THE ISSUE

Effective campaigning for human rights is important in correcting human rights violations and creating a movement for successful change. Such a movement accompanied the case of Michael Anthony Fernando (Tony).

THE LESSONS:

These lessons are based on the case and campaign of Michael Anthony Fernando (Tony).

Lesson 1: the lesson identifies three factors that contributed to the success of Tony’s campaign.

Lesson 2: the lesson discusses the international concepts of judicial accountability and impartiality and relates these to Sri Lankan practices.

Lesson 1

A. Objective: To understand the key factors that contributed to the success of Tony’s campaign and reflect on how they may be used in other campaigns.

The case of Tony is a special one, in that it brings together many of the best aspects of human rights campaign-
ing, while highlighting the stance taken by an individual fighting for an issue bigger than himself. The following news briefs, statements and press releases speak for themselves:

“A Sri Lanka trade unionist who was jailed for contempt while challenging Sri Lanka’s controversial chief justice emerged a free man Friday to be rewarded with an Asian Human Rights Award...

Fernando was jailed in February for a year for contempt of court while arguing a case he had filed against several supreme court justices, including Chief Justice Sarath Silva. He was released early for good behaviour.

His imprisonment led the UN Special Rapporteur on the independence of judges and lawyers, Param Cumaraswamy, to express ‘shock’ at Silva hearing a case against himself. “I am not going into the merits of the case. The question here is if it is proper for the chief justice after having been made a party to a case to sit on the panel and adjudicate on the matter,” Cumaraswamy said in February.

Fernando said his struggle had been for the freedom of expression and the independence of the judiciary...” (Agence France-Presse, Friday 17 October 2003)

“When an injustice happens to us where else can we go other than to the Supreme Court or any other court? We go unarmed, we cannot take hand-bombs and grenades, and demand justice. We are in a democratic institution, the only weapon I took was the country’s supreme constitution and I read the country’s constitution in the Supreme Court of Sri Lanka but I was sentenced like a criminal and sent to jail. I tried to explain myself after the sentence, and the chair looked at me in an angry manner and said ‘if you talk one more word we are going to extend your term of sentence for more than one year.’ It was a threat. It was the threat for justice and fairplay.” (Sunday Leader, 19 October 2003)

“In this case, the fact that the man had been sentenced to one year rigorous imprisonment for contempt of court due to his insisting on proceeding with his fundamental rights application which he was supporting in the Supreme Court and ‘speaking loudly in court’, marks this
The key factors to be gleaned from Tony’s case are the following:

1. An individual case (micro-study approach) addressing a larger, systemic issue;
2. Keeping the issue alive over an extended period of time;
3. Activism - actions undertaken by local groups, as well as by international agencies such as the AHRC, UN Special Rapporteur on the Independence of Judges and Lawyers.

These three factors are behind the success of Tony’s campaign, and can be used in effective campaigning for other human rights issues. They are addressed in more detail below.

1. An individual case (micro-study approach) addressing a larger, systemic issue

This is a very important point to be understood. Not only is it important in Tony’s case, but it is central to effective campaigning in general. The fundamental rights denied to Tony indicate a systemic flaw, which is the end issue to be addressed. Addressing it through a micro-study approach allows the violated rights of an individual victim to be redressed, as well as exposes the systemic flaws in a manner able to be understood by other lay persons, therein creating greater support amongst the ordinary people.

Individual case: Tony is sentenced to one year rigorous imprisonment for contempt of court. However, contempt was not clearly established, and the chief justice, who was named a respondent in the case, was one of the presiding judges.

