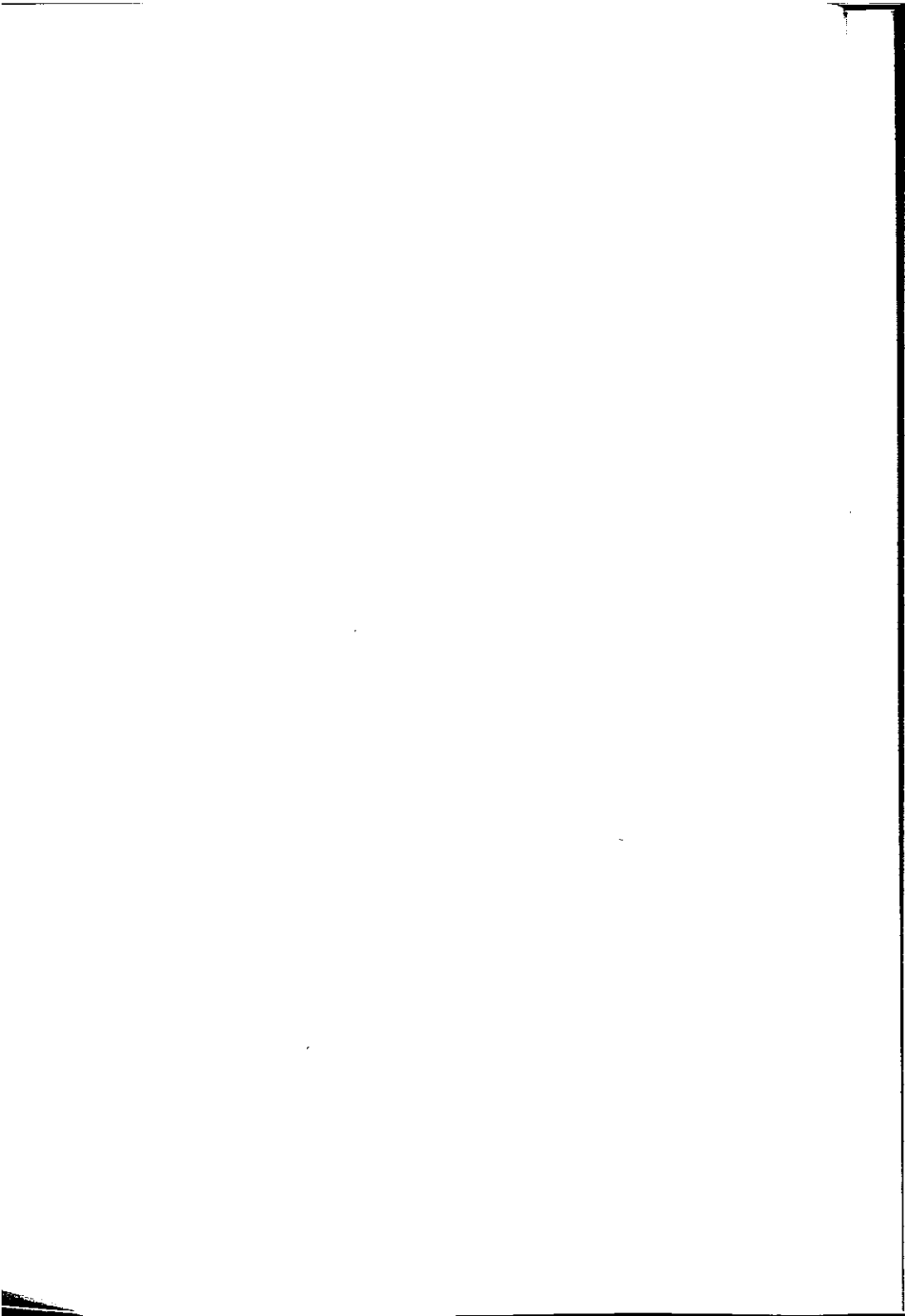


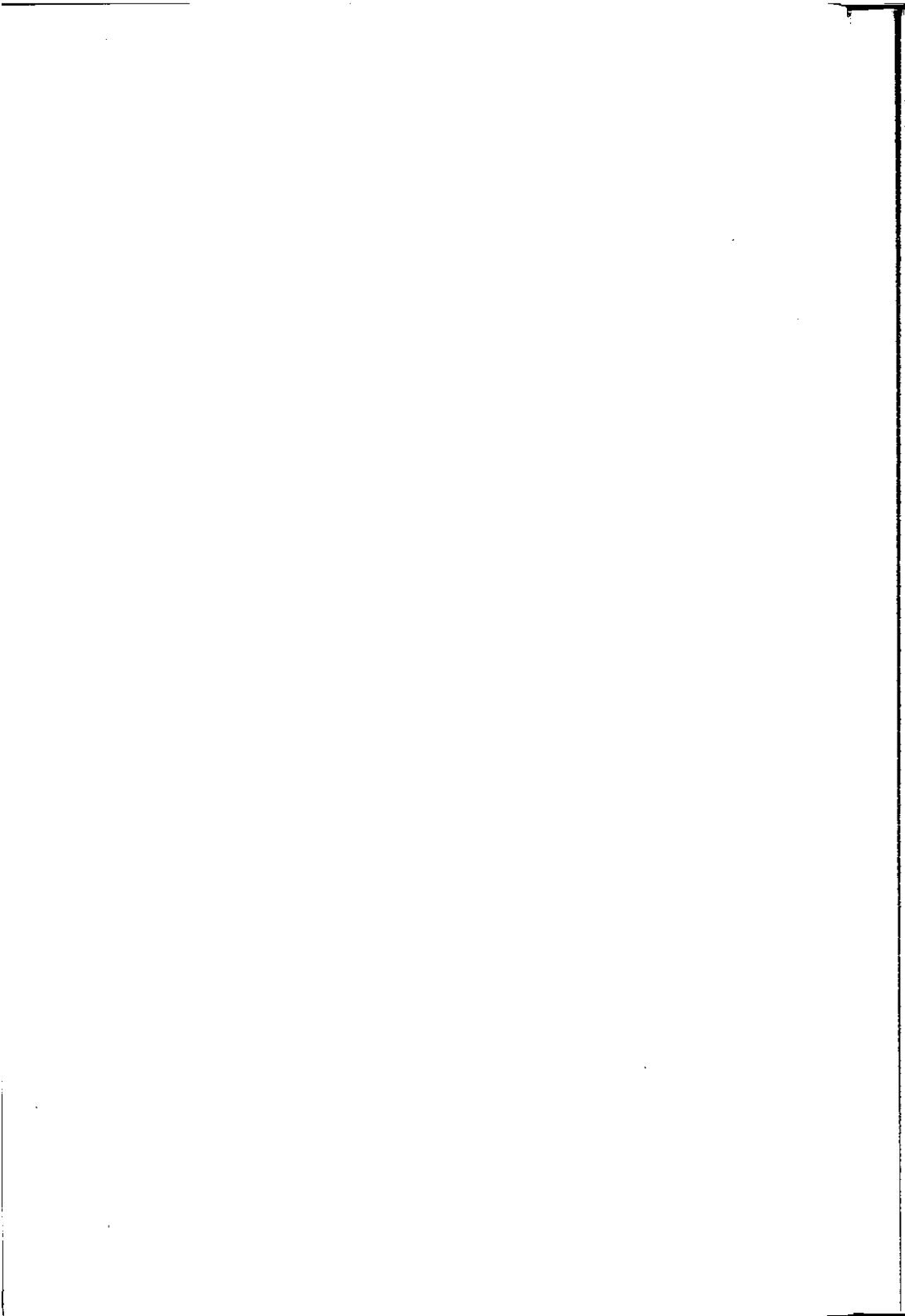
# DECLINE OF FAIR TRIAL IN ASIA



**Papers from an  
Asian Seminar  
on Fair Trial**



# **Decline of Fair Trial in Asia**



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Fair Trial  
in A s i a**

**Papers from an  
Asian Seminar  
on Fair Trial**

**7 - 12 November 1999  
Kwloon, Kong Kong**

*organised by*  
**Asian Human Rights Commission &  
Danish Centre for Human Rights**

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*Cover illustration:* Images from the monument for the disappeared in Sri Lanka (Raddoluwa, Seeduwa) (Photos: AHRC) and in Cambodia, a suspect thief is led out by two policemen of Toul Svay Prey Commune police station. The police later unlocked the handcuffs of the suspect and released him to a waiting mob who beat him to death (Photo acknowledgment: *Phnom Penh Post*).

#### *Acknowledgement*

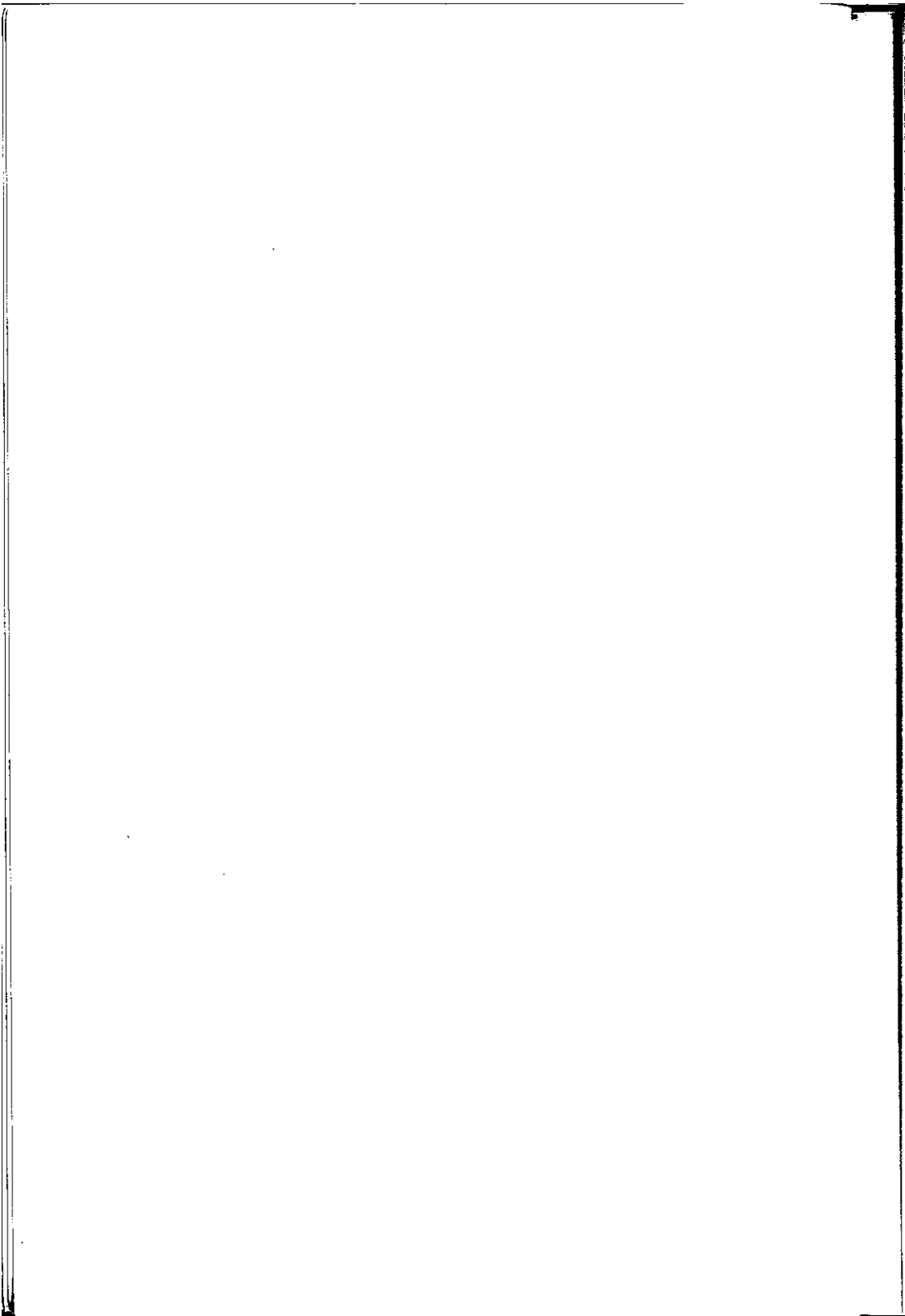
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# Introduction

This book comes out at a crucial time when threats to fair trial are visible in all Asian countries. In fact, there are very good reasons to suspect that the importance of fair trial is diminishing fast in this region. If Cesare Beccaria<sup>1</sup> was to be alive, he would have, unhesitatingly, declared that most of the present practices called ' trials' are barbaric.

