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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;

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

# Contents

# Comments on 'Torture committed by the police in Sri Lanka'*

**Dr. Lyal S. Sunga, Faculty of Law, University of Hong Kong**

Almost every country, including Sri Lanka, recognizes that torture counts as one of the most pernicious violations of human dignity. Not only does the systematic and widespread use of torture traumatize the victim and his or her family, but it terrorizes the community as a whole and undermines the rule of law throughout the country.

Anyone concerned about human rights must welcome the release of the special report of the Asian Legal Resource Centre (ALRC) entitled 'Torture by the Police in Sri Lanka' as part of the Centre's *article 2* publication. The report details 22 recent case studies of torture perpetrated by the police in Sri Lanka, not in the context of the longstanding armed conflict that has raged there, but in the course of 'regular' business. Drawing on authoritative, publicly available sources, such as the reports of the Judicial Medical Officer, official Supreme Court applications, complaints, orders and judgements, and other judicial records and testimony, the ALRC report uncovers a shocking pattern of human rights abuse. Many of the cases involve severe abuse suffered at the hands of police, often in connection with petty or unwarranted accusations and property disputes, or seemingly without any reason at all. Once in detention, victims have suffered rape, severe beatings, and even murder. The pattern of abuse has come to the attention also of the British Broadcasting Corporation (Sinhala Service), the Geneva-based World Organization against Torture (OMCT), Amnesty International and Human Rights Watch, among many other groups.

* These comments were received in response to the special report, 'Torture committed by the police in Sri Lanka', published in *article 2*, vol. 1, no. 4, August 2002.

Various organs of the United Nations Commission on Human Rights have also looked into the human rights situation in Sri Lanka, but mainly as regards the armed conflict (*see* Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr Bacre Waly Ndiaye submitted pursuant to Commission on Human Rights resolution 1997/61; UN Commission on Human Rights (E/CN.4/1998/68/Add.2 of 12 March 1998) and also E/CN.4/1998/38/Add.1; the Report of the Special Rapporteur on the independence of judges and lawyers, Mr Param Cumaraswamy, submitted in accordance with Commission resolution 1999/31 (E/CN.4/2000/61/Add.2 of 24 March 2000); the Report submitted by Ms Hina Jilani, Special Representative of the Secretary-General on human rights defenders, pursuant to the Commission on Human Rights resolution 2000/61 (E/CN.4/2002/106 of 27 February 2002); the Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2000/49 (E/CN.4/2002/83/Add.1 of 28 January 2002); the Report of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/2000/64 of 21 December 1999); and the Report of the Working Group on Enforced or Involuntary Disappearances on the visit to Sri Lanka by a member of the Working Group on Enforced or Involuntary Disappearances (25-29 October 1999) (E/CN.4/2000/64/Add.1 21 December 1999).

Now that peace seems to be at hand in Sri Lanka, the government must seize the opportunity to re-establish human rights and the rule of law, not only in former conflict zones, but throughout the country. The immediate challenge for the government is to show its seriousness actually to implement the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22, it adopted in 1994, and to compensate victims for the immense suffering they have endured.

Perhaps most important, the ALRC report makes well-thought out and constructive recommendations to the government to eradicate torture in Sri Lanka in a feasible and sustained way. Now it is up to the government and all other responsible bodies and organs to seriously tackle the problem

**Professor Michael C. Davis,**
**Chinese University of Hong Kong**

This report ['Torture committed by the police in Sri Lanka'] is of great significance in the effort to close the gap between international commitments and action. Publicity is often the only instrument available to close this gap. But too often these kind of abuses are ignored when countries are off the front page of the international media. In this case we are talking not only about a gap between international standards and local practice but also a gap between local laws and local enforcement. This is

"This report is of great significance in the effort to close the gap between international commitments and action"

precisely the kind of problem that Article 2 aims to address. In the absence of local and international enforcement, attention to this report is vital to progress in this important area.

"The culture of impunity which has allowed most perpetrators of torture to escape prosection is a serious threat to the rule of law in Sri Lanka"

**Asia Forum for Human Rights and Development (Forum Asia), Bangkok**

In response to the report on torture in Sri Lanka issued by the Asian Legal Resource Centre (ALRC), a sister organisation of the Asian Human Rights Commission (AHRC), the Asian Forum for Human Rights and Development (Forum-Asia) calls on the Sri Lankan government to take action to stop the widespread use of torture by law enforcement agencies in Sri Lanka.

The ALRC report, launched today, details case studies of torture committed by police during routine criminal investigations. Cases include:

- A pregnant woman who lost her child after being kicked repeatedly in the abdomen by police officers seeking to arrest her husband, who was not home.
- The case, which has received extensive media coverage, of a 10-year old and a 12-year-old who were tortured by police investigating a theft from a school canteen. The boys were hung upside-down and beaten on the soles of their feet, had sharp objects inserted under their fingernails, were beaten with clubs, had their hair pulled with pliers, and one had his testicles slammed in a drawer. The boys were admitted to hospital for several weeks and are still suffering from the psychological and physical effects of the torture.
- A man who was mistakenly arrested, without a warrant, in relation to a homicide case was blindfolded with his hands tied behind his back, hung from a beam and beaten with an iron bar for one hour before being laid on the floor and burnt with matches. The man remains in a critical condition in intensive care.

Forum-Asia welcomes the resumption of peace-talks between the Sri Lankan Government and the Liberation Tigers of Tamil Eelam (LTTE) and congratulates both sides on the success of recent talks held in Sattahip, Thailand. However, it notes that all cases of torture documented in the ALRC report are from police stations in non-conflict zones, indicating that the problem is independent of the internal armed conflict situation.

[With regards to the report,] Somchai Homlaor, Forum-Asia Secretary-General said, "The obvious disrespect for normal legal procedure on behalf of the police force and the culture of impunity which has allowed most perpetrators of torture to escape prosection is a serious threat to the rule of law in Sri Lanka."

In 1994 Sri Lanka made torture by a state officer a serious offence punishable by not less than a seven-year jail sentence. However, to date, no-one has been charged under this legislation.

Forum-Asia urges the Sri Lankan government not to allow human rights violations such as torture to go unpunished, and to implement serious reforms of the police force and Attorney General's Department in order to address the endemic and systemic use of torture by police in Sri Lanka.

### World Organisation Against Torture, Geneva

The International Secretariat of the World Organisation Against Torture (OMCT), the world's largest coalition of non-governmental organisations collaborating in the fight against torture, has the pleasure of announcing the release of a special report by the Asian Legal Resource Centre (ALRC), entitled 'Torture committed by the police in Sri Lanka'.

OMCT is gravely concerned by the practice of torture in Sri Lanka, which OMCT considers to be systematic as defined by the UN Committee Against Torture, and it is accompanied by near-total impunity for the perpetrators, despite the fact that Sri Lanka is a State Party to the United Nations Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, and has legislation at the national level designed, in theory, to make the act of torture illegal and punishable. OMCT also decries the lack of an effective and implemented mechanism that is able to ensure that adequate reparation is given to the victims and their families.

OMCT recalls that under Article 2.1 of the Convention Against Torture, "each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".

OMCT has denounced a number of cases of torture in Sri Lanka during 2002, with the information provided by ALRC's sister-organisation, the Asian Human Rights Commission, a member of OMCT's SOS-Torture network, and therefore welcomes and supports the release of this special report, containing as it does, both detailed case studies and important, highly relevant and far-reaching recommendations to a range of institutions and groups, which pave the way for much needed change to this very grave situation.

