Human Rights Related Legal Reforms In Sri Lanka

Asian Legal Resource Centre

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THE FINAL DOCUMENT

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WORKSHOP

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- Contents -

INTRODUCTION

1. Concerns

1.1 Public Perception on the Law and Order Situation

1.1.1 There seems to be a loss of confidence in the legal system and a wide spread cynicism about the rule of law.

1.1.2. There is a common perception that law enforcement officers directly or indirectly are contributing to the break down of law and order.

1.1.3. Even the Supreme Court has expressed the view that it is very difficult to discipline erring police officers.

1.2 Human Rights Provisions in the Constitution

1.2.1. These have to be useful to many persons and the number of applications using these provisions have increased greatly.

1.2.2. However, the only effective remedies that the courts have been capable of giving have been declarations and compensation. The courts have expressed their frustrations over the unwillingness of police authorities to take disciplinary actions against those officers found to have been involved in violating people's rights.

1.2.3. Despite much agitation, the one month's time limit on Section 126 still remains a valid constitutional provision, subject only to strict special grounds. In India, there is no such time limit for similar applications.

1.2.4. There are very extensive constitutional limitations on human rights provisions in the Sri Lankan Constitution. These limits need to be brought in line with those recognized in the United Nations human rights instruments.

1.2.5. The Supreme Court in Sri Lanka has construed the provisions in a much narrower manner that the courts in India.

1.2.6. The Constitutional provisions limiting the judicial review of written laws need to be brought in line with international standards and norms.

1.3 Social Action Litigation

1.3.1. Though the present Minister of Justice has earlier praised Social Action Litigation, however, so far Social Action Litigation has not been introduced into the Sri Lankan.legal system.

1.3.2. It is not very likely that in the near future the judiciary in Sri Lanka would introduce this form of "legislation" on their own initiative the way the Indian Supreme Court did on their own *sui moto*.

1.3.3. It is necessary that the Constitution should make specific provision of the type prevalent in India.

1.4 Incorporation of International Human Rights Instruments into Local Law

1.4.a. by legislation;

1.4.b. by way of creating judicial precedents. In India this has been done on many occasions, but this approach is almost unknown in Sri Lankan. In the interpretation of Constitutional Provisions on human rights the courts could give effect to international instruments and incorporate international norms and standards. Frequently this is being done in many countries and this is quite a common practice now in India.

1.5 Criminal Law

1.5.1 Due process in the Covenant on Civil and Political Rights have been part of the Criminal Procedures in Sri Lanka for a long time. However, a great many criminal cases go without being investigated or prosecuted.

Problems: The system of police prosecutions is based on the British model, as against the French model where an investigating magistrate is involved in the investigations. Some form of compromise, perhaps, to overcome the arbitrary nature of police investigations is necessary. For example,

- all police prosecutions to be conducted by a legal officer from the Attorney General's Department;
- appointing a legal officer on the basis of each magistrate's courts so that police officers of the area will be able to consult the officer. All representation to court will only be done only with the approval of this officer.
- a more permanent solution to this problem would be to create an office of the Public Prosecutor who will be responsible for all prosecutions conducted by the state. This way, the types of prosecutions presently conducted by the police would be

brought directly under the supervision of the Public Prosecutor.

1.5.2. Eminent jurists in our country have expressed great concern and deep reservation about the manner in which the functions of the Attorney General has been performed in several instances in the recent past. In this connection the abuse by the Attorney General of the powers vested in him, in particular the power to enter *nolle prosecqui,* and the power to give directions to magistrates in pending criminal proceedings. The Attorney General's Department Sri Lanka needs to assimilate the trends in other jurisdictions where even public officers who violate human rights are prosecuted for appropriate crimes by the Attorney General's Department.

1.5.3. In view of the powers and functions vested in the Attorney General under the constitution and the role played by him in the administration of criminal justice in particular, and in the judicial system as a whole, the holder of the office of Attorney General must be a person of independence, total integrity and professional competence. He should balance the rights of the individual against interests of the state, not be biased in favour of the establishment and in doing so he is called upon to play a crucial role in the protection, promotion and development of all human rights.

1.5.4. A constitutional right to be represented by a lawyer at all police stations needs to be recognized.

1.5.5. Despite the universal recognition that the use of torture is a widespread practice in all police stations in Sri Lanka, there have been no moves to address and change this situation. There exists almost a tacit recognition that third-degree methods are necessary.

1.5.6. The responsibility of law enforcement officers for a great many disappearances in Sri Lanka has been universally acknowledged (60,000 disappearances in the South alone between 1988-90). However, no legal provisions and mechanisms have been

developed to prevent this happening again in the future. Prosecutions for past offenses have proved illusive in most instances.

1.6 Civil Law

1.6.1 There seem to be a wide gap between the law and changed social circumstances.

1.6.2. Public confidence in the competence of some judges seems to be deteriorating. This affects the quality of work of the lawyers.

1.6.3. On matters affecting the protection of the environment, ordinary civil legal remedies are few and even those remedies that are available suffer from the normal limitations of civil litigation. This applies equally to economic, social and cultural rights.

2. Aims

2.1. To provide an opportunity for reflection on human rights related legal reforms on the basis of actual experiences;

2.2. To compare Indian and Sri Lankan experiences regarding these matters;

2.3. To try to identify a few possible reforms in very specific terms;

2.4. To try to identify ways to promote such reforms;

2.5. To try, during this workshop, to develop a paper which could be used as a basis for future work in this direction.

3. Methodology

This workshop was conducted on the basis of an open agenda. It was conducted in a manner to facilitate the maximum possible opportunity for experience sharing.

The Indian participants presented their experiences and the

difficulties presently faced by them. After the discussion on the first day, each participant wrote a short paper on an aspect of the day's discussion. Secretarial facilities were made available to have these papers ready by the next day. On the second day, the meeting was conducted on the basis of these papers. By the end of the second day, new ideas and the improvement to the earlier papers were reduced to writing. By the end of the workshop, a comprehensive paper (this document) was worked out providing guidelines for future work to promote human rights related legal reforms in general and social action litigation in particular.

Preparation

Preparatory Meeting Report 1

The Preparatory Meeting for the Workshop held at Lassalian Centre, Mutuwal, Colombo, Sri Lanka, on 27 December, 1995.

Present:
Alloy Ratnayake, P.C.,
Sunil Cooray, Attorney-at-Law,
Nimal Dassanayake, Attorney-at-Law,
Pathmasiri Nanayakkara, Attorney-at-Law,
Anthony Fernando, Attorney-at-Law,
T. M. N. S. Nanayakkara, Attorney-at-Law,
Surein Pieris, Attorney-at-Law, and
Basil Fernando, Attorney-at-Law.

A few basic issues discussed were as follows:

1. Sri Lanka is going through a period of rapid social transformation. This has created a wide gap between the legal structures of the country which have not kept up pace with the social ethos of a rapidly changing society. All attempts to protect and promote human rights are directly or indirectly influenced by this situation.

2. Social Action Litigation (Public Interest Litigation)

2.a. The Indian experience in this matter had been discussed in Sri Lanka in the past and there had been some attempts to introduce some of the jurisprudence developed by the Indian Supreme Court on this matter. Under the former government a bill was introduced allowing persons and groups who are not directly affected parties to bring a complaint to court on behalf of such affected parties, in relation to the human rights provisions in the constitution. This was a partial recognition of the Indian relegation of the doctrine of *'locus standi.'* However, this did not go beyond the stage of a bill. Further, the present Minister of Justice, Professor G. L. Pieris, has written extensively on the issue of Social Action Litigation earlier and promoted the concept by other means. These earlier discussions need to be revived.

2.b. The constitutional provisions on the fundamental rights (civil and political rights) have been severely restricted by exclusionary clauses incorporated into the constitution itself. The constitutional provisions need to be reviewed to be brought in line with international norms and standards.

2.c. The grave abuses of the constitutional limitations relating to human rights was experienced during the recent emergencies. For example, the emergency provisions like Section 55 FF of the Emergency Regulations which empowered any police office not below the rank of an Assistant Supiritendant of Police to dispose of dead bodies. By this means all possible legal safeguards against extra-judicial killings was removed. The resulting

carnage and terror is well-known. Such emergency provisions had legality within the existing constitutional provisions. In spite of the constitutional provision; "No person shall be punished with death or imprisonment except by order of a competent court made in accordance with the procedures established by law," extra-judicial killings acquired the sanctions of law. If such experiences are to be prevented in the future, it is necessary to review the constitutional limitations on the human rights provisions.

2.d. The existing limitations on the human rights provisions makes it possible to impose severe limits on the jurisdiction of the courts. The recognition of the principle of the independence of the judiciary conflicts with the removal of their jurisdiction by other legal means.

2.e. The justiciability of economic, social and cultural rights within the law in Sri Lanka needs to be considered. The constitution itself does not have any direct provision regarding this aspect. However, the establishment of labour tribunals, rent control boards, and similar types of tribunals or arbitration bodies have at least partially recognized the principle of justiciability on economic, social and cultural rights. Internationally, there are great developments in law regarding the enforcement of these rights.

2.f. There is also a serious international debate on the rights of Third World countries in relation to economic, social and cultural rights as against developed countries and big corporations. This too is relevant to the attempts for the promotion and protection of economic, social and cultural rights.

2.g. Some provisions of the criminal procedure makes it possible to bring some limited redress relating to environmental rights. In many countries there had been vast developments brought about by legislation as well as by the courts relating to the protection of environment.

3. Criminal Law and Procedure

A long period of the operation of emergency laws has had a deep impact on the operation of Criminal Laws and Procedures. At this time, there is a serious attempt to re-establish the law and order situation. However, due to the enormous powers enjoyed by the law enforcement officers during the periods under the emergency law many impediments have to be removed before such an objective could be achieved. The following subjects need to be considered seriously:

3.a. The Right to Legal Representation at the Police Stations:

This has remained as a suggestion for a long period of time. However, the principle has not yet been legally established. The lawyers who accompany suspects, particularly for the purpose of preventing torture, not infrequently find that the undertakings given to them by the police not to harm the suspects are not honoured. There have been a few instances in the past when the accompanying lawyer was also assaulted or subjected to harassment. Often, a lawyer's presence at a police station is not welcomed, except in instances where a lawyer may act as an intermediary to make arrangements between the suspects and the police.

If the lawyers are to be able to effectively intervene for the protection of suspects, it is essential that the right of representation at the police station be legally recognized. It is necessary to consider practical means by which such recognition could be achieved.

3.b. The views of people on the use of third-degree methods by the police are not unambiguous. While the use of third-degree methods is contrary to the provisions of the constitution and is condemned in principle, there seems to be some social tolerance of the use of third-degree methods. This tolerance seems to be based on the general lack of confidence of people on the ability of the police to resolve crimes through proper investigations.

The lack of confidence in the criminal investigation system has become a serious problem.

3.c. The System of Prosecution

Except in the cases of serious crimes, most cases are prosecuted by the police. The criminal procedure lays down rules regarding the manner in which reports should be submitted to courts and prosecutions should be conducted. However, in practice, this gives the police the right to decide which cases are to be prosecuted and which cases should be arbitrated by themselves. 'Police arbitration' is quite a widespread practice.

The issue of criminal prosecutions needs to be considered further during the workshop.

d. The New Legislation on Cruelty to Children, Sexual Harassment, etc.

The Penal Code Amendment Act No: 22 of 1995 which took effect from 31 October, 1995, is a significant development for the protection of the rights of children.

4.a. The promotion and protection of human rights greatly depends on the quality of the judiciary. The constitution recognizes the principle of the independence of the judiciary and the Sri Lankan judiciary has had a reputation for independence.