Systemic issue: Lack of judicial accountability/impartiality.
2. Keeping the issue alive over an extended period of time

For the correction of any human rights violation to be successful and to result in systemic reforms, the interest in the issue must be kept alive until the intended results are achieved. This requires the consistent dissemination of information about the violation. It is important to do this without being too repetitive, so as to ensure that the public interest in the issue does not wane. Creative actions must be taken, which present the relevant information in different ways. For Tony’s campaign, some of the novel actions taken were:

- An online petition on behalf of Tony (with over 3,200 signatures)
- A communication filed at the UN Human Rights Committee
- A newspaper advertisement in Sri Lanka giving information about Tony’s case
- The sending of AHRC urgent appeals, press releases, statements

In addition to the regular statements etc., Tony’s campaign relied on other methods to disseminate information and keep the interest in the case at the same time. Another effect of taking such novel actions is the different audiences the campaign can then reach; for instance, while the Sri Lankan newspaper advertisement targets the local population, the UN Communication targets a more international and government level audience. For a successful campaign or movement, it is important to bring together all the different groups of people.

Tony was sentenced on 6 February 2003 for one year on charges of contempt. He was released on 17 October 2003. Between this time a movement to release him, as well as a dialogue on judicial accountability in Sri Lanka was created.

3. Activism - actions undertaken by local groups, as well as by international agencies such as AHRC, UN Special Rapporteur

Mass support is obviously essential for effective campaigning on human rights issues. Such support is not only useful in helping the victims of violations, but it can become the beginnings of a movement against the larger, systemic issues that allow such violations. This was the case in Sri Lanka; where previously silence had reigned against the judiciary, Tony’s case provided the impetus for dialogue about the judiciary’s lack of independence and accountability.
a. **Local actions**
- A local solidarity group launched a petition on behalf of Tony, which AHRC then put on their website;
- Activists and individuals wrote many letters regarding Tony’s case, as well as supported Tony’s family.

b. **International actions**
- At the onset of Tony’s case, AHRC sent out an urgent appeal immediately, and continued to do so periodically, with updates and other information;
- Jana Sammathaya (or Folk Consensus), an AHRC e-newsletter on Sri Lankan issues, focused exclusively on Tony’s case for several of its issues;
- AHRC took out a newspaper advertisement in Sri Lanka with information about Tony’s case;
- AHRC declared Tony as a ‘Prisoner of Conscience’, and nominated him for an AHRC Human Rights Defenders Award (on the day of his release, Tony was awarded with the Human Rights Defenders Award);
- AHRC’s sister organization, the Asian Legal Resource Center (ALRC) made an oral submission regarding Tony at the 59th session of the UN Commission on Human Rights;
- The UN Special Rapporteur on the Independence of Judges and Lawyers described Tony as a ‘victim of injustice,’ and called upon the Sri Lankan Bar to rally support;
- AHRC also gave some financial assistance to Tony and his family.

The actions that were undertaken led not only to a movement petitioning Tony’s release, but also questioned the integrity of the Sri Lankan judiciary. The result of this movement is the recent appointment of a select committee of Parliament to inquire into and report on the Law Relating to Contempt of Court and to make recommendations regarding the codification of the existing law.

**B. Questions For Discussion**

1. The Sri Lankan National Human Rights Commission mandate includes the defense and promotion of human rights, the education of the peoples in human rights issues and the defense of victims of human rights abuses; and yet, in Tony’s case the Commission stated that the issue was outside their mandate. Why do you think this was the reaction of the NHRC? Given their mandate, reflect on how the Commission could have intervened in Tony’s case, and how they could have used this incident as an avenue for human rights promotion and awareness.

2. Discuss how local groups and organizations could have increased the effectiveness of Tony’s campaign. As
stated in one of the press reports quoted at the beginning of the lesson, why do you think the elitist human rights organizations in Sri Lanka did not take up Tony’s case, and what does this suggest about their concept of human rights?

3. Choose one or two of the actions undertaken by AHRC in Tony’s campaign and discuss how they can effectively be used for your own campaign.

4. Reflect on other micro-studies (i.e. individual cases) of human rights violations you are aware of, and discuss the systemic flaws they indicate/point towards.

Lesson 2

A. Objective: To understand the concepts of judicial accountability as outlined in international law, and compare these to current Sri Lankan institutions. The lesson is split into two sections, covering judicial accountability and contempt laws.