"This special report contains both detailed case studies and important, highly relevant and far-reaching recommendations"

# National security legislation and its adverse consequences: A submission on 'Proposals to implement Article 23 of the Basic Law'*

Asian Human Rights Commission

As a regional human rights non-government organization based in Hong Kong, the Asian Human Rights Commission (AHRC) has observed the adverse effects of national security legislation in many parts of Asia. AHRC is thus deeply concerned that the proposals contained in the Hong Kong government's consultation paper entitled 'Proposals to implement Article 23 of the Basic Law' (Consultation Document, Security Bureau, September 2002) will unnecessarily threaten the freedoms of Hong Kong's people. The foreseeable outcomes of these proposals include serious damage to the rule of law in Hong Kong, loss of public confidence, increased corruption and a concomitant decline in economic conditions.

Though the declared intention of the consultation document is to improve the stability of Hong Kong SAR, the paper has in fact already caused much uncertainty that may have a very harmful impact on the society. The primary fear is that this paper may be a forerunner to some dangerous repressive measures. Numerous statements that have been published by responsible organizations such as the Bar Association of Hong Kong, persons from universities, from the churches and from many social organizations, all expressing considerable misgivings about the unfamiliar future that may be awaiting Hong Kong.

Hong Kong has continued to experience a sense of optimism and certainty since becoming a Special Administrative Region (SAR) of the People's Republic of China (PRC) on 1 July 1997.

* In September 2002, the Security Bureau of the Hong Kong Special Administrative Region released a consultation document entitled 'Proposals to implement Article 23 of the Basic Law'. The document proposes that new national security style legislation be enacted in the territory. The above submission was written in response to that document by the Asian Human Rights Commission, which has its headquarters in Hong Kong.

There are currently no foreseeable threats to national security stemming from Hong Kong. Indeed, "one country, two systems" has been hailed as a success by many local and international observers, as well as the Hong Kong government itself. It is unfortunate, then, that this general mood has now been disturbed such that every group fears that its sphere of activity will be adversely affected by the proposal to introduce new security laws, without there being any internal reason to do so. Because of these proposals, the anxiety local people felt prior to the transfer of Hong Kong's sovereignty in July 1997 is again manifest. The fear is that by way of interpretation all areas of activity brought under security laws, even religious affiliations, may become a problem. Labour disputes, trade union protests, legitimate political activities, publications and human rights programmes may also fall under its aegis. The fear also stems from the perception that these proposed legislative changes may usher a new era of repression into Hong Kong akin to other parts of Asia.

"The definition of 'national security' in Hong Kong would be determined in Beijing"

Since the consultation document was released in late September, government officials have tried to reassure the community that the proposed changes would not be misused. However, oral guarantees do not possess the weight of law, and no amount of assurances by well-meaning state officers and senior bureaucrats will appease such concerns, as there is no guarantee that new persons holding positions of authority will not change their minds. Thus, the immediate consequences of this proposal have not been good for Hong Kong. Some may say that the fears are exaggerated, however, the very nature of fear is that once unleashed it cannot be controlled.

The anxiety spreading among the many respected groups expressing concerns over the Article 23 proposals stems from a number of aspects. First, the content of the consultation document seems to have been ill-defined, causing confusion and uncertainty. Key offences of treason, secession, sedition and subversion are referred to with an ambiguity that would allow the government to use the law as a legal weapon to deny, rather than protect, people's rights.

Second, the intention to proscribe any organisation in the community that has been banned on national security grounds by the central government thereby absolves the government of Hong Kong SAR from having either any responsibility or authority over such matters. Under this particular proposal, the definition of "national security" in Hong Kong would be determined in Beijing, and local organisations would become unlawful without any oversight and protection by the courts in Hong Kong, thereby eroding the "two systems" model.

Third, there is much uncertainty surrounding the expansion of police power given to enter premises to conduct a search and seize materials merely for investigative purposes, without any warrant issued by a court. The oversight function of the judiciary in granting warrants must be preserved if the rule of law is not

to be diluted or threatened. This section of the consultation document clearly grants too much discretionary power to the police, regardless of the rank of the officer.

"In all countries of Asia where laws similar to the new proposals under Article 23 have been adopted, the rule of law has suffered severely"

Fourth, the proposal to widen the provisions on unlawful disclosure of information may inhibit freedom of information and the press, for what is deemed a "state secret" may in reality merely be a remark or decision that is politically embarrassing. While the consultation paper outlines the types of information that should not be unlawfully disclosed, it does not indicate who will make the important decision about what specific information is a state secret. Journalists and other local and international observers have already noted a trend towards self-censorship in the Hong Kong media since 1997. The provisions of this consultation document, if enacted into legislation, will only further contribute to the decline of press freedom in the territory.

Fifth, problems also exist regarding the possible targets of the proposed legislation. In particular, members of Hong Kong's diverse expatriate communities could be at risk of committing one of these crimes, especially if their country were at war with the PRC. The growth of a perception among the international community in Hong Kong that its members are exposed to personal risk under the proposed amendments may have an adverse effect on the atmosphere in Hong Kong, and particularly among foreign investors.

In all countries of Asia where laws similar to the new proposals under Article 23 have been adopted, the rule of law has suffered severely. Indonesia's long years of national security laws, for instance, have led to a society where it is now very difficult to re-root basic institutions for justice. Similarly, in more affluent Malaysia, basic freedoms and the independence of the judiciary are also in peril due to such legislation. And special mention must be made of Singapore. Unlike Hong Kong, the development model of Singapore was premised on the sacrifice of rights and freedoms. Hong Kong was able to achieve equal or greater economic development while at the same time preserving its open society with basic freedoms. It would be a tragedy to needlessly sacrifice this advantage.

The experiences of these neighbouring countries stand in contrast to those western states that have already passed similar legislation apparently without major adverse consequences mentioned in the proposal document to support its case. Those jurisdictions have deep-rooted democratic traditions with a well-defined separation of powers and a system of checks and balances. Hong Kong, on the other hand, does not have a fully functioning democratic legislature; and the PRC much less so. Regional comparisons, then, are likely to be much more revealing than those from further abroad.

Observing the experiences of other Asian jurisdictions, the expansion of discretionary power to the police, especially lower ranking officers, often leads to an abuse of this power, resulting

in a greater number of human rights abuses and more corruption. To believe that strict rules relating to arrest without warrants, detention and judicial supervision can be changed without causing abuse of power and an increase of corruption both within and outside the police force is a delusion that other societies have paid a heavy price for holding.

One of the greatest achievements of Hong Kong SAR has been its Independent Commission against Corruption (ICAC). A central tenet of this institution is recognition that the police must be controlled from outside. Since 1974 Hong Kong has clearly demonstrated that there is an explicit relationship between elimination of corruption in the police and in other sectors of society. However, the fear is that if the proposals are enacted the police may have the power to act outside of ICAC surveillance, even if there are serious complaints. This would greatly undermine the authority of the ICAC. The confidence of both investors and the general public in the economic management of Hong Kong is also closely related to the mechanisms for accountability and transparency put in place by the government. If the prevailing system is tampered with, in the present circumstances of economic downturn potential investors may well go elsewhere.