The results that we have today from the failure to adhere to norms of fair trial are frightening. In Cambodia, it is becoming a common practice for authorities to hand over arrested thieves to be killed by the mob. Despite pictures of such gruesome killings appearing in the newspapers as the one produced below, there has not been any attempt either to stop or prosecute those that engage in such practices. The reason is clearly in the break down of the legal machinery necessary to investigate and prosecute the offenders in a proper manner. There have been several instances of killings of arrested persons in Thailand. It is quite common in countries like India, the Philippines, and Sri Lanka to justify deaths as "encounter killings".

A Sri Lankan Commission, which inquired into the case of large-scale disappearances in the country, concluded that disappearances in most cases were due to killings after the arrest. In short, on the basis of the experience gained it can be asserted that large-scale extra-judicial killings are taking place in Asia today.

The National Security Laws and the Emergency Laws, prevalent in several countries such as Singapore, Malaysia, South Korea and Sri Lanka,

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<sup>1</sup> Cesare Baccaria (1738-1794) was the author of the classic work, *On Crime and Punishment*. His work had a great impact in evolving the concepts on which fair trial is based. He called for enlightened ways of dealing with crime.

make it possible for people to be detained for a long period of time without trial. The executive takes the function to decide on the liberty of persons who are judged without a judicial process.

Beside this, trials are often used for political purposes. Consequently, only the semblance of a trial is maintained generating large-scale skepticism about the credibility of such trials. The spate of trials of political opponents taking place in Malaysia are the clearest examples, which in fact have contributed to diminish the peoples' expectation of the trials to be fair.

The danger of returning to the primitive time in dealing with crimes or alleged crimes is very real for any one who cares about the maintenance of the civilized practices in the administration of justice. The changing practices gravely challenge the role of judges and lawyers. Often lawyers are expected to be intermediaries between the unscrupulous law enforcement officers and the alleged criminals. The lawyers have to bargain for concessions from such officers rather than obtaining redress from court. In the context of such out of court dealings, the judges are pushed to a position of helpless on-lookers. Therefore, there is good reason for judges and lawyers to protest and contribute to the restoration of proper practices in the administration of justice.

The legal education pays scant regard to the actual practices of law enforcement. A critical approach, which examines the actual practices, is essential if legal education is to have an impact on the administration of justice. The relevance of a critical approach for today becomes quite apparent when the countries that once claimed to have developed legal systems are now beginning to show deepest forms of crisis. Malaysia, Singapore, India, Sri Lanka, Pakistan and the Philippines, to cite a few, belong to this category. Countries like China, Cambodia, Indonesia and East Timor, newly attempting to develop their justice systems on the basics of more enlightened principles, stand to gain from suitable changes in legal education.

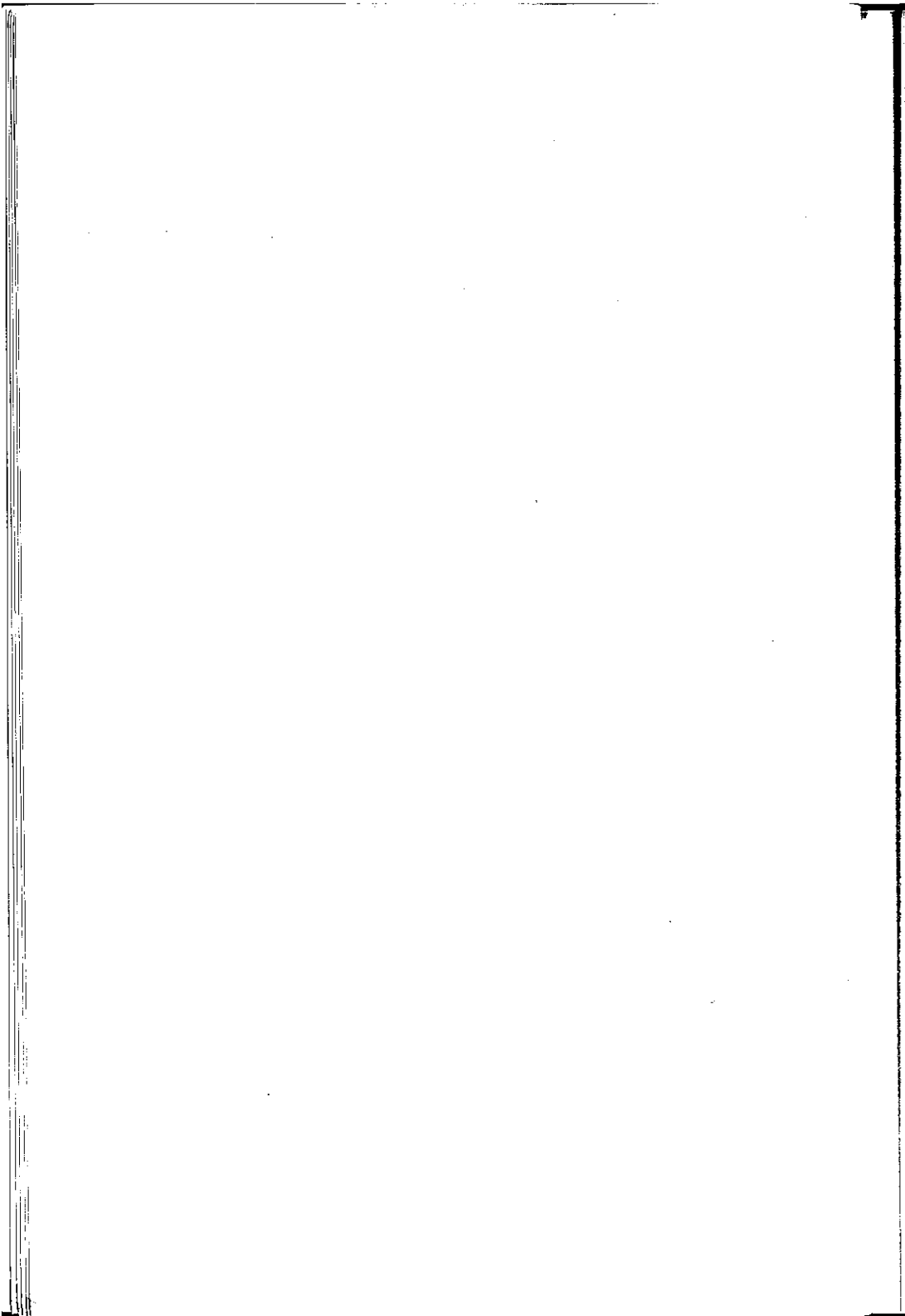
Above all, it is the opinion makers of the civil society that must try to face the dangers of the present moment. It is time for an Asia

wide movement to signal the collapse of the system and register protest against the abuse of the legal process. If the administration of the law mechanisms is allowed to collapse as it is happening now, human rights, democracy and rule of law will have little place in the Asian region.

It is also the time for UN Agencies to respond adequately to the present developments in Asia. The UN Commissioner for Human Rights, Rapporteurs for Extra- Judicial Killings and Independence of Judiciary, and others involved in areas related to fair trial need to take a serious look at the situation before it degenerates into worse forms.

We hope the papers of the Seminar presented in this book will contribute significantly to this crucial debate on 'fair trial' in the Asian Region.

*Basil Fernando*  
*Asian Human Rights Commission*



# STATEMENT OF THE SEMINAR

## I. Introduction

- 1.1. Nineteen lawyers, judges and activists from 9 countries gathered in Hong Kong to discuss issues relating to due process rights and fair trial in the Asian region in the light of their experiences in their countries. The observations and conclusions of the participants are summarized below.
- 1.2. A close look at the legal provisions for *fair trial*<sup>1</sup> and actual practices relating to fair trial in Asia reveals a rather shocking picture. There is much that is defective in all the components relating to fair trial: the criminal investigation, prosecution, court proceedings as well as carrying out of the sentence. Although many countries are signatories to the International Covenant on Civil and Political Rights and some have even made constitutional provisions for fair trial, an examination of state responsibilities for providing the necessary resources, both financial as well as human resources, shows a lack of serious concern for achieving the objective of 'justice through due process.' The discussions of the participants of this seminar revealed the many ways through which the right to fair trial is denied to people, particularly to those who do not belong to the affluent sections of society. These methods vary

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<sup>1</sup> In accordance with the definitions set out in the United Nations instruments.

from the practice of *torture*<sup>2</sup>, which is applied quite routinely in many countries, to various forms of neglect and various forms of pressure exerted by judges and prosecutors of some countries. The legal profession has also failed the people, when they have either allowed themselves to be intimidated or have begun to participate in corrupt practices in connivance with other agencies. The purpose of denial of fair trial is sometimes political. In some countries the legal process is effectively suppressed, so that this process can be used to suppress dissent and punish opposition. Due process is also denied as part of routine attempts to use criminal investigations as means of unlawful gain for the police, as shown increasingly in reports that even prosecutors, lawyers and judges engage in such practices. Political involvement and corrupt practices militate against reforms of the institutions relevant to the process of fair trial. The inadequacy of laws and laws validating impunity also hinder fair trial: in fact due to such laws, trial becomes impossible as the actions covered under these laws are not considered offences. No person concerned with human rights and democracy can ignore this situation. In fact, this issue can be ignored only at societies' own peril. The local communities, and regional bodies, such as the South Asian Association for Regional Cooperation (SAARC), Association of South East Asian Nations (ASEAN) as well as regional peoples organizations, political parties, NGOs and the international community must pay serious attention to the issue of basic reforms related to various

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<sup>2</sup> In accordance with the definitions set out in the United Nations instruments.

aspects of fair trial. The people's faith in institutions of justice has eroded a great deal due to grave failure in various institutions of administrative justice.

## **II. Rule of Law, Fair Trial and Militarism**

- 2.1 The concept of fair trial cannot be de-linked from the basic principle of rule of law. The principle of rule of law is the matrix. Rule of law has no place in the states governed by military rule. Therefore, under such circumstances, it is not possible to have fair trials. Burma presents a complete case of militarism and therefore a complete case of denial of rule of law. The idea of fair trial in Burma had been abandoned for long time now, since the military take-over by General Ne Win in 1962 and the abolition of the Constitution. Since then, rule of law has been abandoned in favour of rule of man. The underlying principles of government changed. Arbitrariness has entered into every aspect of life, including the court system.
- 2.2 At present only two out of the nine Supreme Court judges in Burma have legal qualifications. Most "judges" are military-sponsored personnel without any legal background. In all sensitive cases the military advises as to how cases should be decided. Even in purely civil cases, what happens in court depends very much on the connections the contending parties have with influential persons in the military.

- 2.3 Political cases are heard inside the prison compounds thus denying one of the basic principles of fair trial, which stipulates that cases should be heard in open courts. The decisions in these prison hearings are generally pre-determined.
- 2.4 A pre-condition for a return to the rule of law is the ending of military rule. A constitution, which recognizes the basic human rights and personal liberties, is necessary for re-establishing the rule of law and for introducing the rule of law.
- 2.5 In the past, Burma has had a tradition of a strong legal profession. Lawyers have consistently fought against the attempts of the military to subdue the legal system. Therefore the military has reason to fear the introduction of rule of law and fair trial, and are not likely to entertain any constitutional change introducing fair trial.

### **III. Crushing the Independence of the Judiciary and its impact on Fair Trial**

- 3.1 In recent decades there had been several instances when independence of the judiciary has been attacked severely. Such attacks include removal of senior judges for political reasons, rewarding of some judicial officers who support some political leaders, undue means by which judgements of some courts adverse to some political leaders have been reversed, use of abusive language against judges, punishment of persons who make adverse comments on wrong judgements, legal proceedings against judges, misuse of contempt of court proceedings to stifle criticism, the awarding of disproportionately large amounts as damages in defamation



suits to curtail freedom of speech and to intimidate those who defend the independence of judiciary. Such threats and attacks have a crippling effect on fair trial; while fear spreads among the judiciary, more corrupt elements use the situation to their advantage. What some politicians use for their advantage, is later used by big business for their advantage finally these practices are also employed in private litigation between ordinary citizens. Fair trial thus becomes an impossible aim to achieve. This misuse of the legal system is like a cancer starting at first for the advantage of prominent politicians and then spreading fast into the whole system. The system of fair trial thus dies from within. Only external formalities remain, and the courts are like the biblical expression of the "whitened sepulchres."

- 3.2 National Security Laws (also known as Public Security Laws) including preventive detention laws amount to punishments imposed by the executive. Such laws exclude the intervention of the judiciary. Though the International Covenant on Civil and Political Rights has confined the operation of such laws to a very narrow area under extremely exceptional circumstances to the extent necessary, such laws are widely and routinely applied in most countries of the region. Such practices result in denial of fair trial. The habits formed by the use of such practices deeply infect the criminal justice system and create a counter-culture among the law enforcement officers against the rule of law and the stipulations that must be observed in criminal investigations.
- 3.3 The laws and practices regarding impunity from prosecution also deny the possibility of accountability on the part of state officers and thus gravely obstruct fair trial.

