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article 2

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

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

b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

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

of the International Covenant on Civil and Political Rights

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International Covenant on Civil and Political Rights (ICCPR)

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

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

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

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Editorial board, *article 2*

The inauguration of *article 2* is an occasion to address the global human rights community on a matter of primary importance: the need to deal with problems of human rights implementation, rather than confining our work merely to the propagating of ideals.

Since the adoption of the Universal Declaration of Human Rights in 1948, the human rights movement has worked hard to spread its gospel. The development of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights was a major milestone. Numerous other conventions and declarations have further improved and enhanced the body of human rights principles, and articulated them to the global community. United Nations mechanisms have provided a base for monitoring the observance of rights, not least of all through the establishment of the High Commissioner on Human Rights.

All over the world extensive programmes are now taking place to educate people on human rights. States engage in this work to varying degrees, United Nations agencies facilitate them, and academic institutions participate. The most important education work is done by human rights organisations, predominantly voluntary bodies. As a result, today there exists a vast network of persons and organisations firmly committed to human rights: more than at any other time in the history of humankind.

Yet the actual situation is that human rights continue to be monstrously violated all over the world. The most visible abuses take place where the majority of the world's population lives: the so-called 'Third World', or 'Underdeveloped World'.

It is time for the global human rights movement to examine why it may not yet be achieving real improvement in the global human rights situation. One factor hindering honest examination is the belief that improvement of knowledge about human rights will by itself end human rights violations. This is a myth based

on the corresponding belief that education is itself capable of improving things. In reality human rights can only be implemented through a system of justice. If this system is fundamentally flawed, no amount of knowledge—no amount of repetition of human rights concepts—will by itself correct the defects. Rather, they need to be studied and corrected by practical actions. Hence research and intimate knowledge of micro-level issues must become an integral part of human rights education and related work. This is the key issue in promoting and protecting human rights.

"It is time for the global human rights movement to examine why it may not yet be achieving real improvement in the global human rights situation"

The work of human rights monitoring mechanisms is mainly focused on the correction of individual violations. This approach is inadequate when dealing with systemic breaches. For example, a country may be condemned for acts of torture, mass murder, crimes against humanity and other violations, and a monitoring body may make some recommendations to correct these. However, monitoring bodies have neither the mandate nor capacity to engage in studies on the actual functioning of components within the justice system—the police, prosecutors and judiciary—through which such recommendations have to be achieved. Thus, even if one person or another is punished, the actual system allowing violations remains, and may even get worse.

Another wrongly held belief is that enacting legislation on human rights will by itself result in improvements of rights. Legislation can work only through the mechanisms for administration of justice in each country. If those mechanisms are fundamentally flawed then legislation will remain simply in the books and will be used merely to confuse monitoring bodies into believing that actions have been taken to improve conditions. For example, a constitution may provide for fair trial, however the criminal investigation, prosecution and judicial systems may not have reached a credible standard. Such legislation then only mocks the victims and cynically manipulates monitoring bodies and the international community.

article 2 is being inaugurated to draw global attention to article 2 of the International Covenant on Civil and Political Rights (ICCPR), and make it a key concern of all partners in the global human rights community. This integral article deals with provision of adequate remedies for human rights violations by legislative, administrative and judicial means. Sadly, article 2 has become the forgotten component of the ICCPR. There is a dearth of relevant international jurisprudence, and hardly any mention of it in the enormous volumes of annual literature on human rights.

There is a reason for this neglect of article 2. In the 'Developed World', the existence of basically functioning judicial systems is taken for granted. This does not mean that these systems are perfect; in some instances there may be important challenges to them. However, to assume that these systems exist even minimally in other parts of the world is to ignore reality. A person coming from a 'developed' country may have many problems understanding this. We human beings are often prisoners of our own histories: conditions outside our upbringing and experience

may be incomprehensible. Even an open-minded person may not have the means to abandon her or his framework for understanding society.

Other difficulties also arise. One is the fear to meddle in the 'internal affairs' of other countries. State parties especially can create many obstacles for those trying to go deep down to the roots of problems. Thus, inadequate knowledge of actual situations may be guaranteed by the nature of interactions in the monitoring system itself. A further and quite recent disturbing factor is the portrayal of national human rights institutions and their equivalents as surrogate agencies for dealing with issues related to article 2. Some state parties may agree to new national human rights institutions taking on this role because they know that by doing so they may avoid criticisms of a more fundamental nature.

To overcome these difficulties, human rights movements in different parts of the world should cooperate closely in analysing and solving their respective problems. Cooperation can bring much needed in-depth knowledge of systemic obstacles to human rights implementation. Without cooperation it will not be possible to address some of the key questions facing the global human rights movement today.

After many years of study and work on these issues, the Asian Legal Resource Centre has decided that it is time to ring the alarm bells. We hope that the global human rights community will respond positively to this publication by looking into its own limitations and by trying to improve the human rights situation in different parts of the world. In the meantime, *article 2* will lead the call to arms.

The anatomy of impunity

Basil Fernando

Impunity is a much-used word these days. Perhaps for that very reason it has lost effect. United Nations agencies–and even organizations of states such as the European Union–tell countries to "abandon impunity". Naturally human rights organizations also do the same. States so told do not resist; they just ignore the call. Year after year calls are made and each time states ignore these calls. A consequence of this situation is that such calls on governments do not produce much hope of change among people in the countries concerned. They know that despite calls to prosecute state officers for crimes and violations of rights, nothing really happens.

Why do calls for abandoning impunity produce so few results? Without addressing structural reasons for grave violations of rights by the state officers, suggestions to end impunity are purely generalized abstractions. Let me explain by way of an illustration. A country with a record of serious violations of the Convention Against Torture is told to prosecute all perpetrators. This recommendation having been given to the government, some possible scenarios follow:

- No one reads the relevant report or recommendation. There is no official with the duty to read or to direct the report to a relevant authority for action. (In some situations a person is assigned to formally acknowledge the report, with polite comments that due consideration will be given to it. However the response does not go beyond this.)
- The report is passed to a minister, for example, the minister of justice. However the minister does not have any possibility of implementing the recommendation. The minister may make a formal reply to the head of state, who transmits it to the organization which made the original recommendation.
- Heavy pressure is exercised by many agencies or powerful governments. In response, symbolic action may be taken by the state concerned: for example, to appoint a commission of inquiry or even arrest one or more persons. However as soon as the pressure ceases neglect sets in. This scenario reflects what happens in many countries in Asia.

"While political will is necessary to solve any violation of rights, the lack of it is not a satisfactory explanation for why violations take place"

- The state concerned promises to take action, but there is no genuine authority with power to take complaints or, where a mechanism is available, there may not be an agency for conducting effective inquiries upon receipt of complaints. Again, where there are complaint and investigating mechanisms, there may not be an effective public prosecution system, and so no prosecutions take place. Alternately, where all formal mechanisms exist they may be beset with corruption and other malpractices that obstruct their effective operation.
- The law enforcement agencies themselves have become a major threat to the security of the people and engage in serious criminal activities routinely. Under such circumstances, the call to end impunity is utterly naïve.
- The political system itself is causing the type of violations against which the recommendation is made. The state may not even formally respond to the recommendation, except by way of denials.

Many examples may be given for each of the above scenarios. There are also an almost infinite variety of alternative outcomes for each of those given above.

The need for micro-studies towards improved recommendations

The making of improved recommendations involves both the process of arriving at recommendations and also the very nature of the recommendations themselves. This brings micro-studies into the picture.

Micro-studies on human rights issues focus on details of the problem that obstruct the implementation of human rights, and how they can be removed. For example, instead of merely stating that impunity should be ended, a micro-study will go into the ways that impunity has become possible and offer details of how to overcome those problems.

A micro-study suggests that merely to observe that a particular state party lacks the political will to remove impunity is not much of a discovery. While political will is necessary to solve any violation of rights, the lack of it is not a satisfactory explanation for why violations take place. Putting blame on the lack of political will often becomes a way to avoid developing understanding of how impunity occurs. For example, even with the best political will it is not possible to ensure fair trial in a country where basic principles of independence of the judiciary have not yet been introduced. Many a government brought to power by popular upsurge against a tyrannical regime ends up unable to do much to halt continued violations of rights, despite good intentions. This is often due to entrenched vested interests, which do not go away with the coming of new governments, and other structural problems that do not automatically change. A detailed

understanding of obstacles to the rule of law and well worked out strategies to counter these are necessary, if the wishes of the people who put the new regime into power are to be realized.

> "The demand for prosecution is frequently made of a system that does not even have the legal potential to act"

Elements of micro studies

Micro-studies into the removal of impunity require (a) Study of the legal structure in a country, and (b) Study of factors other than those arising from the legal structure, such as cultural, social and historical conditions. Micro-studies into the legal structure include examinations of the police, prosecution and judicial systems, and their relationships with each other.