The 'Proposals to implement Article 23 of the Basic Law' appear to constitute a threat to the freedoms that Hong Kong has enjoyed prior to and since the transfer of its sovereignty to the PRC. They seem intended to inhibit the participation of Hong Kong people in decision-making and debate relating to their society, to the advantage of the authorities. In reality, however, both the entire community of Hong Kong SAR and its government will be losers. While the proposals ought not to proceed at all, if they are destined to do so nonetheless, then it is vital that a white bill be introduced before the final legislation is presented, to permit detailed community dialogue. Under any circumstances, the setting of arbitrary deadlines for completion of the legislative changes is inappropriate. Hong Kong SAR, as noted earlier, has functioned well for the past five years without this legislation, and faces no imminent threat that demands it. The introduction of a specific deadline may result in an undue element of hurry and an air of inevitability to the whole procedure that would harm the social morale in Hong Kong, already sufficiently damaged by the government's treatment of these proposals to date. The Hong Kong SAR government would do well to reconsider its approach in this instance, and restore public confidence through an open and sensible consultation process that may, if necessary, ultimately contribute to national security without trampling on the human rights of its citizens.

"Both the entire community of Hong Kong SAR and its government will be losers"

# Pakistan criminal law needs amendments: A proposal

Ijaz Ahmad, Judicial Magistrate, Pakistan

Over the 55 years since its establishment, the Government of Pakistan has been practicing laws and procedures it adopted from the British colonial regime. Minor changes have been made from time to time, but the skeleton of rules remains the same. These laws do not provide the common citizens with adequate security to defend them from the wrath of law enforcers, who, while in principle are there to protect citizens against social evils, in practice are those most likely to deny the common person their basic right to security. The problem stems from the police understanding of the law through practices intended to bend and disregard it as much as possible, whereas the courts still follow the outdated rules and procedures acquired from Britain. Each passing day brings us news about the callous, irresponsible and ugly doings of the police department, to the extent that even the average citizen strolling along the road can't avoid an encounter.

I am a Judicial Magistrate with a background in journalism. It is this combination of roles that compels me to research the draconian provisions that have changed the "protectors of the nation" into figures of fear and hate and despots. My research is a small attempt to figure out the problem, make proposals for the required institutions to take proper actions, and introduce the necessary reforms.

My conclusion is that police reform is not enough. Many attempts at reform have been made, but the problem is that the provisions of the procedural law—the prehistoric Criminal Procedure Code (CrPC) of 1898—remain the same, and are not adaptable to an ostensibly free nation like ours. Lawyers and human rights activists make a hue and cry when an ordinary citizen is tortured, humiliated or killed in police custody, but they pay no heed to this law that has allowed the police to restrict freedoms. Instead, the CrPC needs to be reformed so that no policeman dares to torture or detain innocent people illegally. This can only be done if a legally defined body consisting of human

right activists, jurists from abroad and the law commission together overhaul the CrPC. Accordingly, some suggestions follow for the sections in most urgent need of reform by such a body.

> "The legislature has given a free hand to the police to summarily kill the accused if wanted under an offence punishable with death or a life term"

- Section 46 (2) reads:

  If a person forcibly resists endeavor to arrest, the police may use all necessary means to effect the arrest.

The power of the police has under this section has been restricted under subsection (3) which reads:

> The police have no right to cause the death of a person who is not accused of an offence punishable with death or imprisonment for life.

Through this provision the legislature has given a free hand to the police to summarily kill the accused if wanted under an offence punishable with death or a life term. Put bluntly, the section deems resistance to arrest under these circumstances punishable with the death of a person who is yet to be tried by a competent court. There have been reports of many fake encounters in which innocent people have been shot and killed under section 46(3). These could be stopped if we simply replace the last portion of the subsection with a certain insertion, for instance, *"Nothing in this section gives right to cause the death of the accused except a proclaimed offender in cases punishable with death or a life sentence"* (rest wants deletion).

The CrPC has also not yet defined the word "accused". This omission seems to be deliberate, because it permits widespread application of the Act. The British omitted the term to perpetuate their ruthless rule, quell any insurgency and terrify innocent people. To that end, sections 54 & 55 extend the police powers over persons who are still to be declared as accused, by permitting arrest without warrant.

- Section 54 reads (and continued below):

  Any police officer may without a warrant or order arrest any person;

  Firstly; who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned.

Under this sub clause, two types of persons can be arrested without a warrant: those concerned in any cognizable offence and those against whom a reasonable complaint, credible information, or reasonable suspicion exists. It is necessary for the legislature to define or restrict these terms, otherwise the police can detain and interrogate any person on a whim; as a consequence, innocent people are arrested for crimes such as robbery, theft, dacoity or homicide and released after they pay bribes.

Instead, what ought to occur is that power be given to the courts to investigate a complaint, information or suspicion and then issue a warrant for the arrest of the alleged perpetrator as adjudged in a summary proceeding. The problem is that this

appears to be a lengthy process and the police would argue that many of the accused would escape in the interim. A simple procedure could solve this problem. If a person against whom such suspicion exists were to be immediately brought before the court or—if the court is out of session—before the magistrate on duty, they could be released on submission of bail bonds (not under section 497 but under a new section) pending further information. After further information was received, the person might be designated as accused and arrested. This procedure would save many from being fleeced by the police.

"I am at a loss to say as to how and under what authority the provincial government can exercise the right of a court"

- Secondly; in possession without any lawful excuse any implement of house- breaking.

For the second sub clause too the aforementioned procedure could be adopted and the person tried in summary proceedings, which should end only in the confiscation of the housebreaking instrument in favour of the state. Mere possession of an instrument of some kind should not amount to an offence if no unlawful act or attempt has been committed. There is no special law relating to housebreaking instruments like the Arms Ordinance, under which the possessor of a weapon can be tried.

- Thirdly; who has been declared as a proclaimed offender under this code or by the provincial government.

Under the third sub clause the provincial government has been given the power to declare a person a proclaimed offender. I am at a loss to say as to how and under what authority the provincial government can exercise the right of a court when there are ordinary and special courts to deal with the law of the land. Whenever there is a law there is a court to deal with it and without any corresponding penal provisions how can the provincial government exercise this right? Any illegal order stands nowhere in the eyes of law and any arrest made by the police under such a provision would be illegal. That is why this portion requires deletion and replacement with suitable words like, *"Any person who has been proclaimed as an offender under this code [CrPC] or by any other court established under any other law."*

- Fourthly; in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such a thing.

Under the fourth sub clause the police have been given the power to arrest a person if they have suspicion that the thing possessed is stolen property or that the person has committed an offence in reference to that thing. I would say that only a suspicion should not lead to the arrest of the person because there are people who are habitually pessimists and doubt everything. I would also question the mental calibre of the average police officer standing on the roadside. Have they been trained in a manner to improve their mental calibre? Of course not: they have been trained as if the whole society is a mess and

they have to correct it. Again I would suggest that the only way to resolve this problem is to introduce the procedure mentioned in the first instance. I would also ask whether any corresponding right for action against the police is available to an ordinary person once it is established that the police suspicion which led to their arrest was unfounded.

"When someone is tried for an offence committed in a third country, no law in Pakistan can punish that person if they have already been tried"

- Fifthly; who obstructs police while in execution of his duty.

(No comments.)

- Sixthly; suspected to be a deserter from the armed forces of Pakistan.

(No comments.)

- Seventhly; who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned in any act committed at any place out of Pakistan which, if committed in Pakistan, would have been punishable as an offence and for which he is, under any law relating to extradition or otherwise, liable to be apprehended or detained in custody in Pakistan.

I would question the rationale behind the seventh sub clause, because the criminal law has been enacted to establish law and order within the bounds of Pakistan. Logically, it should have nothing to do with acts committed outside. When someone is tried for an offence committed in a third country, no law in Pakistan can punish that person if they have already been tried and convicted or acquitted. The aforesaid rules bypass the constitutional protection against double jeopardy.