**IV. The List of Countries in the Asian region which are Signatories to the International Covenant on Civil and Political Rights (ICCPR) and Covenant Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment**

	International Covenant on Civil and Political Rights (ICCPR)	First Optional Protocol to the ICCPR	Second Optional Protocol to the ICCPR	Covenant against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Afghanistan	X			X
Bangladesh				X
Bhutan				
Cambodia	X			X
China	S			X
India	X			S
Indonesia				X
Japan	X			X
Korea Republic	X	X		X
Lao Democratic Republic				
Malaysia				
Maldives				
Myanmar / Burma				
Nepal	X	X	X	X
Pakistan				
Philippines	X	X		X
Singapore				
Sri Lanka	X	X		X
Thailand	X			
Viet Nam	X			

*(Amnesty International Report, Amnesty International Publication. London, United Kingdom 1999)*

X= denotes that country is a party, either through ratification, accession or succession

S= denotes that country has signed but not yet ratified

## **V. Rights of Victims of Crime<sup>3</sup>**

### **5.1 Having Their Statements Recorded**

5.1.1 Victims have a right to have their complaints recorded by criminal investigating authorities. Such recording must be authentic, thorough and complete. These rights imply that victims' statements must be recorded by competent persons. Not to provide competent persons to record complaints is a fundamental violation of victims' rights. Faulty recording of complaints can lead to failure of legal actions by or on behalf of the victims. It can frustrate the victims' search for justice.

5.1.2 Beside competence, sensitivity of the investigating officers makes a difference to recording of complaints. Gender and ethnic factors can sometime vitiate understanding of the recording and investigation officers. The victim will be the one who gets punished for the mistakes of recording and investigating officers.

5.1.3 Refusal to record complaints is fundamental denial of rights of victims. In fact, such refusal effectively denies the operation of the due process and disentitles the victims of any remedies. Sometimes the investigating authorities refuse to record complaints on orders. Such situations must be taken up by the human rights organizations as serious violations of rights.

5.1.4 Victims must have alternative places for making complaints against the police and other state officers.

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<sup>3</sup> Victims of crime, complainant etc.

- 5.1.5 Quick transmission of complaints can be very helpful to the victims. Delayed transmission may provide time for culprits to escape, for tampering of evidence or intimidation of witnesses. All these affect the victims badly and adversely.
- 5.1.6 Victims have a right to information relating to all the actions taken by the officers recording statements.
- 5.1.7 Victims have the right to be informed of the final result of their complaint/report.
- 5.1.8 Victims should have the right to apply to review and/or appeal the decision of the police/prosecutor to not proceed with and/or discontinue with any prosecution. They should have access to mechanisms that enable them to continue with the prosecution if the police/prosecutors do not proceed with the prosecution of any case for whatever reasons. At present, the victim only has the right to make a complaint to the magistrate if the police refuse to act on his/her complaint.

## 5.2 Investigations

- 5.2.1 Victims have a right to have their complaints investigated, thoroughly, competently, and speedily.
- 5.2.2 Poor investigations often lead to failure in proving cases and victims thus have to bear the consequences of defective investigations. Thus victims must have the right to hold investigating officers liable for the incompetence as well as negligence.

5.2.3 Just and proper<sup>4</sup> investigations require trained investigating officers, proper forensic facilities and all other facilities for quick and comprehensive investigations. It is the duty of the state to provide these. The failure to provide these is a violation of victims' rights resulting in denial of fair trial.

### 5.3 Prosecutions

5.3.1 Victims have a right to proper/just prosecutions. All crimes should be prosecuted. The state officers having the duty to prosecute should be held responsible for conducting prosecutions in all cases, in particular, law enforcement officers and other state officers who have been accused of committing crimes should not be exempted from prosecutions.

5.3.2 Prosecutors must act professionally and decisions on whether or not to institute prosecutions must not be based on political reasons. The courts must have the power to examine the decisions made by the prosecutors to prosecute or not to prosecute cases. In some countries the power of nolle prosequi<sup>5</sup> has been abused for political or other reasons.

5.3.3 Proper/just prosecutions require competent prosecutors, who have time and other facilities to devote to conduct proper prosecutions. The prosecutors must be given all the facilities and financial allocations to do their work in a competent manner.

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<sup>4</sup> Professional, efficient, impartial, correct etc.

<sup>5</sup> The voluntary withdrawal by the prosecuting attorney of present proceedings on a criminal charge.

## 5.4 Judiciary

5.4.1 Both victims and accused have the right to have their cases heard by competent and impartial judges.

5.4.2 Victims as well as accused have the right to quality justice.

## 5.5 Right to Quick Redress

5.5.1 This is a right of both the accused and the victim. In many countries there are extraordinary delays in trials. The delays affect the quality of justice. In addition, as people nowadays are used to a quicker pace, delays in holding cases will lead to lack of faith in the system much more than in the past.

## 5.6 Maintaining the Confidence in the Justice System

5.6.1 One of the main problems facing legal and judicial systems in modern times in Asia, is people's loss of faith in these systems because they are ineffective. The ineffectiveness is due to failure in developing these systems that are in keeping with the changes that have taken place in technology, sophistication and social consciousness. These systems have remained primitive and outdated.

5.6.2 Loss of faith in legal systems is in some instances due to political interference on the part of political and state authorities. In such instances people do not believe in the independence of these institutions.

5.6.3 Loss of faith in the institutions leads people to demand punishments without legal process or through modifications of the legal process. In some places people take law into their own hands and punish persons whom they consider to

be the culprits. It was also noted that in many countries encounter killings have become a common phenomenon. However, what are often called encounter killings are executive killings by the law enforcement agencies or persons who are considered serious criminals. Also in some instances where there is serious social insecurity people demand punishment without trial for such crimes as theft and robbery. It is only by strict enforcement of laws and with competent inquiring officers, persecutors and judges that the public confidence in 'punishment through the judicial process' can be maintained.

### 5.7 Victim Assistance Services as an Integral Part of Criminal Prosecution Procedures : an essential condition for ensuring due process rights for all concerned:

- 5.7.1 Victims of crime in all kinds of cases, especially when they are members of vulnerable and marginalized groups in the society (referred to also as basic sectors), women, children, migrants, handicapped, or simply the poor, very often have little or no access to justice. Sometimes it is because they do not know their rights in particular situations; sometimes they feel discriminated against and not taken seriously; sometimes they feel intimidated by the bureaucratic and complicated legal language, procedures and paperwork.
- 5.7.2 Especially in the cases of rape and sexual abuse of women, men and children, domestic violence, trafficking of women and children for prostitution, the subject matter, and the experiences of the victims are so emotional or traumatic that they feel doubly victimized by an insensitive juridical

system, which is not concerned about their welfare at all, and which generally puts the blame on the victims themselves for the violence done to them. In many instances female victims in sexual violence cases are also afraid of repercussions or revenge actions from the perpetrators if they press charges. It is even more serious when victims, especially women, are afraid that the police or other authorities will also sexually abuse them in the juridical system when they report sexual abuse cases. Prostitutes in most countries are regularly forced to service the policemen who are supposed to enforce the law against "vice."

5.7.3 As a consequence, these crimes will not be adequately investigated and the perpetrators prosecuted. But in the cause of justice to both defendants and victims, it is necessary that there be thorough and proper investigations, whereby it is necessary that the victims feel safe and confident enough to cooperate with the investigating authorities. It will also be difficult to undertake preventive actions unless victims come out and relate their experiences, so that there is knowledge about the circumstances under which such crimes take place. Therefore, a just and accessible judicial system must contain within itself some form of victim assistance services.

5.7.4 Example: In the Netherlands, next to state subsidized legal aid bureaus which give advice on all kinds of legal matters, there is a whole system of "Victim Assistance Bureaus" which resort under and are financed by the Ministry of Justice. These are run mostly by volunteers, with a paid coordinator, who are trained to advise victims about the legal



procedures they are involved in, as well as about other forms of assistance - medical, social, financial, which they might need. They even accompany victims to the police, to press charges, to the investigating authorities, to their lawyers and to the courts if necessary. They translate the complicated legal jargon into common language and explain the rights which victims have under each step of the procedures. For example, that they have a right to be informed about the status of the case, to appeal, etc.

5.7.5 Another example: The Global Alliance against Trafficking in Women (GAATW) has formulated the Human Rights Standards for the Treatment of Trafficked Persons, which is a comprehensive guide for state and judicial authorities, as well as non-governmental agencies at all levels on the rights of victims of trafficking, and how they should treat them with respect for these rights. This document is similar to the Standard Minimum Rules for the Treatment of Prisoners, which is endorsed by the UN. GAATW is lobbying to get these principles in the protocol on trafficking attached to the UN Crime Convention. They can be used in campaigning for measures at local and national level, which respect the rights of victims of trafficking.

5.7.6 Where dead bodies are found it is the duty of the police to investigate the causes of their death and if there is suspicion of crime, take the case to appropriate courts for appropriate actions.

## **VI. Rights of Persons under Investigation and Police Custody**

A very useful model for such instructions, taken from the Indian Supreme Court judgement in the case of *D.K. Basu V. State of West Bengal*. The Indian Supreme Court laid out the following instructions:

- 6.1 The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
- 6.2 That the police officer carrying out the arrest shall prepare a memo at the time of arrest, and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter-signed by the arrestee and shall contain the time and date of arrest.
- 6.3 A person, who has been arrested or detained and is being held in custody in a police station or interrogation center or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed as soon as practicable that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.
- 6.4 In cases when the next friend or relative of the arrestee lives outside the district or town, the police must notify them telegraphically of the time, place of arrest and venue of custody of an arrestee within a period of 8 to 12 hours after the

arrest through the Legal Aid Organization in the district and the police station of the area concerned.

- 6.5 The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
- 6.6 An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend<sup>6</sup> of the person who has been informed of the arrest and the names and particulars of the police officers in whose custody the arrestee is.
- 6.7 At the time of arrest, and where he so requests, the arrestee should be medically examined, and any major and minor injuries present on his/her body must be recorded immediately. The "inspection memo" must be signed both by the arrestee and the police officer effecting the arrest, and a copy be provided to the arrestee.
- 6.8 The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody, or by a doctor on the list of approved doctors appointed by the Director of Health Services of the concerned state or union territory. The Director of Health Services should prepare such a list for all provinces and districts as well.
- 6.9 Copies of all the documents including the memo of arrest, referred to above, should be sent to the magistrate for his record.

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<sup>6</sup> i.e. Next of kin

- 6.10 The arrestee must be permitted to meet his lawyer during interrogation.
- 6.11 A police central room should be provided at all districts and State headquarters where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest within 12 hours of effecting the arrest, and at the police central room the information should be displayed on a conspicuous notice board.

## **VII. Torture and Confessions**

- 7.1 During these discussions it became clear that in almost all countries in Asia torture remains a very common practice.
- 7.2 There seems to be a mentality in all sectors in the administration of justice to take a tolerant attitude regarding torture and inhuman and degrading punishment meted out by the law-enforcing authorities on citizens, particularly the poor. There appears to be a tacit acceptance of torture as a means of criminal investigations. This is notwithstanding the fact that many countries are signatories to the International Convention on Civil and Political Rights (ICCPR) and to the Convention against Torture and Inhumane and Degrading Punishment. Some countries have even promulgated their own laws in keeping with the above mentioned conventions. However, these legal provisions remain in the books. In actual practice a completely different situation exists. The attention of the human rights community in each country, the region and the international community must specially be directed towards this issue.

- 7.3 The type of torture that is prevalent in several countries is extremely gruesome and inhuman. The use of electric gadgets and special devices for torture, brutal forms of assault and special forms of torture for women are among the worst instances which are so frequently reported to the courts in these countries. Still despite various declarations to the contrary, the attitude adopted by the judiciary and the human rights commissions does not show a great resolve to bring such practices to an end.
- 7.4 Forms of torture include stage-managed assaults and physical violence by fellow prisoners and prison authorities and various forms of humiliation and mental torture. In some countries, for example in Thailand, there is still shackling of suspects and at times people are shackled almost like animals.
- 7.5 All provisions of laws and procedure permitting confessions or the consequence of confessions as permissible evidence must be deleted from statutes.
- 7.6 Torture remains the most common method of criminal investigations in most countries. The confessions obtained through torture are still used despite of the fact that some of the provisions of the evidence ordinances make such evidence inadmissible and unacceptable. However, torture is used as a shortcut to gain access to other witnesses or fabricate evidence. The method at the moment is to proceed from the criminal to the crime not from the crime to the criminal.
- 7.7 Given the seriousness of the situation in our view it is necessary for the governments of the Asian region to provide for a special arrangement to receive complaints and to investigate torture and inhumane and degrading treatment and

remove all possibilities of use of confessions as evidence directly or indirectly. In this instance it will be useful to study the recent decisions of the House of Lords in Britain on the Pinochet case and other existing mechanisms in the European Court of Human Rights and Inter-American Commission on Human Rights with the view of promoting some regional possibilities to deal with complaints and investigations relating to torture.