Detailed studies into the police system indicate both how it is envisaged and how it actually functions. The way the system is envisaged is important in finding out whether, at least theoretically, the system would meet the requirements of a system under the norms and standards of article 2 of the International Covenant on Civil and Political Rights (ICCPR). If the envisaged system is itself flawed, as in many instances it is, then it is not possible to expect compliance with article 2. Mere ratification of the ICCPR and other human rights instruments will not make much sense unless accompanied by genuine reforms to upgrade the system. Instead, what happens all too often is that a government with a very poor law enforcement system gets international credibility by ratification of human rights covenants and conventions and qualifies itself for greater international respect while its human rights record remains unchanged. It is a different situation when a good system has been envisaged and articulated in law but for practical reasons does not function as it should. The causes of such malfunctioning must be studied meticulously, if proper recommendations are to be developed for correcting the situation.

It is also essential to know whether a proper prosecution system exists in law. Often close study shows otherwise. The demand for prosecution is frequently made of a system that does not even have the legal potential to act. In many instances the prosecutor's office is a minute institution with very little significance and power. If demands for proper performance are made without real understanding of its lack of power, the result is merely a public gesture without any contribution to the solving of rights violations. The situation is again different when a proper system exists in law but there are problems of actual functioning, despite the legal potential being available.

In essence micro-studies into human rights violations mean that the legal mechanisms which allow such violations to happen must be studied in detail. When understood, it is possible to prescribe suitable remedies. Merely to condemn violations and demand cures without exposing the way violations take place is futile.

Causes other than those arising from the legal structure

"Merely to condemn violations and demand cures without exposing the way violations take place is futile"

There are many causes of human rights violations not directly related to the legal structure. A few illustrations follow.

- A massive psychological crisis may undermine the legal process temporarily. If such a crisis is allowed to stay long enough it can affect the protection of rights absolutely. The global situation after 11 September 2001 is one example of this condition. This event has been used by some to call for the suspension of normal protections available to people, such as for detainees and criminal suspects. Public opinion is manipulated to have people believe that effective security measures require suspension of legal norms. A form of consensus is worked out from within the society to not assert rights strongly at these times. This 'consensus' is then used to attack the legal framework for protection of rights. Two results occur: no expansion of mechanisms for the protection of rights takes place during these times, and the existing mechanisms are weakened. When this condition persists for some time it begins to have a logic of its own in further deteriorating the legal mechanisms.
- There are other long-term processes affecting the protection mechanisms adversely. For example, in societies that have not seen a very dramatic transformation from feudalism, old habits reassert themselves over newly installed laws for the protection of rights. The social force of old habits can be much more powerful than the legal force of institutions created to protect rights. Under pressure, the new protection mechanisms can give way or become ineffective. Without micro-studies into the conflict between old and new, and without taking effective action to counteract the pressure based of past habits, mere imposition of a new paradigm for rights protection will be of little use.
- Another category of causes affecting rights protection mechanisms may come from special types of repression deeply rooted in a particular society that the rest of the world may not find easy to understand. An illustration is the Indian caste system. When the Indian government introduces constitutional and legal provisions to eliminate this system the outside world credits it for taking action to protect rights. However only those who live under such repression know these measures to be purely cosmetic. Here again only a micro-understanding of the system can lead to effective proposals to end it.

- Social privileges in countries where people other than the poor have not been brought under any effective legal controls also result in violations. In such a legal culture the law exists only to work against the poor. There is tacit consensus that the privileged must not be touched by legal mechanisms. Such deeply engrained social practices and the modern conception of the universality of rights cannot coexist: when modern rules are accepted by way of constitutions and the signing of international treatises, not much seriousness is attached to them.

Here too a micro-study must be undertaken, for the mere imposition of a legal mechanism for protection will prove futile. Women's rights issues in many countries fall under this category. Where men's privileges are unchallenged, legal reforms only have superficial influence.

In most countries, human rights implementation requires much more than mere ratification of covenants and conventions. The promoters of human rights need to trouble themselves with the problems of their implementation. When this does not happen gaps between what is in print and reality will not only remain, but will also have the hidden approval of the international consensus, not wanting to bother too much to rectify matters.

Return to liberal democracy: a precondition for ending Sri Lanka's civil war

Basil Fernando

Legal battles do not often attract much public attention, particularly when about legislative amendments, however they can have momentous consequences. In retrospect the course of history may appear to have turned on the outcome of one courtroom decision. Such a battle played out before the Supreme Court of Sri Lanka on November 4, 1982, when the legality of a bill for an amendment to the constitution was challenged. The amendment, proposed by the government of the time, was to allow for a six-year extension of parliament. The petition against the amendment was rejected; the bill became law subject to referendum. A dangerous journey into colossal violence began.

That journey continues to the present day. While most people in Sri Lanka wonder how to get out of this situation, they lack answers partly because the role that this judgement played in undermining the nation's constitutional law has yet to be seriously recognised. In Sri Lanka, constitutional disorder stimulated the chaos and violence on the streets, not the other way around. The systematic devaluation of Sri Lanka's legal system precipitated the breakdown of its liberal democracy.

The 1978 Constitution and demise of liberal democracy

The significance of the Supreme Court's decision can be seen in light of preceding events. In 1948, Sri Lanka gained independence from Britain and a Westminster-style parliamentary democracy took root. Periodic elections were held and governments were replaced peacefully; people expressed their will freely and usually the government in power was defeated. The principle that a government was elected only for fixed period was well established. A new constitution in 1972 did not drastically alter the structure of government, although it also did not contain any particular provision recognising minority rights, as had the 1948 Constitution.

In 1977 a new government was elected with over three-quarters of parliamentary seats. In 1978 this government again changed the constitution, but this time introduced an entirely new structure, with power concentrated around an executive president and the parliament pushed to a subordinate position. The 1978 Constitution radically altered the character of the state in Sri Lanka. Though maintaining a liberal democratic façade, suggestive of the French presidential system, it was not a liberal democratic constitution. Liberal democracy was abandoned in favour of one strong leader, thought necessary for achieving quick economic progress. In short, it introduced dictatorship. Within the year, the president spoke to the nation, telling the Tamils, "If you want war, let us have war." Immediately people took to violence across various parts of the country. The president sent a close relative to serve as commander in Jaffna, with a mandate to wipe out terrorism completely. The crisis had begun.

"[The Supreme Court] made the wrong decision and paved the way for the nation's decent into madness"

The Supreme Court declines to take a stand

As it envisaged a strong presidency, the 1978 Constitution introduced a framework for governance that could not function without a parliamentary two-thirds majority. With its popularity waning, the government knew that it would be unable to get such a majority again; indeed, as the new constitution envisaged proportional representation no political party could obtain a sufficiently large majority. The strong presidency aimed for by the constitution required a legal subterfuge through which the electoral victory of 1977 could be kept alive even after the expiry date of its validity. However at that time tension between the legal concepts of the former constitution and the new one remained. Hence the amendment that gave rise to the hearing of November 4, 1982.

The Supreme Court was presented with a remarkable opportunity to challenge the legitimacy of the dictatorial 1978 Constitution and its proponents. It could have upheld the petition opposing the government's scheme to extend its grip on power and thus threatened the mantle of authority the president had assumed by destabilising its legislative foundation. Instead it made the wrong decision and paved the way for the nation's decent into madness. It is worthwhile to read the full text of this historic judgement. Possibly the single most important decision delivered by this institution, and one ultimately with immense consequences for the entire nation, it consists a mere paragraph:

> The majority of this Court is of the view that the period of the first parliament may be extended as proposed by the draft Bill which is described in its long title as being for the amendment of the Constitution and intended to be passed with the special majority required by the Article 83 and submitted to the People by Referendum. In view of this decision this Court in terms of Article 120 Proviso (b) states that it does not have and exercise any further jurisdiction in respect of the said Bill.
>
> Three members of this court are not in agreement with the above view.
>
> (Case Reference: S.D.No.3 of 1982 P / Parl.)

"The government authorised law enforcement agencies to carry out extensive killings"

The names of all seven judges were given below this paragraph, but those who agreed and those who disagreed were not revealed. The court gave no reason for its decision, which made the extension to the life of parliament by referendum a legal possibility.

The Supreme Court may not have been aware of the great problems it could have avoided had it made a different decision that day. It may not have realised that the whole fabric of Sri Lanka's liberal democracy was under threat. Whatever the case, the negative outcome has proven that eternal vigilance is the price for democracy.

Aftermath of the Supreme Court's decision

In 1982 the referendum to amend the 1978 Constitution passed amid massive violence, the deliberate use of which is no longer disputed by anyone. By coercion and force, the government extended its tenure from July 1983 to July 1989. In the first month of its new reign – a month known infamously as 'Black July' – the government organised anti-Tamil riots throughout the country. The extent of the violence was enormous, and it changed the Tamil-Sinhala relationship irreparably. The riots were condemned the world over. They created the legitimacy for the Tamil exodus to abroad and fueled support for more militant elements in the Tamil political spectrum. Faced with international criticism, the government blamed leftist groups and banned four political parties; the ban was later lifted from three, but the JVP (People's Liberation Front) remained outlawed. As conflict grew, the government authorised law enforcement agencies to carry out extensive killings, torture and 'disappearances': a euphemism for extra-judicial killings. From 1988-92 between 30,000 (official figure) to 60,000 (independent estimates) disappeared.