4.b. However, in recent years the judiciary has faced many threats: increased political pressures, legal provisions which often limit the powers of the judiciary (such as the emergency regulations), legal vacuum relating to many areas of life, unwillingness of law enforcement officers to strictly enforce discipline on themselves, etc.

4.c. The independence of the judiciary is also related to such matters as the method of the promotion of judges and what the judges do after their retirement. There are many approaches to the problem. The issue of career judges, the issue of raising the age

of retirement, the issue of proper retirement benefits, etc. are some of the issues. Ongoing training of judges and open discussion of judicial decisions are essential to ensure real independence of the judiciary. Journalism on legal matters should be encouraged and promoted.

4.d. Independence of the judiciary also depends much on the competence of the judges. In recent times much concern has been expressed in this regard, particularly relating to the lower judiciary.

4.e. In practical terms the expansion of courts and reduction of over-work are necessary conditions for effective administration of justice. The great delays in the final adjudication of cases remains a major weakness in the system of the administration of justice.

The participants agreed that the matters discussed were not exhaustive and there are many other matters that need to be discussed during the workshop. The participants further agreed to write notes on different aspects which were discussed. These notes/papers will be shared among the participants before the workshop.

Preparatory Meeting Report 2

Summary of the Discussion on 05 January, 1996, Bangalore, India.

1. The purposes of the workshop are two-fold. One is to discuss basic problems relating to the promotion and protection of human rights in the light of recent experiences. The other is pedagogical. That is to prepare a basic document which could be used as an educational document for the promotion of ideas agreed upon by the participants of this workshop. The methodology will be more experiential. The participants have been engaged in legal practice for considerable periods of time.

Their experiences relating to human rights implementation is an invaluable source for developing future perspectives in promoting the basic rights of the people.

2. The implementation of human rights through the courts and judicial processes would much depend on the extent of the people's involvement for the achievement of their rights. It is the grassroots activities done by various groups and individuals that finally results in judicial decisions. If the level of organization and activities at the level of social organization remain unsatisfactory, then, this will also be reflected in the manner in which the judiciary would grant redress. The primacy of the participation of peoples and organizations should be kept in mind in a discussion on the contribution of the judiciary to the promotion and protection of human rights.

3. The social action litigation promoted by the Indian courts needs to be discussed in more detail to understand the ways by which this could be introduced in Sri Lanka. Already some faint reflections of the initiatives by the judges to protect the rights of the peoples have surfaced. In some instances the Supreme Court on its own initiative has called upon records and inquired into some matters. Even in the past some Supreme Court judges have acted on the basis of some information they have received to initiate inquiries into the violation of human rights. However, as compared with India the initiative exercised in Sri Lanka remains at a lower level. The incorporation of international norms and standards by way of judicial initiatives still remain a rare experience. As a result, the judges are prone to interpret their role in a limited manner.

4. The improvement of the competence of the judiciary should be looked at from a broader perspective. Legal education itself needs to undergo fundamental changes if it is to contribute to the need of contemporary society to cope with its complex problems. The conceptual education needs to be expanded to include human rights education as an integral part of legal

education. On the other hand in the process of education law students must be brought closer to society so that they would have a practical understanding of the society in which they will practice their profession. Intense social awareness must be made part of legal education.

5. Besides legal education in general there must be specific education for the judges. The institute of judges could provide comprehensive courses which would help the judges to improve their competence in understanding law as well as society. In this context the study of the new methodologies developed in other countries may prove useful.

6. The improvement of the competence of the judiciary is very much linked to the improvement of the quality of the legal profession. If the lawyers adopt creative and innovative ways to expand the jurisprudence they would be helping the judiciary to be more sophisticated. The modern forms of repression and tyranny call for sophisticated approaches by lawyers and judges if they are to protect the liberties of the people.

7. The above consideration raises the issue of intellectual integrity of judges as well as lawyers. This matter has been raised by several persons including some former Supreme Court judges.

8. There are new tendencies to encourage law enforcement officers to use third degree methods. This is some times done under the pretext that terrorism cannot be contained if the law enforcement officer are to act within the confines of the law. The overall impact of such encouragement is the breakdown of law and order in general. The law enforcement officers begin to be less concerned with investigations and begin to arbitrate over crimes themselves. This results is a general breakdown of discipline and morale among the law enforcement officers.

9. With the degeneration of the quality of the law enforcement officers more and more importance is given to confessions and other information received by illegal means.

10. The constitutional limitations incorporated in the Constitution remain a basic impediment to the protection and promotion of human rights. It is necessary to study the Indian experience of promoting human rights through constitutionalism.

11. There had been considerable developments of laws relating to the environment and their implementation in India. This jurisprudence needs to be studied and assimilated in the Sri Lankan context.

12. In the field of the civil law there is a tendency sometimes to neglect the rights of people, particularly of the poor. In this respect too there has been a considerable development of law in India.

LESSONS FROM EXPERIENCE

1. Social Action Litigation on "Environmental Matters"

1.a. In Sri Lanka, some provisions of the Criminal Procedure Code (Section 98) (Public nuisance) make it possible to grant redress to environmentally affected public, though in a limited scale. But in other countries, especially India, there have been vast developments resulting from legislation as well as by the courts relating to the protection of the environment. In contrast, Sri Lankan courts have not yet taken a very positive approach in this respect.

Hence, the study of experiences of other countries in general and the Indian experience in particular on this aspect is of vital importance.

I.b. CITIZENS' SUITS

Sri Lankan law at present does not have any provision for the filing of "citizen's suits." However, the proposed new Environmental Law has suggested provisions for "citizens' suits." In the proposed new law, citizens are to be given power to file cases either on one's own behalf or on behalf of another in the District Courts to enforce environmental law and compulsory duties of government agencies. In such actions District Courts could grant injunctions, damages, costs and civil fines. The requirement that a citizen must give 60 days notice to the defendant before filing the cases should be removed.

We support this concept of Citizens' Suits which we hope would be incorporated in the proposed new law with amendments regarding 60 days notice. In fact, the giving of notice prior to filing applications is not necessary at all.

The Indian experience in this respect is very important since this is a completely new area of law in Sri Lanka.

I.c. The Role of Social Organizations in Social Action Litigation

In Social Action Litigation on environmental issues, public campaigns against environmentally unsound projects are necessary. A concerted effort should be made by the social actions groups together with the media to agitate against environmentally unsound projects in supplementing Social Action Litigation.

I.d. Environment and Development

A key argument brought forward by the violators of the environment is that Social Action Litigation hampers 'development.' It cripples progress and economic growth, they say. Another argument is that a closure of an environmentally disastrous factory/ project creates unemployment, loss of foreign revenue etc. The Indian courts have held that 'development'

should mean human development and not 'development' as understood normally. Often, `development' means the unscrupulous exploitation of resources to prop-up economic growth rate irrespective of consequences to the human beings and their environment.

2. Human Rights in Civil Law

The right of effective access to justice is not available to poorer classes even in respect of enforcement of civil and political rights. Though the legal aid system is in existence in Sri Lanka, effective access is not available. The institutional framework exists to some extent but it needs much improvement.

For Recommendations, see page. 34

3. Administration of Criminal Justice and Human Rights

Article 11 of the Constitution of Sri Lanka has entrenched provisions to protect persons against torture and other forms of cruel, degrading and inhuman treatment and punishment.

Nevertheless, persons are subjected to third-degree methods of torture and other cruel and degrading treatment in exercising investigative power by the law enforcement officer. This remains a common practice.

A police officer investigating a crime under the powers granted under the code of the Criminal Procedure Act and the Police Ordinance often resort to such third-degree methods.

This inhuman orientation of the police officers results from tolerance and tacit acceptance of such behavior by the community at large and the State.

This psychological and sociological orientation of the community is due to the following factors:

3.a. The general lack of confidence of people regarding the ability of the police to trace the crime and the offender through proper investigation and therefore, the lack of confidence in the criminal investigation system.

3.b. Suppression of crime by convicting an accused even on evidence obtained by illegal means is tolerated and is admissible in courts as evidence.

3.c. There is a lack of 'a culture of human rights' deeply rooted in the mind and the conscience of the people. Human rights literacy and awareness still remain at a very low level.

The total lack of sensitivity towards the protection of human rights by the police has aggravate the situation. Judges are trapped in the inherent contradiction found in the procedure set out in the administration of Criminal Justice to maintain security and the law and order of the community as a whole on the one hand and on the other the protection of the rights of the individuals. If they lack the required sensitivity to protect the rights of individual's, and shift the focus on the former aspect and they may fail to maintain the equilibrium between the two contradicting objectives in the administration of Criminal Justice.

The tendency to focus more on the security and safety of the society as against the violations of human rights of the accused who are subjected to third-degree treatment results in the encouragement of cruel and barbaric behavior among the law enforcing police officers.

Powers vested in the police under the Emergency Regulations (ER) and under the Prevention of Terrorism Act (PTA) in Sri Lanka have made the situation worse. By taking away the most important guarantees given under the Constitution and under the provisions of the code of the Criminal Procedure Act for a fair trial by making confessions made before a police officer admissible and shifting the concept of presumption of innocence against the accused and

protections regarding arrest and detention (Modifying the provisions of the Criminal Procedure Act, particularly in regard to the time set for investigation and grant of bail) have contributed to aggravate this situation.

The powers given to a police officer under the Emergence Regulations and the PTA has made them more prone to resort to third-degree methods.

In terms of these laws, a person accused of an offense could be made a witness against himself by using the confession made to a police officer admissible against him. This in turn compels or induces a police officer to resort to third-degree methods to force an accused to make a confession.

For Recommendations, see page. 36

4. Investigations and Prosecutions of Crimes

Some Aspects of it Resulting in Violations of Human Rights

Ever since the Police Force was introduced by the British Rulers to Sri Lanka, as has happened in many other South and Southeast Asian countries, a large percentage of Criminal Prosecutions were done by Police Officers. In fact not less than 90% of the Criminal Cases in Sri Lanka are filed by Police Officers after the investigations conducted by them into the complaints received by them. The power to investigate a complaint regarding a commission of a crime is exclusively vested with the police.

Investigations necessarily include the recording of complaints and statements from individuals including the statements of the alleged offender and of other suspects. At the same time for the purpose of maintaining 'Law and Order' these police officers are also empowered to arrest anyone who is suspected to have committed or is concerned

in committing a crime.

Accordingly, what we see here is concentration of these three aspects of recording of information, investigation and prosecution within the same force or organ, which has, in the past led to many incidents of serious violations of human rights.

If the investigations are conducted with a view to securing a conviction, then the person conducting the investigation will be motivated not to investigate but to bring about a conviction, somehow. This position is made worse when recognition and promotions of the officers are also made on the basis of successful prosecutions culminating in convictions.

At the same time police officers are appointed, transferred and promoted by the State, which practically means the ruling party. Due to this, these officers tend to 'please,' and as a rule they are always expected to 'please' the political leaders and their close associates. During the last two decades, this tendency has worsened.

During the last two decades, this position resulted in many human rights violations since the police officers adopted many 'short cuts' to extract 'information' which at the end are termed 'confessions!' For this end, torture of 'suspects' did become an essential part of the investigations.

This method instilled a concept in the minds of the public that if you are 'taken in' by the police for the purpose of investigation, the rule is that you are assaulted and therefore many sought the assistance of lawyers and local politicians to prevent such treatment. Assaults had become the rule and not the exception.

This system in fact 'glorified' some individuals in the local areas since they were able to exercise some influence over the police and could 'help' the people in these areas. People living in these areas were also at the mercy of these persons and if anyone dared to challenge the authority of these individuals, they usually had to 'pay dearly.'