- 7.8 Torture victims must be adequately compensated by the state.
- 7.9 Police powers of arrest and detention, their discretion as to investigation, their discretion to allow for visits/phone calls by/to suspects, etc., their discretion to allow release on police bail results in a situation where corruption has become rampant. Money can result in persons being released and investigations discontinued: For example in Malaysia prisons, it is reported, that a hand-phone call cost about 300 RM (80 US\$), a packet of cigarettes 50 RM (13US\$), a drink RM 50 (13 US\$). There have also been cases of families of suspects in remand receiving phone calls asking for RM 10,000 (2665 US\$) and above to ensure that the suspect be released/not charged. In some countries considerable amounts of money are paid to the police.
- 7.10 Police use of violence and/or threats of violence to obtain self-incriminating statements and/or confessions have also become rampant.
- 7.11 Mechanisms need to be developed that allow the victims of police abuse to make their complaints. The forum of complaint should be independent of the police.

- 7.12 Ensuring legal representation to suspects from the moment of arrest must be recognized as a right. Despite persistent demands for many years, this right is still not recognized in many countries. In some countries surveillance cameras have been introduced in all police cells where suspects are held. This is a practice that should be introduced in all countries.
- 7.13 Under no circumstance should a person brought to judicial custody be returned to police custody. Many persons are afraid to make statements regarding police harassment to the judiciary for the fear that they may get further harassed as a result of such complaints.
- 7.14 A person who makes a complaint about police violence, torture, etc risks having a complaint/report filed against him/her for "making a false report" which is a criminal offence. This practice has the effect of intimidating and discouraging the victims of police violence from making complaints against the police and should be stopped.
- 7.15 As for evidence of police violence/torture, the evidence of a qualified medical practitioner in private practice should carry equal weight with the evidence of a government practitioner.
- 7.16 It is to be noted that the police in almost all the countries are poorly paid. Wages of the police should be suitably revised.
- 7.17 Where a judge suspects torture inflicted on a detainee, he/she has to initiate action immediately and in order to protect the suspect from undergoing intimidation by police, the judge shall make arrangement to remove him/her from police custody.

- 7.18 In some countries prisons and police departments are not separated, which situation is to the disadvantage of the accused.

## **VIII. Change of Mentality/Attitudes and Ensuring Accountability**

- 8.1 During the discussion it has clearly emerged that the adverse mentalities of the police, prosecution and the judiciary remain one of the major problems affecting the proper administration of justice and achievement of fair trial. One of the aspects of this mentality is the confession syndrome, which needs to be eradicated. This mentality militates against the general population, particularly the poor. The requirements of the people such as their time, their liberty, their expenses and their convenience does not seem to bother most persons engaged in the administration of criminal justice. Thus achieving the change of mentality remains one of the major challenges in most Asian countries if they are to achieve reasonably acceptable systems of administration of justice.
- 8.2 To achieve a change of mentality education is one of the principle means. Various groups involved in the administration of criminal justice need to be educated on a new style of working, with a better grasp of modern concepts of criminal justice and more sensitivity to the needs of the people. Particularly in South Asian countries where caste, gender and other factors have played a major role in shaping mentalities, the achievement of a modern style of work is not easy. Feudal mentalities refuse to die and remain alive quite unconcerned of the discontent spreading throughout the nation against the slow



and inefficient ways of the old system. In some countries concerned persons have developed education/training systems in collaboration with the judiciary in order to bring about a change in this direction. The Nepalese initiative in this regard is a very unique one. It is hope that this experiment will spread and also be imitated in other countries.

8.3 Together with an education component it is also necessary to develop systems of pressure from among the people as well as from the legal profession to demand change. A proactive legal profession committed to defend the rights of the people can make a serious contribution towards that change. In this regard there is much to be changed on the prevailing practices. Also in this regard the legal profession itself must be willing to give up some of its own attachments to the unacceptable aspects the prevailing system. The original good tradition of pro-bono and legal aid work needs to be revived. It is observed that in many countries, sections of the legal profession gets involved with the police in corrupt manner and thus defeats the ends of justice. More and more there are complaints of corruption against the judiciary also. These trends need to be effectively countered.

8.4 It is necessary to establish methods of monitoring all agencies involved in the administration of justice. Community and human rights groups must evolve surveys and other forms of reviews of the performance of each of these agencies. Media can play a significant role in this matter. All barriers for responsible reporting on administration of justice issues must be removed.

- 8.5 All governments in the region must be encouraged to pursue legal reforms on a planned basis and allocate adequate resources to achieve this end. The example of a 5-year plan for legal reform proposed by the Chinese government is a useful example to study. Reform-oriented research groups like the Criminal Law Institute in Thailand can be very useful for promoting reforms on a regular basis.
- 8.6 In most countries in Asia drastic police reforms has become an urgent necessity. As one participant quoted from a press statement: "In the past when there is a thief people call the police, now when they see a policemen they say 'thief!'" The confidence in the police force is at an all-time low in most countries of the region. Participants of this seminar had the opportunity to read two reports on police reforms, one relating to Sri Lanka<sup>7</sup> and the other on Cambodia.<sup>8</sup> Civil society must take an active role to promote police reforms in their countries. The international community should also assist in this matter if the faith in the rule of law and democracy is to survive.

## **IX. Judicial Independence and Executive Interference: The Effect on Fair Trial**

- 9.1 Fair trial is an inherent right of every citizen, whether a victim, litigant or otherwise.

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<sup>7</sup> Consultations on Police Reforms in Sri Lanka, jointly organized by Vigil Lanka Movement, Vigil India Movement and Asian Human Rights Commission in India, on 7-11 April 1999.

<sup>8</sup> Consultations on Police Reforms in Cambodia, organized by Asian Human Rights Commission in Hong Kong, on the 6-8 January 1999.

- 9.2 Executive interference in the judiciary to coerce the judiciary to decide in its favour for its own political survival violates the right to fair trial and has long-ranging effects.
- 9.3 Once a judiciary has been tainted by a lack of transparency due to executive interference, it will lose the public's confidence. It is also most likely that corruption will spread rapidly.
- 9.4 In some Asian countries the executive has assaulted the judiciary in the manner described above.
- 9.5 Sometimes when the public questions the judiciary's loss of independence, the court uses the weapon of defamation to successfully silence these critics. The very same corporations that were actively colluding in corruption with the judiciary bring defamation suits against their critics who had alleged corruption and 'judge-choosing' practices. On one instance a journalist who wrote a story querying the closeness of a prominent politician with a particular corporate figure who had achieved vast business interests in a relatively short time was successfully sued for defamation by the corporate figure.
- 9.6 Apart from defamation, the courts in certain Asian countries also use the weapon of contempt of court to silence critics. Journalists in particular have been victims of such action.
- 9.7 The citizens' fundamental right to freedom of speech and freedom of information is therefore curtailed when lawyers and the media - the very people who can expose lack of transparency - are gagged by use of defamation suits and contempt of court proceedings.

9.8 Criminal cases are not excepted. In one well known instance the interests of a minor became subservient to political expediency when in an allegation of statutory rape by a minor against a politician, the police kept the minor at their headquarters and incommunicado from her family for two months for the purposes of investigation. At the end of that period 14 other men were charged for statutory rape but not the politician. The 14 accused pleaded guilty and were bound over by the court despite the fact that there is a mandatory jail term for statutory rape. In the course of this incident a sitting Member of Parliament who had raised the matter for public discussion was charged for sedition for using a poster that said "victim jailed, perpetrator freed." He was sentenced to jail and served the term after losing his appeal.

9.9 In all the situations described, if the police, prosecution and judiciary had adhered to the principles of fair trial, the victim/litigants' rights would have been preserved. The interference by the executive often results in the state abrogating its duty to provide the citizen with his right to fair trial and instead perverting the course of justice to ensure its own political survival.

9.10 Independence of the judiciary extends to all persons who exercise judicial power. To ensure this independence, mechanisms should be put in place like the security of tenure, remuneration, security from transfers, demotions or removal, except in accordance with strict procedures which is/will be revisable by the courts.

9.11 The basic principles on the independence of judiciary adopted by the Seventh United Nations Congress on the Prevention

of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 need to be applied in all countries.

## **X. Grossly Inadequate Budget for the Judiciary and Pitiful Salaries of Judges**

- 10.1 In most Asian countries one of the principal causes of the delay in the dispensation of justice and the manifest prejudice to "fair trial," as pointed out by the conferees, is the gross inadequacy of the budget or appropriation provided by the government of their respective countries. It has been shown that generally budgets or appropriations for the judiciary barely constitute a miniscule one-percent of the total budget of their entire respective governments. It has been bewailed that this lack of concern for the judiciary is apparent from the disproportionate and much bigger allocations to the other departments of the Government, like National Defense and Public Works and Highways. Above all, the interest of justice has suffered incalculably in these countries from the insufficiency of appropriations. This has resulted to the appallingly low salaries of thousands and thousands of justices and judges therein. In the Philippines, the monthly salaries vary from US\$ 1,000 for a Chief Justice of the Supreme Court, US\$ 880 for an Associate Justice of the same court, US\$ 630 for Associate Justice of the Court of Appeals, and US\$ 550 to less than US\$ 500 to the thousands of Judges of the lower Courts; in at least one of these ten countries represented in this seminar, judges receive the pitiful amount of the equivalent of US\$ 20 as monthly salary.

Certainly, these salaries affront their dignity as judges and professionals, starve their families, and destroy their independence.

## **XI. Independent Legal Profession as a Pre-requisite for Fair Trial**

- 11.1 One of the most important components of fair trial is an independent legal profession whose members fearlessly fight for their clients. It is most desirable that judges should be recruited from among legally qualified persons only.
- 11.2 In recent times there has been attempts in many countries to subdue the legal profession. Sometimes the legal profession has succumbed. It is very essential to examine what has been happening to the legal profession in all countries, as part of ascertaining the extent to which the tradition of fair trial continues to exist.
- 11.3 The legal profession must strictly adhere to the ethical standards of the profession. These standards must be strictly enforced through proper legal procedures.
- 11.4 No adequate legal remedies have been developed for the realization of economic, social and cultural rights. Lawyers must work closely with the persons whose rights have been violated in this area and the organizations of the civil society in order to defend economic, social and cultural rights. The example of some developments of administrative law in China is worth studying in this regard. The legal profession must play a creative and innovative role in developing redress for denial of these rights. A long delay involved in

civil litigation discourages most persons, particularly those who do not belong to the affluent sections of the society, from pursuing these rights. Ways must be found to introduce new modes of adjudication and arbitration to deal with these issues.

- 11.5 The practice in several countries of allowing persons who have no legal qualifications to become judges should be discontinued.

## **XII. Training of Judges and Lawyers for Fair Trial**

- 12.1 Fair Trial is a basic element of equal and impartial justice. Independence of judges and lawyers is a primary requisite of fair trial. Lawyers are sometimes seen as a part of the court itself for they are involved as an indispensable part of the administration of justice. However, recognizing the legal profession as a part of the administration of justice may impinge upon the independence of the legal profession and thus may impair the course of fair trial. Hence, independence of judges and lawyers should be equally emphasized and the required separation between these two professions should be always maintained. It is the duty of the legal profession to expose the mal practices and abuses on the part of the judiciary.
- 12.2 In some countries, like Nepal, judges and lawyers have over the past few years confronted each other openly in some issues, corruption in particular. Increasing corrupt practices and abuse of judicial safeguard by judges are accusations made by lawyers. Judges are still adamant to recognize that

there is corruption in the judiciary. The increasing gap between judges and lawyers is obviously weakening the whole institution of justice. Hence, strengthening a pragmatic relationship between judges and lawyers which protects the independence of both the judges and lawyers is an urgent need for securing fairness in proceedings, impartiality in substance and de-politicization of justice.