After 1983 the conflict in the North and East grew steadily, and continues to the present. The government's ruthless use of force has found its match in the response from rebels led by the LTTE (Liberation Tigers of Tamil Eelam). Both parties have engaged in acts that constitute war crimes. Solutions to this conflict have been seen purely in military terms.

Although the government that introduced the 1978 Constitution was finally defeated at the polls in 1994, inspite of promises by the new government that it would make amendments to the constitution it has been left substantially unchanged. With time, this government too showed its determination to retain the power structure established by the 1978 Constitution. All recent elections, including the general elections of 2000 and 2001, have been accompanied by extreme violence and have been condemned as neither truly free nor fair.

In December 2001 a new government was elected to parliament under the United National Front. The majority membership of the front is the United National Party, which introduced the 1978 Constitution. It also has promised several amendments to the Constitution. The 17th Amendment was introduced shortly before the dissolution of the old parliament and it has established a

Constitutional Council and four new commissions. The Constitutional Council is to be appointed shortly, and it will in turn select the other four commissions. It is yet to be seen as to how these amendments can work within the framework of the 1978 Constitution.

> "Everyone has proceeded with trying to find a democratic solution to the civil war within a non-democratic construct"

Implications of the 1978 Constitution

Politicians and jurists alike have played down the drastic changes introduced by the 1978 Constitution and have tried to treat it more or less like earlier ones. Many have discussed the need to change one aspect or another, for example the executive-presidency, or even to drop the unitary character of the government. However all these have been proposed within the structure created by that constitution. The essentially dictatorial character of government within this framework has been ignored. Everyone has proceeded with trying to find a democratic solution to the civil war within a non-democratic construct.

The fundamental difference between liberal democracy and dictatorship lies in the view taken by each on the use of coercion. In his celebrated book *The Constitution of Liberty*, Friedrick A. Hayek states, "We are concerned with that condition of men in which coercion of some by others is reduced as much as possible in society. This state we shall describe throughout as a state of liberty or freedom." The two constitutions of 1948 and 1972 were based on this liberal democratic premise. The 1978 Constitution, on the other hand, was inspired by the East Asian political doctrines of leaders such as Soeharto and Lee Kuan Yew, who saw the limiting of freedom as a precondition for economic development. A considerable section of Sri Lanka's political elite – in both of the major political parties – shared this view then, as they do now.

This change of view on the use of coercion underpins changes to laws and regulations on the use of violence by the state. The structure created by the new constitution mandated extensive use of force; the strong presidency it envisaged could not be achieved by mere declaration. The 1978 Constitution incorporated national security provisions allowing the president to dismiss restraints written into the liberal democratic system and to use the military with greater ease, through widespread application of emergency powers. By taking advantage of every conflict that arose, new powers were acquired. The president ruled the country, with his military; the rest was of little importance. The parliament, judiciary, and even the administrative bureaucracy were sidelined. As always happens in such situations, with the course of time even the president became highly dependent on the military. The civilian police force became dependent on both. Again, as naturally happens, people saw and understood the changing situation and lost faith in institutions that maintained democratic exteriors but internally were subdued and modified to fit the changed political reality.

"If dialogue and negotiation are to become possible, Sri Lanka's return to a liberal democracy is a necessity"

Under these circumstances, war has become a wholly military affair and the controls that a liberal democratic system would have offered have dissolved. Neither the parliament nor judiciary has any capacity to intervene. For all practical purposes, the military alone are the arbiters of Sri Lanka's civil war. In response, the rebels have become equally militarised. Various peace gestures have been made under foreign pressure, and periods of tranquility have come and gone; in retrospect none of these have been serious enough to transform this situation of intense armed conflict into peaceful dialogue. The war's outcome has been left to a military solution; that is, no solution at all.

Return to liberal democracy

The usual debates on peace in Sri Lanka, particularly those offered to the outside, depict the conflict simplistically. The government puts the blame on terrorism, and the LTTE on racial chauvinism. Propaganda obscures its root causes and reasons for its continuation. Well-intentioned exhortations for peace do not proceed beyond platitudes.

If dialogue and negotiation are to become possible, Sri Lanka's return to a liberal democracy is a necessity. Informed discussion on peace must take into consideration Sri Lanka's tragic political transformation away from liberal democracy. A move back into such a framework is essential for any real solution to the civil war. This means abandoning the 1978 Constitution and the state structure it has spawned. It means challenging the credibility of that legislation and its offspring; it means doing what the Supreme Court was not willing to do on that fateful day in November 1982.

Sri Lankans, both Sinhalese and Tamils, have paid a heavy price for this change of course from democracy to dictatorship. The time has come to again change direction and opt for liberal democracy. The end to civil war is irrevocably tied to renewal of this path.

Behold the Throne of Anarchy: The Constitution of Sri Lanka and failure of law enforcement agencies

Basil Fernando

Ever since the promulgation of the 1978 Constitution, Sri Lanka has proceeded on a course of anarchy. This is not due to any mysterious circumstances or bad omen but rather the constitutional provisions that brought an end to rational government there. Enough critiques of this constitution have been made from the points of view of constitutional law and political science. The purpose of this article is to show how the 1978 Constitution makes law enforcement difficult by affecting the relevant agencies adversely.

The 1978 Constitution, which was tailored to give the first president absolute power, made inevitable the diminishing in importance of two major institutions for the enforcement of law. These two are the Department of the Attorney General, which also acts as the main prosecution institution of Sri Lanka, and the police. Their independence undermined, they were brought under the influence of the all-powerful president. This situation became even worse as institutional habits adjusted to the new power relationships. The fierce independence of the prosecution and police investigation functions gave way to the wishes and instructions of successive presidents. Taking advantage of this situation, powerful politicians began to exercise their control over these institutions, either through the president or directly. Decisions on the investigation and prosecution of criminal cases were no longer left to a rational process based on principles of due process. Instead, doors were opened to extraneous influences.

The prosecution function

A prosecutor's duty is to uphold the principles of due process by acting on their basis alone. Applying criminal principles defined by law, the prosecutor must examine evidence and charge those where there is sufficient evidence of the commission of a crime. To do this, the prosecutor must have legal power and actual power.

"The 1978 Constitution of Sri Lanka did not change the legal powers of the prosecutor, the Attorney General, however it changed the prosecutor's actual power."

The 1978 Constitution of Sri Lanka did not change the legal powers of the prosecutor, the Attorney General, however it changed the prosecutor's actual power. The all-powerful president was no longer the nominal head of the prosecution branch; he was, in fact, the real head of every branch, including the prosecution branch. Thus he could influence decisions on a routine basis.

The chief prosecutor could claim to be head of his branch only in theory. In reality he is not the real head, and nor is he perceived as the real head. His own subordinates and the public understand where the real power lies and where his stops. However the executive president cannot in practice run the prosecution branch. There is so much work to be done by a chief prosecutor that an executive president simply does not have the time or possibility to attend to such tasks. This results in an absurd situation. On the one hand, the chief prosecutor has no real power to carry out the duties of a prosecutor. On the other hand, the executive president, who has the real power, is not in a position to attend to the tasks of a chief prosecutor. The outcome is the absence of a functioning chief prosecutor in the country. A vacuum has thus developed in one of the most fundamental institutions necessary for maintaining the rule of law.

This same process has taken place in the police. The inspector general of police, who within a rule of law model of policing would be the final decision-maker in the police institution, is no longer the real holder of this power. His immediate subordinates, the deputy inspector generals, also are no longer the key players of the institution. A vacuum has developed in the actual decision-making process. Thus, another very important institution for maintaining the rule of law has lost functioning leadership.

The 1978 Constitution and lawlessness

When the two most important institutions for law enforcement—the prosecutor and the police—lose real leadership, the only result to be expected is lawlessness, and that is what has now penetrated all areas of life in Sri Lanka. While the police and Department of the Attorney General perform some functions, they are unable to address the more fundamental problems besetting the enforcement of law, due to their lack of actual power.

This is a direct result of the 1978 Constitution. While bad situations can arise even under a good constitution—perhaps due to the failures of people who do not enforce the constitution—even the best people cannot do much to prevent lawlessness within the framework of the 1978 Constitution. It is very likely that the best people will not even want to take positions of authority, as they would perceive that doing their job properly is an impossibility.

The 1978 Constitution is so absurd that it can only confuse all the institutions necessary for maintaining the rule of law. By contrast, the 1948 Constitution, with all of its limitations,

introduced a basic framework for a liberal democracy: it laid a foundation which, though insufficient to deal with many future developments, did provide a logical and constitutional framework for a society based on the rule of law. Like the clock repairer who destroys the entire machine in order to correct some of its defects, the makers of the 1978 Constitution removed the basic framework necessary for the rule of law under the pretext of improving the 1948 and 1972 Constitutions.