The right the police have to arrest any one for the purpose of

conducting investigations had laid the basis for such a situation and had given the 'license' to the police to 'give works' to any individual 'legally.'

Since the power to arrest for the purpose of investigation is legal, "O.K., get into the jeep, let us go to the police station, then you will know why," and subsequent 'handling' of the suspect has become the accepted norm of police investigations.

In order to overcome the legal repercussions arising from an illegal arrest, detention and assault, the police use the next step, namely, to prosecute the individual for the commission of 'a crime.' At least a 'B' report is filed which is followed up by several other 'further reports.'

An innocent individual has, first to come out of this 'case' before exercising his/her rights to prosecute and file action for wrongful arrest, detention etc. Double litigation has become the minimum exercise available to a citizen to establish, defend and assert his/her rights.

Arrest and Detention

The time has now come to question the necessity of arresting a person for the purpose of investigating a crime. Unlike in the past, identifying and locating an individual is not a complex procedure, with all the modern facilities and methods available in this regard. A suspect being 'at large' would not offer any threat to any witness or to the complainant, except in a rare, extreme case.

Once a suspect is questioned and his/her statement is recorded, there is no good reason to arrest him or detain him. What difference would it make if the suspect is arrested on Monday and produced before a magistrate on Tuesday when he is bailed-out or simply his statement is recorded and he is sent back home and subsequently he is summoned to appear?

A suspect who intends to evade arrest or the process of law may anyway do so, immediately after the commission of crime and not

necessarily after he was questioned and his statement is recorded. The possibility and motivation to abscond or to interfere with the investigation is only one of the considerations even in appropriate cases for making orders for arrest and detention.

Insisting that the 'suspect' be arrested, kept in custody and be remanded show inefficiency and incompetence on the part of the police and their lack of confidence in their own apparatus. This also has a color of mistrust placed on the judicial process, since the public wants some form of retribution for the offense that the alleged suspects are deemed to have committed, since the end result, namely a conviction is not certain due to a lack of proper investigation and record of events. This feeling of 'doubt' in the minds of the public is also a result of the incompetence of the police to do a proper investigation. Professionalism in investigation has not kept its 'pace' with professionalism in crime!

Thus there is no necessity to arrest a suspect, except maybe a person who is committing a serious crime such as murder, rape or armed robbery. Interference with witnesses or obstructing investigations are excuses which have been used to cover up the inefficiency of the police force.

Police Prosecutions

If the police have no right to prosecute and that responsibility is given over to a separate authority, such as a 'District Prosecutor' who acts independently of the police and decides on his/her own whether to prosecute or not, then the police officers who investigate would concentrate more on investigations and not on convictions.

Once the investigations are completed and the 'crime file' is handed over to this prosecuting officer, there will be an independent scrutiny and the case would be assessed before any individual is prosecuted and produced in court or summoned to appear in court.

Since the prosecuting officer is an outsider, he/she is in a better position to evaluate the process of investigation done and when it appears to him/her that some further investigations should be done

in a particular area, he/she should direct the police to investigate that aspect also.

This process would prevent people being prosecuted even in the absence of evidence against them and would help to have successful prosecutions with regard to the offenses that are actually committed by suspects. At the same time a plaintiff in a malicious prosecution suit would have a better chance of succeeding and getting compensation too.

5. The Role of the Judiciary in the Protection of Peoples/ Human Rights

5.a. The judiciary has a very vital role to play in the protection and promotion of human rights of the people. As an essential component of the state, the judiciary is entrusted with the task of securing the fundamental rights of the people. As such the judiciary must play not a passive, but an active role not only in the protection, but also in the promotion and expansion of the rights of the people.

5.b. If the judiciary wishes to and dares enough, it can act to prevent the abuse of executive power, to assert its right as the final authority on the interpretation of law and the Constitution and protect the democratic rights of the people. In fact the courts in Sri Lanka have done so in some instances.

5.c. However, the Judiciary is generally inclined to act passively, adopting a rather conservative attitude in interpreting laws. It often tries to evade the task of interpreting vital constitutional issues affecting the powers of the Executive or of the legislature. The Supreme Court (of Sri Lanka) has imposed a self-restraint on itself when it held that the right to proclaim emergency by the President is solely left to his discretion and that it is not a matter justiciable by the court. The Indian Supreme Court has

successfully intervened to limit the emergency powers and to bring the use of emergency powers within the limits prescribed in international instruments.

5.d. The prevailing political situation is often reflected in judicial attitudes. When the political situation is tense and insecure, there is a judicial tendency to give judgments restrictive of people's rights and when the political situation is getting relaxed they tend to give more liberal judgments.

5.e. There are many instances of violations of fundamental rights of the people by the judges. Since infringement of fundamental rights by judicial conduct is not actionable, the people are left without any remedy in respect of such violations. Instances of Judges encouraging hostage taking by the police, illegally remanding people, ordering cash plus personal bail without any legal provision so as to enable them to remand the surety when an accused is absent;

5.f. During the past few years, the Court of Appeal has rarely exercised its constitutional powers granted under Art. 145 of the Constitution of reviewing *ex mero* motu illegal orders made by minor courts. Often even judges in the highest tribunals have not paid much attention to the ever expanding new concepts of human rights and humanitarian laws or the United Nations human rights instruments;

5.g. Neither the Constitution nor the Judiciary in Sri Lanka have recognized group rights in the exercise of securing fundamental rights. The scope is limited to individual rights. If the courts are to give effect to social, cultural and economic rights of the people, they must be more concerned with groups' rights;

5.h. There is no tradition of criticizing, judicial decisions publicly.

5.i. It has become imperative to evolve a system of orientating the higher judiciary of Sri Lanka to create a new jurisprudence in line with the international human rights instruments as the foundation for drawing inspiration.

5.j. Regular programmes should be conducted to orientate and impart knowledge of international human rights instruments and provisions relating to fundamental rights in Sri Lanka. Such educational programmes should include sensitizing activities directed towards understanding the social ethos of the country.

6. Improvement of the Quality and Integrity of the Judiciary in Sri Lanka

6.1. It is the quality of justice meted out by original courts (Primary Courts, Magistrate Courts, District Courts and High Courts) that concerns the majority of the public. Although a right of appeal may be available to a litigant dissatisfied with a decision of an original Court, either due to the delay or expenditure involved, or due to a doubt about the quality or integrity of the Appeal Courts (Provincial High Courts, Court of Appeal or Supreme Court) such a litigant may not go up in appeal. The need to safeguard the quality and integrity of judges of original Courts is no less than the need in respect of judges of appeal courts.

6.2. Once the general public loses the confidence that it has in the quality and integrity of the judiciary, no amount of hard work or explanations would remedy the situation.

6.3. It is unfortunate, that in many cases the public in general and litigants in particular are questioning the quality of justice meted out and integrity of the judges who deliver judgments and orders.

6.4. It is not surprising to find that sometimes judgments are not delivered on considerations of legal principles, human rights, or principles of natural justice which leads members of the public to question the present system.

6.5. The present system of automatic promotion based on seniority only should be done away with.

For Recommendations, see page. 37

7. The Need for Human Rights Education

The field of human rights litigation and in particular Social Action Litigation is a "jurisprudence which demands judicial activism and an highly creative ability." For human rights to flourish and Social Action Litigation to grow, judges must be prepared to innovate to meet the needs of social justice.

It was felt in the Sri Lankan context that judges should display more awareness, knowledge and concern for social justice, be active in the sphere of human rights, and creative in the field of Social Action Litigation. Even some lawyers, pleading the cause of their clients were often unwilling to expand the frontiers of justice.

It was felt that human rights education had a major role to play in changing the negative attitude of both the judiciary and the bar, in relation to human rights litigation.

For Recommendations, see page. 38

8. The Activities of Social Groups Stimulate and Inspire the Change in the Attitudes of the Judiciary

Sri Lanka, like most countries in the Third World who were freed from the yoke of colonialism inherited a legal system of Western origin. And Sri Lanka has continued to retain this system irrespective of its incompatibility with the social, economic and cultural aspirations of its people.

In India the experience in Social Action Litigation is a bold attempt to break out from the shackles of colonialism and its new manifestation as neo-colonialism as a more relevant legal order.

Even though the impact of this new activism has influenced the legal and political outlook of the entire South Asian region, the judiciary

in Sri Lanka has largely not fallen in line with this trend, and still follows the positivists and pro-establishment attitudes.

The so-called Structural Adjustment Programme imposed on poor Third World countries which includes liberalization of the economy, privatization of state ventures, and devaluation of the currency have led to increased poverty, a break down in basic facilities like health, education subsidies, and have deprived the poor countries including Sri Lanka of their national sovereignty.

The United Nations Children's Fund has in its reports clearly shown how some World Bank programmes have contributed to rising infant mortality, spectacles of closed hospitals or hospitals without drugs, empty schools, growing malnutrition and the spread of preventable diseases.

Indian Courts, by its new judicial activism formulated through Social Action Litigation, have probed such areas of socio-economic policies and have closely scrutinized governmental actions and non-actions. Social Action Litigation also gave an impetus to the activities of social action groups and non-governmental organizations (NGOs) who began to campaign against this "new development model" which brought great misery and poverty to the millions of poor people in India. (i.e. Chipco Movement, Narmada Bacho Andolan, Vigil India Movement, Bar Association of India, Bandhua Mukthi Morcha). The campaigns of these groups against such anti-poor economic and social programmes seeking a new social and political transformation outside the mainstream of the political party system was encouraged and inspired by the new people-friendly jurisprudence expanded by the Indian Judiciary through Social Action Litigation.

A human rights culture must be created in the country stressing economic, social and cultural rights together with civil and political rights through mass agitational campaigns which will strengthen the hand of the judiciary to deliver judgments in the public interest.

We can say that Social Action Litigation in India is judge-led, ably encouraged, and actively supported by a whole host of non-state

persons like lawyers, academics, activists, and various organizations of workers, farmers, youth, students, women, peasants, indigenous peoples, environmentalists, and various NGOs.

As a result of this, highly articulated campaigns and issues based on such campaigns canvassed before them, the courts in India have adopted an activist approach and have intervened often in areas of social and economic policy.

The salient elements of Social Action Litigation are:

8.1. The broadening of *locus standi;*

8.2. The dispensation with the formal writ petition and initiation of action, by consensus, of a letter. (Epistolary Jurisdiction);

8.3. The Supreme Court in our country needs to assimilate the progressive trends in other jurisdictions in using its inherent powers to build up a human rights jurisprudence. In this connection our Supreme Court can be inspired by the Indian example where in the Indian Supreme Court and the High Court have used Social Action Litigation to protect and safeguard the basic human rights of the poor and the underprivileged. It is of special importance to mention that the Indian Supreme Court has moved away from the traditional concept of *locus standi* and the adversary system of justice and has ventured out to even appoint commissions of inquiry to ascertain the facts of the case before handing down a decision on allegation of violation of human rights. The Supreme Court should make access to justice meaningful and real. In this regard the interaction between the superior court of Sri Lanka and the other courts in the region, in particular India must be promoted and encouraged.

8.4. The adoption of commissions of inquiry as fact finding organs for assertaintment of facts in Social Action Litigation.

The participation of the people in all aspects of economic, social and political life at all levels is essential.

Social Action Litigation has now become a strategy for social action.

WHAT COULD BE DONE?

1. A Task Force on Human Rights is a very important institution which came into existence in recent times. It has been able to intervene in many cases of illegal detentions. At times the space allowed to a task force was restricted by political pressure. There ought to be much greater public awareness of the activities of the task force and public recognition of its work. The Task Force needs to be made a permanent institution.

2. Actions under Section 126 of the Constitution:

2.a. Despite many years of agitation, the one-month prescriptive limit has not been changed. A bill that was introduced under the last government, was later shelved.