- 12.3 An integrated approach to continuous education of judges and lawyers should be a strategy for strengthening the professional capacity of judicial actors. Hence, regular training and refreshment activities should be effectively implemented by universities and organizations involved in promoting fair trial. For example the Centre for Legal Research and Resource Development (CeLRRd) is working in Nepal according to this strategy for the last six months. A weekly program named Sunday Round Table has been successful in sorting out problems and initiating action to resolve them collectively. This program has achieved the active participation of judges, including Supreme Court judges, senior advocates, lawyers, forensic experts and police officers. In the Philippines, the creation of the Philippine Judicial Academy by statutes and its operation has improved the judiciary in its mandated duty, among others, of dispensing justice through fair trial. In other countries, the idea of the judicial academy had been opted, but there has been no attempt to put the idea into practice. It is useful for other countries to study the Philippine experience in this regard.



12.4 The replacement of conservatism by activism in judicial process is a long term necessity in many countries. This cannot be achieved from outside the system alone. Hence, the generation and continuous encouragement of pro-active judges within the system itself should be part of a strategy of reforms in the criminal justice system in the coming millennium. Training and all kinds of access to professional learning and exposures should be made available for this group of judges who will in future be leading the judiciary. CeLRRd, in cooperation with the Danish Centre for Human Rights (DCHR) and local partners like Institute for Legal Research and Resources (ILRR) and Community Legal Research Center (CLRC), have planned the following activities:

- 12.4.1 Formulation of comprehensive guidelines or manual of procedure for fair trial. The mission will incorporate all the actors of criminal justice.
- 12.4.2 The proposed manual will be discussed in the forum of interactions in order to secure effective implementation of the manual. It is believed that training should go together with implementation of the manual. Five interaction programs are thought to be implemented nationwide.
- 12.4.3 The interaction programs will be followed by training for a group of 24 trial judges, who are found sensitive to the promotion of conditions respecting human rights during trial, based on the manual. The training will be implemented by a small group of judges and CeLRRd will help in organizing. The Supreme Court Research sections and Judges Society, a philanthropic syndicate of judges, will be involved in the process as partners.

- 12.4.4 Similar trainings will be organized for lawyers by CeLRRd in cooperation with these judges and bar units.
- 12.4.5 CeLRRd is negotiating with the National Police Academy to design and implement training jointly for police and lawyers.
- 12.5 Random prosecution and sentencing are also serious problems of the criminal justice system. Young and first-time offenders are subjected to the same sentence and prison conditions. This has to be taken into consideration while thinking about equal justice. The following programs are under consideration of CeLRRd.
- 12.5.1 Development of Crime Trend Analysis Program.
- 12.5.2 Amendment of Legislation concerning sentence, clarity of sentencing policy.
- 12.5.3 Separation of hearing for conviction and sentencing. Courts can do this themselves. Sensitization of the need would be a program in this regard.
- 12.5.4 Increment of budget for the judiciary in order to implement the activities mentioned above.
- 12.6 Curriculum
- 12.7 To ensure that provisions of law regarding fair trial are applied without fail, those who are actively involved in the various stages have to be sensitized to the concept and philosophy. To those who are already involved, exposure to carefully designed training modules is a response. However, it will take a long time to cover the wide range of practitioners.

- 12.8 One sure way of reaching out to the coming generations is to introduce the concepts through the curriculum of the law schools. We may recommend that legal literacy campaigns and legal education should have carefully structured inputs on human rights jurisprudence and related issues.

### **XIII. Appeal and Review**

- 13.1 There should not be a limitation of the right of appeal/review of any decisions by statutory provisions or otherwise. There should at the very least the guaranteed right of two appeals.
- 13.2 In Malaysia, there are certain ministerial decisions provided for by certain statutes/acts. For example, the Printing Presses and Publications Act which does not allow any right of appeal/review and the decision of the Minister is "final." Similarly, under the laws providing for detentions without trial like the Internal Security Act and the Dangerous Drugs (Special Preventive Measures) Act, judicial review is limited to compliance of procedural requirements only. The Elections Judge decision is also not open to appeal.

### **XIV. Prison Systems**

- 14.1 A community in accordance with its philosophy of punishment deals with a violation of a legal enactment crime. The offence is investigated, if found prima facie guilty, the accused is sent to trial and is either acquitted or convicted. If convicted he goes to a prison for undergoing the punishment, eventually for reformation and re-integration with society. Prisons are therefore integral to the criminal justice systems.

- 14.2 It is widely believed that prisons breed crime, and instead of reforming they harden the criminal and expose him to new tricks and new links. The privacy and seclusion of the prisons provide opportunity for abuse of prisoners and violation of their human rights. Women and children are particularly vulnerable. Under-trials suffer harsh treatment and stand to forfeit their right to an effective defense. Prisons, it is reported, breed corruption, spawn criminal gangs and groups with linkages to gangs outside, and sequel reprisals, planned in jails, take place.
- 14.3 All these indicate the need to turn our attention to prison conditions and prison administration. Free access by human rights activists, concerned sections of lawyers and social workers must form part of routine prison management.
- 14.4 All attempts at reforming the criminal justice system should ipso facto include "prison reforms" also.

## **XV. Media**

- 15.1 Modern media offers tremendous possibilities for ensuring fair trial at all stages: at the stage of investigations media can play a useful role in exposing the defects of investigations; at the stage of prosecution and trial media can contribute a great deal by reporting on all aspects of the trial. Under the glare of the cameras and the eyes of the reporters many shady deals can be exposed thus creating the possibility of objective standards being observed during the trials. The experience of several Asian countries show that the media in fact have been able to lessen many unfair practices relating to trials. Trial by publicity however, should not be allowed.

- 15.2 The judicial officers must be given special training to accommodate media. Police and prosecutors too must be available to the media and be accountable. Special codes of conduct must be drawn in order to encourage a liberal and honest attitude towards the media.
- 15.3 The contempt of court proceedings and other forms of suppression of information should not be used against the media. Such suppressive methods have a chilling effect on media and thereby can silence one of the main instruments available to the people to get proper information and to counter corruption and unfair practices.
- 15.4 Proper codes of ethical conduct must be developed within the media to ensure that they do not abuse their rights and that trial by media (media should not portray suspects of crimes as criminals) does not take place. Media must be independent and crime-reporting journalists should be those who are exposed to relevant laws and legal procedures. Media should also respect the rights of persons involved in litigation. There have been some instances in the past when the media has been used to smear the reputation of persons who are being tried before courts. Such practices have also been used against suspects and political opponents.
- 15.5 Laws relating to criminal defamation should be abolished. There are many instances in which criminal defamation is being abused.

## **XVI. Technology as a Means of Promoting Fair Trial**

- 16.1 In many countries in Asia the technology that is used mostly have not kept up with the technological changes of the time. The use of computers and other forms of modern technology can help to create greater efficiency and speed in dealing with cases.
- 16.2 The use of modern technology in the work of the police can be helpful in achieving efficiency. What is more important is that such technology can also be used to promote civil liberties. For example if the names and other details of arrested persons are immediately entered into a computer network to which senior officers of the police have immediate access, much of the abuses relating to arrest can be reduced. If the courts too have access to such police records the applications relating to habeas corpus and other actions relating to illegal arrest can be dealt with with greater speed and accuracy. In fact, in countries which are known for disappearances and other grave abuses of human rights the creation of such networks can help to reduce such occurrences. National Human Rights Commissions too should have access to such information.
- 16.3 Technology can also help in speeding up much of the court work such as issuing of certified copies to parties to the cases and also for issuing other information to which people are entitled. Such technology can also speed up preparation of documents for appeals.

- 16.4 The use of technology requires legal provisions enabling the use of such technology. Such laws must be made speedily.
- 16.5 As the judges, prosecutors and investigating officers in most countries do not have training in use of new technologies, provisions must be made for providing such training.
- 16.6 The introduction of technology requires adequate budgetary allocations.
- 16.7 Media should be used for education in laws and human rights.

## **XVII. Truth Commissions**

- 17.1 The raging cry of Asian peoples for truth and justice needs to be redressed. This, especially among countries whose legal systems, instead of serving the cause of human rights and justice, were used as weapons and tools of repression.
- 17.2 There can be no justice without truth. Also, any legal system, though cloaked in the fine rhetoric of due process and the rule of law, needs to be anchored on truth.
- 17.3 Asian countries, notably Sri Lanka and the Philippines, have stood witness to the emergence of the phenomenon of naked repression of peoples in various brutal forms that shock humanity's conscience - extra-judicial executions that gave birth to the phenomenon of hundreds of thousands of disappearances, arbitrary arrests and detention, and torture. These are only some of the forms of human rights violations that have been perpetrated by regimes that even proclaim themselves as human rights champions.

- 17.4 The healing of human wounds and pains, particularly by those who have fallen and suffered in the dead of night, the anguished cry of the orphaned, of mothers whose sons and daughters had been abducted, raped and murdered, has to take place now.
- 17.5 For only truth could unleash the light of healing, of justice, of redress of a wrong. To smother the cry of the victims and the heirs of human rights abuses at this point of humanity's history is to encourage further the perpetration of ruthlessness and grievous injustice. This, as the failure of governments to muster enough political will to fully unearth, to completely expose to the peoples the full extent and total picture of the barbarity of the perpetrators of this dark injustice would only provide the latter with despicable impunity.
- 17.6 In light of this, a truth commission composed of independent, fearless, and morally upright individuals should be formed in order to pursue the task of investigating the full extent of the human rights abuses that occurred during the reign of terror in various Asian countries.
- 17.7 This truth commission would serve as humanity's shield and armor in defending human rights. The Universal Declaration of Human Rights as well as its related documents ought to be realized by examining what really happened during those darks days with a view towards avoiding a repetition of these crimes against humanity.



## **XVIII. Functioning Constitutional Council/Court**

18.1 In some countries, like Cambodia, the supreme body, Constitutional Council/Court, which has power to interpret the law, does not function well. The too lengthy procedure of complaint obstructs the development of the legal system. This body should be independent and composed of qualified and legally experienced persons. It should be easy to access and everybody should have the right to file a complaint of unconstitutionality of any provisions or law.

## **XIX. Disappearances**

19.1 Disappearances have become a very common phenomenon in several Asian countries. The instances of mass disappearances have come in recent times from Sri Lanka and some of the states in India, some parts of Indonesia in particular. Disappearances in most instances mean extra-judicial killings by law enforcement agencies. Often disappearances are a result of decisions taken by persons in higher political authority empowering the law enforcement agencies and military to carry out such acts and to dispose of the bodies. In Sri Lanka alone there are over 30,000 cases of state recognized disappearances during the last decade. The government announced it would institute prosecutions for about 400 cases only. However, persons who have observed this process doubt however even this figure. The large scale of disappearances amounts to crimes against humanity. However there has not yet been any initiative on the part of the international community to take a serious view on mass disappearances that has taken place in Asia. A parallel to this, and an example to follow, is the case of Pinochet of

Chile who has been brought to justice for causing death of more than 3,000 persons during his time in power. We call upon the UN Commission for Human Rights in particular to study the issues of mass disappearances in Asia and evolve a way to deal with it as an abuse of human rights.

## **XX. Death Sentence**

- 20.1 In recent times there has been much clamour to introduce the death sentence in many Asian countries. Given the enormous defects that exist in all aspects of fair trial procedures - investigations, prosecutions and actual trials - there can be no fairness in introducing the death sentence. These defects of the system affect the poor even worse. Introduction of the death sentence has become a short cut to discourage crimes. In fact, this amounts to an admission that effective control of crime by proper investigation of crimes has been given away even as an ideal. Instead of investigation, an executive approach has been adopted. This has to be condemned as inhuman and callous.
- 20.2 When courts award very high awards of damages (for example in Malaysia ranging from around 10,000,000 RM/ 2,665,956 US\$) and punish plaintiffs with high costs (in Malaysia ranging from around 100,000,000 RM/ 26,659,558), legitimate victims are deterred from turning to the courts with their claims. This phenomenon has resulted in limiting access of the poorer sectors of society to the courts. With the independence of the judiciary being questioned, genuine victims of the fries, allies and/or agents of the ruling power or the state may all the more be left with almost no access to legal remedies.

# PROBLEMS IN FAIR TRIAL: THE PHILIPPINE EXPERIENCE

*Justice Abraham F. Sarmiento (Ret.)\**

## Prefatory

I thank the Asian Human Rights Commission and the Danish Center for Human Rights, as well as the Commission's Executive Director, Mr. Basil Fernando, for their kind invitation to me to participate in this "Asian Seminar On Fair Trial." As your invitation does not appear to be limited to fair trial in criminal cases, I take it that civil cases are encompassed as well. In this paper, I will thus write of the "actual problems facing fair trial" in the Philippines, which "problems may arise at the stage of police investigations, at the stage of preparing prosecutions (and) at the stage of the trial".

