

**A Dysfunctional System of Justice
as a Permanent Social and Political Disaster
and
The Asian Human Rights Commission's Unique Vision**

By Basil Fernando

We are familiar with the concept of natural disasters.

However, the problems associated with a system of justice becoming dysfunctional to a human community have not yet been recognized as a similar or worse disaster as a “natural disaster”.

What is the content of disaster caused by “a dysfunctional system of justice”.

1. Organized way of life becomes impossible
2. Maintenance of a system of values also become impossible
3. Preservation of the rule of law also become practically impossible
4. The consequential effect of these aforementioned problems are:
 - A) It becomes impossible to prevent widespread corruption, and this itself becomes the primary source of almost all social problems;
 - B) The use of torture and ill-treatment becomes widespread and such use of torture and ill-treatment begin to be used as alternative forms of justice, resulting in the State relying on illegal use of coercive methods; in a crisis, this leads to the use of extrajudicial killings of various kinds, including the use of enforce disappearances, and as a result a culture of fear and impunity become widespread¹;
 - C) The State also permits powerful groups to use violence as a means of suppressing those they want to suppress; the suppressing of minorities by violence becomes normal; a classic example of this is the suppression of Dalits by the upper castes;

¹ See the submission made on behalf of Asian Human Rights Commission by Basil Fernando to The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

- D) Good governance becomes impossible, as it requires accountability and transparency, and it is not possible to have these when the existing system of justice is dysfunctional;
- E) Democratic forms of governance become impossible;
- F) Prevention of violence becomes impossible;
- G) Dealing with unequal treatment also become difficult;
- H) It becomes impossible to solve any of the social evils;

Defining a Social Disaster

One definition of a natural disaster is as follows:

“The United Nations defines a disaster as a serious disruption of the functioning of a community or a society. Disasters involve widespread human, material, economic or environmental impacts, which exceed the ability of the affected community or society to cope using its own resources.”²

A dysfunctional justice system has all the characteristic of a disaster found in the above mention definition. A dysfunctional justice system causes widespread human, material, economic, and environmental impacts. The very existence of a dysfunctional justice system also takes away the ability of the affected community or society to cope using its own resources. A closer study of any jurisdiction or country suffering from a dysfunctional justice system would illustrate the depth of widespread human, material, economic, and environmental impacts.

The inability of such a society to overcome these problems by its own recourses and efforts has a few factors attached to it. Due to the very nature of a dysfunctional justice system, the society in question lacks the human resources necessary to overcome this by its own efforts. Empirical studies on the impact of a dysfunctional justice system can show that one of the direct results of such a situation is the deterioration of the intellect with respect to comprehending legal / justice issues and deterioration in the administration of justice within a value system framework that is based on equality and fairness³. In fact, in such a situation, the very quality of human life and

² <http://www.wcpt.org/disaster-management/what-is-disaster-management>

³ Deterioration of the Legal Intellect in Sri Lanka, Basil Fernando. Internet link: <http://alrc.asia/publications/deterioration-of-the-legal-intellect-in-sri-lanka-a-miraculous-cure-is-possible/>

human relationships degenerate, and thus it can be asserted that a dysfunctional justice system dehumanizes the society.

The absence of protection, which is a direct result of a dysfunctional justice system, deprives a society of the means for just settlements of disputes, creating favorable environments for the powerful and the mighty and very unfavorable environments for the poor and the weak. Such an environment also creates a greater condition for the emergence of deeply impoverished sections within that population. Also, a direct result of a dysfunctional legal system is the creation of insolvable helplessness. In such a situation, an organized society based on a set of common values becomes impossible. In fact, the very meaning of values loses validity⁴. A natural consequence of this is that the existence of a system of rights common to all becomes, in all practicality, a lost possibility. These situations naturally create conditions for violence⁵.

Lacking a functional legal system, the very possibility of controlling violence by just means ceases to exist. In such an environment, deepening of distances between the powerful and the powerless gives rise to permanent forms of discriminations and separation of peoples. Within such an environment, neglect of natural resource management is an unavoidable consequence, and as a result it paves the way for every kind of man-made natural disaster. This is indicative of the kinds of disasters a dysfunctional justice system can generate.

Defining a dysfunctional justice system:

When the three basic components of a system of justice in modern times, i.e. policing, prosecutions, and judiciary, suffer from extreme defects that each of these institutions cannot any longer function in the manner that could protect the basic value system on which it was created

⁴ *Opposing the Rule of Law: How Myanmar's Courts Make Law and Order*, Dr. Nick Cheesman, Cambridge University Press. Internet link: <http://newbooksnetwork.com/nick-cheesman-opposing-the-rule-of-law-how-myanmars-courts-make-law-and-order-cambridge-up-2016/>. This book illustrates how “a justice system” can turn into its very opposite and become an instrument of opposing the rule of law in favor of an authoritarian regime.

