcomings, which did not conduct or commission another investigation. Instead, it relied upon the testimony and other evidence gathered directly, or under control of the MPS police officers, that is, implicated police officers. In addition, the Supreme Court proceedings lasted almost seven years, although there was nothing in terms of complexity of the case which could justify such delay. The authors conclude that article 2, paragraph 3, read in conjunction with articles 6, par. 1, 7, 9 par. 1, 2 and 4, and 10 par. 1 was breached with respect to Sunil Hemachandra.

3.12 By way of remedy, the authors request (i) a full and independent investigation into the circumstances of the arrest, detention, torture and custodial death of Sunil Hemachandra; (ii) the payment of full and adequate compensation to the authors, which is proportionate to the seriousness of the violations and the damages an suffering inflicted; (iii) a public apology containing an unequivocal acknowledgement of the numerous violations of the Covenant in the present case; (iv) as full rehabilitation as possible to the authors, including psychological counselling services if appropriate; and (v) the establishment of an independent body or institution tasked with investigating complaints into serious human rights violations committed by police and other law-enforcement personnel, which is capable of documenting and investigating incidents of torture, following the recommendation of the Committee against torture.[8]

8 CAT/C/LKA/CO/2 (15 December 2005), para. 12(a).

Lack of cooperation from the State party

4. By notes verbales of 22 August 2011, 5 March, 21 May, and 6 July 2012, the State party was requested to submit information to the Committee on the admissibility and merits of the communication. The Committee notes that this information has not been received. The Committee regrets the State party's failure to provide any information with regard to admissibility or the substance of the author's claims. It recalls that article 4, paragraph 2, of the Optional Protocol obliges States parties to examine in good faith all allegations brought against them, and to make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the authors' allegations, to the extent that they are substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with Rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol.

5.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

5.3 In the absence of any submission by the State party on the admissibility of the communication, and noting the authors' statement that domestic remedies have proven to be unduly prolonged, the Committee declares the communication admissible, in as far as it appears to raise issues under article 6, paragraph 1; article 7; article 9, paragraph 1, 2, and 4; article 10; real alone and in conjunction with article 2, paragraph 3 of the Covenant.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided in article 5, paragraph 1, of the Optional Protocol. It recalls that in the absence of a reply from the State party, due weight must be given to the authors' allegations, to the extent that they are substantiated.

6.2 Regarding the authors' claim under article 6 in relation to the arbitrary deprivation of Sunil Hemachandra's life,[9] the Committee recalls its jurisprudence, in which it determined that

9 See communication No.1756/2008, *Zhumbaeva v. Kyrgyzstan*, Views of 19 July 2011, para. 8.6.

by arresting and detaining individuals, the State party takes the responsibility to care for their life, and that a death in any type of custody should be regarded as prima facie a summary or arbitrary execution. Consequently, there should be a thorough, prompt and impartial investigation to confirm or rebut this presumption, especially when complaints by relatives or other reliable reports suggest unnatural death.[10] Sunil Hemachandra was arrested on 22 July 2003 at his place of residence by members of the Moragahahena police station (MPS). Four days later, that is on 26 July 2003, he died in the National Hospital in Colombo as a direct result of an "acute subdural hemorrhage following a head injury caused by blunt trauma". Although the victim was bleeding uninterruptedly, and was in a visible critical medical condition the day after his arrest and placement in detention (on 23 July 2003), the police failed to seek medical assistance for at least three hours (para 2.7 and 3.3.).