In one formulation, "fair trial" was equated with due process - that a trial was fair if it satisfied substantive and procedural due process protections. And substantive and procedural due process had settled meanings.

"Substantive due process requires the intrinsic validity of the law in interfering with the rights of the person to his life, liberty or property. The inquiry in this regard is not whether or not the law is being enforced in accordance with the prescribed manner but whether or not, to begin with, it is a proper exercise of legislative power."<sup>1</sup>

[But even assuming that the law itself was valid, a due process issue could still be raised. Consider Basil Fernando, "Expectations From the

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\* A former Supreme Court judge in the Philippines and a well-known Human Rights advocate.

<sup>1</sup> ISAGANI A. CRUZ, CONSTITUTIONAL LAW, 101 (1995 Edition).  
Mr. Cruz was a former Associate Justice, Supreme Court of the Philippines.

Judiciary: A Few Questions”], speaking of a “rule established by law”.

1a Is it enough to be a conscientious judge? This would only mean doing the duty according to the rules already established in accordance with one’s conscience. What if the rule established by law is itself wrong? (For example section 55 ff of the Emergency Regulations which was virtually an encouragement to commit extra-judicial killings, by giving the power of disposal of bodies to any officer above the rank of Assistant Superintendent of Police?) What can a judge who follows the conscientious actor do under the circumstances, except to accept that he is *functus*? Doesn’t it require a different philosophical outlook for a judge to intervene decisively to prevent legally encouraged extra-judicial killings?<sup>2</sup>

As to procedural due process, again Cruz: “The essence of procedural due process is expressed in the immortal cry of Themistocles to Eurybiades: “Strike, but hear me first!” In more familiar words, the justice that procedural due process guarantees, to repeat with Daniel Webster, is the one “which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial”.<sup>3</sup> Cruz goes further as to the list the requirements of procedural due process both in judicial proceedings thus:

- (1) There must be an impartial court or tribunal clothed with judicial power to hear and determine the matter before it;
- (2) Jurisdiction must be lawfully acquired over the person of the defendant and over the property which is the subject matter of the proceeding;
- (3) The defendant must be given an opportunity to be heard;
- (4) Judgment must be rendered upon lawful hearing.<sup>4</sup>

and in administrative proceedings as follows:

- (1) The right to a hearing, which includes the right to present one’s case and submit evidence in support thereof.
- (2) The tribunal must consider the evidence presented.

<sup>2</sup> In “Social Justice and the Judiciary: Report of the Seminar Workshop on Judiciary for the 21st Century.”

<sup>3</sup> Cruz, *supra*, 104.

<sup>4</sup> *Ibid.*, 104-105. Cruz cites *Banco Español vs. Palanca*, 37 Phil. 921.

- (3) The decision must have something to support itself.
- (4) The evidence must be substantive.
- (5) The decision must be rendered on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected.
- (6) The tribunal or body or any of its judges must act of its own or his own independent consideration of the law and facts of the controversy and not simply accept the views of a subordinate in arriving at a decision.
- (7) The board or body should, in all controversial questions, render its decision in such a manner that the parties to the proceeding can know the various issues involved, and the reason for the decision rendered.<sup>5</sup>

I accept this formulation of "fair trial" and its substantive and procedural aspects. Although I fear that the formulation concentrates on the role of the legislative in "fair trial" (as to its substantive aspect) and the trial proceedings itself (as to its procedural aspect), I thus will take another tack, and I start with Fair Trial and the Individual. From there, I will go to:

Fair Trial and the Judiciary

Fair Trial and the Prosecution

Fair Trial and the Police, and

Fair Trial and the Community.

In the Philippines, the Police, the Prosecution, the Courts, the Corrections (system), and the Community are identified as the five pillars of justice.<sup>6</sup> A sixth—Public Defense, has been suggested.<sup>7</sup> I will go just briefly into *The Corrections*, and I will go as well into the issue of Fair

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<sup>5</sup> *Ibid.*, 115-116. The case cited in *Ang Tibay vs. CIR*, 69 Phil. 635.

<sup>6</sup> See Alberto C. Agra, *Integration of 2 Mandates: Local Autonomy and Administration of Justice* (Final Draft, May 24, 1999), 11-12.

See Emmanuel E. Buendia, *Enhancing Access of the Basic Sectors to the Judiciary* (Supreme Court-United Nations Development Program (UNDP), Technical Assistance to the Philippine Judiciary on Justice and Development

The covering folder of the copy used here bears the notation "To be finalized."

<sup>7</sup> *Ibid.*, 12.

Trial and Public Defense. I feel that this approach is more consistent with your invitation on the presentation of "a comprehensive paper on the actual problems facing fair trial in your country," as your invitation says: "The problems may arise at the stage of police investigations, at the stage of preparing prosecutions, or at the stage of trial." This approach, which utilizes the pillars of the Criminal Justice System, save only for my starting point, Fair Trial and the Individual, was an approach taken in *Enhancing Access of the Basic Sectors to the Judiciary* (Supreme Court-United Nations Development Programme [UNDP]), Technical Assistance to the Philippine Judiciary on Justice and Development and the Journalism Conference on Current Court Issues sponsored by the SC-UNDP Technical Assistance to the Judiciary on Justice and Development and Kapisanan Ng Mga Broadcasters Sa Pilipinas (KBP), from which papers and proceedings I will, with thanks, quote extensively from. These papers and proceedings have more than simplified my task. And while I am starting here with Fair Trial and the Individual, I am also aware that in *Enhancing Access of the Basic Sectors to the Judiciary*, the poor and the disadvantaged (the Basic Sectors) was the group around which the whole study was conducted. Specifically, these twelve (12) basic sectors are the: farmers; fisherfolk; indigenous peoples; urban poor; workers in the formal sectors, including migrant workers; workers in the informal sectors; women; children; youth and students; persons with disabilities; elderly or senior persons; and, victims of disasters and calamities.<sup>8</sup>

## **I. A) Fair Trial and the Individual (Part I)**

I submit that in any discussion of fair trial we must start with the individual and the basic thing to remember is that an individual is a person and that as such person he has rights. As the Philippine Constitution says:

No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws.<sup>9</sup>

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<sup>8</sup> *Enhancing Access Of The Basic Sectors To The Judiciary*, 15-22.

<sup>9</sup> Art. III, sec. 1, Const. (1987).

Even if that individual were under custodial interrogation, he has constitutionally protected rights, thus:

- (1) Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.
- (2) No torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against him. Secret detention places, solitary, incommunicado, or other similar forms of detention are prohibited.
- (3) Any confession or admission obtained in violation of this or Section 17 hereof shall be inadmissible in evidence against him.
- (4) The law shall provide for penal and civil sanctions for violation of this section as well as compensation to and rehabilitation of victims of torture or similar practices, and their families.<sup>10</sup>

And even if that person were accused of a crime, the Constitution still protects him, thus:

- (1) No person shall be held to answer for a criminal offense without due process of law;
- (2) In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustifiable.<sup>11</sup>

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<sup>10</sup> Art. III, sec. 12, Const. (1987).

<sup>11</sup> Art. III, sec. 14, Const. (1987).

In the Philippines, as early as July 4, 1986, the teaching not only of these rights but of human rights in general had been a matter of state policy. Executive Order No. 27<sup>12</sup> provides, in part:

1. The Ministry of Education, Culture and Sports shall include the study and understanding of human rights in the curricula of all levels of education and training in all schools in the country, adapting the scope and treatment of the subjects or courses in human rights to the respective educational levels. It shall likewise initiate and maintain regular programs and special projects to provide venues for information and discussion of human rights including the utilization of informal education and other means to stress the importance of respect therefor.
2. The Civil Service Commission shall include in the qualifying examinations for government service basic knowledge on human rights.
3. In the formulation and creation of courses or subjects on human rights to be included in the school curricula or other educational or training programs to implement and carry out the directives herein including the writing, printing and publication of textbooks and other reading materials relative thereto, the ministry or agencies concerned shall consult and coordinate with the Presidential Committee on Human Rights and shall at all times emphasize the following principles on human rights, and the laws and rules governing the same, to wit:
  - a) All persons are born with human dignity and inherent rights. No one loses his dignity and these rights regardless of what he or she may have done and no matter what his or her political convictions may be.
  - b) Torture, other cruel and degrading treatment or punishment, unexplained or forced disappearances and extra-legal executions (salvaging) are crimes, punishable by Philippine laws under any and all circumstances.
  - c) Anyone may, by himself or on behalf of a person arrested or detained, question the legality of the arrest and detention before the appropriate court.
  - d) The Bill of Rights as adopted *in toto* in the Provisional Constitution under Proclamation No. 3 dated March 25, 1986 or in the New

<sup>12</sup> "Education to Maximize Respect for Human Rights" (July 4, 1986).



Constitution when ratified, including the jurisprudential ramifications thereof.

- e) Prisoners shall be treated with humanity. Juvenile prisoners shall be kept, if the jail would admit of it, in apartments separate from those containing prisoners of more than eighteen years of age; and the different sexes shall be kept apart. The visits of parents and friends who desire to exert a moral influence over prisoners shall at all reasonable times be permitted under proper regulations.
- f) Convicted prisoners may be assigned to work suitable to their age, sex and physical condition.
- g) Articles 124 to 131, 235, 245, 267 to 269 of the Revised Penal Code.<sup>13</sup>
- h) Republic Act No. 857.<sup>14</sup> [This Act imposes the penalty of arresto mayor upon any public officer or employee who shall obstruct, prohibit, or otherwise prevent the exercise of the right of attorneys to visit and confer with persons arrested, at any hour of the day, or, in urgent cases, of the night, said visit and conference being requested by the person arrested or by another acting in his behalf, x x x]
- i) Rules 113 and 126 of the 1985 Rules on Criminal Procedure.<sup>15</sup>
- j) The Rules for the Treatment of Prisoners as adopted by the Department (now Ministry) of Justice on January 7, 1959; the Ministry of Justice Manual on the general rules, policies and operating principles adhered to in the prison service.

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<sup>13</sup> Philippine Revised Penal Code: Article 124 (arbitrary detention), 125 (Delay in the delivery of detained persons to the proper judicial authorities), 126 (delaying release), 127 (expulsion), 128 (violation of domicile), 129 (search warrants, maliciously obtained and abuse in the service of those legally obtained), 130 (searching domicile without witnesses), 131 (Prohibition, interruption, and dissolution of peaceful meetings), 235 (maltreatment of prisoners), 245 (abuses against chastity), 267 (kidnapping and serious illegal detention), 268 (slight illegal detention), 269 (unlawful arrest).

<sup>14</sup> "An Act To Punish Any Public Officer Or Employee Who Shall Obstruct, Prohibit, Or Otherwise Prevent The Exercise Of The Right Of Attorney To Visit And Confer With Persons Arrested," June 16, 1953.

<sup>15</sup> 1985 Rules on Criminal Procedure: Rule 113 (Arrest), Rule 126 (Search and Seizure).

4. If found appropriate and practicable by the Ministry of Education, Culture and Sports, after considering the needs and capabilities of the students in the different educational levels, subjects or courses dealing with international convention, agreements, declarations or covenants on human rights which were ratified by the Philippines or to which it is a signatory, shall be included in the curricula.

I am unaware, however, of the extent of implementation of this Executive Order.

Perhaps, because the fact that an individual is a person and that as such person he has rights is so basic that we overlook or forget this truth. Or, in the Philippines, perhaps because this is due to the fact that Executive Order No. 27 has not been completely implemented.

This oversight or forgetfulness of what Executive Order No. 27 states, that: "All persons are born with human dignity and inherent rights" has resulted in the blurring of the distinction between a person (who has rights as such person) and a criminal (who has rights notwithstanding such fact). This blurring or distinction between a person and a criminal has resulted in a denial of fair trial, the phrase "fair trial" used in its broad sense.

Consider the Philippine experience. At one point, the overzealousness of police authorities in the anti-drug campaign resulted in the spraying of houses of suspected drug pushers with identifying marks, the so-called "Lim's Scarlet Letters",<sup>16</sup> a campaign that "[h]a(d) gained the support of [among others] Vice President Joseph Estrada,<sup>17</sup> Interior Secretary Robert Barbers,<sup>18</sup> Parañaque Rep. Roilo Golez, and Malabon Mayor Prospero Oreta, Chairman of the Metropolitan Manila Development Authority<sup>19</sup>."<sup>20</sup>

Of due process objections, Mayor Alfredo Lim, former Mayor of Manila, who ran in 1998 for President in the last Presidential elections

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<sup>16</sup> "Lim's Scarlet Letters," Vol. LXXXVIII, No. 29, *Philippines Free Press*, July 19, 1997. Alfredo Lim was a decorated police officer who went on to become Mayor of Manila. He ran, and lost, in the 1996 Presidential elections.