Meanwhile, there have been very strict interpretations of Section 126. A wife of a detainee was not allowed to file an action, as

only the victims, or a lawyer on his behalf, could file an action. A lawyer was not allowed to file a petition on behalf of a 14-year-old girl who was a victim of torture. He was not allowed to file a petition as the girl was a minor. The petition was later amended by adding the girl's guardians as a party.

Litigation by social interest groups has not been recognized by law.

It is necessary to bring social pressure to bring about necessary legal amendments. However, meanwhile the judges could make a difference by liberally interpreting the law and following the precedence set by the Indian Supreme Court.

2.b. Jurisdiction of court applications under Section 126 of the constitution with regard to human rights needs to be expanded. All high and district courts should have jurisdiction to entertain such applications. The same should apply to *Habeas Corpus* applications.

3. Electronic media should be used for extensive human rights education. The state could allocate time-slots for this purpose. The programmes could be developed with the co-operation of all persons and groups interested in human rights education. The experience of the United Nations Transitional Authority in Cambodia (UNTAC) in this regard could be a useful guide to developing such programmes.

4. Within the existing framework of civil law, it is difficult to find redress for many human rights problems. The procedural limitations as well as the delay in the disposal of cases are some of the difficulties which create such problems. In the short run, it is difficult to overcome such problems. Therefore, it is necessary to create new ways of dealing with the violations of rights.

For example, the increase in value of real estate poses a danger to the wet-lands. Re-filling of wet lands poses a threat to the environment. However, powerful individuals and companies

find in this a vulnerable means of enrichment. Often the affected parties are too weak to put up effective resistance. Existing civil law remedies are insufficient to deal with the situation. While laws and procedures need to be amended, a jurisdiction similar to a Task Force may need to be created for the protection of environmental rights.

5. Social Action Litigation

5.a. The broadening of *locus standi;*

5.b. The dispensation with the formal writ petition and initiation of action by consensus of a letter. (Epistolary Jurisdiction);

5.c. The Supreme Court in our country needs to assimilate the progressive trends in other jurisdictions in using its inherent powers to build up a human rights jurisprudence. In this connection our Supreme Court can be inspired by the Indian example where the Indian Supreme Court and the High Court have used Social Action Litigation to protect and safeguard the basic human rights of the poor and the underprivileged. It is of special importance to mention that the Indian Supreme Court has moved away from the traditional concept of *locus standi* and the adversary system of justice and has ventured out to even appoint commissions of inquiry to ascertain the facts of the case before handing down a decision on an allegation of violation of human rights. The Supreme Court should make access to justice meaningful and real. In this regard the interaction between the superior court of Sri Lanka and the other courts in the region, in particular India must be promoted and encouraged.

5.d. The adoption of commissions of inquiry as fact finding organs for assertaintment of facts in Social Action Litigation.

The participation of the people in all aspects of economic, social and political life at all levels is essential.

Social Action Litigation has now become a strategy for social action.

6. Human Rights in Civil Law

6.a. Quality legal aid assistance to needy persons needs to be improved. A legal aid scheme needs to be organized in a manner to encourage the involvement of experienced lawyers in this work.

6.b. Traditional concepts, and reluctance to deviate from outdated precedents, has caused considerable difficulties and hardship, especially in enforcement/ execution proceedings after a decree is entered in civil litigation, while the judgments are under appeal. This is so in rent and ejectment cases. After 14 days of entering judgment, a successful party can move for writ of execution pending appeal and eject the tenant.

6.c. Speedy remedial legal procedures are necessary where fraudulent methods have been resorted to by unscrupulous litigants to eject people from their houses and land. Some litigants only become aware of the existence of such litigation when they are ejected or dispossessed.

6.d. In family matters like divorce proceedings custody applications, etc., in order to ensure the best interests of the child, there should be representation of such children in courts.

6.e. Family Courts need to be reintroduced with trained family counselors. A training institute needs to be established to train family counselors. In this respect too the Indian experience may provide a useful guide.

6.f. Education programmes for the people at grass-roots level need to be established to give them an idea of their rights and obligations.

6.g. No fault liability funds need to be established to help the victims of running down cases.

6.h. The procedural barriers which prevent human rights enforcement need to be overcome. This may be done by simplifying procedures and adopting innovative approaches.

6.i. The consumer courts of India are one of the examples that may be followed in the context of rapid commercialization. These courts are also an example of the use of simplified procedures. Such changes could come about by public agitation and new legislation.

6.j. Industrial law in Sri Lanka was created with the view of introducing simplified procedures. In order to assist the litigants and to protect them from the harassment of litigation under the normal civil procedures. However, by a series of judgments the focus of this legislation was shifted in favour of the employer.

6.k. The unreasonable delay in disposal of cases is itself a violation of human rights.

6.l. There are no effective remedies for people evacuated from their land for the purpose of 'development' projects. In such situations there is little that could be done through the existing legal procedures.

6.m. The people who have occupied crown lands for a long period of time should not be prosecuted for trespass. Often, such prosecutions have been undertaken for the purpose of ejecting people from the lands they have cultivated and developed. Such evacuations result in deprivation of livelihood and therefore, is a violation of the right to life.

6.n. The right to work needs to be recognized as a human right. This right implies that where due to circumstances employment cannot be granted, a payment of minimum wages must be guaranteed by the State by way of social security.

7. Administration of Criminal Justice and Human Rights

7.a. To enhance the level of awareness of human rights and to develop a culture of human rights by the promotion of human rights literacy.

7.b. Original court judges' sensitivity towards the protection of human rights must be stimulated.

7.c. Police must be reoriented and reformed. There is a need to restore to the police the skills for proper investigations and integrity as public officers. For this purpose steps should be taken to improve the quality of training of the police.

7.d. A Police Reform Commission must be appointed.

7.e. Criminal proceedings must be instituted against police officers for excesses and abuse of powers and such errant officers should be interdicted forthwith pending such inquiries.

7.f. To take special measures to ensure respect for human rights by police officers.

7.g. The Prevention of Terrorism Act (PTA) should be abolished.

8. The Role of the Judiciary in the Protection of Peoples/ Human Rights

8.a. It has become imperative to evolve a system of orientating the higher judiciary of Sri Lanka to create a new jurisprudence in line with the international human rights instruments as the foundation for drawing inspiration.

8.b. Regular programmes should be conducted to orientate and impart knowledge of international human rights instruments and provisions relating to fundamental rights in Sri Lanka. Such educational programmes should include sensitizing activities

directed towards an understanding of the social ethos of the country.

9. Improvement of the Quality and Integrity of the Judiciary in Sri Lanka

9.a. Recruitment of officers to the judiciary should be done with extreme care and caution so that only lawyers with experience and proven ability are selected rather than selecting on seniority in the profession.

9.b. Recruitment should be done at different levels; at the level of Primary and Magistrate Courts, District Court, High Court, and Appeal Court level. This would enrich the judiciary with lawyers who have experience in each of these levels rather than promoting someone from the level below who had no experience in the relevant field.

9.c. The lawyers could be asked to come up voluntarily to take up these assignments as judges for a limited period of two to three years. Recruitment of well-experienced lawyers would enrich the judiciary and help re-establish the confidence and faith in the judiciary once again.

9.d. There should be no 'automatic promotions' and each level should be filled in dependent of the lower level judges but they also should be able to apply to be recruited either after a set period of time or if they already have gained experience in the relevant field.

9.e. A sense of accountability to society should be inculcated in all judges. To ensure this there should be a programme of continuously educating all judges, not only in law, but in the socio-economic issues and values of contemporary society. The education programme should expose judges to gain experience among different classes of society and to the current thinking of

trade unionists, sociologists, social activists, and social workers.

10. Need for Human Rights Education

10.a. Human rights education needs to be introduced in the curriculum of the Sri Lankan Law College and the University. It was observed that steps were being taken in the right direction by introducing human rights education in the university.

10.b. Professional bodies and NGOs engaged in the field of human rights had a role to play in conducting "workshops," seminars and educational activities at the basic legal education institutions such as the Law College and the universities. It is suggested that the practical training programmes now undertaken at the Law College is a possible avenue for such educational activities.

10.c. On a higher level it was considered necessary to lobby for a greater emphasis on human rights education and Social Action Litigation in bodies such as the Institute of Judges. This would create awareness in the judges of the lower courts of the importance of human rights and the need to effectively use the available machinery and framework of our judicial system to enforce constitutional and legal rights and afford a measure of social justice.

10.d. It is hoped human rights education it is hoped would create the necessary background in which the attitude to human rights litigation in the Sri Lankan perspective would become positive and creative.

10.e. It was felt that there was a growing need to educate the general public on human rights. This would ensure that the general public would support the human rights culture. In such a climate, litigation for human rights violations would become more meaningful. It was felt that "people's movements" and NGOs engaged in human rights activities had an important role to play in propagating the human rights culture, and in educating the general public on human rights.

CONCLUSIONS

Human rights jurisprudence in Sri Lanka still remains at a very elementary stage. However, human rights problems in Sri Lanka are very acute both in the sphere of civil and political rights as well as in economic, social and cultural rights. The gap between the violations of rights by individuals as well as by institutions and the redress available against such violations could be narrowed only by the participation of people themselves. Intense public awareness and eternal vigilance remain the foundation of protection of democracy and the promotion of human rights.

One of the positive developments in jurisprudence in many parts of the world is the permeation of human rights considerations in all aspects of the law. These experiences in other countries need to be assimilated into the body of law in Sri Lanka. This should happen by way of legislation as well as by way of judicial precedent. It is only

natural that more conservative elements whose conceptions of law are based on outdated and obsolete philosophies would resist the development of such a jurisprudence. However, the compulsions of a rapidly changing society are in favor of evolving legal institutions in line with international norms and standards. As Sri Lanka is eager to find its place in the international community it is imperative that international developments in the human rights field be incorporated into the Sri Lankan Law speedily. This is today a matter of national pride and self-respect.

The judiciary could play a vital role in developing such a jurisprudence. An enlightened legal profession could assist the judiciary in this respect. The creative and innovative approaches need to be adopted in the Third World and in Asian social context in particular. In this respect, the initiatives taken by the Indian Supreme Court have been followed in several other countries in Asia and Africa. By such creative approaches it is possible to emerge out of the mold of the Anglo-Saxon-law where such law is irrelevant to the social context of Sri Lanka.

To achieve these objectives, the mass media, including the electronic media, needs to play a vital role positively. Human rights journalism is essential for rapidly promoting an outlook that incorporates human rights considerations into all aspects of life. This is particularly so in relation to human development as against 'development' which results in creating chaos for vast sections of the population and massive environmental problems. Open discussions on all aspects of life, including court cases, should be encouraged.

ANNEXURES

Annexure I

Towards a Burgeoning Indian Jurisprudence of Social Action and Public Interest Litigation

- Justice V. R. KRISHNA IYER -

The Dialectics of Public Interest Litigation :

The central concern of law and justice is humanity and its happy, orderly advance, their focus. But in actual fact, notwithstanding emphatic rhetoric in constitutional parchments, equal protection of the laws and a just social order remain paper projects for the have-not segments of society. The rule of law is but a pleasing illusion if the

judicial process does not serve as a delivery system of social justice 'in widest commonalty spread. Litigation, *the curial modus operandi* for securing rights of citizens, may well lose its curative potency *vis-à-vis* the indigents, agrestics [rural; rustics] and illiterates. For them it may survive for some time as the tantalising opium of remedial hope if the court, by its performance, blesses the rich but betrays the poor. How can the judicative system command the confidence of the humbler millions if law-in-action marginalises the masses, even menaces the many who hunger for right and justice? In an exploitative system the anonymous lines below ring a bell:

> "The law locks up both man and woman who steals the goose from off the common, but lets the greater felon loose who steals the common from the goose." Anatole France acidly expressed the truth of the lie that law is the agent of justice:
>
> "To disarm the strong and arm the weak would be to change the social order which it's my job to preserve. Justice is the means by which established injustices are sanctioned."