Some suggest that this sub clause, coupled with section188 of the CrPC and section 3 of the Pakistan Penal Code (PPC), is intended to restrain Pakistanis abroad from committing crimes that would defame Pakistan as a whole. If that be the case then I would suggest that a certain amendment be made to this provision, such that it read, *"Any person committing any act which is a crime both under the PPC and the law of the land in which the act has been committed can be arrested, except those who have been tried, convicted or acquitted by a court of that state."*

- Eighthly; any released convict committing a breach of any rule made under Section 565 (3).

The eighth sub clause is to be read with section 565, which states that the court may make an order regarding an accused who has been convicted twice under section 215 or 489 A, B, C, D, or under Chapter XII or XVII, for more than 3 years such that the residence of the person be notified for a term not exceeding five years. Subsection 3 empowers the provincial government to make rules to carry out this section, giving it the capacity to fix any term it so pleases for the defaulter who has changed residence without permission.

"Although 50 years have passed since our independence, we still must live by the same rules"

Persons arrested under section 54 cause technical problems in the procedure and for the magistrates. Suppose a person who is arrested under this section, when the police are acting under an enquiry within section156 (3) of the CrPC, is brought before the magistrate and is released forthwith by the presiding officer and ordered to submit bail bonds. Under what section of the CrPC is that person released? The order may be made under section 497 or discharged under section 63 of the CrPC. In both the cases, after registration of the First Information Report the person cannot be arrested again without a warrant, or summoned through a court. But in reality, police do re-arrest suspects under these circumstances, suggesting that there is in fact an urgent need for the introduction of clear provisions relating to the procedure to be adopted by the courts to deal with the persons arrested under section 54.

- Section 55; Arrest of vagabonds, habitual robbers, etc.

Any police officer in charge of a police station may in the like manner arrest or cause to be arrested;

a. any person found taking precautions to conceal his presence within the limits of such station ,under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence;

b. any person within the limits of such station who has no reasonable means of subsistence, or who cannot give a satisfactory account of himself;

c. any person who is by repute an habitual robber, house-breaker or thief, or an habitual receiver of stolen property knowing it to be stolen, or who by repute habitually puts or attempts to put persons in fear of injury.

This section refers in its marginal notes and heading to "vagabonds and habitual robbers, etc". There is a difference of opinion among jurists on its importance. To some the headings and marginal notes are not part of the section while to some although they should not be held to govern the text of the section, they can be taken as an indication of what the legislature intended. In this instance, it is only in the third clause that the meaning is narrowed to not be inclusive of all persons, as is the case in the first and second clauses. Both these provisions may have suited the British but in modern Pakistan they are in violation of the constitutional right to free moment and the privacy law relating to one's income.

Furthermore in sub section (a), the reference to "precautions to conceal" has not been clarified, because under the current interpretation remaining inside one's house is sufficient to raise the suspicion of a police officer that one is concealing oneself with a view to committing a cognizable offence. This is reminiscent of the pre-partition days in which the Station House Officer [senior-most officer in a police station] had the right to line up all the villagers in the morning and then have them work for him. Although 50 years have passed since our independence, we still must live by the same rules. Under this

clause even today the police can compel a person to come out of the house to make sure that they are not concealing themselves. If the person refuses to come out, it is sufficient for the police to hold that they are concealing themselves for the purpose of committing a cognizable offence.

> "To continue to accept the law as it stands, supporting tyranny, is sheer foolishness"

Under sub section (b), the police can arrest jobless people and investigate how they are living. To avoid unnecessary arrest, a jobless person has to visit a police station everyday to prove that they have worked and earned money sufficient for daily subsistence. Even then, the person can be searched. Likewise, to avoid arrest, a newcomer to an area has to go to the local police station to get a certificate for living or visiting there.

Persons who default under subsection (a) or (b) are bound by the CrPC to execute bonds for their good behavior. If such a person has no contact to give as surety then they are liable to languish in jail.

- Section 61: Person arrested not be detained more than 24 hours.

No police officer shall detain in custody a person arrested without a warrant for a longer period than under all circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a magistrate under Section 167, exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

This provision imposes a bar on detention beyond 24 hours. Our police have interpreted it to mean that they have the power to keep a person in the lockup for 24 hours without any obligation. If a person is arrested in the morning they are not forwarded to a magistrate the same day but are kept in the lockup for the night. The reference to the 24-hour timeframe should be replaced with words to the effect of *immediately* or *as soon as possible*. Arrests made during hours the courts are not in session should be dealt with the magistrates on duty, who are meant to be available around the clock.

- Section 62: Police to report apprehensions.

Officers in charge of police stations shall report to the Sessions Judge, or, if he so directs, to the Judicial Magistrate, the cases of all the persons arrested without warrant within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

This section is hardly obeyed. To ensure compliance, there should be an insertion in the section to permit that action be taken against any defaulting officer.

These are some of the sections of the CrPC that require the serious attention of human rights activists, lawyers and the outside world. It is our misfortune that none of them have either been noticed or have not been addressed, due to the vested interests that protect the current arrangements. If the present apathy towards the existing situation persists, it will worsen considerably. If, however, we start now, our children may grow to live in a society where justice, democracy and respect for our fellow humans prevail. To continue to accept the law as it stands,

supporting tyranny, is sheer foolishness. Now is the right time for the relevant institutions to look into the matter. They have to put aside their differences and particular agendas, and collectively force the government to bring the criminal law into line with international standards, with a view to improving the human rights situation in Pakistan. Finally, I would invite suggestions and assistance from all concerned readers of this article. I believe that "parts make a whole" and social integration is what we need to create a practical, secure, integrated and democratic Pakistan.

## A comment on 'Pakistan criminal law needs amendments'

Ali Saleem, former officer, Punjab Police, Pakistan

In principle, I agree with the remarks by Mr Ijaz Ahmad, but would question as to whether or not such amendments to the Criminal Procedure Code (CrPC) as raised in his article would really effect any change, given the problems faced by institutions involved in the administration of justice in Pakistan. Amid deeply rooted corruption, undefined institutional boundaries, the militarization of civil administration, and the culture of impunity that is a product of social and political circumstances past and present, how can any legal framework function properly in Pakistan?

There is no doubt that police powers must be limited and the police force be developed into an institution based on the principles of both the domestic law and also universal human rights. But the police force also needs institutional independence. Should powers of investigation be given to the judiciary (with due respect to the judiciary) what would be the checks and balances for effective functioning of the new system?

Above all, the law will only be effective if sufficient willingness exists to implement its arrangements with a positive frame of mind at all levels. I would suggest that to start with, Pakistanis must promote respect for the national constitution, as it has been played around with ever since being created. It is this lack of respect for the most fundamental national law that has seriously damaged both the national identity and respect for civil norms in Pakistani society.

### Ijaz Ahmad replies:

After going through Mr Ali Saleem's comment, one gets the impression that he wants to maintain the status quo. These "ifs" and "buts" are what we Asians raise whenever someone comes up with a good idea. By and large we are reticent about change. It is only after change has occurred that we come to know of its practicality and shortcomings. Only after the CrPC is reformed will we come to know if the amendments have improved

the human rights situation or not. So far as I am concerned, such reforms would definitely minimise police excesses and provide the ordinary citizen a chance to get justice. But to suppose that simply amending criminal procedure would root out all the ills of the society is an error. To root out corruption we need a complete overhaul of our institutions, which cannot be done overnight. It will be a long and drawn out affair.

I think that Mr Saleem has not properly understood the essence of the article. I am of the opinion that the magistrate is part and parcel of the investigation. If it were otherwise then the CrPC would have never conferred on the magistrate powers to grant custody. Likewise, a confession before the magistrate is admissible in the law because he is part of the investigation. Statements that are recorded under section 164 before the magistrate are also admissible. My suggestion is simply that the court be given powers to evaluate police apprehension or suspicion. This does not mean a complete transfer of investigative power to the magistrates. It simply means that the police will have to work hard to investigate properly and honestly so that the court may not overrule their apprehension or suspicion.