"The makers of the 1978 Constitution removed the basic framework necessary for the rule of law"

Thus the Sri Lanka's constitutional crisis arose from the 1978 Constitution itself. It was not the events subsequent to the making of this constitution that created chaos in the country: this constitution made those events inevitable. Like the throne of Macbeth, the post-1978 Sri Lankan "throne" can produce nothing but chaos. It not that J. R. Jayawardene was a bad president who abused a good constitution. His mistake was to create this very constitution. After promulgating it, he himself became its victim. Instead of absolute power, all that he enjoyed was colossal chaos. Subsequent presidents have not been able to extricate themselves from this constitution and its kiss of death. The 1978 Constitution is not a clock that can be repaired. It is, constitutionally speaking, no clock at all.

Talk of returning to the rule of law cannot be done under this constitution. It is instead necessary to create a constitution giving real powers of law enforcement to the two basic institutions that are so vital to maintaining the rule of law. Under a rational framework there are ways to curtail abuses of power by these institutions. But to use or abuse power they must have the real possibility of undertaking their functions.

Difficulties in reforming the law enforcement agencies

At the 57th session of the United Nations Commission on Human Rights (UNCHR) in 2001, the Asian Legal Resource Centre (ALRC)—a sister organisation of the Asian Human Rights Commission (AHRC)—made submissions on reforming the prosecution and criminal investigation systems in Sri Lanka. The basic arguments were those set out above.

Shortly thereafter a senior Sri Lankan diplomat invited AHRC to a discussion. He had seriously studied the ALRC proposals and thought them worthy of further consideration. He raised a question: which government agencies, or which persons in the government, did AHRC think would consider proposals like the ones mentioned above? The AHRC representatives had to admit that they were unaware of any agency or group within the government that would consider them. They pointed out that the absence of a think-tank or research group within the government is a major defect in the Sri Lankan system. People make whatever suggestions they like, but there is no one to consider them. If proposals are rationally considered and rejected, there is the possibility of developing better proposals; but when there is no one even to consider them, there is no real possibility of progress.

"The importance of the 1978 Constitution is not in what it created but in what it took away"

The result is that organisations or individuals make proposals merely to discharge moral obligations, without expecting anything to happen. For something to follow there must be some arrangement to consider ways to improve the system of governance.

The absence of an active centre to take in and deal with proposals for improvements of the system is also a product of the 1978 Constitution, for the same reasons as above. It has made governance nobody's business.

A paradigm loss, not Paradise Lost

The result of the 1978 Constitution was a power vacuum. Early after 1978 many argued that the constitution had centralised power in the hands of one person, and possibly created a constitutional dictatorship. However experience has proved that although it took away earlier powers exercised by other persons, it did not place all of them in the hands of the executive president. The president's hands were too small to hold the lot. The result was that no one was left responsible for the exercise of many powers. In the heart of the system of governance, there was a big black hole. Thus the importance of the 1978 Constitution is not in what it created but in what it took away: the liberal democratic framework of governance established by the 1948 Constitution.

The argument that every country has a right to decide on its system of governance is, of course, valid. This may mean a paradigm shift from the original basis for governance. However, if all this means is that the original foundation is removed and not replaced with anything else, let alone anything better, it cannot be called another form of governance, but rather a kind of anarchy. A governance vacuum cannot be called a homemade product in any complimentary sense: it is more like a homemade epidemic.

The civil conflicts that have occurred in Sri Lanka since 1978 cannot be understood without reference to the power vacuum created by the constitution. It is not that these conflicts, both in the South and North, started due to the 1978 Constitution; they have their own historic roots. However, the 1978 Constitution made the resolution of these conflicts impossible for the reasons described above.

Change of fate

What Sri Lanka needs is to replace the power vacuum with a rational system of exercising power. This can be done only by abandoning the 1978 Constitution altogether. However up to now no political party or leader has consciously taken this course, though there is a common realisation that the 1978 Constitution has brought about disaster to the country. Perhaps when this common realisation is more crystallised a national consensus may emerge to take a decisive step towards a workable paradigm. Since this is a matter of survival, it is quite likely that this will happen sooner than we can predict. Among other things, a rational solution to the civil conflict depends on a decisive change of the

Constitution. Until then, the type of law enforcement we are likely to have is described in a recent Supreme Court case by three judges thus:

> It is a lamentable fact that the police who are supposed to protect the ordinary citizens of this country have become violators of the law, [and we] may ask with Juvenal, *quis custodiet ipsos custodes*?—who is to guard the guards themselves?
>
> [Edussuriya J, Amerasinghe J and Wadugodapitiya J., Agreeing—Case number S.C. (F.R.) Application 343/99, on 6 November 2001]

The progress and influence on law enforcement of the Cambodian Ministry of Interior

Pol Lim, Cambodian Ministry of Interior

The roles of the Cambodian Ministry of Interior are to:

1. Lead and govern provincial territories, people and public property;
2. Ensure national security and public order;
3. Urge development in all fields in order to improve living standard of people; and
4. Take responsibility for leading the national police, to ensure public order and national security.

The Ministry of Interior has used armed force, material means and finances to ensure national security and economic stability. Conditions have improved and people increasingly trust the government, as the Ministry has had a good relationship with prosecutors, all levels of courts, military police and other concerned authorities, especially the Ministry of Justice.

Judicial police and prosecutors have generally cooperated in order to perform their duties as required by law and according to their limited resources. Both judicial police and local authorities have accepted and seriously enforced all court decisions. The Ministry of Interior has in particular cooperated with prosecutors attached with the appellate court and Ministry of Justice to propose amendments to four articles of the State of Cambodia (SOC) Criminal Procedure Law, and make a new Law on Aggravating Punishment of Crime (adopted November 2001).

Two new articles of the SOC Criminal Procedure Law are articles 36 and 38. Article 36 states that the procedural and investigative operations of judicial police shall be led and facilitated by a prosecutor, in order to ensure their effectiveness. Under this provision, if a prosecutor cannot directly lead the judicial police, he or she can facilitate by other means and the police can accept that measure. Article 38 proposes extension of the maximum 48-hour detention period by judicial police investigating an offense meeting the following criteria:

1. It is a serious crime (felony);
2. There is some indication that the accused committed the crime;
3. Necessary measures are in place for conducting an effective investigation;
4. A written request is submitted to the prosecutor, with reasons for the extension request;
5. The extension is approved by the prosecutor and a written record of approval kept on the case file;
6. Special conditions apply to minors:
    a. No extension over 48 hours for a minor under 18 years old is permitted.
    b. Minors under 13 years old shall not be detained beyond 36 hours.

In short, the Ministry of Interior hopes and believes that the justice system will continue to progress through new legislation, human resource training and also reform of the judicial system, especially of the judicial police, who play important roles in suppressing and preventing offenses.

The progress and influence on law enforcement of the Cambodian Ministry of Justice

Ith Rady, Cambodian Ministry of Justice

Under the 1993 Constitution, Cambodia adopted policies of liberal democracy, political pluralism and free market economics. Correspondingly, we need a consistent legal system to ensure and enable the country to be developed.

The Ministry of Justice was legally established and promulgated by Royal Decree No. NS/RKM. 0196.04, to carry out and reform the Cambodian legal system. Its role is to draft legislation, govern administrative work and provide technical support for all judicial tribunals, to enable the judicial system to be transparent. Its specific duties include the following:

1. To administer the judicial process, including civil and criminal cases, administrative disputes, and labour and commercial cases.
2. To enforce judgments via detention centers and prisons.
3. To establish legal policies and other rules regarding adjudication.
4. To ensure, in preparing and enforcing laws, the consistency between civil and criminal procedure, administrative law, labor law and commercial law.
5. To govern and issue the list of criminal records.

After 1993 tribunals at all levels were brought to conform with the principle of independence of the judiciary. Accordingly the Ministry of Justice made an effort to reform the judicial system in five areas: the institutional and financial framework, legislative framework, human resources, material resources and information.

Institutional and financial framework

The lower courts were separated from the legal framework of the provinces and cities. The appointment of court personnel and the judicial budget were allocated separately from the controlling provincial authorities.

Legislative framework

The Ministry of Justice drafted legislation to reform the structure and activities of tribunals. The law on the appointment and activities of tribunals has legally determined the structure and competence of all levels of courts.

Human resources

Reform of the judicial system requires adequate skilled human resources. The Ministry of Justice has tried to open training for judges and prosecutors with the cooperation of non–governmental organizations and international agencies. Exchange programmes have been set up with France, and Japan has granted numerous scholarships for judges and prosecutors to study technical aspects of the legal profession. The Ministry of Justice has trained 42 new judges and will continue to do so into the future.