The portentous poignancy of this unhappy reality is writ large on the state of justice in India. This ominous scenario is mitigated by fresh signs of humanism, tho' with halting steps. Law is what law does and so, a performance audit of the legal system alone can tell whether it fills the bill of securing to the people what the Constitution solemnly pledges: Justice, Social, Economic and Political; .... Equality of Status and of Opportunity; and ... the dignity of the individual. The present study is confined to the judicial system which, in any society, is but a super-structure, the hard socio-economic equations being the foundation. I have often quoted a profound thought of Seton Pollock relating to my theme here and so I borrow it again:

> "The law itself, though of crucial social importance, is only one element in the total human task. That task is to meet and master those frustrations that diminish man in his humanity and obstruct the realisation of his freedom and fulfillment within the human society. Those frustrations stem from ignorance, poverty, pain, disease and conflicts of interest both within the person (the field

of psychological medicine) and between persons (the territory of the law). These manifold and interacting frustrations cannot be met by any one discipline but only by a co-ordinated attack upon the problem through enlightened political and administrative initiatives and by educational, medical, psychological and legal remedies."

Only a judicial culture which, in its texture, has social justice, human dignity and egalite woven into it can make the judicature in a Third World country, based on a socialistic democratic order functional. The raw realities of Indian society to-day are colossal illiteracy, intractable indigency, and countless chronic injustices, blended with a militancy generated by the Preambular Rhetoric of the Constitution. The feudal-colonial status quo ante received its legal death sentence with Indian Independence. The tryst with destiny Indians made, when the country awoke to Freedom, 'to wipe every tear from every eye' and to underwrite "a social order in which justice, social, economic and political shall inform all the institutions of the national life," is still a pious wish.

This sublime sentiment, consecrated in the Constitution, is distancing itself from the still sad music of Indian humanity whose life, for considerable numbers, remains a tale of blood, toil, tears and sweat. The political water-shed was marked by Indian Independence. The Great Divide between the colonial legal system and free India's value laden jurisprudence must be grasped if one is to approach the story of judicial developments in the domain of Public Interest Litigation. The political compulsions and socialistic imperative, which ignited processes of transformation in the administration of Indian justice, desiderata creative adaptations and mass-based mutations in manifest fulfillment of the constitutional mandate that "the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall.... ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities"(Art. 39 A). The Judiciary, being one of the three principal instrumentality of the State, is also bound by this command

to slough off the dated dogmas of colonial vintage and so to shape the processes of the law as to enrich the national resolve to secure equal justice to all, regardless of economic and other disabilities.

It needs no dialectical materialist to conclude that the social dimensions of jurisprudence when it makes a quantum jump from a dying imperial order to a living democratic order must undergo a people-oriented radicalization. The people of India are illiterate, around 70%, indigent, around 50% being below the poverty line, primitive, more than 20% being depressed classes and tribal miserable. A land where gender injustice is religiously practiced by all the religions, where *sati* or pressure to leap into the husband's funeral pyre, child marriage, bride-burning, deadly dowry ubiquity, gang rape, bonded labour and marketing of tribal women and dedicating them to goddesses as a pious device to push them into prostitution-these and other besetting vices mar the human map, agonizing realities cannot but summon the robed brethren to catalyse the constitutional processes and make social justice a fact, not a fiction. The writ of the court must conscientise the social forces or else it is dope, not hope. The pariah sector is a silent victim of countless privations and human rights violations. The judicature cannot be a jejune and jaundiced limb inertly witnessing the Constitution being stultified.

Environmental pollution, toxic effluents and deforestation by industrial irresponsibles, public corruption by 'privatized' power processes and a host of other mafia operations vitiate the social milieu, violate public morals and deflate the faith of the mute millions in the legal system as a corrective instrument. In sum, the lowliest, the lost and the last, who are the Fourth World within the Third World, wait in vain for social justice, in its comprehensive connotation. A chapter on Fundamental Duties casts, *inter alia*, a constitutional obligation on every citizen 'to protect and improve the natural environment including forests, lakes, rivers, and wild life, and to have compassion for living creatures and to safeguard public property and to abjure violence'. If a poor person, unable to stop pollution although affected by it, seeks the help of the Court to decree its eradication, the judicial process cannot slumber. Similarly, when public property is squandered, plundered

or, by corrupt means, siphoned off for illegitimate ends, a helpless citizen must be able to arrest the process through judicial aid. If a tribal finds the State funds for his tribe's rehabilitation looted by political dacoits or his forest precincts dubiously snatched away by moneyocrats, the court should issue fire-fighting writs or rescue directives because his fundamental duty to safeguard public assets can be enforced only through court orders. Equal wages for equal work, regardless of sex, is a constitutional and statutory duty of the employer. If there is breach, judicial power must offer effective shelter. Even if a legislation hurting or hampering the backward sector is passed, the higher courts have to declare the statute void, if it be contra-constitutional. In sum, the judicial process, in its functional fulfillment, must be at once a shield and sword in defending the have-nots when injustice afflicts them. And this must be possible even if the humbler folk, directly aggrieved, are too weak to move the court. Access to justice, as will be explained later, is fundamental to fundamental rights. For a right without a remedy is writ in water, being but printed futility. And when the battle is between India (Private) Limited and Indian (Public) Unlimited, the Court, with large constitutional authority, must act. 'To be or not to be' is the question before a dynamic judiciary.

Human rights are inalienable values which make for the dignity and worth of personhood. In a feudal universe and colonial cosmos, — India is, alas, a blend of both — fundamental freedoms are a casualty or a formality. Freedom of speech and of the press, freedom of association, of labour's right to strike and people's right to protest are jural marijuana in a court system of slow responses. For landless tillers and other deprived and underprivileged categories, for ill-treated prisoners and victims of police torture and lock-up liquidation, for child labour, homeless floatsams, sufferers of custodial cruelties and unspeakable forms of indignity and shame for the socio-economic 'deprived' abounding in India, social justice is constitutional cant and judicial justice a rope of sand unless enforceability is easy and the forensic process committed to compassionate realism in the grant of relief. The *suprema lex* of India promises most of what the Universal Declaration of Human Rights inscribes; the Supreme Court and the

High Courts, under solemn oath swear to do justice, using the legal process as a means towards that end. If the judges take the Constitution seriously, they are bound to accelerate the process of forensic perestroika geared to the goal of affirmative relief within the reach of everyone, be he backward, primitive, tongueless or suppressed. Justice, in the constitutional connotation, embraces many dimensions, not mere adjudication between two litigants visualised by the gladiatorial scenario of the adversary system. A radical rupture with that 'combatant' culture, transplanted into India and nurtured by the Indo-Anglian judicature, is thus inevitable. Moreover, the tasks which functionally belong now to the forensic system are far beyond the mimic battles carried on according to medieval rules and indifferent to the inequality of the weaker sector. According to the anglophilic institutional vision, the judge is but an umpire, and the better boxer, not the juster party, wins the game. Obviously, he who needs help to present his case finds himself at the losing end. This shall not be. Third world jurisprudence, in its processual, remedial and substantive dimensions, must inspire a result-oriented credibility in the Lazarus sector and Abel bracket. Then only will the rule of life Legitimize the rule of law.

The Constitution of India, like other national charters of our times, has a progressive hue. Here a few major provisions in Parts III and IV need emphasis. Equality and equal protection, when enforceable as law (Art.14), gives the Court a power to wipe out the terrible inequalities and iniquities rampant in a feudal-colonial society. Freedoms of speech and association, of movement inside and outside the country, of profession and business, guaranteed under Art.19, vest in the judges vast powers to interdict State authoritarianism and ensure individual autonomy. Most importantly, human life and personal liberty are made impregnable subject, of course, to legal procedure (Art.21). Though seemingly vulnerable to legislative invasion, this protection has been rendered an inviolable rampart against Executive and Legislative breaches through rulings of the Supreme Court.

For emphasis, let me recapitulate the inhumanity of life, despite the humanism of the constitution. India lives simultaneously in several

centuries. Some practices still flourish, though not extensively, which are survivals from ages of human bondage. Women are suppressed; trafficking in human beings, including servitude, flourishes; child labour in factories and risky enterprises is piteously extant. The numerous backward brackets, living in shanties and pavement dwellings and shocking sub-human social and economic conditions, are in no mood to vanish, what with caste wars in Bihar, bonded labour in feudal estates and dispossessed tribals, harassed in their forest habitats, roaming homeless in despair. A gathering storm is bound to blow unless a creative rule of law, socially sensitive, operationally dynamic and remedially prompt and potent, comes into being. The Proprietariat versus the Proletariat confrontation must generate a progressive jurisprudence out of the creative tension. The grim urgency of the summons for a radical, humanist version of the jurisprudence of justice, cadres of justices and techniques of justicing is evident form the frequent reports about terrible injustices on a macro-scale. Otherwise, human rights of the hungry militants become non est. This is the social essence of the battle of the tenses. The Raj past still holds the Republic prisoner. A struggle for peaceful deliverance is possible only if law and court conspire to change this sorry scheme of things entirely and remould it nearer to our heart's desire. In British Indian days, poverty itself was a crime and a wandering indigent could be bound over as a security suspect by the criminal law. Independence brought ideological winds of change, and humans without rights were clothed with guarantees of fundamental rights. But where was the promised land? Progress has been made, mass awareness has been infused, courts with extraordinary powers have been incarnated, but the actualisation of rights has remained distant. India was waiting for the judicial activist, social action litigation, people-oriented jurisprudence and a vaster jurisdiction with broader access to justice.

The jurisdiction of the Indian Supreme Court is the widest in the world; the challenges of India's social changes are the sharpest; the dynamics of a functional jurisprudence is the creative expression of judicial response to the crisis of hunger for justice. Public Interest Litigation is the offspring of these social forces. This burgeoning process,

seminal and innovative, makes the court a catalyst of social justice, a defender of the constitutional faith and the protagonist in the drama of human rights for the common man.

Judicial power, as the constitutional sentinel on the *qui vive,* has vigilant, versatile functions as the interface between 800 million people and the moghuls of power. Here is a rising revolution of justice expectations, ignited by Independence, which may burst as an angry explosion of frustrations if the judiciary, by omission and commission and conservative tradition, fails in its mission as a radical fiduciary and redemptive instrumentality of the people.

Democracy of Judicial Remedies:

This role transformation democratises the judicial institution - both process and personnel - and banishes the cult of the court as imperium in imperio. Judge Jerome Frank aptly sums up for his country what obviously applies to India:

> "The robe as a symbol is out of date, an anachronistic remnant of ceremonial government..... A judge who is part of a legal system serving present needs should not be clothed in the quaint garment of the distant past. Just as the robe conceals the physical contours of the man, so it needlessly conceals from the public his mental contours. When the human elements in the judging process are covered up, justice operates darklingly. Now that the Supreme Court has declared the judiciary a part of candid democratic government, I think that the cult of the robe should be discarded."

There has to be a paradigm shift if the march from despair to hope is to take place-a new way of thinking about old problems, a shift of the judicial centre of gravity from the affluent to the indigent which, in truth, is the fulfillment of the Constitution. Statesmen of the Law must surely dynamise the forensic methodology with creative intelligence and consciousness of social dimensions, and democratise its institutional accountability so as to ensure the Third World

mendicants for justice, in their millions, meaningful remedial alms!