<sup>17</sup> now President.

<sup>18</sup> now Senator.

<sup>19</sup> Jejomar Binay, former Mayor of Makati, is now the Chairman.

<sup>20</sup> James Payawal Saspa, "Make My Day", *Philippine Free Press*, 4, July 19, 1997.

and lost, had this to say:

What about due process, the rights of the accused? "Presumption of innocence, we don't contest that. We respect that," said Lim, who is also a lawyer. "But to my mind, that principle is applicable only in court...so that defendants can get a fair trial. And we operate outside court." Lim said his position is supported by a Supreme Court ruling that judicial knowledge, which is equivalent to common knowledge, need not be proven. "If, say, the people in a neighborhood know that one of their neighbors is a drug dealer, that would be enough for the mayor and the police to go to his house and spray it with it a sign saying a drug pusher lives there and people should stay away from it," Lim said. Then there is a constitutional provision (Section 13, Article 2) that gives the State mandate to promote the physical, moral, spiritual and social well-being of the youth.<sup>21</sup>

That this "Scarlet Letters" campaign had hit even the innocent has been reported in the *Philippine Free Press*:

Still, some avowed nonpushers have reportedly been hit. Daniel Saligumba, a resident of Binondo district, filed a complaint with the Commission on Human Rights, whose protection he also sought for fear of reprisals. "My family and I are afraid that they might plant evidence and falsely accuse us because of what we did," Saligumba said in his complaint. He said that police actions are tainted with malice while that of Lim borders on libel. The painted signs are baseless, malicious and libelous and a clear invasion of personal and property rights as guaranteed by the Constitution, Saligumba said.<sup>22</sup>

In certain cases, the blurring of the distinction between an individual and a criminal has been taken to extremes.

I refer to salvagings or extra-legal executions and this notwithstanding the fact that since 1994, we have had in the Philippines a death penalty statute in our books.<sup>23</sup>

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<sup>21</sup> "Edging to a Police State," LXXXVIII, No. 34, *Philippines Free Press*, 3-4.

<sup>22</sup> "Make My Day", fn. 19, 4.

<sup>23</sup> Republic Act No. 7659, "An Act To Impose The Death Penalty On Certain Heinous Crimes, Amending For That Purpose The Revised Penal Code, As Amended, Other Special Penal Laws, And For Other Purposes" (December 15, 1993).

As reported in the *Philippines Free Press*:

[F]our years ago, another antidrug campaign turned up dozens of dead pushers, found in the streets, in the creeks and under the bridges of Manila, with signs on them saying "I'm a drug pusher, don't emulate me." Congress and the press raised concerns that the pushers were illegally arrested, tortured and summarily executed. Maybe. But as a result of the campaign, pushers fled Manila and drug dealing stopped.<sup>24</sup>

But then: "So what about that? of course, they'll say that," Lim said. "That's the standard reply: I'm not a pusher. That's what he say. But our tips are verified to ensure that real pushers are identified," *id.*

But an individual does not cease to be an individual simply because he has been convicted of a crime. The Philippine Constitution provides, that:

(2) The employment of physical, psychological, or degrading punishment against any prisoner or detainee or the use of substandard or inadequate penal facilities under subhuman conditions shall be dealt with by law.<sup>25</sup>

I submit therefore that fair trial should also include fair treatment in a criminal case after trial.

In 1965, a Philippine Supreme Court decision described prison conditions in the Philippines, thus:

[B]ut the members of the Court cannot in conscience concur in the death penalty imposed, because they find it impossible to ignore the contributing role played by the inhuman conditions then reigning in

<sup>24</sup> James Payawal Saspa, "Make My Day", *Philippines Free Press*, July 19, 1997, 2.

<sup>25</sup> Const., Art. III, sec. 19(2) (1987).

See Executive Order No. 27, *supra*.

See section 63, Republic Act No. 6975.

*Establishment of District, City or Municipal Jail.* - There shall be established and maintained in every district, city and municipality a secured, clean, adequately equipped and sanitary jail for the custody and safekeeping of city and municipal prisoners, any fugitive from justice, or persons detained waiting investigation or trial and/or transfer to the national penitentiary, and/or violent mentally ill person who endanger himself or the safety of others, duly certified as such by the proper medical or health officer, pending the transfer to a mental institution.

the penitentiary, vividly described by the trial Judge in his decision. It is evident that the incredible overcrowding of the prison cells, that taxed facilities beyond measure and the starvation allowance of ten centavos per meal for each prisoner, must have rubbed raw the nerves and dispositions of the unfortunate inmates, and predisposed them to all sorts of violence to seize from their owner the meager supplies from outside in order to eke out their miserable existence. All this led inevitably to the formation of gangs, that preyed like wolf packs on the weak, and ultimately to pitiless gang rivalry for the control of the prisoners, abetted by the inability of the outnumbered guards to enforce discipline, and which culminated in violent riots. The government cannot evade responsibility for keeping prisoners under such subhuman and dantesque conditions. Society must not close its eyes to the fact that if it has the right to exclude from its midst those who attack it, it has no right at all to confine them under circumstances that strangle all sense of decency, reduce convicts to the level of animals, and convert a prison term into prolonged torture and slow death.<sup>26</sup>

A more recent view indicates that the 1965 observation remains, even only as a perception, thus:

Among the five pillars, the correction pillar appears to have the least resources. To the general public, it is narrowly viewed as the jail where society's outcasts are confined. The pillar gets media coverage only during events such as riots, hunger strikes, epidemics, jailbreaks, incarceration of celebrities, and recently, the issue of death penalty. Problems of congested jails, inhuman living conditions, lack of transportation facilities (to and from court salas) have not been addressed for about several decades now.<sup>27</sup>

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The municipal or city jail service shall be headed by a graduate of a four (4) year course in psychology, psychiatry, sociology, nursing, social work or criminology who shall assist in the immediate rehabilitation of individuals or detention of prisoners. Great care must be exercised so that the human rights of those prisoners are respected and protected, and their spiritual and physical well-being are properly and promptly attended to.

<sup>26</sup> *People vs. de los Santos*, Nos. L-19067-68, July 30, 1965, 14 SCRA 702 (1965).

<sup>27</sup> *Enhancing Communication Between the Judiciary and the Citizenry*, Abstract (For Final Editing)

as also:

To the general public, the correction pillar is narrowly viewed as the jail or penitentiary whose society's outcasts are confined. The rehabilitation and reformation tasks are either ignored or unknown.<sup>28</sup>

## B) Fair Trial and the Individual (Part II )

In the Philippines, the individual to whom a fair trial is likely to be denied is more often than not poor or disadvantaged.

In *Enhancing Access of the Basic Sectors to the Judiciary*, the poor and disadvantaged are identified thus:

Republic Act 8425, otherwise known as the Social Reform and Poverty Alleviation Act, institutionalizes the processes under the SRA<sup>29</sup> that President Ramos pushed during his Administration. The law defines the coverage of the "disadvantaged sectors of Philippine society." It includes at least 12 major basic sector groupings. They are referred to as the "poor". The law defines them as individuals and families who cannot afford in a sustained manner for their minimum basic needs of food, health, education, housing and other essential amenities of life.<sup>30</sup>

Most of the members of these sectors belong to at least 35 percent of households living below the poverty income threshold. These are the farmer-peasants, artisan fisherfolk, indigenous peoples, urban poor workers, in the formal sector (including migrant workers), workers in the informal sector, women, children, youth (including students), senior citizens, persons with disabilities (differently-abled persons), and victims of disasters.<sup>30</sup>

While *Enhancing Access of the Basic Sectors to the Judiciary* lists specific problems and specific observations as relating to specific sectors,<sup>31</sup>

<sup>28</sup> *Ibid.*, Part Four, Communication in the Five Pillars in the Administration of Justice and Other Branches of Government.

<sup>29</sup> Social Reform Agenda.

<sup>30</sup> Emmanuel E. Buendia, *Enhancing Access of the Basic Sectors to the Judiciary*, 16-17 (Supreme Court-United Nations Development Programme (UNDP), Technical Assistance to the Philippine Judiciary on Justice and Development).

<sup>31</sup> See Chapter Two (Pushing for Social Reforms Toward People Empowerment) and Chapter Four (Preventive and Mitigating Mechanisms to Protect the Rights and Welfare of the Basic Sectors)

I quote these passages therefrom which I submit are material to a consideration of the individual's plight in relation to fair trial:

## The Flow of Injustice

In spite of past efforts to approximate the realization of these mandates, history tells us about people confronted with the legacy of structures of injustice and inequity. It is recognized that discrimination exists in the sphere of laws based on class, gender, and ethnicity. This situation is exacerbated by the state of poverty and the political disparities that impinge on the effective use of productive resources, delivery of services, and participation in governance and decision-making.

Inequity and injustice spring from the society's bias for those who hold power. Unfortunately, our people, especially the Basic Sectors, are still marginalized and sidetracked from the center of power that to this tie remain in the control of a few. Power connotes the ability to unduly influence or otherwise shape the actions and behavior of others in accordance with one's designs. In reality, therefore, our means for achieving the common goals of empowering people and protecting the rights and welfare of the majority are still a long way from being concretized in practice.

A number of times, the enactment and enforcement of laws favor only a few. The so-called privileged few capitalize on the failure of the government machinery to enact policies or to effectively enforce the law. Others abuse their authority and use their powers to circumvent the law. While several of them violate the rights of others to satisfy their self-serving interests. Most of the time, the rich and powerful get away with it scot-free.

The weight of justice usually falls heavily on the poor and less privileged in favor of the rich and powerful. The Basic Sectors that comprise the poor majority continue to suffer discrimination. Their discrimination stems from a host of inequalities and inequities that include economic marginalization, political subordination, gender stereotyping, and other structural and social disparities. These biases heighten the domination of aggressors over the majority who bears the brunt of being poor, weak, helpless and vulnerable.

## The Effects and Impact of Injustice on the Basic Sectors as the Aggrieved

In a society which limits individuals' right to humane and improved quality of life, which impairs people's dignity, which obscures people's dreams and aspirations, poverty effectively negates people empowerment. Consequently, the disadvantaged Basic Sectors suffer physical, social, economic and cultural displacements; violence against their persons; and curtailment of their rights and privileges. Their poverty situation worsens as the wheels of justice slowly turn. By common perception society has penalized them, not because they have done wrong, but because they are poor.

The poor encounter numerous obstacles in asserting their rights, in harnessing their own potentials for growth and claiming the fruits of just and equitable development. In the community, they fear for their lives and property. They also confront a lot of insecurity due to the pervasiveness of criminality and, most of all, their lack of access to needed support mechanisms, such as the media and legal entities. At the workplace, they suffer discrimination, low wages, sexual harassment, and hazardous working conditions, among others. At home, they are vulnerable to demolitions, domestic violence, inadequacy of health services, lack of medical/dental support, and other basic needs. In all fronts, the poor doubly suffer and experience various forms of injustice.<sup>32</sup>

as also:

However, it recognizes that a number of issues infringe on the enjoyment of these rights by the people. These are often reflected in the plights and circumstances of the Basic Sectors and the disadvantaged. The vulnerability of the poor to violations of human rights and the resultant impact on their lives serve as indicators of the extent by which these rights are exercised and respected. Poverty, the lack of education, lack of legal assistance, and absence of credible witnesses most often doubly burden those whose human rights are violated. While human rights violations are rampant under repressive political conditions and in situations of armed or internal conflicts,

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<sup>32</sup> *Ibid.*, 10-12, Charts omitted.



other forms are evident in normal settings. When the enforcement of laws and their concomitant processes are circumvented for the convenience or interests of power holders, the human rights of the victims are trampled upon. Such occurrences are observed during illegal detention, searches and arrests without warrant, press censorship and union busting.<sup>33</sup>

Judging by *Enhancing Access of the Basic Sectors to the Judiciary*, that:

The time has come for the Judiciary to concretely respond, within its mandate, to the Basic Sectors' clamor for overcoming the legal constraints that hinder their meaningful participation in development. It must heed the call of the poor, the Basic Sectors that comprise the majority of the country's population.

Put the Basic Sectors, the poor, first in our agenda. Only they can effectively enable our nation, as a whole, to move toward real development. Sustainable growth and improved human well-being in our society can, after all, be realized only through an empowered majority.<sup>34</sup>

it appears that the Philippines is addressing the problem of fair trial.