Material resources

The Ministry has focused on building and repairing courthouses. So far we have built two new courthouses at Prey Veng and Takoe provinces under the national budget. Some courthouses have been repaired in Kampong Cham, Kampong Spue, Kampong Thom Kampong Chhnang, Kandal and Phnom Penh. The Ministry has also provided other materials for use in courts, such as typewriters and computers. The Ministry has previously provided motorbikes to all courts and prosecution offices, and cars to a number of offices.

Information

The Ministry of Justice has always paid attention to information distributed to all levels of courts and prosecution offices, especially on the norms necessary for law enforcement. The Ministry has photocopied and sent details of any new laws adopted and promulgated, sub–decrees, orders, regulations and other standards to provincial courts and prosecution offices. In addition, the Ministry has taken into account the gaps between laws by issuing regulations to advise courts and prosecutors in that regard.

The Ministry of Justice has paid attention to the laws necessary to ensure and better strengthen the rule of law in Cambodia. In 1993 the Ministry drew up plans to draft a number of key laws, including codes of criminal law, criminal procedure, civil law and civil procedure. Laws introduced to date are the

1. Law on the Supreme Council of Magistracy (adopted 22 December 1994),
2. Law on Suppressing of Kidnapping and Trafficking in Persons (adopted 16 January 1996),
3. Law on Narcotic Drugs (adopted 9 December 1996),
4. Law on Organizing and Functioning of the Constitutional Council (promulgated 8 April 1998), and
5. Laws already drafted, including those on the role and duties of

the judiciary and the statute of judges and prosecutors.

"The treatment of convicted persons is an important point for legal reform ... food and accommodation for prisoners remain outstanding issues"

Cooperation in making laws

The Ministry of Justice signed an agreement with the Japanese to draft key legislation for Cambodia, including the civil law and civil procedure codes and other related laws. So far 80 percent of the drafts have been completed, and we hope they will be finished in 2002. The French also signed an agreement to assist the Cambodian government on criminal law and criminal procedure codes. The Ministry of Justice has revised and sent a draft of the Code of Criminal Procedure to the Cabinet of Ministers Council. The Ministry of Justice has examined and finished 70 percent of revisions to the Code of Criminal Law.

The Ministry of Justice has paid more attention to enforcing laws. Since 1993 Cambodia has been using the UNTAC (United Nations Transitional Authority for Cambodia) Transitional Law and other laws that, related to criminal law, were revised and adopted by the State of Cambodia. The Ministry has sought to enable law enforcement officers to better enforce laws, especially against criminal offenses such arrest, detention, prosecution and imprisonment. The National Assembly has also passed a law proposed by the Ministry amending article 51 of the Statute of Government Civil Servants to allow for prosecution of any civil servant without approval from his or her boss.

After frequent discussions, especially in the General Assembly, the Ministry of Justice together with the Ministry of Interior reduced the period of detention without charge to 48 hours. Pretrial detention has been applied as required by law, as the Ministry of Justice has issued regulations to instruct judges and prosecutors to do their best not to detain accused persons beyond the period of detention required by law (Regulation No. 13/RB/6160 of 1994, Letter No. 198/96 of 1996, Regulation No. 04/97 of 1997). Besides this, the Ministry has issued letters at the provincial and municipal level to remind judges and prosecutors not to detain accused persons over the period of detention limited by law. This issue was also raised for discussion in the annual General Assembly in 2000, where it was decided to end detention beyond the period of limitation, as required by law. Notwithstanding, this problem has not been completely solved.

The treatment of convicted persons is an important point for legal reform. Although the existing laws in Cambodia do not refer to punishment by hard labour and convicted persons just lose their freedom of movement but are otherwise entitled to their usual rights, food and accommodation for prisoners remain outstanding issues. The Ministry of Justice has also paid more attention to pardoning and paroling of prisoners, as well as reducing sentences. Twice each year the Ministry requests the King to pardon and parole convicted persons who have followed the conditions of their imprisonment.

In short, the law in Cambodia is truly developing but still has not reached the point we are aiming for. Some law enforcement officials have not seriously fulfilled their roles. Some—including judges and prosecutors—have not thoroughly studied existing laws. They enforce laws based on their own habits and understanding, in some cases leading to contradictions with the actual law. Shortfalls in enforcing laws have also been caused by gaps between laws that have been difficult to interpret and apply. Shortages of resources and finance have been key factors that have led to a lack of commitment to duties by law enforcement officials.

"The law in Cambodia is truly developing but still has not reached the point we are aiming for"

The Ministry of Justice has tried its best to reform and strengthen the court system and improve the knowledge of judges, prosecutors and court clerks, including other supporting officials such as lawyers and judicial police. Having capable human resources and sufficient laws are factors for effective implementation of laws and the strengthening of the rule of law.

Independence of the judiciary and rule of law in Cambodia

So Inn, Cambodia Defenders Project

Independence of the judiciary

In the past the executive and legislative branches of government heavily interfered in Cambodian courts. However over time this interference has decreased. This may be due in part to the executive and legislative branches of government better understanding the meaning and nature of independence of the judiciary. The judiciary itself has also better understood the principle.

However the evolution of independence of the judiciary in Cambodia is incomplete. Some basic principles are not yet being practiced. Three key points requiring reform are:

1. During trial, a presiding judge cannot proceed with a case without permission from the prosecutor. He or she is not likely to dare to open a trial if the prosecutor objects.
2. During trial proceedings, judges play the roles of both judge and prosecutor. Judges interrogate the accused in favour of the prosecutor. In that circumstance it appears that the judge has presumed the accused person is already guilty.
3. Article 138 of the State of Cambodia (SOC) Criminal Procedure Law provides more power to the prosecutor than the judge. Under this article a judge's decision is legally insufficient without agreement from the prosecutor.

Equality before the law

Judges have tried to apply this principle, seeking defense lawyers to represent the accused, as required by law. Judges have also permitted accused to mount self-defence, or to choose a lawyer during trial.

In 1993 there were few defenders representing clients in the Phnom Penh Municipal Court. Since then the number has increased. This is one factor that has pushed the court to apply the above principle. However, Cambodian courts still suffer from two gaps in this area:

1. Under article 79 of the SOC Criminal Procedure Law, the petition of a prosecutor appealing a case has more power than the petitions of other parties.
2. In practice also the presiding judge always believes evidence and explanations by teh prosecutor over those of the defence lawyer.

Hence, judges do not stand on the principle of equality before law between the prosecutor and defence lawyer in criminal cases. This is because prosecutors have more power legally than defence lawyers. Accordingly, both investigating judges and trial judges have to improve implementation of the principle of equality and review article 79 of the SOC Criminal Procedure Law in order to ensure the application of this principle.

Presumption of innocence

Both investigating judges and trial judges have tried to apply this principle and we have obtained some good results, however more work is needed. In most cases investigating judges do not seem to investigate in a manner to find evidence to assist the accused, and as noted, in most of the cases trial judges interrogate to obtain evidence against the accused. Hence, in both the investigation and trial the accused is presumed guilty, contrary to the principle of presumption of innocence as stated by law.

Pre-trial detention and bail

Article 14 of the UN Transitional Authority for Cambodia (UNTAC) Transitional Law states that a request for bail during pretrial detention can be made only in the investigating stage, and it is not necessary to pay a bail bond. However, article 65 of the SOC Criminal Procedure states that a trial judge may grant bail, but only with the payment of a bail bond. In the later case the problem is that most of the accused are poor. Entire families of accused persons are forced to sell their property to pay a bail bond, increasing poverty.

Review of judicial process in Cambodia: 15th Workshop on Administration of Justice Reform

Asian Human Rights Commission

In December 2001 thirty participants gathered in Sihanouk Ville for two days to review the progress of judicial process in Cambodia since the adoption of the 1993 Constitution. The meeting was jointly organised by the Cambodian Defenders Project and the Asian Human Rights Commission. Participants included senior officers from the Ministry of Justice, Ministry of Interior, Prosecutor's Office, the Courts, and representatives from the legal profession and civil society. Participants agreed to assess the judicial process in accordance with article 2 of the International Covenant on Civil and Political Rights (ICCPR). Cambodia has ratified the ICCPR and incorporated it into domestic law (article 31 of the Constitution), together with all other international human rights instruments.

The judicial process in Cambodia includes investigation of crimes and allegations of violations of rights, the prosecution of offenders, and conduct of trials by the judiciary. The participants went through a list of questions to review progress in these areas, and after careful study and discussion agreed that there has been a degree of progress since 1993. They concluded:

1. Access available to lawyers to intervene on behalf of their clients at the pre-trial and trial stages has increased. Perhaps the most significant progress is the development of an independent legal profession, which did not exist prior to 1993. Within a short time the legal profession has established itself as an important part of Cambodian life. While there is enormous room to improve, it can be said that the potential of the legal profession to intervene in the judicial process is already significant.
2. Education and training among the police has increased. However, due to the continuance of the police organisation much as it existed before, the progress needed to safeguard the rights of persons and bring the police force to a professional standard—in keeping with the international obligations that Cam-

bodia has undertaken—is great.