Finally, if Mr Saleem has any idea as to how Pakistanis could be taught to respect the constitution and to rectify the entire society then I am sure that we all would be happy to receive such suggestions from him.

The *article 2* website now contains a 'Talking Point' for exchange of ideas arising out of published content, where this dialogue will be continued. Readers are invited to visit the homepage, then click on the 'Talking Point' link to read more on this and other topics pertaining to material in *article 2*, as well as register their own contributions. The 'Talking Point' will be monitored for inappropriate matter.

# Memoirs of a forensic medical practice*

Professor Niriellage Chandrasiri, President,
College of Forensic Pathologists of Sri Lanka

Memoirs can be a collection of pleasant and unpleasant reminiscences over a period of time arising from personal experience. Life without pleasant and unpleasant experiences is not worth the while. What is important is that we should learn about human nature and the subject we profess to know from these experiences and shape our lives, and enhance our knowledge and skills in relation to our work, to live as happily as possible till we die. I will therefore speak of some of my personal experiences as well to highlight human nature and some of the difficulties of my chosen profession.

These comments are made without an iota of anger, vengeance, rancor and disrespect, but rather to highlight the weaknesses in the present medico-legal services in Sri Lanka. It is my belief that these comments will be taken in the intended spirit and those affected will reflect on the issues addressed.

## Beginning a career in forensic medicine

I commenced my full time judicial medical career in 1970, as a lecturer in forensic medicine at the University of Peradeniya, under the tutelage of former professor Harischandra Ranasinghe, who later migrated to United Kingdom and became a Home Office Pathologist to Newcastle area. I moved to Galle in 1981. Since then I have been fortunate to practice clinical forensic medicine and forensic pathology in Sri Lanka and forensic pathology intermittently in the UK, USA, Singapore, Cyprus, Bosnia and East Timor.

Early in my career I had to conduct autopsies on makeshift tables. A significant feature of section 370 of the Criminal Procedure Code is that it neglects to stipulate the minimum

* This text consists of extracts from the inaugural lecture given by Professor Niriellage Chandrasiri as new president of the College of Forensic Pathologists of Sri Lanka, 5 October 2002. The concluding paragraph in particular has been taken from a different part of the original speech.

conditions in which autopsies are to be conducted. This resulted in situations where the investigating police would hurriedly construct temporary autopsy tables with coconut or bamboo rafters. Often only a single bucket with a little water was supplied! Obviously this must have been the standard practice, because the doctor never did the autopsy examination, but was a passive onlooker. I must say that things have changed now, and only a stupid doctor would allow an untrained and unskilled labourer to do the autopsy examination.

> "The experienced Judicial Medical Officer is an anathema to both state and defence counsels"

### The place of the Judicial Medical Officer in Sri Lankan society

Most common folk look upon Judicial Medical Officers as glorified cutters of dead bodies, "*menee kapana dosthara*", while a few more educated people look upon them as Sherlock Holmes-style characters. In fact they do not belong to either category.

The public is unaware of the role played by the Judicial Medical Officers. Some members of the public even consider them to be lapdogs of the police and the state counsel. There are many reasons that people have been misguided. One reason is the poor attitude of fellow specialists in the medical profession. A Judicial Medical Officer sometimes has to give evidence against a practicing colleague, and this has lead to antipathy towards them. This attitude is unfair when it is realized that a lawsuit against a careless and errant doctor is the only safety mechanism available for the patients. The other main reason for misunderstanding is that up to recent times the judicial medical services—except in the metropolitan areas—have been managed by untrained doctors rendering a poor quality service.

### The shabby treatment of forensic officers by the courts

The surgeons who have treated patients are often reluctant to give evidence in civil trials, because they don't want to face stiff cross-examination and undergo humiliation in court. It is in these instances that the respondent has to obtain the services of a forensic expert. The experienced Judicial Medical Officer is an anathema to both state and defence counsels. One or two state counsels have made disparaging remarks to me when I did not agree with them.

Oftentimes defence lawyers, and even the prosecution lawyers, object when the forensic medical expert gives an opinion in compensation cases. Clinical forensic medicine is a distinct entity and includes examination of persons who are hurt from various agents, subjected to sexual assaults and produced by police and courts to the forensic expert. Their objections are on the grounds that the forensic expert has not treated the person concerned. The unfortunate part is that some judges are quick to accept this line of thinking. This is a frivolous objection, because the forensic expert is fully entitled to express opinions on the nature of temporary and permanent injuries sustained.

> "It is also ironic that a forensic medical person is considered both an expert and darling of the prosecuting and defence counsels whenever it suits them"

It is also ironic that a forensic medical person is considered an expert and darling of both the prosecuting and defence counsels whenever it suits them, but at the same time is requested to leave the courtroom when lay witnesses give evidence in court. Judges too hastily uphold this request, humiliating the medical expert. In my career only one trial judge had the courage to say that medical experts are entitled to stay in the courtroom at all times, which is the practice in the UK, from where we have imported our legal system.

No one seems to bother about the loss of time incurred by a forensic expert appearing in court. The judges and lawyers must realize that most forensic experts have other responsibilities to their paymasters. Those in the universities have to publish research papers or perish. The District Medical Officer may have had to cancel clinics and even come to court when there is a patient requiring close attention. Cases are postponed without a whimper when senior and well-known lawyers make requests, but some judges are swift in issuing bench warrants to young forensic experts who fail to appear in courts for genuine reasons like non-receipt of summons or police messages. Sometimes I have wondered whether I have been made the accused. I am sure some of my colleagues will have faced such embarrassing situations.

These are instances that call for dialogue between the Chief Justice, council of the Bar Association and the College of Forensic Pathologists of Sri Lanka, to arrive at a consensus on where medical experts should be offered minimum courtesy.

### Role of the Inquirer into Sudden Deaths in Sri Lanka

Sri Lanka has a unique officer called an Inquirer into Sudden Deaths, appointed by the Minister of Justice to conduct inquests according to the provisions of the Criminal Procedure Act and the Judicature Act. The inquirer is the only layman appointed to a quasi-judicial post in Sri Lanka without a law degree or without being registered as a lawyer in the law college. According to sections 370, 371 and 373 of the same Criminal Procedure Act, magistrates and inquirers are only expected to ascertain the identity of a dead person, and to ascertain whether their death was due to accident, suicide, homicide or natural causes.

There is nothing binding on the inquirers to ascertain the true cause of death of a person by getting an autopsy examination done from a government medical officer. Both magistrates and inquirers too often depend on the statements of witnesses to arrive at a final verdict. In fact, many inquirers avoid getting autopsies done by a medical officer. The reasons for their reluctance include a willingness to yield to pressure from relatives, politicians and others, and a few other reasons only too well known to the inquirers themselves. Avoiding autopsies and giving verdicts that indicate death by natural causes has led to failure in detection of secret homicides. The second post-

mortem examinations done after several days or months of delay often make detection of true cause of death difficult even for a highly experienced forensic pathologist.

Inquirers in the provinces have the habit of finding fault with a person or persons apparently associated with the death of another person on the basis of the evidence submitted at the inquest. In my opinion this is highly irregular, because the inquirer has no powers of a judge conducting a trial, and yet often these proclamations appear in the national newspapers.