⁵ Asian Legal Resource Center and Asian Human Rights Commission have over the years published extensively on the link between violence and dysfunctional legal systems in many of the Asian countries, such as Bangladesh, Pakistan, Sri Lanka, Philippines, Burma, Nepal and Indonesia. These can be found in the regular publications of ALRC titled *Article 2* which has published 45 issues since the inception of the publication in 2002. These issues constitute a rich resource for the study of various aspects of the problem of the dysfunctional justice systems.

and the interactions among the three components fails to coordinate to an extent that the purposes of justice could not be served such a situation could be called dysfunctional.

Generic definitions of the word dysfunctional are as follows:

- 1) not performing normally, as an organ or structure of the body; malfunctioning
- 2) Having a malfunctioning part or element
- 3) Behaving or acting outside social norms⁶.

A dysfunctional justice system would have the same characteristics. However, here a distinction must be made between some defects in one or more institutions of the justice system that are curable by ordinary and normal means and other extraordinary forms of defects, which can affect the final outcome in a negative manner, and which cannot be cured except by way of fundamental redesigning of the institutions to make it possible for the justice system to function.

The reference here is not for a normal distance between ideal and reality. It is quite normal for the actual happening not to fully comply with the expected ideal. However, this is not a situation that can be described as dysfunctional. It becomes dysfunctional only when the actual performances and the expected performance are mutually contradictory. This is when the system's delivery become the very opposite of the expected delivery.

A reference to a dysfunctional justice system is when the policing, prosecution, and judicial institutions ultimately perform in a manner that is contrary to their expected performance and produce results that appear to be the opposite of what the institutions, on paper, and in theory, were designed for.

A few illustrations are in order:

- 1) A rape victim goes to a police station with the view to make a complaint about what happened to her, with the hope that the police will record her statement and begin an inquiry to arrest and ultimately prosecute the offender. However, at the police station, the inquiring officer pressures her and beats her up insisting that she should not mention the

⁶ <http://www.dictionary.com/browse/dysfunctional>

name of the actual culprits and instead give the name of another person. Here the police officer is engaged in trying to save the culprit and thus deny justice to the victim⁷.

- 2) A Dalit woman makes a complaint about a rape. The police investigate and finally an indictment is filed against a culprit charging him of rape. There are enormous delays in the courts and the culprit remains at large, on bail. Then the culprit abducts the victim, rapes her again, and forces her to drink acid. As a result of injuries, the victim dies⁸.
- 3) In a country where lawyers' representation of clients was very restricted for a long time, some space is created for such representation. A group of human rights minded lawyers take their task seriously and begin to appear for their clients. The result is that they are all arrested; some are detained for a long time and finally charged in courts and made to confess that they have committed a crime against the State and are punished by way of various sentences⁹.
- 4) A woman marries a man of her choice, which is not approved by the girl's family. Knowing this the newly wed couple goes into hiding. After few months, the family files a case against them and court issues summons for them to come. By then the girl is pregnant. When they arrive, they are dragged out of the court premises. As a result, the girl dies out of her injuries. The court summons was used as an excuse in order to get them out of their place of hiding.
- 5) A Dalit boy marries a girl belonging to the upper caste. After marriage, the girl is taken away by the parent and then within a few days the boy is abducted by a gang and buried. Then the police file a report that the boy has committed suicide. However, due to local and international pressure, the body was exhumed. The autopsy reveals injuries indicating that he was murdered.

⁷ <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-087-2016/?searchterm=Sri%20Lanka:%20Suspect%20in%20rape%20of%2014-year-old%20girl%20released%20without%20proper%20investigation>

⁸ <http://www.humanrights.asia/news/ahrc-news/AHRC-ART-042-2016>

⁹ <https://defendlawyers.wordpress.com/2016/08/06/china-a-joint-statement-by-ngos-in-hong-kong-and-taiwan/>