3. Discussions among prosecutors about the problems that they are facing and ways to find solutions have increased. Interaction between the investigating police and prosecutors has also expanded.

4. Judgments are now generally handed down in writing. The reasons for judgments are also now usually given. Overall, prewriting of judgments and discussion of cases before trial appears to have decreased. The access of lawyers to the judiciary has also improved.

5. The real generator of change in the judicial system has been the Cambodian people themselves, who have been pushing very hard for substantial changes. The sharpest expression of the people's wish for change has come from large numbers of volunteers taking various positions as lawyers, paralegal staff and others doing their utmost to assist litigants to find justice. There is a tremendous movement for justice from below. This should be recognised and supported both at the national level and by the international community. A few officers have responded positively to this popular push for a better system of justice.

The participants noted some grave hindrances to the progress of the judicial process:

1. The total budget for the Ministry of Justice is just 0.3% of the national budget. It is impossible to expect great changes within the confines of such a paltry amount. Any real improvements require a substantial increase in the government's budgetary allocation to the Ministry of Justice. The participants noted that in the last Consultation Group Meeting, reform of the judiciary was recognized as one of the priorities for assistance to Cambodia. In other statements from the international community, there have also been calls to recognise and support judicial reforms. Under these circumstances, an increase in the budgetary allocations for judicial reform needs to be pursued with seriousness.

2. The draft criminal procedure and penal codes have not yet been made into law. The United Nations Transitional Authority for Cambodia (UNTAC) Transitional Law and the State of Cambodia (SOC) Criminal Procedure Law remain in force. The UNTAC Transitional Law was intended only for the period of UNTAC operations. It recognises only about 35 criminal offenses. The SOC criminal procedure law was also meant to be an interim measure. It does not conform to international standards: procedures for fair trial, pretrial detention, powers of the police and prosecutors, and other procedural matters to ensure due process are inadequately stated or absent altogether. The continuance of these laws remains a major obstacle to the development of the administration of criminal justice in Cambodia. The draft criminal procedure and penal codes have been talked about for several years now, yet there seems to be a lack of

urgency to develop and adapt these codes to Cambodian conditions.

"Considerable confusion surrounds the arrest of persons before the completion of investigations"

3. Considerable confusion surrounds the arrest of persons before the completion of investigations. Police arrest persons halfway through investigations then complain that 48 hours is not long enough to complete their investigations. It needs to be stressed that persons should be arrested only when adequate evidence has been obtained. In many countries the time period allowable for police detention is much shorter than 48 hours. Under no circumstances should the 48-hour rule be extended. Sometimes suspects are arrested even before criminal investigation has begun, in order to elicit information from the accused. This technique violates the constitutional recognition of the presumption of innocence. It also paves the way for use of pressure, physical or otherwise, to obtain confessions or admissions from the suspect. Fair trial cannot be achieved until such practices are eliminated.

4. Although there had been some degree of improvement regarding the granting of bail, obstruction of that right is again increasingly common. A circular issued by the former Minister of Justice forbidding bail to any person accused of a felony, though illegal, has had the effect of severely reducing the incidence of bail granted to those accused of serious offenses. Thus, the actual law laying down the guidelines for the granting of bail is being frequently ignored.

5. The institution of the investigating judge is problematic. In Cambodia it does not operate in the manner of its French counterpart, where an elaborate mechanism for criminal investigations exists to examine evidence at the early stages and determine whether a person can be charged. Within that system, developed over hundreds of years of practice, there is very sophisticated collaboration between the investigating police and investigating judge. The lack of such in Cambodia has led to confusion that may need to be resolved in the future. Investigating judges are also overworked, creating long delays in the disposal of cases.

6. The appeals process requires improvement. Time limits on the hearing of an appeal must be clearly set out and followed. Both the law and practice in Cambodia is that a person is confined in prison while an appeal is pending if the person was also in pretrial detention. If the appeal is delayed, the accused may remain in prison for a longer period than that to which they were originally sentenced, and even for a period longer than the maximum prescribed sentence for that offense. As a consequence, a person may be compelled to withdraw an appeal even though innocent of the offense.

7. Many forms of interference in the execution of judgments prevail. These come from government ministries and political authorities, such as provincial governors. Some prisoners released by the court have remained imprisoned due to such obstruc-

tion. In some cases higher authorities in Phnom Penh have had to intervene. Such interference affects the basic rights of people as well as the independence of the judiciary.

8. Other reforms are needed in the areas of trial in absentia and independence of the judiciary. Trial in absentia should be avoided unless absolutely necessary, in which case procedure must be developed to guarantee the right to a defense of the accused. To guarantee the independence of the judiciary, the law on the statute of magistrates must be passed as soon as possible.

The consultation grew out of dialogue between various people involved in judicial process in Cambodia with a view to improving the system and its performance at every level. The discussion was frank and open. There was a spirit of self-criticism and a desire to look forward to better times. This review, started at this meeting, should be continued in more depth and with more participants. It would also be useful for different parts of the justice system to carry out their own internal reviews. Above all, it is necessary for the independent legal profession to take a very active part in promoting such a review. It is likely to benefit Cambodia by raising many creative insights of people engaged in judicial reform since 1993.

Attacks on human rights defenders in Indonesia: Written statement to the UN Commission on Human Rights 58th Session, 2002

Asian Legal Resource Centre

1. The Asian Legal Resource Centre welcomes the recent prosecution of 10 persons responsible for crimes against humanity in East Timor between January and October 1999. Although the convictions do not reach those top-level decision makers responsible for the widespread human rights violations there in the lead-up to the independence ballot, the sentences handed down may go some way to ending the culture of impunity that existed in the Republic of Indonesia under the Soeharto regime. Notwithstanding, the Indonesian legal system continues to fail human rights defenders there more than three years after the fall of Soeharto.

2. It is clear that there has not been any real reform of the criminal justice system in Indonesia since the days of dictatorship, which began with the 1965-66 massacre of between 500,000 and 2 million alleged communists. To date not one perpetrator has been arrested and charged for that atrocity. Human rights defenders were among those murdered, tortured, detained and otherwise abused both during that period and subsequently. Pramoedya Ananta Toer, a prominent author, was sentenced to 11 years without trial or formal charge; Ibu Sulami, a women's movement leader, spent 20 years in prison—just to name two of thousands. A system that denies justice to past human rights defenders is unlikely to protect the rights of current ones.

3. Among human rights defenders targeted at present are those documenting violations of human righs in Aceh and West Papua, where struggles for self-determination are currently unfolding. These people are subject to threats, disappearances and extra-judicial killings at the hands of the military, police, paramilitary, security guards and armed independence groups. In Aceh, where only one judge remains, as of 7 December 2001, Koalisi NGO HAM Aceh had verified 103 disappearances during 2001.

In West Papua, the recent assassination of independence leader Theys Eluay with the suspected involvement of Kopassus (Army Special Force Command) affirms that the tactic of 'silencing through terror' spans the length of the archipelago. The Indonesian National Human Rights Commission (Komnas HAM) has conducted preliminary research into the murder and recommended that the government establish an independent commission of inquiry into the death of Mr. Eluay. Unless this inquiry can be conducted in a matter that will satisfy the local and international human rights communities, the last strands of goodwill remaining among the Papuan population towards Jakarta will surely be lost.

4. Central Sulawesi (2,000 civilians killed since 1999) and Maluku and North Maluku (5,000 to 12,000 civilians killed since 1999) are also now entrenched in communal violence and religious segregation. It is clear that the military has engineered and extended these conflicts for its own political and financial ends with complete impunity. Armed civilian groups such as Laskar Jihad and Christian militias have a political and economic interest in maintaining the suspicion, animosity and violence, and have suppressed human rights defenders from their own communities trying to rebuild inter-faith relations. Despite ceremonies and discussions on 'conflict resolution' and 'reconciliation', the government has failed to intervene to disarm and disband those perpetuating the conflict. Even the most basic demand of the people—that armed militia groups be prevented from travelling en masse to different islands on militant religious missions—has not been met, as thousands of Laskar Jihad members reportedly travelled to Poso in December 2001 to reawaken the bloody conflict in Central Sulawesi.