6.3 The Committee recalls that criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by articles 6 and 7 of the Covenant.[11] In the instant case, the Committee observes that all investigative steps undertaken by the State party were carried out by members of the Moragahahena Police Station (MPS), i.e. the same police forces which arrested and detained Sunil Hemachandra (para. 3.9); that the investigation ordered on 8 August 2003 by the Magistrate of Horana was closed further to the Attorney General's decision of 29 April 2004 not to pursue charges for assault; that it took the Supreme Court seven years to rule on the fundamental rights petition filed by the authors; that in its decision of 6 August 2010, the Supreme Court discarded the possibility of the victim's custodial death as a result of torture, without ordering any independent investigation to ascertain the facts and identify possible perpetrators: No police officer was identified as a suspect, interrogated, let alone suspended or brought to justice. In the absence of any explanation by the State party, the Committee concludes that the State party's investigations into the suspicious circumstances of the death of Sunil Hemachandra were inadequate. The Committee concludes that the State party's authorities, either by act or omission, were responsible for not taking adequate measures to protect Sunil Hemachandra's life, and to properly investigate his death and take appropriate action against those found responsible, in breach of article 6 paragraph 1, read alone and in conjunction with article 2, paragraph 3 of the Covenant.

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10 See communication No. 1225/2003, *Eshonov v. Uzbekistan*, Views adopted on 22 July 2010, par. 9.2.

11 General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40* (A/59/40 (Vol. I)), annex III. *See also* communications Nos. 1619/2007, *Pestaño v. the Philippines*, Views adopted on 23 March 2010, para 7.2; 1447/2006, *Amirov v. Russian Federation*, Views adopted on 2 April 2009, para. 11.2, and 1436/2005; *Sathasivam* v. Sri Lanka, Views adopted on 8 July 2008, para. 6.4.

6.4 The Committee took note of the authors' allegations under article 7 of the Covenant with respect to Sunil Hemachandra, that he was subjected to severe beatings on the head and abdomen during the course of his arrest and transfer to the MPS detention facility on 22 July 2003. The Committee further observes that despite his critical medical condition on the following day, characterized by uninterrupted bleeding, to which the detention authorities were alerted, the latter failed to seek medical assistance for several hours (para 2.6. and 2.7). In the absence of any information from the State party in that regard, the Committee finds a violation of article 7 of the Covenant with respect to Sunil Hemachandra.

6.5 Having found a violation of articles 6 and 7 of the Covenant, the Committee will not examine separately the authors' allegations under article 10 of the Covenant.

6.6 The Committee took note of the authors' allegation that by failing to launch appropriate investigations into their son and nephew's death, the State party has left them in continuous mental suffering. The Committee observes that although close to 12 years have elapsed since the death of Sunil Hemachandra, the authors still do not know the exact circumstances surrounding it and the State party's authorities have not indicted, prosecuted or brought to justice anyone in connection with this custodial death in the suspicious circumstances described previously. The Committee acknowledges the continued anguish and mental stress caused to the authors, as close relatives of a deceased detainee, and considers that it amounts to a breach of article 2, paragraph 3, read in conjunction with article 7 of the Covenant in their regard.[12]

6.7 Regarding article 9, the Committee took note of the authors' allegations that in the late evening of 22 July 2003, five officers from the Moragahahena Police broke into the second author's house; that they started beating Sunil Hemachandra, who was found sleeping in his room; that they subsequently proceeded to arrest Sunil Hemachandra, without informing him of the reasons for his arrest; that the latter was arbitrarily detained, without any possibility to challenge the legality of his detention; that he could not contact his relatives; and that he was not legally represented. In the absence of any rebutting information from the State party, the Committee concludes that the rights of Sunil Hemachandra under article 9of the Covenant were violated.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee reveal violations by Sri Lanka of article 6, paragraph 1, read alone and in conjunction with article 2, paragraph 3, of article 7, article 9, paragraphs 1, 2, and 4 vis-

12 *Eshonov* v. *Uzbekistan*, para. 9.10; See also Amirov v. 1447/2006, para.

à-vis Sunil Hemachandra; and of article 2, paragraph 3, read in conjunction with article 7, with respect to the authors.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, which includes a prompt, thorough and independent investigation into the facts; ensuring that perpetrators are brought to justice; and ensuring reparation, including payment of adequate compensation and a public apology to the family. The State party should also take measures to ensure that such violations do not recur in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy where a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views, and to have them translated into the official languages of the State party, and widely distributed.

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