- 6) The police are under pressure to resolve some crimes. However, they do not have adequate training in modern method of investigations. They also do not have adequate human and material resources. As a result they cannot resolve many of these crimes, and public criticism increases. Higher ranking police officers exert more pressure on the investigating police. Knowing that they are unable to identify the actual culprits, they begin to arrest innocent persons and try to get them to confess that they are the culprits. Naturally those arrested so refuse. The result is that the police severely beat up these innocent persons. Gradually this becomes they normal mode of policing¹⁰.
- 7) The police investigation into a triple murder does not succeed in terms of any clues on the identity of the culprits. The police begin to randomly arrest persons, and beat them up with the hope that they may find some evidence. In one such case, the innocent man arrested and the beaten man suffer kidney failure. After getting treatment, he files a complaint against the police. After investigations, the prosecutor and the Attorney General file an indictment against the police officers. Before the victim gives evidence in court, the police murder the victim of torture.
- 8) Due to some internal conflicts, large-scale disappearances are taking place. The police, prosecution, and para-military groups engage in this practice. Public pressure arises from local sources, as well as international sources, in order to demand inquiries into missing persons. However, the government is aware that its armed forces and police have been engaging in causing these disappearances. The government refuses to investigate these matters. This results in people lose faith in the system of justice, and also realizing that any kind of reconciliation becomes nearly impossible.
- 9) A government declares arrangements for holding a referendum on the new Constitution, in a country where the Military has taken over power. A group of lawyers discuss this issue and want to camp for provisions for democratic reforms in the Constitution. While they are travelling in a vehicle, they are arrested, and the police take all their publishing materials. The police, however, do not find any material that can be called illegal.

¹⁰ Narrative of Justice in Sri Lanka, Basil Fernando, Asian Legal Resource Centre. Internet link: <http://www.humanrights.asia/resources/books/ALRC-PUB-001-2013/?searchterm=Narrative%20of%20Justice,%20told%20through%20stories%20of%20torture%20victims>

However, instructions are given from a commander holding a high post, to prosecute these lawyers. Now the charges are being filed under some provisions of the Constitution or the other that are not in fact relevant to the matter at all.

- 10) A woman reading some material on the Internet regarding the royal family in her country makes a comment with a single word: “yes”. She is arrested and charged under *lese majeste*. And, under this charge, very serious punishments are envisaged¹¹.
- 11) A Supreme Court presided over by the Chief Justice makes some judgments that are seen as adverse to the government in power. The government threatens to impeach the Chief Justice and uses all the electronic and other media to publicly humiliate the Chief Justice. Many demands are made for the Chief Justice to resign. She does not resign. An impeachment is filed and the investigation against the Chief Justice is carried out by a group of politicians who are very close to the President. The Chief Justice is denied the right to properly defend herself. She is impeached and removed from her position.
- 12) A rape victim goes to court seeking relief for the crimes committed against her. The court proceedings take 17 years. The court order holds the accused guilty. However, the girl was 14 when she was raped. And, by the time she gets the court’s verdict, she is already 31. She has had to suffer 17 years of humiliation, embarrassment, insult, and social stigma before the court is able to do justice. (In some countries it takes even more than 17 years; in many there are also no witness protection laws or practices. Obtaining compensation involves civil litigation, which takes even more time, and demands the bearing of major expenses too.)
- 13) In developing countries there is no effective legal aid scheme, and the result is that the poor are unable to pursue justice.
- 14) In many developing countries there is a common allegation of corruption by the police, prosecutors, as well as the judiciary. This results in loss of faith in the judicial system.

¹¹ <http://www.bbc.com/news/world-asia-36944205>

- 15) The loss of faith in a judicial system often leads powerful persons resort to criminal elements in order to get what they want. Naturally, these criminal elements use violence. Thus, instead of resorting to law, choosing violence is developed.
- 16) When the dysfunctional nature of a justice system remains in place for decades, the policeman, judges, lawyers, and the prosecutors lose memory of the law and the legal process. As a result, new forms of settlement and negotiation, which may be contrary to legal principles, replace justice. At this level, a fundamental deformity of the justice system takes place.
- 17) In one country where failure of the system of justice due to corruption and delays has caused a loss of faith in the judicial system, the President has authorized extrajudicial killings of drug dealers and other criminals. According to reports, about 7,000 people have been killed in this manner.
- 18) In another country, where the State has failed to take control of the law and order situation, violence has spread, and a vast number of arbitrary killing have taken place. The government response has been to call upon the people of the capital to bear arms and to deal with the situation by themselves.

How a Dysfunctional System of Justice Challenges the Human Rights Movement

Since 1948, with the Universal Declaration of the Human Rights, the United Nations has attempted to develop international law for the protection and promotion of human rights. The International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights were adopted by the International Committee.

On that basis, a new mechanism developed, often referred to as UN mechanisms, on one hand, and domestic mechanisms, on the other. The latter implying methods to grant redress to human rights violations at the national level.