5. Although it is urgent that the international community address conditions in these 'exceptional' areas, it is also vital to understand that there is nowhere in Indonesia that human rights defenders can carry out their work without repercussions. An example of how the entire military-police-judicial system remains Soeharto's legacy comes in the treatment of 19 persons in Bandung motivated to demand reasonable prices for cooking oil. On 14 June 2001, students, workers and activists held a rally to protest government plans to increase the price of oil, an essential commodity. The police, apparently angry that they did not make any arrests for a separate protest the previous day, violently attacked the protestors. Helped by 'preman' (civilian representatives of the military), the police kicked, punched, and beat the defenders with long bamboo poles. One defender was knocked unconscious with a teargas gun; another was sliced in the back with a removable bayonet; a third was beaten unconscious and dragged along the ground; a fourth hit on the head with a bamboo pole so that her headscarf was soaked in blood. The defenders were then taken to a 'holding area', where they were beaten further and verbally abused incessantly. They were herded into police vehicles, and beaten again. They were taken to the Bandung police station,

> "The environment for the promotion of human rights in Indonesia has worsened in 2001 with the re-emergence of 'anticommunist' organisations"

where they were beaten and interrogated and forced under threat of torture to sign statements, many of which were not read by the defenders. They were kept incommunicado for the first five to seven days of detention, while the majority of their torture wounds were healing, during which time they were subject to further physical and mental abuse. Under international pressure they were finally released on bail after two months. Since the trial began the court has ignored complaints of torture and instead accepted the statements signed by the defenders under police intimidation as evidence. The judges have enabled the prosecution to enjoy endless delays in proceedings, and have cross-examined the defence witnesses far more harshly than the prosecutors themselves. There is no pretence of neutrality by the judges—they clearly believe the defenders are guilty of some serious crime, but lack any concrete evidence to convict them.

6. The environment for the promotion of human rights in Indonesia has worsened in 2001 with the re-emergence of 'anticommunist' organisations. These groups have attacked any person, organisation, office, movement, worker or object considered to have 'left-wing ideology'. Attacks have included book-burning, physical intimidation, kidnapping, public threats on television and other mass media, and burning and destruction of offices. Many of the organisations that operated covertly under the Soeharto regime and had at least been able to conduct their human rights work openly during the past few years have had to go underground again. This deterioration in conditions is unsurprising, as the military-police-judicial system remains almost identical to the pre-1997 model, and Soeharto's allies retain power and influence.

7. Although the Asian Legal Resource Centre is pleased that the Government of Indonesia has introduced new legislation to separate police and military functions, congratulations must be reserved until the police and military are seen to be fulfilling their purported functions of protecting and promoting the welfare of the Indonesian people, rather than continuing to violently suppress those calling for human rights. Furthermore, despite the courageous role of the Secretary General of Komnas HAM, the commission remains paralysed by the ongoing presence of numerous former members of Soeharto's military. What the commission has been able to achieve to date looks set to be lost as the organisation is now being brought under direct control of the government. Its staff will be made public servants and the parliament appoint future commissioners, at a minimum age of 40 years, which will rule out the majority of the current commission.

8. The Asian Legal Resource Centre urges the international human rights community not to be misled into believing that Indonesia has entered a period of democracy and human rights promotion. Until the military-police-judicial system and the criminal prosecutions system are reformed, the role of these

institutions remains as it was during the Soeharto dictatorship: to protect the perpetrators of state crimes and suppress the voices and activities of human rights defenders. The international community must instead press for fundamental criminal justice reform in Indonesia to enable the future protection of the many courageous defenders of human rights there.

Impunity in Sri Lanka: Written statement to the UN Commission on Human Rights 58th Session, 2002

Asian Legal Resource Centre

1. In Sri Lanka there is near complete impunity for state officers alleged to have caused serious crimes such as murder, torture, disappearances, war crimes and crimes against humanity. The very judicial framework of the country in fact promotes and accommodates impunity. The present 1978 Constitution of Sri Lanka has placed all power in the hands of an executive president thus displacing the holders of power within the law enforcement sections of the government. The independence of the Attorney General (AG)—the chief prosecuting officer in the country—and the Inspector General of Police (IGP) has thus been deeply undermined.

2. The impact of impunity has spread into all areas of life. From over 30,000 cases of disappearances reported to state-appointed commissions of inquiry only about 500 cases have been prosecuted and even these have in most cases been conducted negligently. Cases of massacres—such as the Bindunuwewa Massacre (see E/CN.4/2001/NGO/70) in which about 60 armed law enforcement officers oversaw the murder of 24 young rehabilitation camp detainees—led to no satisfactory criminal action against all the culprits. Elections in Sri Lanka have seen much violence, and the General Election held on 5 December 2001 was considered the bloodiest to date, resulting in over 2,000 complaints of abuse and around 60 persons killed. Among them, the case of 10 persons killed in cold blood at Udathalawinne, Kandy district, has not yet reached a satisfactory conclusion. There are also many cases of well-known persons killed, such as BBC journalist M. Nimalarajan and prominent Tamil politician Kumar Ponnambalam.

3. More alarming still are the many cases of torture about which much evidence has been placed before the prosecuting authorities without subsequent action. Sri Lanka incorporated the Convention against Torture and Other Cruel, Inhuman or De-

grading Treatment or Punishment into domestic law under Act No. 22 of 1994. This Act provides a minimum period of seven years' imprisonment for torture, however no officer has been punished under this law despite the police's endemic use of torture and Supreme Court findings against many. There are numerous other cases of rape and murder in which state officers have been alleged culprits but have been able to escape from the law.

4. The reason that impunity in Sri Lanka occurs to this extent is due to the virtual collapse of two institutions: the police and the prosecution branch, which functions under the Attorney General. Police investigations into offences allegedly committed by other police suffer from the loyalties that police officers exercise on behalf of each other. For example, investigation files on senior police that have been passed from the Missing Persons' Unit (MPU) of the AG's Department to the Disappearances Investigation Unit of the Police Department have even after many years not been returned to the MPU. Related records routinely kept at police stations are destroyed despite instructions by the authorities—including the IGP—to keep them protected till criminal investigations are over. No action has been taken against those who have caused their destruction. Police tampering with documents has become so common that a November 2001 Supreme Court judgement observed that

   > it is unsafe for court to accept a certified copy of any statement or notes recorded by the police without comparing it with the originals. It is a lamentable fact that the police who are supposed to protect the ordinary citizens of this country have become violators of the law, [and we] may ask with Juvenal, *quis custodiet ipsos custodes*—who is to guard the guards themselves?

5. The failure of the supervisory functions of high-ranking police officers is due to the influence exercised over the leadership of the police force by the political authorities. The Seventeenth Amendment to the Constitution of Sri Lanka, certified on 3 October 2001, has, among other things, created a National Police Commission. However for this Act to become effective it is necessary to appoint the Constitutional Council which was also promulgated by the same Act. The Constitutional Council, once appointed, will have powers to appoint the commissioners for the National Police Commission. Thus were it to proceed, the speedy appointment of the Constitutional Council followed by the National Police Commission could create an opening to address some of the more important problems impeding and obstructing independent criminal investigations in the country.

6. The other institution that has contributed to the practices of impunity prevailing in the country is the prosecution branch under the AG's Department. Several state-appointed commissions since 1946 have consistently recommended the establishment of an independent public prosecutor's office, however this recommendation has not been carried out—apart from a

short attempt in the early 1970s. The creation of an effective independent prosecutor's branch is an essential condition to ending the climate of impunity. The Vigil Lanka Movement—an association of lawyers in Sri Lanka—has held rightly that

> The practice that has got established over the years is that the prosecutor—officially the Attorney General—deals with prosecutions only and exercises no function relating to investigations. In practice, crimes which are not considered grave are also prosecuted by the police. In many jurisdictions, the situation has now changed, with representatives of prosecuting departments playing a greater role in advising on investigations into crime and preparing prosecutions at a much earlier stage before receipt of the completed files from the police. Adoption of a similar practice would improve the quality of criminal investigations in the country. Such advice from professional prosecutors can also go a long way to elimination of torture. Often, torture is taken as an unavoidable component in police investigations. This primitive method of investigation needs to be replaced with more sophisticated forms of investigation with better use of forensic facilities. In those circumstances, the intervention of professional prosecutors will also be helpful in instilling professional habits of proper investigation on police investigators.

7. The judiciary too has suffered setbacks in recent times. A November 2001 report by the International Bar Association arising from the visit of a delegation to Sri Lanka has accurately observed that the perception of a lack of independence of the judiciary was in danger of becoming widespread and that it was extremely harmful to respect for the rule of law by ordinary citizens. It was concerned that not only is there a perception that the judiciary is not independent, there may indeed be some basis in fact for the existence of such a viewpoint in relation to a minority of the judiciary. There were also serious concerns expressed about the discipline, retirement, appointment, transfer and promotion of judges under the auspices of the Judicial Services Commission (JSC). The delegation was not confident that the JSC is acting entirely without outside interference.

8. The Asian Legal Resource Centre is greatly concerned by the alarming degree of impunity prevailing in Sri Lanka. The Centre is aware of the tremendous frustration of the general public there caused by this situation. Without urgently required remedies, the enforcement of any rights will become increasingly difficult in Sri Lanka. The Centre therefore urges the Commission to apply all appropriate measures to the Government of Sri Lanka that it might make the appropriate reforms before conditions in the country deteriorate any further.