True, economic transformation is the primary function of the Executive and the Legislature. But where Justice is the end product and its content has socio-economic components, the Constitution which is the nidus of all Power, commands the judges to catalyze and control, monitor and mandate by writs, and directions-vide Arts.32 and 226-so that they may bear true faith and allegiance to the Constitution and say 'Thy shall be done'.

Public Interest Litigation (P I L) is the product of creative judicial engineering. The first obstacle to the people-oriented Project 'P I L' is the blinkered adversary praxis. Friedman was right when he said : "It would be tragic if the law were so petrified as to be unable to respond to the unending challenges of evolutionary or revolutionary changes in society." Lord Scarman likewise hit the nail on the head in his Hamlyn Lectures: "I shall endeavour to show that there are in the contemporary world challenges, social, political and economic, which, if the system cannot meet them, will destroy it. These challenges are not created by lawyers; they certainly cannot be suppressed by lawyers, they have to be met either by discarding or by adjusting the legal system. Which is to be?" Legal Justice must not operate in a sound-proof, light-proof court room with obsolete chants, mystiques and techniques but discern the social changes and re-design its delivery system, so as to accelerate people's access to effective, litigative justice. The tension between heritage and heresy will, if neglected for long, tear down the tower of justice. In truth, the law lags behind contemporary advances. When we deny this gap, the law becomes "the government of the living by the dead." The 'ayatollahs' of the law are negative navigators of the old order. Commonwealth Secretary General, Ramphal once observed:

> "The law has a greater, more positive, more exciting role in discerning change and legitimising progress. It is a role played consistently over the ages as the law fulfilled its noblest purposes with consummate discretion in such areas as human bondage, the right of dissent, desegregation and women's rights. There

will assuredly be other roles ahead for which you will need wisdom, perception and courage but most of all a vision of change and sensitivity to its arrival. Only thus will you secure your validity and fulfill your deepest duty in our changing world."

Pathology of Adversaries:

The social credential of the Justice System and its functional potential desiderate a remedial jurisprudence which is the cutting edge of court justice, breaking the bigotries of the current 'adversarial' ideology and other forms robesque' rituals lest a dinosaur fate should overtake the Justice System.

The adversary regime, a legacy of the Anglo-American legal culture, is splendid in principle in many respects and is a victory in practice for human rights, viewed historically with Star Chamber memory, but is hostile to current expectations from court justice unless necessitous innovations are wrought into the system. A court where man matters is the goal. 'Appropriate judicial technology' for human justice is the desideratum.

In recent years the cost-intensive features of the adversary system and the way in which it closes the door against lesser mortals has provoked daring departures by jurists of the eminence of Lord Devlin. Professor Zeidler has suggested conference-like procedures and elimination of gladiatorial features. Some Judges have proposed reforms by making the judge not a referee but one who seeks to reach the truth. The disabilities of one of the disputants in producing evidence should not and would not, if the judge were activist, weaken his case if truth is on his side. Justice must be founded on truth, not mere 'proof' which depends, in an adversary milieu, on the strength of the party. Consequently, a wind of change is blowing over the Indian judicial terrain.

Easy Access to Justice:

Any discussion of this nascent jurisprudence in social locomotion must begin with the lucid thought of Cappelletti:

> "The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, early, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement - the most basic 'human right'- of a system which purports to guarantee legal rights."

Access to justice today is confined to a 'person aggrieved' and having 'standing' or cause of action by alleging a direct personal injury. In Third World conditions this restricted approach defeats the object of justice to the voiceless for whom the court is 'untouchable' and 'unapproachable'. Access to courts is not an abstract conception but a reified project with mutations and adaptation according to the exigencies of society. Class actions, test cases, representative suits, public interest litigation, social action groups going into courts as initiators or intervenors and so on are some of the forms. The subject matter in such cases may be environmental pollution, public nuisance of other sorts, oppression of socially weaker groups, violation of social welfare legislation, evasion of legal controls by the corporate sector, illegitimacy of appointments to high offices, executive excesses by public functionaries, administrative delinquencies and so on. Civil rights litigation, consumer protection, the fight against deprivation of liberty of the poor, over-incarceration, torture in custody, unjust death penalties, etc., etc.-these classes of cases have more impact on the weaker sector of society and take much less time and expense than property litigation, tax cases and corporate battles put together. Public law must develop in this direction at the procedural level so that justice may come within the reach of the common classes directly or vicariously. 'Standing' is the legal entitlement of a person to invoke the jurisdiction

of the court or tribunal regardless of his personal injury. The adjectival law must be broadened to bring within the orbit of "standing" any person, who has a real concern in the cause. 'Concern' is a word without definite legal connotation such as is possessed by 'interest'. The use of 'real', emphasizes that busy-bodies are not to have standing and the word is itself a flexible one which may operate as a regulator in this context; it transforms the concept of 'concern' into one which is clearly objective." Indeed, the jurisprudence in this branch is of great promise despite the exaggerated apprehensions deliberately generated by some "yesterday" jurists and judges who are allergic to the dawn of the new public law. The floodgates argument', often urged on the score that busy bodies will flood our courts with frivolous cases, is a phoney bogey. "The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom".

Properly used, the poor become strong through an independent, dynamic national legal services authority, with a net-work of duties for educating and arming the weak with legal missiles and helping them use litigative artillery for vindicating rights. Otherwise, the poor will dismiss the justice system as an expensive inconsequent.

How can a bonded labourer working in a stone quarry ever know of moving the Supreme Court of India?; "bonded labourers are non-persons exiles of the system, living a life of animals. The bonded labourer has no home, no shelter, no food, no drinking water. He has no hope. A human being without hope has no Supreme Court," says Nandita Haksar, an activist. It is only a socially committed individual or politically aware organization that can speak on his behalf. Such an individual or organization may be deeply moved by the misery he sees or by a report he reads. Such a person (or organization) does not suffer the disabilities himself but he feels for the poor and reacts to injustice. Can such a person (or organization) move the court on behalf of the poor, ... the jurisdiction of the Supreme court "can be invoked by a third party in the case of a violation of the constitutional rights of another person or determinate class of persons, who, by reason of poverty, helplessness, disability or social or economic disadvantage is

unable to move the court personally for relief." In fact, public interest cases, started by social action campaigners, involve the rights of humble people at one go, unlike traditional litigation which deals with disputes between individuals. And a single case may give relief to thousands of people instead of driving them to separate cases which would have to be heard separately.

Seminal Judicial Trends

The Supreme Court of India in the Fertilizer case accepted this people-oriented broad-based perspective. The actual case arose when a damaged plant was sought to be sold by a Public Sector Factory for an allegedly low price causing loss to the exchequer. The workers of the Factory challenged the proposed sale. The Court observed:

> "Two questions, incidentally arise: Have the workers locus standi under Art.32, which is a special jurisdiction confined to enforcement of fundamental rights? What, if any, are the fundamental rights of workmen affected by the employer's sale of machinery whose mediate impact may be conversion of permanent employment into precarious service and eventual exit? Lastly, but most importantly, where does the citizen stand, in the context of the democracy of judicial remedies, absent an ombudsman? In the face of (rare, yet real) misuse of administrative power to play ducks and drakes with the public exchequer, especially where developmental expansion necessarily involves astronomical expenditure and concomitant corruption, do public bodies enjoy immunity from challenge save through the post-mortem of Parliamentary organs. What is the role of the judicial process, read in the light of the dynamics of legal control and corporate autonomy? This juristic field is virgin ... law must meet life in this critical yet sensitive issue. The active co-existence of public sector autonomy, so vital to effective business management, and judicial control of public power tending to go berserk, is one of the creative claims upon functional jurisprudence."

> "While it is unnecessary for us to spell out in greater detail the emergence of a new branch of administrative law in relation to the national plan and the public sector of the economy, it is important to underscore the vital departure from the pattern of judicial review in the Anglo-American legal environment because the demands of development obligated by Part IV compel creative extensions to control jurisprudence in many fields, including administrative law, contract law, penal law, fiscal law and the like."
>
> "A pragmatic approach to social justice compels us to interpret constitutional provisions, including those like Arts. 32 and 226, with a view to see that effective policing of the corridors of power is carried out by the court until other ombudsman arrangements - a problem with which Parliament has been wrestling for too long - emerge.

The learned Attorney General challenged the petitioner's locus standi either qua worker or qua citizen to question in court the wrong doings of the public sector although he maintained that what had been done by the Corporation was both bona fide and correct. We certainly agree that judicial interference with the Administration cannot be meticulous in our Montesquien system of separation of powers. The court cannot usurp nor abdicate, and the parameters of judicial review must be clearly defined and never exceeded.

> "Assuming that the Government company has acted *mala fide*, or has dissipated public funds, can a common man call into question in a court the validity of the action by invocation of Art.32 or 226 of the Constitution?
>
> "We have no doubt that in competition between courts and streets as dispenser of justice, the rule of law must win the aggrieved person for the law court and wean him from the lawless street. In simple terms, locus standi must be liberalised to meet the challenges of the times. *Ubi jus ibi remedium* must be enlarged to embrace all interests of public-minded citizens or organizations with serious concern for conservation of public

resources and the direction and correction of public power so as to promote justice in its triune facets."

"Law, as I conceive it, is a social auditor and this audit function can be put into action only when someone with real public interest ignites the jurisdiction. We cannot be scared by the fear that all and sundry will be litigation-happy and waste their time and money and the time of the court through false and frivolous cases. In a society where freedoms suffer form atrophy and activism is essential for participative public justice, some risks have to be taken and more opportunities opened for the public-minded citizen to rely on the legal process and not be repelled from it by narrow pedantry now surrounding *locus standi*."

The foundation for court action is no longer the personal injury of the plaintiff, and a liberalised rule for seeking relief, in categories of cases now well established, through surrogates, Good Samaritans and public-spirited organizations is now integral to the processual jurisprudence of India. A radical democracy of judicial remedies is now taking shape in the forensic universe of Third World countries. This litigative avatar as the deliverer of social justice is the crimson phenomenon of public interest forensics. Now considerable liberties are taken with vintage procedures. For instance, instead of formalised pleadings even letters setting out grievances are treated as sufficient to trigger judicial action. Why? The illiterate indigents and rural primitives suffer injustices but are out of bounds for expensive lawyers' offices and exotic legalese. Hence what has been called epistolary jurisdiction is in vogue in P I L cases whereby an ignorant victim or lay social activist is permitted to lay information before the court. Thereupon the court moves on its own in a compassionate jurisdiction to inhibit wrongs and to enforce rights.

However, certain safeguards are being institutionalised; letters are processed by legal aid societies who pass them on to advocates for conversion into proper writ petitions which are filed through the registry so that they often are represented in a more satisfactory shape. When a socially conscious individual

or a voluntary organization moves the Court on behalf of the poor it does so mostly on the basis of newspaper reports or scanty personal knowledge. The Court needs facts, statistics, affidavits and evidence before it can come to a conclusion on violation of fundamental rights. The contest is always unequal. On the one side is the government, with the entire administration at its command and an army of lawyers. Or the might of a corporation or moneyocrat. On the other side is a social activist seeking justice without any idea of court procedures or requirements or an indigent priced out of the judicial theatre. Often for such an individual or organization, obtaining an affidavit from a bonded labourer, a woman in a rescue home, or a jailed trade union leader is in itself a hard task. Other procedural abracadabra, familiar to the bar, may baffle them. In such predicaments, juristic realism suggests new recipes, forges new tools, devises new methods and adopts new strategies for the purpose of making human rights meaningful for the large masses of people. Social workers, journalists, engineers, law teachers, advocates and welfare organizations have been involved in such undertakings and their reports have become mines of information on the condition of the people. People who have no forum for redressal of their grievances have now some access to justice. This is a new dimension to the forensic process. Public Interest Litigation is not, to borrow a court ruling, "in the nature of adversary litigation but a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community to assure them social and economic justice which is the signature tune of our Constitution."