"The police department should train police officers on how they should behave and assist the Judicial Medical Officer at the scene of a homicide"

### Forensic pathologists and the scene of a crime

The next issue I would like to stress is the extremely poor quality of scene examination in secret and open homicides in Sri Lanka. Too often we see uniformed police officers, magistrates and clerical staff in their civil clothes—none wearing gowns, masks and gloves—gazing at dead bodies in front of massive crowds. More often, bodies are covered with dried thatched coconut palm leaves, an act that is insulting to the dead. Matters are made worse when these scenes are videotaped and shown on television. The police department should train police officers on how they should behave and assist the Judicial Medical Officer at the scene of a homicide. Each headquarters police station should have a still-photography and video unit, and the local police should be able to obtain their services quite easily.

After receiving information that a homicide has occurred, at present the police should inform the area magistrate. Most magistrates do not come to the crime scene until they finish hearing all the cases for that day, usually late in the afternoon. By the time the magistrate comes, the body may have undergone some drying due to exposure by the sun, and decomposition, and so many things may have been added to or even removed from the scene because of police inattentiveness. Meanwhile, the unfortunate Judicial Medical Officer has to wait twiddling his thumbs and kicking up his heels till the arrival of the magistrate, after which the magistrate may give orders to the medical officer to do the autopsy at an unsuitable time. In fact the situation in the UK was similar to what is happening at present in Sri Lanka, but under the coroners' rules of 1953, coroners in the UK were relieved of the authority to investigate the crime scene.

### Secret homicide

Secret homicide has occurred since time immemorial and will continue so long as the human race survives. I conducted about 30 cases of secret homicide in my forensic practice in the Southern Province. All these cases were challenging. Detection of secret homicide is perhaps an instance where the skills of the forensic pathologist are stretched to the limits.

To detect secret homicide, the investigating police, crime scene officer and Judicial Medical Officer should work in close cooperation with the necessary back up facilities such as the services of a photographer, toxicologist, histopathologist, ballistic

expert, serologist, finger print experts and molecular biologist. This is not happening in Sri Lanka. There is a severe lack of these ancillary facilities. One often wonders why they conduct judicial autopsies under such primitive conditions at all.

"Often the police officer submitting the person for examination or bringing the autopsy order is quite unaware of the background details of the case"

### Torture by the police

Torture is still practiced by police officers in Sri Lanka. Even with the establishment of the National Human Rights Commission by an act of Parliament, torture of those arrested by the police takes place. Several workshops held have been of no avail. The Commission will have to seriously think of adopting new methods to curtail torture.

### Conclusion

A forensic expert has to obtain accurate background information regarding the case that is being examined or subjected to autopsy and it is the responsibility of the investigating police to provide such information. This is exactly what is lacking in Sri Lanka. Often the police officer submitting the person for examination or bringing the autopsy order is quite unaware of the background details. The police should realize that the medical officer compares the findings with the history obtained and gives an opinion. However the experience of the medical officer is the most important factor in arriving at the correct interpretation. The value of an accurate history in a chronological order cannot be overemphasized.

# 'Sati' and the role of the state in India

Bijo Francis, Advocate, Kerala

This August, a case of 'Sati'—an act of suicide by a wife who throws herself on to the burning funeral pyre of her husband—was reported from the state of Madhya Pradesh. The report came from the village of Tamali Patna, of Panna district, and the incident was said to have occurred on August 6. The deceased, Mrs Kuttu Bai, aged 65 years, was reported to have thrown herself on the funeral pyre of her deceased husband, Mallu Bai. According to the information received, on news that an act of Sati would occur, the authorities dispatched two police officers from Saleha Police Station to the site, but they were attacked by an approximately 1000-strong mob that had gathered in support of the act. These people allegedly stoned the police officers and prevented them from intervening. 15 persons were arrested in connection with the incident. Subsequently, two versions of the official response to the incident emerged. The locals opposed to the act claimed that they informed the police as early as 7am that Mrs Bai would commit Sati that day, whereas the police maintained that they received the information only around 9am.

Whatever be the claim, counterclaim and allegations, this incident points to yet another breach of duty by state agents and indicates the manner with which such incidents are dealt with. To understand this, it is first necessary to appreciate some aspects of the history of Sati and the legislative response.

Historically, the conditions for widows of Hindu families have in all respects been pathetic. Custom had typically demanded that a widow must shave her head and wear only a white sari or other white clothing after the death of her husband. She was prohibited from remarrying and from wearing any gold ornaments. Yet a much more inhuman custom was that a Hindu widow should simply kill herself in the funeral pyre of her husband, in an act of Sati.

Many times the act of Sati was not a case of self-destruction. Widows were thrown into the funeral pyre of their husbands and sometimes those who were willing to die in the sacred fire would

ask their relatives to tie their hands and legs together to prevent them from escaping when the intense heat became unbearable. But a widow unwilling to be burned to death would be thrown crying for her dear life into the funeral pyre and if she tried to escape would be pushed or held in the fire with long sticks or iron poles.

"A widow unwilling to be burned to death would be thrown crying for her dear life into the funeral pyre"

Mr Rajah Ram Mohan Roy, a great thinker and reformer from Bengal, and one of the founders of the Indian Press, had to witness these horrendous crimes being committed on his neighbors and fellow human beings. He was a profound scholar and humanist, whom Monier Williams referred to as "perhaps the finest earnest-minded investigator of the science of comparative religion that the world has ever produced". Moved by the atrocities committed against women of his own community, he called for a total ban on such customary rituals and for a complete prohibition of polygamy, which was a recognized customary right for the Hindu males in his community. In 1828 he founded the Brahma Sabha to propagate his teachings. His efforts had an effect, leading to the prohibition of Sati by the British colonial government in an enactment with directives in 1829. In spite of its weaknesses, and accusations by some nationalist historians that the legislation was just another element of the 'divide and rule' policy, this enactment must be recognized as a bold step towards progressive reforms.

By contrast, it took the state of post-independence India decades to draft clear legislation to prevent Sati. It was only in 1987 that clear steps were taken to end this social menace by way of effective central legislation. Although the current Act—Act No. 3 of 1988—is not exhaustive, it does provide for adequate powers to block the attempt, abetment, commission, and even glorification of Sati. The essence of the Act is in section 3, which reads as follows:

> Notwithstanding anything contained in the Indian Penal Code (45 of 1860), whoever attempts to commit Sati and does any act towards such commission shall be punishable with imprisonment for a term which may extend to one year or with fine or with both:
>
> Provided that the Special Court trying an offence under this section shall, before convicting any person take into consideration the circumstances leading to the commission of the offence, the act committed, the state of mind of the person charged of the offence at the time of the commission of the act and all other relevant factors.

'Abetment' is addressed in section 4:

> (1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), if any person commits Sati, whoever abets the commission of such Sati, either directly or indirectly, shall be punishable with death or imprisonment for life and shall also be liable to fine.
>
> (2) If any person attempts to commit Sati, whoever abets such attempt, either directly or indirectly, shall be punishable with imprisonment for life and shall also be liable to fine.
>
> Explanation. - For the purposes of this section, any of the following acts or the like shall also be deemed to be an abetment, namely;

(a) Any inducement to a widow or women to get her burnt or buried alive along with the body of her deceased husband or with any other relative irrespective of whether he is in a fit state of mind or is labouring under a state of intoxication or stupefaction or other case impeding the exercise of her free will;

(b) Making a widow or woman believe that the commission of Sati would result in some spiritual benefit to her or her deceased husband or relative or the general well being of the family;

(c) Encouraging a widow or woman to remain fixed in her resolve to commit Sati and thus instigating her to commit Sati;

(d) Participating in the procession in connection with the commission of Sati or aiding the widow or woman in her decision to commit Sati by taking her along with the body of her deceased husband or relative to the cremation or burial ground;

(e) Being present at the place where Sati is committed as an active participant to such commission or to any ceremony connected with it;

(f) Preventing or obstructing the widow or woman from saving herself from being burnt or buried alive;

(g) Obstructing or interfering with the police in the discharge of its duties of taking any steps to prevent the commission of Sati.