Implementing article 2 of the ICCPR to ensure effective remedies for human rights violations in Asia: Written statement to the UN Commission on Human Rights 58th Session, 2002

Asian Legal Resource Centre

1. Failure to ensure effective remedies for violations of human rights is itself a basic violation of rights guaranteed under the International Covenant on Civil and Political Rights (ICCPR). Most neglected in this Covenant is article 2. In fact no agency or mechanism has consistently monitored the implementation of article 2. Nor is there a specific item on the agenda of the Commission for its discussion.

2. The neglect of article 2 may be related to the differences between remedies available in countries called 'developed democracies' and those falling outside this category. In a developed democracy, once ratification of a convention takes place its implementation can be ensured through the existing mechanisms of law enforcement. However, this is not the case in countries where the law enforcement mechanism itself is defective.

3. Most law enforcement mechanisms in Asia impede the implementation of effective remedies under article 2 of the ICCPR. In many countries criminal investigation systems are so fundamentally flawed that there are constant public complaints and the absence of faith in these institutions, such as in Pakistan, Nepal, Bangladesh, Cambodia and Indonesia. Sri Lanka is an extreme example of a totally collapsed system. Malaysia and Singapore are examples of countries that deny remedies by operation of "internal security acts" In Myanmar criminal investigations and prosecutions are totally controlled by the military regime. Even India, which in the past had a developed law enforcement system, has suffered greatly due to the opera-

tion of various anti-terrorism and internal security laws.

> "Impunity can safeguard itself through defective mechanisms even when there are laws against it"

4. In ensuring effective remedies for violations of rights and thus the proper implementation of article 2, the prosecutor's function is very important. The absence of an independent prosecuting agency is a feature in several Asian countries. In China, Vietnam and Laos, despite many attempts to carry out legal reforms, the role of the independent prosecutor has not yet been recognized. In countries such as Pakistan, Nepal, Bangladesh, Cambodia and Sri Lanka, the independence of the prosecutor has been greatly undermined by higher political authorities. Concerning political issues, the prosecution systems in Malaysia and Singapore are also defective.

5. While there are many rhetorical condemnations of impunity, it is not often realised that without independent criminal investigation and prosecuting authorities it is not possible to overcome impunity. Impunity can safeguard itself through defective mechanisms even when there are laws against it. Typically what occurs is that after a violation takes place the criminal investigation authorities either do not pursue the matter at all, or do so unsatisfactorily. The prosecutor then claims that there is little or no evidence to act against the perpetrators. Even if under pressure the prosecutor takes the case to court, with insufficient evidence the perpetrators are released. In some instances the perpetrators then claim that their own human rights have been violated. Thus the absence of adequate criminal investigation and prosecution mechanisms creates a vicious circle in which the work of human rights organisations is defeated by the very legal mechanisms upon which they rely.

6. In recent times many Asian governments—under heavy pressure from the international community—have appointed governmental commissions or committees to look into violations of human rights. These are mostly bodies performing mere public relations exercises. Without addressing the basic defects of the criminal investigations and prosecutions mechanisms the work of these agencies does not produce any positive results in ensuring the implementation of article 2. Unfortunately the same observation is valid regarding most national human rights institutions in Asia.

7. Accordingly, the Asian Legal Resource Centre urges the international community to pay greater attention to problems relating to the implementation of article 2 of the ICCPR. It should facilitate studies and develop recommendations on this issue. Special financial and non-material support must be provided to countries to reform and develop their criminal investigation and prosecution mechanisms, to ensure proper implementation of article 2. The Asian Legal Resource Centre also urges all UN human rights mechanisms to pay special attention to article 2, particularly by ensuring proper criminal investigations and prosecutions. Those of particular relevance are the Special Rapporteur of the Commission on Human Rights on the question of torture, Special Rapporteur of the Commission on

Human Rights on extrajudicial, summary or arbitrary executions, the Working Group on Arbitrary Detention, the Working Group on Enforced or Involuntary Disappearances, the Special Representative of the Secretary-General on the situation of human rights defenders, the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers and the Special Rapporteur of the Commission on Human Rights on violence against women, its causes and consequences. This issue is also very relevant to all groups working on economic, social and cultural rights, and the Independent expert of the Commission on Human Rights on the right to development. Finally, we urge all civil society organisations, international human rights groups and bodies involved in the promotion and protection of human rights to take special note of issues relating to the implementation of the article 2. Without it, much of the work they do will produce little or no result in altering the patterns of human rights violations, particularly in countries not falling within the category of developed democracies.

Human rights defenders in Asia: Written statement to the UN Commission on Human Rights 58th Session, 2002

Asian Legal Resource Centre

1. The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms recognizes the obligation on the part of all people and organisations to be active in promoting and protecting human rights. In this submission the Asian Legal Resource Centre examines the performance of some states and civil society groups in Asia vis-à-vis the obligations under this Declaration.

2. Article 2 of the Declaration casts the primary responsibility and duty to protect, promote and implement all human rights and fundamental freedoms on the state. Sadly, during the last year developments in Asia have tended in the opposite direction. The spread of national security laws has eaten into the fabric of protection mechanisms for human rights in Asia and increasingly obstructed the enjoyment of fundamental freedoms. For example, Malaysia has extended the use of national security laws to restrict all expressions of dissent. Many persons have been detained without trial and some convicted by an unjust process that has denied them their basic rights. Internal security laws have also been tightened in India and Nepal under the pretext of controlling terrorism. Under national security laws, remand periods and monitoring of personal communications have increased, provisions for bail, legal assistance or appeal curtailed, trials held in secret, witness identities concealed, people related to or with tenuous links to suspects detained without charge, and capital punishment invoked without the accused proven guilty. These conditions have affected the implementation of all human rights and fundamental freedoms in Asian societies. The will of the society to seek expression of rights and expand freedoms is retarded—if not crushed—by these actions.

3. Article 3 of the Declaration speaks of a juridical framework within which human rights and fundamental freedoms should be implemented. However this framework in many Asian countries is so defective that immense reforms are needed to bring them up to the task. The juridical framework of Pakistan, for instance, suffered complete collapse with the military takeover; while it had many defects even before the takeover, afterwards the population came to perceive the judiciary as subordinate to the military. In Asia most police forces are seen as both not independent and also ineffective, while the military extends its influence into all aspects of society. In Indonesia for instance, despite the demise of the Soeharto dictatorship, the military grip on all areas of society remains intact. Asian law enforcement agencies lack an upstanding tradition, new institutions in the place of military ones, and resources. In Cambodia, eight years after the UN-sponsored election the judicial, prosecuting and police institutions do not constitute any kind of credible framework as required by the Declaration. In China, legal reforms are still at a very early stage, and the independence of the judiciary is recognized only in abstract. The judiciary has no powers to intervene in disputes between the state and individuals, and therefore individuals do not have adequate remedies as required by article 9 of the Declaration. The extent of the collapse of the judicial framework in Sri Lanka is evident in the total loss of confidence in the law by people there. The Sri Lankan Attorney General's department has proven unable to prosecute literally thousands of cases due to direct or indirect pressures, and a lack of resources and independent power. As for Myanmar, there is no juridical framework of any form that would meet the requirements of the Declaration. Thus violations of the rights of people by failure to comply with articles 2, 3 and 9 of the Declaration are quite noticeable in the region.

4. The Declaration casts obligations not only on states but also on individuals and groups. It is the duty of civil society organizations, educational institutes, groups promoting morality and others to be engaged in promoting a basic juridical framework within which the realization of rights is possible. Mere abstract promotion of human rights ideas—without trying to understand and promote such a juridical framework—remains one of the defects of such groups in the region, including those in the human rights movement. There must be a common effort to find ways towards an institutional framework for the realization of rights throughout Asia and the globe.

5. Until juridical frameworks of the sort referred to in the Declaration are thoroughly developed, it is necessary to develop measures to bring to draw attention to violations, even when it may not be possible to get protection from the authorities. Given the development of global communication systems it is possible develop various forms of intervention, such as urgent appeals and special task forces. The state must be encouraged to develop protective agencies and provide the means and facili-

ties to relevant groups by which they may exercise their protective functions. As experience in India shows, the judiciary can play an active role in independent initiatives towards urgent interventions. Civil society groups can also develop their own systems of quick communication and intervention. Experience demonstrates that people from all over the world can intervene within a short time when they are informed of violations of rights. Human rights education should also be developed to make it possible for more and more people to intervene and protect rights.

6. The Asian Legal Resource Centre welcomes the appointment of a Special Representative with a wide mandate to promote the objectives of this Declaration. The Special Representative needs the support of every state and the international community as a whole. In particular, the Special Representative needs the help of all civil society organizations. The Asian Legal Resource Centre urges the special representative to intervene on behalf of groups most exposed to violations, such as Dalits and all so-called low caste groups in India, South Asia and elsewhere. The Asian Legal Resource Centre also urges the Commissioner to allocate more resources for urgent interventions by the Special Representative.

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

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

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

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

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

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

In this issue of *article 2*

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ALRC invites submissions to ***article 2*** by interested persons and organisations concerned with implementation of human rights standards in the region.

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