While a broader perspective regarding locus standi is a desideratum, more radical procedural reforms are essential if the marginalised masses are to regard the Justice System as theirs. Judicial justice must be liberated from the sclerosis of the adversary process, for the sound reason that between unequals that procedure fails to be just and handicaps the underdog. Procedural fair process based on principled

pragmatism must govern our choice. Prof. Dr. W. Zeidler has pinpointed the controversy thus:

> "Amongst the procedural systems the common law (adversary) procedure is what a shining Rolls Royce car is amongst automobiles whereas the German procedure may be compared with a dusty small Volkswagen. I agree. But the question remains: What is it you can afford to pay for, and how often and in what situations are you in need of a Rolls Royce or a Volkswagen?"

The greatness of the Adversary System (including the accusatory process, as it is popularly known in the criminal jurisdiction) and its revolutionary part in the progressive story of human justice cannot cover up its current anti-poor aberrations, its chronic elitism and soft response to exploitative interests as their rescue shelter. I view the Court Process as a value weighted ally of the People's Process and suggest a Reform Project on the basic assumption that the democratic politics of justice (in the higher sense) desiderates humanist procedural mutants with activist egalitarian bias. The creed of social justice sanctions the swing towards the have-nots.

From this angle, affirmative procedural action, a departure from "adversarism," becomes an obligation where public justice and the whole truth become the major concern of the Judge. Indian Courts have now established the praxis, subject to rules of natural justice, of collecting evidence through its own agencies like commissions. In Sunil Batra II where the Court acted on a letter from a prisoner complaining about the torture of a fellow prisoner, a senior advocate was deputed to enter the Delhi Prison, question Officers and prisoners, examine entries in books and make a report to the Court. This measure unearthed a horrendous torture which the prisoner could never have established. In Mehta's Cases a legal action was started by a public-spirited citizen on the ground that hazardous manufactures by a private company should be forbidden. A major leakage of oleum gas affecting a large number of persons led to the litigation. The Court, to judge the issue of toxic emanations appointed a team of experts and got their reports.

The Supreme Court, in this case, expanded the concept of locus standi even in the area of environmental preservation. Further, the Judges resorted to the collection of independent information on a technical subject through the agency of a Commission. The relevant observations are excerpted here :

> "There is also one other matter to which we should like to draw the attention of the Government of India. We have noticed that in the past few years there is an increasing trend to the number of cases based on environmental pollution and ecological destruction coming up before the Courts. Many such cases concern the material basis of livelihood of millions of poor people are facing this Court by way of public interest litigation. In most of these cases there is need for neutral scientific expertise as an essential input to inform judicial decision making. These cases require expertise at a high level of scientific and technical sophistication. We felt the need for such expertise in this very case and we had to appoint several expert committees to inform the Court as to what measures were required to be adopted by the management of Shriram to safeguard against the hazard or possibility of leaks, explosion, pollution of air and water, etc., and how many of the safety devices against this hazard or possibility existed in the plant and which of them, though necessary, were not installed. We had great difficulty in finding out independent experts who would be able to advise the Court on these issues. Since there is at present no independent and competent machinery to generate, gather and make available the necessary scientific and technical information, we had to make an effort on our own to identify experts who would provide reliable scientific and technical input necessary for the decision of the case and this was obviously a difficult and by its very nature, unsatisfactory, exercise. It is therefore absolutely essential that there should be an independent Centre with professionally competent and public spirited experts to provide the needed scientific and technological input. We would in the circumstances urge upon the Government of India to set up an

Ecological Sciences Research Group consisting of independent, professionally competent experts in different branches of science and technology who would act as an information bank for the Court and the Government departments and generate new information according to the particular requirements of the Court or the concerned Government department."

The voice of the Third World asking for social justice is heard in Gupta's case relied on in Mehta The rationale of the new development is spelt out :

"Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened, and any such person or determinate class of person is by reasons of poverty or disability or socially or economically disadvantaged position unable to approach the Court for relief, any member of the public or social action group can maintain an application for an appropriate direction, order or writ in the High Court under Art. 226 and in case of breach of any fundamental right of such person or class of persons, in this Court under Art.32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons. This Court also held in S.P. Gupta's case (supra) as also in the People's Union for Democratic Rights v. Union of India, and in Bandhua Mukti Morcha case (supra) that procedure being merely a handmaiden of justice it should not stand in the way of access to justice to the weaker sections of Indian humanity and therefore where the poor and the disadvantaged are concerned.... this Court will not insist on a regular writ petition and even a letter addressed by a public spirited individual or a social action group acting pro *bono publico* would suffice to ignite the jurisdiction of this Court. We wholly endorse this statement of the law in regard to the broadening of locus standi

and what has come to be known as epistolary jurisdiction."

"Nor should the Court adopt a rigid stance that no letters will be entertained unless they are supported by an affidavit. If the Court were to insist on an affidavit as a condition of entertaining the letters the entire object and purpose of epistolary jurisdiction would be frustrated because most of the poor and disadvantaged persons will then not be able to have easy access to the Court and even the social action groups will find it difficult to approach the Court."

The concept of State itself has been broadened to encompass every enterprise which is under the control of the State. Even prisons, hospitals, rescue homes and other like sanctuaries have come within the court's new-found ombudsmanic jurisdiction. The old 'hands off' doctrine is dead. For instance, wages for prisoners who work in the prisons are now made obligatory by an order of the High Court of Gujarat. A report was called for by the Court before the hearing of the case and relief granted linking up the remedy of wages with the constitutional prohibition of forced labour. Similarly, the same High Court issued a Commission to a task force headed by a jurist to investigate into and report on the working conditions of the Surat Textile Workers and based thereon, protective measures in favour of the workers were mandated by the Court. The Supreme Court itself has, after investigation and hearing through unorthodox methods, got juveniles lodged unlawfully in the prisons of India released. Mental hospitals which were torture homes were invigilated by the Supreme Court and affirmative action, through a scheme approved by the Court, gave relief to those miserables. Likewise, after getting expert reports, the Supreme Court gave positive directives to prevent quarrying of stones from the Doon Valley to protect the environment. Prisoners of Bihar, who were blinded by Police torture, women who were sold like chattel and undertrials who were unjustly languishing in custody were liberated by the Court. A host of such humanist instances is issuing from the higher judiciary breaking away from ancient judicial obscurantism but firmly based on the Indian Constitution, expansively

and imaginatively interpreted. In short, revolutionary changes are taking place in judicial technology, and judicial law-making. Epoch-making social dimensions are being added to the judicial process. Law with a heart, Court with a human face, is the serendipity!

Another facet of forensic innovation. The Ratlam Municipality Case is a path-braker even like the Rickshaw Pullers case. Specific schemes were prepared in both these cases under the authority of the Court. Dynamic developments in the field of relief, not by mere decree for money or declaration of right, but by regular schemes being framed and judicially monitored, are the new discovery. How fascinating and heart-warming to read these creative pages of judicial history in the making! In Sunil Batra a whole code to protect prisoners was made by the Court not merely for the prison which figured in the case but for all prisons in the country and sessions judges were directed to visit penal institutions periodically to investigate prisoners grievances. In Sheila Barse cases, the Court called for a report, through the head of a college of social work, about the fate of female inmates of police lockups in Bombay and issued directives for the police stations in the whole State. In environmental pollution and like situations, this dynamic dimension to remedial justice, of framing projects and operating them under judicial monitoring, is reflected in court judgments. Even so, the pace is slow; dissenting voices make the process zigzag; tradition is a *vis intertia; vigoroso tempo* is still a wish, not the finish. But judicial perestroika is no longer anathema. The court is now a sentinel of the nation, but operationally it has 'miles to go' and 'promises to keep' even though 'the woods are lovely, green and deep.' The robed brethren cannot afford to live in several centuries simultaneously, nor be colonial and free, black and white. *Fiat justicia* is a constitutional command for India of 800 million humans, most of whom are alienated from the system.

Cappeletti's lovely cynicism has a message:

> "Our judicial system has been aptly described as follows: Admirable though it may be, (it) is at once slow and costly. It is a finished product of great beauty, but entails an immense

sacrifice of time, money and talent."

> "This "beautiful" system is frequently a luxury, it tends to give a high quality of justice only when, for one reason or another, parties can surmount the substantial barriers which it erects to most people and to many types of claims."

The elusive beauty of exotic justice which is beyond reach for the Fourth World can no longer tantalise, and Operation Public Interest Litigation, pruned and disciplined, structured functionally and inspired jurisprudentially, is the Indian legal Lamarckism [The Lamarckian theory that characters acquired by habit, use, disuse, or adaptations to changes in environment may be inherited] evolved by the Constitution interacting with the militant environment.

> "Our judges are not monks or scientist, but participants in the living stream of our national life, steering the law between the dangers of rigidity on the one hand and of formlessness on the other. Our system faces no theoretical dilemma but a single continuous problem: how to apply to ever-changing conditions the never-changing principles of freedom."

The frontiers-persons of the Indian Judiciary may patriotically remember Brougham's words:

> "It was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler will be the sovereign's boast when he shall have it to say that he found law dear and left it cheap; found it a sealed book and left it a living letter; found it the patrimony of the rich and left it the inheritance of the poor, found it the two-edged sword of craft and oppression and left it the staff of honesty and the shield of innocence."

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Annexure 2

Human Rights Commission of Sri Lanka Bill

- Sunil F. A. Coorey -

The Bill, presented in the Parliament of Sri Lanka in August 1995, was on 22nd February, 1996, read a second time and referred to a Standing Committee "A" of Parliament.

The Bill contains 32 sections. As usual, the first section sets out the long title of the (proposed) Act and enacts that it shall become operative on such date as the Minister may appoint by Order published in the *Gazette*.

Sections 2 to 32 are arranged under four Parts, namely, sections 2 to 11 under Part I entitled "Establishment of the Human Rights Commission of Sri Lanka," sections 12 to 20 under Part II entitled "Powers of Investigation of the Commission", sections 21 to 26 under Part III entitled "Staff of the Commission", and sections 27 to 32 under Part IV entitled "General."

Part I. Establishment of the Human Rights Commission of Sri Lanka.

Part I establishes the "Human Rights Commission of Sri Lanka" as a body corporate and consisting of five persons.[S.2.] The five appointees are required to be "chosen from among persons having knowledge of or practical experience in, matters relating to human rights."[S.3(1)] It has been suggested during the second reading in Parliament as well as by certain academics that those words should be replaced with a different formula such as "chosen from among persons having proven expertise and competence in the field of protecting and promoting human rights" in order to ensure that the five members of the Commission represent a variety of backgrounds and disciplines.

According to Article 28(2) of the International Covenant on Civil

and Political Rights, members of the Human Rights Committee established under that Covenant "shall be composed of the nationals of the State Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience." Whichever phrase is used to described the type of person who should be considered for appointment, the idea is to remind the appointing authority that the appointees should be persons who know what is expected of them and who have the capacity to effectively function as members of the Commission.

The appointing authority is the President of Sri Lanka "on the recommendation of the Constitutional Council."[S.3(2)]. It is further provided as a proviso to s.3(2) that until the Constitutional Council is established, members of the Commission shall be appointed by the President "on the recommendation of the Prime Minister in consultation with the Speaker." The Constitutional Council is to consist of the Prime Minister, the leader of the Opposition, the Speaker, Chairman of the Chief Ministers' Conference, retired Judges of the Supreme Court and representatives of political parties having seats in Parliament.