And, the main approach of the human rights community became one that attempted to help the victims of human rights abuses find redress. One may thus say that a whole scheme for the pursuit of redress developed.

The task of human rights organizations has therefore become one that primarily seeks to help victims find redress. For this purpose, human rights organizations engage in education of people, in general, and victims, in particular. Human rights organizations specialize in helping persons – on the basis of things like skills and knowledge of litigations – pursue redress. A new addition is what are called national institutions, which also have the duty of helping victims find redress.

However, in developing countries in particular, a common problem has emerged. Due to the dysfunctional nature of justice institutions, the efforts to obtain redress began getting frustrated. Throughout the developing countries, a common complaint developed: through the system of justice redress could not be found for the violations of rights.

Gary A. Haugen is someone who, has, in the *Locust Effect*¹², proposed a mission similar to what the AHRC has expressed.

Identification of the Problem

A close examination of the problem reveals that the universal system promoted by the United Nations was based on the assumption that in all countries there would be justice systems capable of giving redress to human rights violations. However, this was an incorrect assumption. The developed countries had at least three to four hundred years of development of their political institutions and justice institutions. It is these institutions that provide redress to the people in their countries. When the normative framework is improved in these developed countries, they have a system of justice that is capable of practically implementing the requirements of the normative framework. However, the concrete situation of developing countries was different. Their justice systems had serious defects. These defects prevented the granting of redress.

Meeting the Challenge

¹² *The Locust Effect: Why the End of Poverty Requires the End of Violence*, Gary A. Haugen and Victor Boutros.

This challenge needed to be met. It is in this context that the Asian Human Rights Commission came with the mission: in developing countries reforms of the justice system is an imperative requirement if the rights articulated in the UN Convention are to be, in practicality, available to the people of developing countries.

The AHRC's proposal was that in developing countries, the primary target of human rights should be to work towards reforms of the institutions of justice. This basic idea has been extensively illustrated and articulated by AHRC's literature.

To achieve this goal in the developing countries, very substantive assistance was needed from the developed countries. Such assistance was on the one hand is to developed is jurisprudence that will bring the global human rights movement to face up to the challenge caused by the dysfunctional justice systems. The UN human rights mechanisms, such as UN Human Rights Council, the mandate holders, treaty bodies, and all should develop the focus towards dealing with the enormous problems of reforms of justice institutions in developing countries, so that the people of these countries will be able to enjoy human rights.

Even a greater challenge was caused to democratic forces and human rights communities in developing countries. They had to develop their capacity to grasp the nature of the justice system that has become an obstacle to their advancement. They had to learn new advocacy techniques in order to build mass pressure on the governments, in order to cause such fundamental reforms in their systems of justice.

How AHRC engages in this work

The following mission statement of the Asian Human Rights Commission expresses the organization's approach to these problems as follows:

Our Mission

The Asian Human Rights Commission / Asian Legal Resource Centre works towards the radical rethinking and fundamental redesigning of justice institutions in Asia, in order to render the transformed institutions capable of providing relief and redress to victims of human rights violations, as expected in Common Article 2 of the International Conventions, making them effective instruments of human rights protection and guarantors of the rule of law and democracy.

In 1984, the Founders of AHRC / ALRC envisioned the upholding of broad aspects of human rights, which they expressed as objectives in abstract terms. The organization, therefore, initiated its work on broad agreement on principles. Over the years, the AHRC / ALRC has refined its objectives, to reflect its actual involvement and experience in trying to address specific problems in Asian countries. This redefined focus, which the AHRC / ALRC has arrived at, through its repeated encounters with institutional obstacles to human rights and justice, is the vision of the AHRC / ALRC.

To achieve the overall goal, of radical rethinking and fundamental redesigning of justice institutions in Asia, the AHRC / ALRC is engaged in the following work:

1. Identifying the defects of Asian justice institutions, i.e. police, prosecution, and judiciary, and making recommendations and suggestions for changes, in terms of international human rights norms and standards, for legal and institutional reforms;
2. Building and equipping a large advocacy group in each country, to enable consistent work to achieve the desired changes; assisting these groups to articulate their demands for change clearly; and spreading their ideas widely;
3. Creating international awareness and support for justice institution changes in Asia;
4. Engaging in advocacy in concrete cases of human rights violations, and protecting human rights defenders;

5. Assembling a people's narrative of human rights and, through this, promoting knowledge about human rights, particularly from the point of view of equality before law and fair trial;
6. Intervening in cases of torture, and all forms of custodial abuses and state excesses, such as extrajudicial executions and disappearances;
7. Paying special attention to vulnerable groups, such as women, children, minorities, and indigenous people, so as to ensure their protection;
8. Using the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to highlight fundamental defects of justice institutions;
9. Building a wide network of partnerships and contacts, and assisting civil society and victims of human rights abuses, in order to achieve the aforementioned work in light of the overall goal.