'Glorification of Sati' is defined in section 2:

(1) In this Act, unless the context otherwise requires,

(b) "Glorification", in relation to Sati, whether such Sati was committed before or after the commencement of this Act, includes, among other things,

(i) The observance of any ceremony or the taking out of a procession in connection with the commission of Sati; or

(ii) The supporting, justifying or propagating of the practice of Sati in any manner; or

(iii) The arranging of any function to eulogise the person who has committed Sati; or

(iv) The creation of a trust, or the collection of funds, or the construction of a temple or other structure or the carrying on of any form of worship or the performance of any ceremony thereat, with a view to perpetuate the honour of, or to preserve the memory of, a person who has committed Sati;

Punishment for offences under the Act is captured in section 5:

Whoever does any act for the glorification of Sati shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and with a fine which shall not be less than five thousand rupees but which may extend to thirty thousand rupees.

The Act further enumerates certain safeguards to be taken by the government machinery and by the administration, casting a duty upon the state to prevent any act of Sati from occurring, as follows:

Section 6. Power to prohibit certain acts.

(1) Where the Collector or the District Magistrate is of the opinion that Sati or any abetment thereof is being, or is about to be committed, he may, by order, prohibit the doing of any act towards the commission of Sati by any person in any area or areas specified in the order.

(2) The Collector or the District Magistrate may also, by order, prohibit the glorification in any manner of Sati by any person in any area or areas specified in the order.

(3) Whoever contravenes any order made under sub-section (1) or sub-section (2) shall, if such contravention is not punishable under any other provision of this Act, be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and with a fine which shall not be less than five thousand rupees but which may extend to thirty thousand rupees.

Section 7. Power to remove certain temples or other structures.

(1) The State Government may, if it is satisfied that in any temple or other structure which has been in existence for not less than twenty years, any form of worship or the performance of any ceremony is carried on with a view to perpetuate the honour of, or to preserve the memory of, any person in respect of whom Sati has been committed, by order, direct the removal of such temple or other structure.

(2) The Collector or the District Magistrate may, if he is satisfied that in any temple or other structure, other than that referred to in sub-section (1), any form of worship or the performance of any ceremony is carried on with a view to perpetuate the honour of, or to preserve the memory of, any person in respect of whom Sati has been committed, by order, direct the removal of such temple or other structure.

(3) Where any order under sub-section (1) or sub-section (2) is not complied with, the State Government or the Collector or the District Magistrate as the case may, be, shall cause the temple or other structure to be removed through a police officer not below the rank of a Sub-Inspector at the cost of the defaulter.

Section 8. Power to seize certain properties.

(1) Where the Collector or the District Magistrate has reason to believe that any funds or property have been collected or acquired for the purpose of glorification of the commission of any Sati or which may be found under circumstances which create suspicion of the commission of any offence under this Act, he may seize such funds or property.

(2) Every Collector or District Magistrate acting under sub-section (1) shall report the seizure to the Special Court, if any, constituted to try any offence in relation to which such funds or property were collected or acquired and shall await the order of such Special Court as to the disposal of the same.

Certain persons are also cast with the responsibility to report to the authorities regarding the crime and its preparations. The provisions are as follows:

Section 17. Obligation of certain persons to report about the commission of an offence under this Act.

(1) All officers of Government are hereby required and empowered to assist the police in the execution of the provisions of this Act or any rule or order made there under.

(2) All village officers and such other officers as may be specified by the Collector or the District Magistrate in relation to any area and the inhabitants of such area shall, if they have reason to believe or have the knowledge that Sati is about to be, or has been, committed in the area shall forthwith report such fact to the nearest police station.

(3) Whoever contravenes the provisions of subsection (1) or sub-section (2) shall be punishable with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

Over and above all this, in the case of Sati, the burden of proof is the reverse of the norm, i.e., it is upon the accused to prove that the act of Sati was not committed. The provision in section 16 is as follows:

> Where any person is prosecuted of an offence under Section 4, the burden of proving that he had not committed the offence under the said section shall be on him.

Moreover, in the Commission of Sati (Prevention) Rules, 1988, provision is made that adequate measures be taken to prevent the crime. In rule 4, the authorities are vested with powers for passing prohibitory orders as follows:

> (1) Every prohibitory order under Sec. 6 shall be made by beat of drum or other customary mode, in the concerned village, or in case of town or city, in the locality in which the act prohibited is likely to occur or has taken place.
>
> (2) The prohibitory order shall be displayed at some conspicuous place in the area or areas to which such acts relate and a copy thereof shall also be displayed in the office of the officer issuing the prohibitory order and such display shall be taken as a sufficient notice to all persons concerned in the area or areas to which such order relates.

Inevitably, offences occur irrespective of whether or not prohibitory legislation is in place to deal with it; this is a fact of human nature. However, offences can be contained and their recurrence limited through effective implementation of enactments and through a conscious attempt at social change. Implementation does not merely mean punishment of the culprit but effective prevention of crime as well.

This is apparently what the legislature had in mind when drafting the law on prevention of Sati, as it made adequate provision to stop commission of the offence before it occurs. Unfortunately, the law has not seen much use since its promulgation. The provisions intended to prevent the commission of Sati have not been put into practice, nor have later lawmakers developed them further. The framers of the enactment would presumably never have thought that their successors would sleep through their duty and neglect the authority available to them to bring in adequate revisions to address the changing conditions since 1988.

What are some of the weaknesses in getting this legislation brought into practice and both the public and legislature's consciousness? Mere proclamations, sound and fury, will not prevent crime. Education and awareness–building must begin

"The provisions intended to prevent the commission of Sati have not been put into practice, nor have later lawmakers developed them further"

at the grassroots level. NGOs have a major role to play here. The people should be adequately enlightened to appreciate the utter hollowness of such ritual practices and brought to question such practices within their belief system.

"In this country it is not difficult to compel a woman to commit Sati and get away with it"

Another problem lies in the practical administration of the law. The officer empowered to take action on receiving a report regarding preparation for commission of Sati or glorification of such an act is also an executive officer of the district burdened with other administrative responsibilities. Many of these officials are appointed via nepotistic and corrupt channels, and are little bothered about the welfare of the community and, needless to say, the impact of such horrendous crimes on the society.

Then comes the inattentiveness of the police. In the case cited above there are already different versions of how and why the police failed to respond to the complaint. The police have held that they were not informed in time to prevent the crime, but can they be believed? The police in this country have not earned the trust of the people, and their claims invariably lack credibility. Under any circumstances, their un-preparedness to meet such an emergency—manifest in the number of officers dispatched to the site to interfere in a so-called religious ceremony—is also condemnable.

The death of Mrs Bai was just another act of Sati reported in the national media this year. What has the government done so far? Where was the district machinery when these acts were committed? Where were those persons cast with the duty to prevent such crimes? An act of Sati is likely to happen again in the near future. In a country where racial violence the likes of was seen in Gujarat recently can occur and be tacitly approved by the persons of authority, it is not difficult to compel a woman to commit Sati and get away with it. What else can be expected when the politicians spend their time consulting hardcore 'sadhus' (hermits clad in saffron) on each and every step to be taken regarding issues of national importance? These are the same 'sadhus' who openly declare in public that Hindustan is for Hindus and that they will not pay heed to any directives of the courts, even those of the Apex Court. Time and again the government has demonstrated an inability—or unwillingness—to understand that by being guided by religious sentiment and the words of these so-called holy men, this country is being lead into deeper havoc. As a result, under the independent government of India our people may suffer from a far greater level of religious intolerance and communalism than what our forebears faced under the British regime.