I. Judicial accountability and impartiality

"Judges are conferred and clothed with independence in their adjudicative process so that they can dispense justice without fear or favour in accordance with the facts, evidence and the law presented to them. For this purpose many national constitutions provide for conditions with regard to the appointments, promotions, discipline, security of tenure and immunity to insulate them. These conditions are prerequisites for protection of their independence... The guarantee of judicial independence is for the benefit of the judged, not the judges. There have been cases where judges are said to have abused this independence. These insulations are sometimes used as a shield against investigations for judicial misconduct including investigations for corruption...

Judges are accountable to the extent of deciding the cases before them expeditiously in public (unless for special reasons), fairly and delivering their judgments promptly and giving reasons for
their decisions; their judgments are subject to scrutiny by the appellate courts… Beyond these parameters, they should not be accountable for their judgments to any others. Judicial accountability stretched too far can seriously harm judicial independence.

... It is not their [the judges’] role to make disparaging remarks about parties and witnesses appearing before them or to send signals to society at large in intimidating and threatening terms, thereby undermining other basic freedoms like freedom of expression.” (D’ato Param Cumaraswamy, ‘Tension between judicial independence and judicial accountability - An international Perspective.’ Columbo, 17 October 2003)

International Covenant on Civil and Political Rights (ICCPR), article 14

“1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

Sri Lankan Judicature Act No. 2 of 1978 (as amended)

Section 49(1) stipulates that “no judge shall be competent and in no case shall any judge be compellable to exercise jurisdiction in any action, prosecution, proceeding or matter in which he is a party or personally interested.

Sub-section (2) of that section provides that no judge shall hear an appeal from or review any judgement, sentence or order passed by himself.

Sub-section (3) of that section states that where any judge who is a party or personally interested, is a judge of the Supreme Court or the Court of Appeal, the action, prosecution, proceeding or matter to or in which he is a party or is interested, or in which an appeal from his judgement shall be preferred, shall be heard or determined by some other Judge of Judges of the said court.” (Sri Lanka Legal Reforms, Vol. 1, No. 3, p. 8)
A ccording to international norms of fair trial, a just and impartial tribunal is essential for a fair trial, which is a fundamental right of all peoples. It is for this reason that the no-bias principle for judges requires any judge personally involved or interested in a case to not determine/hear the case. In light of this, Chief Justice Silva should not have been a presiding judge in Tony’s case.

II. Charge of contempt

A nother factor involved in judicial accountability is the charge of contempt:

“Another source of concern is the manner in which contempt of court powers are used to instill fear. When judges resort to such conduct, they lose their judicial decorum and eventually their insulation from the guarantees for judicial independence. They open the door for public criticism of their conduct and bring disrepute to the institution. That could lead to loss of confidence in the system of justice in general. Respect for the judiciary cannot be extracted by invoking coercive powers except in extreme cases. The judiciary must earn its respect by its own performance and conduct...” (Cumaraswamy, ‘Tension between judicial independence and judicial accountability - An International Perspective.’)

Contempt of court laws are not to be used lightly. A ccording to the often cited judgment made by Lord Denning in 1968,

“It is a jurisdiction which undoubtedly belongs to us, but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter. Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticize us will remember that, from the nature of our office we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, would I add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.
So it comes to this. Mr. Quintin Hogg has criticised the court, but in so doing he is exercising his undoubted right. The article contains an error, no doubt, but errors do not make it a contempt of court. We must uphold his right to the utmost.” (Qtd. in Cumaraswamy, ‘Tension between judicial independence and judicial accountability - An International Perspective.’)

For Tony to be sentenced to one year imprisonment while seeking justice, is the height of injustice perpetrated through the judicial process. The absence of judicial accountability is a central problem in the implementation of human rights, particularly in Asia. The judiciary is the last resort for citizens when the executive, legislature and others commit human rights violations. Thus, when the judiciary itself ignores human rights, it participates in the abuse of power.

B. Questions For Discussion

1. What do you think would have happened if there was no campaign for Tony?
2. What is your opinion about the select committee of Parliament that is currently meeting about the contempt laws?
3. What are the problems and obstacles with regard to the judiciary, laws and legal system, in your country, in bringing human rights cases before courts?