Winning international support

In order to win support for the perspective articulated above, AHRC has, together with one of its partners DIGNITY, Denmark, developed a concept for a think tank. This jointly agreed think tank concept is as follows:

Think Tank for the Prevention of Torture through the Promotion of the Rule of Law

Problem

There is a common feeling among those who have been playing an active role in working towards the improvement of protection and promotion of human rights in developing countries: at the implementation level, the global human rights project faces serious obstacles to progress.

The core issue that needs to be addressed from a human rights point of view is the virtual futility of arriving at agreements to protect and promote human rights with countries where the criminal justice system is not designed to do so, or where new systems are adapted to political and economic interests rather than the protection of human rights.

The failure of a criminal justice system to function effectively has been recognized globally as a major factor that impedes development and human rights, as is evident in the newly adopted Sustainable Development Goals, and in particular Goal 16.

This failure has broad implications for a range of areas, such as economic development, human security, public health, and the environment. The focus of the Think Tank will be on the need for a new approach to criminal justice sector reform, one that focuses on the root causes and the structural problems that underpin the lack of effectiveness of criminal justice systems.

Therefore, this Think Tank is both timely and relevant.

Overall Objective of the Think Tank

To transform global and national discourse, policies, and practices, on criminal justice in order to end torture.

Specific Objectives

The specific objectives of the Think Tank are:

- a) To establish a platform for discussion, based on research, with a view to gaining a more comprehensive and nuanced understanding of how and why criminal justice processes and reform programmes fail or succeed in protecting human rights and ending torture.
- b) To use this research to influence the way in which international development and human rights actors understand why national criminal justice processes succeed or fail to protect human rights and end torture, and to transform the ways in which these actors develop approaches, policies, and programmes for criminal justice reform.
- c) To influence national discourses and practices, through research and analysis, on challenges and obstacles to effective, accountable, and inclusive criminal justice processes.

Asian Human Rights Commission as unique organization with a new vision for dealing with protection of human rights in developing countries

In over two decades of effort, i.e. since it began involvement with human rights work in 1994, the Asian Human Rights has developed a new vision for improved protection of human rights in developing countries. This paper attempts to illustrate this vision, and place it before all the governments in developing countries, as well as all stakeholders concerned about the better protection of human rights in developing countries.

The Asian Human Rights Commission (AHRC) urges these governments to consider this vision when developing policies and practices meant to assist the protection of human rights. The AHRC also urges these countries to support the promotion of this vision and also provide financial resources where it is needed, both in terms of government institutions and civil society organisations in need of funding, to assist in the practical achievement of this vision.

The AHRC also places this in front of all international agencies dealing with development. It is argued herein that without incorporating this vision in all programmes dealing with development, as an integral part of their development philosophy, it is not possible for the international agencies to achieve any of the goals of development, and to contribute to sustainable development.

The AHRC also decided to place it before the United Nations, particularly the human rights agencies of the United Nations, such as the High Commissioner's Office, United Nations Human Rights Council, various mandate holders, and all treaty bodies. A policy expansion within the United Nations by incorporating ways to deal with dysfunctional systems of justice in developing countries as a primary objective of its global perspective, as well as perspective for each of these countries, is what is being suggested. We propose that development of this issue conceptual and also with the development of international law to ensure practical resolution of this problem should be incorporated into the vision of United Nations human rights promotion.

This document is also being placed before the European Union (EU), which is engaged in many efforts to promote human rights in developing countries. We urge the relevant authorities of the EU to critically evaluate why the past interventions and contributions in developing countries have not achieved their objectives to any satisfactory degree. We are confident that if this matter is carefully examine it would clearly emerge that inability to grasp the nature of a dysfunctional justice system and its impact on all development objectives and human rights objectives is one of the primary reasons of such failure. We are sure that critical examination of this sort will be beneficial, both to the European Union, as well as to developing countries.

Above all, we place this vision before the human rights community, all international organizations involved in human rights, and also all people's initiatives across the world. If, through people's initiatives, the problems of dysfunctional justice institutions in the developing countries become part of the global conversation, we are confident that soon many initiatives can develop that will advance justice in the world.

We believe, the work of the AHRC can provide the necessary literature for the pursuit of this goal. We hope with the intervention and addition of other larger bodies of literature can conjoin to generate enlightened opinion on how justice and human rights in the developing world should be pursued.