The provision made for appointments of members of the Commission until the Constitutional Council is established has been rightly criticised. The Prime Minister and the Speaker will be from the same political party and hence, that political party only will, in effect, be recommending the appointments. Further, there should not be any undue delay in establishing the Constitutional Council and appointments can wait until it is established. If that is not possible, the recommendation of a non-political person such as the Chief Justice can be provided for, as is the case now with the appointments to the Commission for the Elimination of Discrimination and Monitoring of Fundamental Rights in Sri Lanka.

As for the provisions in the Bill intended to secure the independence of the members of the Commission, it is found that under s.8 "salaries of members of the Commission shall be determined by Parliament and

shall be charged on the Consolidated Fund and shall not be diminished during their terms of office." At the same time, amendments have been validly suggested. The traditional safeguard for tenure of office by superior court judges in English speaking democracies has been the concept of tenure of office "during good behaviour." The Bill has not provided that members of the Human Rights Commission shall hold office "during good behaviour." This concept of "good behaviour" is enshrined in Article 107 of the Constitution of Sri Lanka which safeguards the tenure of office by all judges of the Supreme Court and of the Court of Appeal, who cannot be removed by the Executive in the exercise of discretional power. Section 3(3)(c) of the Bill read with section 4(c) empowers the President of Sri Lanka to remove from office a member "if he is unfit to continue in office by reason of infirmity of mind or body." As to what is "informity of mind or body" is a matter for decision by the President, and although it can be cogently argued that the decision of the President that a particular member of the Commission suffers from "infirmity of mind or body" will be open to challenge in the ordinary courts, such a confrontation should if possible be avoided, and the members of the Commission should be free to act without the possibility of such a confrontation with the President. No such discretionary power need be vested in the President of Sri Lanka. It is suggested that the same provisions now found in Article 107 should be enacted to provide for security of tenure of office of members of the Commission.

Further, it must be pointed out that the security of tenure of superior court judges is provided for by the Constitution itself (Article 107) which cannot be amended except by a special procedure and by a special majority. An Act of Parliament which is not part of the Constitution can be changed at any time by a simple majority. This shows that at least the basic provisions regarding a Commission such as this should be enshrined in the Constitution. The executive arm of the State will be usually headed by leaders of the party in power in Parliament, and in the event of a real confrontation between the executive arm of the State and Parliament may be urged to repeal the statute itself.

According to the Bill, members hold office only for three years, but are eligible for re-appointment. It must be expressly provided that a re-appointment also must be done only on the recommendation of the Constitutional Committee.

Under sections 10 and 11 of the Bill the Commission has the function of:

(1) monitoring executive and administrative practices and procedures with a view to compliance with, and for promotion of "Fundamental Rights;"

(2) inquiring into and investigating complaints of violations or imminent violations of "Fundamental Rights" and for resolution thereof by mediation and conciliation;

(3) in furtherance of protection and promotion of "Fundamental Rights" and "Human Rights," to make recommendations to the Government regarding legislation, administrative procedures and other measures; and

(4) to undertake research into, promote awareness of, and provide education in relation to, "Fundamental Rights" by conducting programmes, seminars, workshops, and to disseminate and distribute the results of such research. The Commission has wide powers of investigation and monitoring conferred on it by section 11.

A "fundamental right" is defined by s.32 as "a fundamental right declared and recognized by the Constitution." A "human right" is defined as a "right declared and recognized by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights."

It has been validly suggested that the reference to "fundamental right" be replaced with the reference to "human rights" in the bill so that the functions of monitoring, investigating, recommending, and education will be broader. ("Fundamental Rights" defined by the Constitution of Sri Lanka are narrower than "human rights" as defined

above.)

Part II. Powers of Investigation of the Commission.

A welcome feature is the wide powers of investigation conferred on the Commission. It has been suggested that the words "by executive or administrative action" in s.13(a) be replaced by the words "by state action," so that the functions of the Commission will be wider. At the same time, it has been suggested during the second reading of the Bill as well as by certain academics that the entirety of s.13(b) [which empowers the Commission to investigate violations of fundamental rights by terrorist groups resulting in punishable offenses under the Prevention of Terrorism (Temporary Provisions) Act] should be altogether dropped. The arguments are that, as is said to have happened in the Philippines, too much attention would be focussed on terrorist activities and violations by public officers and security personnel could get side tracked, that in any event the police is there to investigate terrorist activities, and also that the Commission is not adequately equipped to make investigations of terrorist activities.

Where on an investigation the Commission finds that an infringement or imminent infringement of a fundamental right is disclosed, the Commission can refer the matter for conciliation or mediation. Otherwise, of if conciliation or mediation does not work, the Commission can (a) recommend to the appropriate authority a prosecution or other appropriate proceedings in the ordinary courts, or (b) refer the matter to an ordinary court of law having jurisdiction to hear and determine such matter, or (Charter) make recommendations to the appropriate authority or person or persons concerned with a view to remedying or preventing such infringement. In the alternative, the Commission can make recommendations that the questionable act or omission be reconsidered or rectified or altered.

Perhaps one of the most important aspects of an investigation by the Commission is publicity. Provision is made in s.14(6) of the Bill that a copy of the recommendation made by the Commission shall be sent to the complainant party, to the head of the institution concerned,

and to the Minister to whom the institution concerned has been assigned. The person to whom the recommendation is sent should under s.14(7) to report back to the Commission what remedial steps were in fact taken. If no such report is received or if no adequate steps are taken as remedial measures, the Commission, under s.14(8), "shall make a full report of the facts to the President who shall cause a copy of such report to be placed before Parliament."

It is thought that the involvement of the President in placing the report before Parliament is unnecessary as such report may be embarrassing to the Government. Moreover, as the President is not a member of Parliament, which Minister is to place it before Parliament ? Who ultimately will be responsible for the report before Parliament is also not clear. What is more important is that there should be specific provision in the statute that the report be published for the information of the general public. Provision must also be made that the Commission should in important matters publish interim reports apart from the annual report it is required by s.29 to Parliament. Provision must also be made in the statute requiring the publication of each such annual report for the information of the general public.

Another point of debate has been the fact that the Commission will be wholly funded by the State. (See s.28 of the Bill.) It has been suggested that the funding of the Commission should not be restricted to the State, and that the Commission should be permitted to receive funds from elsewhere as well. This, however, as pointed out during the second reading of the Bill, could lead to more difficulties, for, funding by interested parties, perhaps certain foreign governments, could have a negative effect on the Commission.

Perhaps it will be more conducive to have the Commission funded exclusively by the State and that a minimum annual amount, to be fixed by Parliament, be made a charge on the consolidated fund.

Part III. Staff of the Commission.

The Commission is to have a Secretary and other staff. However, the Bill makes no express provision as to who actually carries out the

field investigations and inquiries of the Commission regarding allegations of violations or imminent violations of fundamental rights. They surely cannot left to the police or to the military. The Commission should have adequate staff and other infra structure facilities to carry out its investigations and inquiries effectively.

Another matter of importance is that the sitting of the Commission should be held not only in Colombo, but also in important provincial towns as well, and that for this purpose as well as to facilitate field investigations and inquiries by the staff of the Commission, regional offices of the Commission should be established.

Part IV. General.

It is clear from the scheme of the Bill that the Commission to be established under it is to replace the Human Rights Task Force as well as the Commission for the Elimination of Discrimination and Monitoring of Fundamental Rights. In fact, when the members of the latter body went out of office at the end of their terms of office at the end of 1995, no new appointments were made.

Rather than having several organizations which in different ways are concerned with violations of fundamental rights and provide for redress in different ways and to different extents, thus creating uncertainty and confusion among the public, it has always been thought better if there was only one organization that exercised wide powers and granted a wide variety of remedies.

At the same time, it must be said that the Bill was apparently not preceded by any deep study of the several existing organizations and institutions that are concerned with violations of fundamental rights, what their shortcomings were, and how they could have been remedied. In the absence of such a study which preceded this Bill, some reservations have been entertained as to whether this Bill will create yet another institution without proper planning and without proper infra structure facilities.

Nevertheless, on the whole, assuming sufficient funds are made available to the Commission, qualified persons are appointed as members of the Commission, and their independence and impartiality can be provided for as discussed above, the Commission can be expected to greatly enhance compliance with and respect for fundamental rights and/or human rights in Sri Lanka.

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Resource Persons

16. Adv. K. Pratap Reddy, Vigil India Movement, India
17. Justice H. Suresh (Retired), India
18. Justice Rajendar Sachar (Retired Chief Justice), India
19. Justice Dr. V. R. Krishna Iyer (Retd. Suprem Court Judge), India

20. Justice P. N. Bhagwati (Retd. Chief Justice), India
21. Justice Nittoor Srinivasa Rao (Retd. Chief Justice), India
22. Swami Agnivesh, (Social Activist), India
23. Professor M. Basheer Hussain, India
24. Dr. M. V. Pylee, Former Vice Chancellor, India
25. Dr. Mathews George Chunakara, Christian Conference of Asia, Hong Kong
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Participants

Justice P. N. Bhagwati

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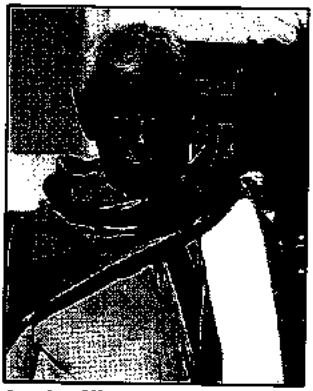
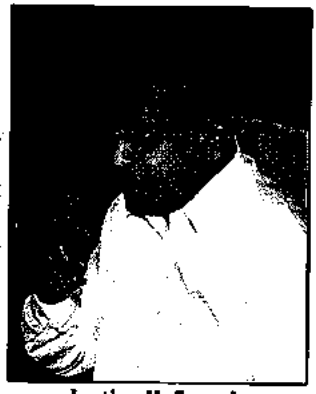
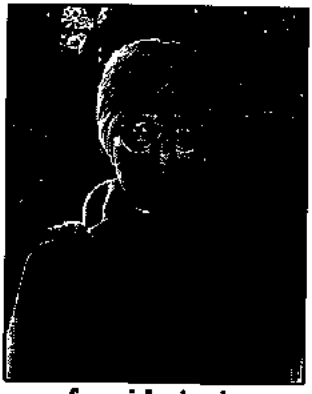


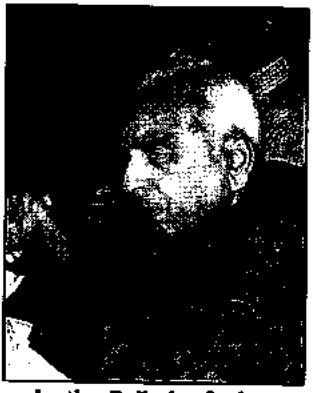
Justice Nittoor Srinivasa Rao



Justice H. Suresh



Swami Agnivesh



Justice Rajindar Sachar

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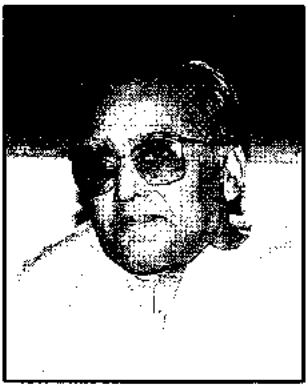

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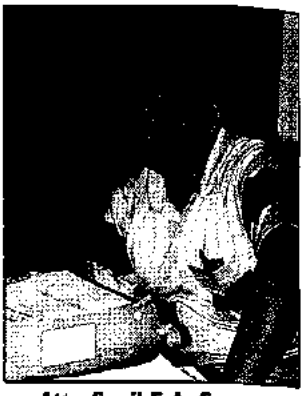

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