# Fear of rape: The experience of women in Northeast India*

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Justice J S Verma, former Chairperson of the National Human Rights Commission (India) has said that the law enforcement agencies are the biggest violators of human rights in the country. His statement is highly relevant to what is happening in Manipur and the other neighboring states of Northeast India, which are subject to an exceptionally high level of militarization.

Women everywhere, irrespective of caste, creed, religion, wealth or age, have faced various forms of violence. Northeast Indian women are no exception. Of all forms of violence, rape is considered the most cruel and inhuman form of torture. The fear of rape is common to all women, however, among Northeast Indian women this fear is heightened by the situation in which they live. It stems not merely from the horror of physical assault, but from the subsequent social stigmatization and many other inexpressible feelings. In fact, in Manipuri the literal meaning of the word to describe rape is "elimination of one's esteem". In a single act of wild sexual aggression the victim loses her esteem forever. Not only does she suffer from this social stigmatization, but also from the mental trauma of potential pregnancy, lost virginity, possible physical injury that may render her unable to bear children and the prospect of sexually transmitted diseases such as AIDS. The survivor of such violence is never the same person. Many victims complain of headaches, general weakness, lost appetite, nightmares, insomnia, restlessness and anxiety.

In this part of the country the rapists are typically members of the Indian armed forces deployed to curb insurgency. Most of these men hail from the strictly patriarchal societies of mainland India, which are extremely prejudiced against women. Coupled with this, in Northeast India they enjoy elated status as security forces. They usually carry out rapes during combing operations

* This is a revised and edited version of a paper presented at the National Conference on Human Rights, Social Movements, Globalization and the Law held at Panchgani, Maharastra, India, from 26 December 2000 to 1 January 2001.

in residential areas, when they compel the males to come out of their homes and gather them at one place, while women are forced to stay indoors. Anyone who tries to intervene is severely beaten. Generally, the perpetrators go completely free, as they acquire immunity from prosecution under the Armed Forces (Special Powers) Act of 1958, which has been imposed in the whole of Northeast India for decades. It has become a common practice among the security forces engaging in the counter insurgency operations to do away with the safeguards accorded to women by the Criminal Procedure Code. After the crime, the army also always tries to cover it up by using any available means. In some instances, rapists have been deliberately left out of the line up for the purpose of identification. In others, the identification parade has not been done at all, or after a lengthy period since the crime.

"Out of the rape cases from the northeast that have been brought out into the open so far, only in one case were the rapists tried and punished"

Most of the rape cases go unreported for obvious reasons, implied above. The victims typically fear being stigmatized, losing marriage opportunities, revealing lost virginity, or are reluctant to talk about a sexual act in public. Under any circumstances, the perpetrators are almost never found guilty, the victims receive no compensation and are liable to be harassed, while their families are also traumatised and at a loss as to what steps to take. Proper steps for treatment and rehabilitation have also not been adopted by the state, in spite of directions to this end by the Supreme Court of India. Although a few organizations have taken up humble initiatives, a lot more needs to be done.

Out of the rape cases from the northeast that have been brought out into the open so far, only in one case were the rapists tried and punished, that too in their own military court. This was a case from August 1996, when two army personnel raped a woman in front of her disabled son during the course of a combing operation. Overcome by a sense of humiliation, she came out into the open. The general population and human rights activists joined her in seeking justice. It was only because of the public outrage and the intensity of the movement that the army authorities were compelled to initiate court martial proceedings against the two personnel. They were found guilty and punished for their crime in 1997. Although the case was a turning point in public attitudes, it was an exception to the norm. In other reported cases, the military tribunal has decided against the victims, and there is then little the women can do. On 4 April 1998, for instance, Pramo Devi—then aged about 27 and pregnant—was raped at gunpoint inside her own house by a soldier of the 6th Btn J K Rifles, while on patrolling duty. The military court ruled that it was only a case of molestation and not rape.

While dealing with suspects, male security personnel routinely arrest, interrogate, torture and sexually abuse women. For instance, the Central Reserve Police Forces (CRPF) picked up two sisters—Laishram Bimola Devi, aged about 32 years, and Laishram Manishang, aged about 29 years, of Pukhao Ahallup

Awang Leikai—at around 11am on 14 January 1999, falsely accusing them of sheltering underground activists. The all male team took them to their camp located at Pangai, allegedly stripped them naked, and inhumanely beat them with iron rods and sticks on their hips, buttocks, thighs, calves and feet. They were released on the same day, as nothing incriminating was found against them, and were hospitalized for the next two weeks. In a different case in January 1999, a 17-year-old innocent girl, Oinam Subhashini Devi of Thanga Island, was detained and interrogated on suspicion of being an insurgent sympathiser. In spite of the psychological pressure Subhashini's life continues, but in another case a girl took an extreme step. On 25 March 1999, following the investigation of a murder case, the 32nd Assam Rifles stationed at Yairipok took Chabungbam Jamini Devi, an 11-year-old girl, into custody, alleging that she was the girlfriend of an underground activist. She was interrogated in their camp and a recorded version of her statement broadcast in a public meeting convened by the Commanding Officer of the Assam Riffles on March 29. Two days later, on April 2, the girl committed suicide.

Women themselves are now being forced to take responsibility to prevent rape. The *Maira Paibi* (Women Torch–Bearers) have been at the vanguard of this movement, and are present in all localities. But the *Maira Paibi* are now also becoming a target of abuse for their human rights work.

# Invitation for submissions

*article 2* is inviting submissions for a coming edition on Rape. Articles should focus on specific case studies of the legislative and practical treatment of rape cases in Asian countries, and between 2000–5000 words. The suggested format is:

**1. The story of the case:** about the circumstances, victim, perpetrators and other necessary details.

**2. Legislative aspects:** how does the law deal with rape in your country? What is the definition of rape? What is the punishment? Are there any defects in the law?

**3. Implementation:**

*a. Complaint system*: is there a complaint system? Is it easily accessible and sensitive to the victim? What are the defects?

*b. Investigation*: was the investigation satisfactory and sensitive to the victim? What are the legal provisions for investigation? Are they adequate?

*c. Hearing*: Was it satisfactory? What are the defects?

**4. Civil law:** beside the criminal law, can civil claims be filed for rape? In this case was a civil claim made? What are the difficulties in filing a civil claim?

**5. Payment of damages by the state:** does the state pay damages to the victims? Is the principle that the state is liable for failures of protection recognized in your country?

**6. Support groups:**

*a. General*: which support groups helped in this case? How did they help?

*b. Agitation for Reforms*: is there a lobby for reforms relating to rape in particular and violence against women in general? What are the proposals of this lobby? What means are employed by the lobby? Does the public know of the proposed changes?

**7. Any other matters of importance:** is there any other lesson learned from this case? Particularly, is the fight against rape improving in your country? If so, how and why? If not, why not?

Please direct enquiries and submit completed articles to the editor: editor@ahrchk.net.

## 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*




***article 2*** is a published by the Asian Legal Resource Centre (ALRC) in conjuction with *Human Rights SOLIDARITY*, a publication of the Asian Human Rights Commission (AHRC).

ALRC is an independent regional non-governmental organisation holding general consultative status with the Economic and Social Council of the United Nations. ALRC seeks to strengthen and encourage positive action on legal and human rights issues at local and national levels throughout Asia.

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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