At this juncture and apropos the preceding discourse on criminal unfair trial, let me advert to a case decided by our Supreme Court of which I was the ponente of the decision of reversal (the case was raffled to me):

Usman Hassan was accused of murder for stabbing to death Ramon Pichel, Jr. y Uro, 24, single, and a resident of Zamboanga City. At the time of his death on July 23, 1981, the deceased was employed as manager of the sand and gravel business of his father. On the other hand, Hassan was an illiterate, 15-year-old pushcart cargador.

The quality of justice and majesty of the law shine ever brightest when they are applied with more jealousy to the poor, the marginalized, and the disadvantaged. Usman Hassan, the herein accused-appellant, belongs to this class. At the time of the alleged commission of the crime, he was poor, marginalized, and

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<sup>33</sup> *Ibid.*, 26.

<sup>34</sup> *Ibid.*, 1, 4.

disadvantaged. He was a flotsam in a sea of violence, following the odyssey of his widowed mother from one poverty-stricken area to another in order to escape the ravages of internicine war and rebellion in Zamboanga del Sur. In the 15 years of Hassan's existence, he and his family had to evacuate to other places for fear of their lives, six times. His existence in this world has not even been officially recorded; his birth has not been registered in the Registry of Births because the Samal tribe, to which he belongs, does not see the importance of registering births and deaths.

Usman was convicted on the bases of the testimony of a lone eyewitness for the prosecution and the sloppiness of the investigation conducted by the police investigator, Police Corporal Rogelio Carpio of the Homicide and Arson Section of the Zamboanga City Police Station, who also testified for the prosecution.

We rule that Usman Hassan's guilt was not proved beyond reasonable doubt and that Usman Hassan must, therefore, be set free.

The fact remains that both Samson and the accused testified clearly and unequivocally that Usman was alone when presented to Samson by Carpio. There was no such police line-up as the police investigator claimed on second thought.

The manner by which Jose Samson, Jr. was made to confront and identify the accused alone at the funeral parlor, without being placed in a police line-up, was "pointedly suggestive, generated confidence where there was none, activated visual imagination, and, all told, subverted his reliability as eyewitness. This unusual, coarse, and highly singular method of identification, which revolts against the accepted principles of scientific crime detection, alienates the esteem of every just man, and commands neither our respect nor acceptance."

Moreover, the confrontation arranged by the police investigator between the self-proclaimed eyewitness and the accused did violence to the right of the latter to counsel in all stages of the investigation into the commission of a crime especially at its most crucial stage - the identification of the accused.

As it turned out, the method of identification became just a confrontation. At that critical and decisive moment, the scales of justice tipped unevenly against the young, poor, and disadvantaged accused. The police procedure adopted in this case in which only the accused was presented to witness Samson, in the funeral parlor, and in the presence of the grieving relatives of the victim, is as tainted as an uncounselled confession and thus falls within the same ambit of the constitutionally entrenched protection. For this infringement alone, the accused-appellant should be acquitted.

Moreover, aside from this slipshod identification procedure, the rest of the investigation of the crime and the preparation of the evidence for prosecution were done haphazardly, perfunctorily, and superficially. Samson was not investigated thoroughly and immediately after the incident. As previously mentioned, his statement was taken by the investigator only two days after the murder of Ramon Pichel, Jr. and sworn only two days after it had been taken.

Considering that the age of the accused could exempt him from punishment or cause the suspension of his sentence under Articles 12 and 80, respectively, of the Revised Penal Code, if found guilty, more meticulousness and care should have been demanded of medical or scientific sources, and less reliance on the observation of the judge as had happened in this case. The preliminary findings of the dentist that the accused could be anywhere between fourteen to twenty one years, despite the difficulty of arriving at an accurate determination due to Hassan's mouth condition, would have placed the trial judge on notice that there is the probability that the accused might be exempted from criminal liability due to his young age. All the foregoing indicates that the accused had not been granted the concern and compassion with which the poor, marginalized, and disadvantaged so critically deserve. It is when judicial and police processes and procedures are thoughtlessly and haphazardly observed that cries of the law and justice being denied the poor are heard. In any event, all this would not be of any moment now, considering the acquittal of the accused herein ordered.<sup>35</sup>

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<sup>35</sup> *Sarmiento, J., People vs. Usman Hassan*, G.R. No. 68969, January 22, 1988, 157 SCRA 261.

## II. Fair Trial and the Judiciary

In the Philippines, "the judicial power," which "includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government," "shall be vested in one Supreme Court and in such lower courts as may be established by law."<sup>36</sup>

The Supreme Court is the highest adjudicating body, being the fourth level of the Integrated Court System, the other three levels being the Metropolitan and Municipal Trial Courts/Circuit Courts (First level), the Regional Trial Courts and the Shari'a Court (Second Level), and the Court of Appeals (third Level). There are special courts with limited jurisdiction as well as quasi-courts or quasi-judicial bodies.<sup>37</sup>

Judges and Justices are appointed by the President from a list of at least three nominees submitted by the Judicial and Bar Council,<sup>38</sup> a constitutional body the principal function of which is to recommend appointees to the Judiciary<sup>39</sup> and which is composed of the "Chief Justice as ex officio Chairman, the Secretary of Justice, and a representative of the Congress as ex officio Members, a representative of the Integrated Bar, a professor of law, a retired Member of the Supreme Court, and a representative of the private sector."<sup>40</sup> The very composition of the Judicial and Bar Council thus makes for a conservative outlook, which is expected to be reflected in its recommendees.

Judicial conservatism, which may not necessarily have a negative impact on fair trial is one thing, but corruption is another. The issue of corruption in the Philippine Judiciary is such that a phrase - "hoodlums in robes" - entered the Philippine vocabulary. This phrase - "hoodlums in robes" was used by President Estrada when he was still Vice-President and "is regarded as one of the most scathing criticisms against the

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<sup>36</sup> Art. VIII, Section 1, Const.

<sup>37</sup> Buendia, *Enhancing Access of the Basic Sectors to the Judiciary*, 27-30.

<sup>38</sup> Art. VIII, sec. 9.

<sup>39</sup> *Ibid.*, sec. 8(5).

<sup>40</sup> *Ibid.*, sec. 8(1).

judiciary.”<sup>41</sup>

If a judge were corrupt, the “scathing criticism” is deserved, for:

*The Courts.* Of all the components in securing the efficacy, efficiency and fairness of the administration of justice, the courts stand in the position of vital importance. The courts determine the innocence or guilt of the accused, the commission or non-commission of the offense or violation charged and the imposition of the penalty. Courts determine the law applicable to the given facts as established by the rules of evidence. Courts determine whether or not a particular local policy, ordinance, resolution or executive order is constitutional or legal. They also have jurisdiction over matters of culpability of local governments, local government officials.<sup>42</sup>

and the violation of one’s right to fair trial manifest.

I do not know of your experiences in your countries, but I can conceive of a situation where a litigant can be denied justice by a Justice or a Judge, without the question of corruption coming into the picture. I refer to the Judiciary and the Death Penalty. I consider the death penalty statute<sup>43</sup> as the most significant piece of criminal legislation that has come out of the Philippine Congress in recent times. I find it however unfortunate that some Judges have seen the word “significant” in other lights. To these judges, the word “significant” has been used in the sense of “significant as being the first Judge to impose a death penalty under the statute,” “significant as being the Judge to have imposed numerous death penalties,” “significant in that a group of Judges had found a guillotine society.” It is frightening that in the Philippines, the imposition of the death penalty has become a contest.

Frankly, I am wondering why the Philippine Supreme Court has not moved against such judges or such societies, or at the very least, discouraged them. If there is one thing the law expects of Judges, it is not

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<sup>41</sup> Part Four, *Enhancing Communication Between the Judiciary and the Citizenry* (For Final Editing).

<sup>42</sup> Agra, *Integration of 2 Mandates: Local Autonomy and Administration of Justice*, 11 (To Be Finalized)

<sup>43</sup> Republic Act No. 7659 (1993). To date, six (6) persons have been put to death under this statute which was enforced only this year.

only intelligence or speed in deciding cases: always, however, it is also fairness.

The conservatism and corruption of judges impact on fair trial as well as the conservatism of judges in disposing of certain cases. Other factors have been identified.

In *Enhancing Access of the Basic Sectors to the Judiciary*, these factors have been identified as affecting "Access to Justice by the Basic Sectors":

- (1) delay in judicial proceedings
- (2) decisions rendered are erroneous;
- (3) prohibitive cost of litigation
- (4) inadequacy or lack of information; and
- (5) lack of lawyers in some areas,<sup>44</sup>

These same factors, I submit, affect not only access to Justice by the basic sectors, but also the assurance of a fair trial.

Let me take up just numbers (1) and (2), the rest being easily understood.

## Delays in Judicial Proceedings

These delays in turn have been attributed to these factors.

\* Lack of courts and inadequate number of qualified professional and personnel support who can perform the following tasks: handle increasing number of cases filed over the years, lack of information on new laws and rules as they relate to existing legislative measures;

\* Limited budget of the Judiciary that prevents it from adequately performing its mandate and instituting improvements in the dispensation of justice;

\* shortfall in the number of judges appointed to available positions due to the limiting constitutional requirement imposed upon the President, who is mandated to issue the appointment of a judge chosen

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<sup>44</sup> *Supra*, 32.

from among three nominees, when, in most cases, applicants to said position do not reach the required number of nominees;

\* complexity of the rules of procedure and the medium of communication used during court proceedings that may unnecessarily limit the active participation of the accused or aggrieved Basic Sectors or cause further delay in the judicial proceedings;

\* Lack of prosecutors who can serve for the speedy trial of cases; and

\* Prioritization of cases over other pending cases, particularly those involving the Basic Sectors.

I concede these sentences in *Enhancing Access of the Basic Sectors to the Judiciary*, that:

Litigation, by its very nature, takes time. It goes through various processes to ensure that both parties are given the opportunity to present their cases in court.<sup>45</sup>

for the satisfaction of the requirements of fair trial requires the expenditure of time. But the very time needed to ensure fair trial could defeat it.

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<sup>45</sup> *Ibid.*, 32.

**Consider this Summary Report Of Cases For The Year 1998 from  
the Office of the Court Administrator, Supreme Court:**

Branch / Station	Pending cases as of 1/31/98	Case Newly Filed	Inflow Cases Revived/ Reopened	Cases Recd from other salas/cts	Case Decided/ Resolved	Out - flow Cases Archived	Cases Transf. to other salas/cts	Cases w/ proc susp	Pending cases as of 12/31/98
Court of Appeals	16,201	8,578	0	0	8,606	0	0	0	16,173
Sandi-gan- bayan	3,109	699	100	0	636	0	0	0	3,272
Court of Tax Appeals	350	139	0	0	200	4	0	0	285
Regional Trial Courts	214,382	153,568	9,815	7,973	111,972	37,074	9,277	2,547	224,868
Metro- politan Trial Courts	184,982	157,313	6,952	1,446	56,059	106,852	2,245	3,749	181,788
Municipal Trial Court in Cities	160,467	128,367	7,819	29,682	72,203	69,887	5,508	1,290	177,447
Municipal Trial Courts	134,421	100,038	3,092	4,513	58,383	22,705	19,725	20,052	121,199
Municipal Circuit Trial Courts	49,366	53,478	2,030	9,343	33,264	7,267	8,101	1,500	64,085
Shari' a District Courts	150	64	1	4	33	1	0	3	182
Shari' a Circuit Courts	236	298	1	18	292	10	3	23	225
<b>TOTAL</b>	<b>763,664</b>	<b>602,542</b>	<b>29,810</b>	<b>52,979</b>	<b>341,648</b>	<b>243,800</b>	<b>44,859</b>	<b>29,164</b>	<b>789,524</b>



What do these statistics tell us?

If the number of pending cases as of December 31, 1998 - 789,524 - were decided at the same rate as the cases decided/resolved as of December 31, 1998 - 341,648 - it would take more than two (2) years to resolve this backlog, assuming no new cases are filed. Assuming that new cases would be filed at the same rate as of December 31, 1998 - 602,542 - it would take another one-and-a-half years to catch up. A three-and-a-half-year trial period may be alright to some, but it could be disaster for the poor. Note that the figures above do not include cases with the Supreme Court.

Time for the Basic Sectors is essential. Each day that is lost to court hearings means a lot to them. Such does not only require them to spend their limited resources but also deny them the time to earn a decent living. Opportunity cost is high. Justice delayed is justice denied. For the Basic Sectors, this translates to increased social and economic marginalization. For some of them, their children will be denied education. Others will miss decent meals for a long time. The wives or mothers of some will bear the burden to work double time to make both ends meet in the family. Some of them will continue to suffer community ridicule even after the resolution of their cases. The impact on the basic sector may be hard to quantify. One thing however is definitely sure: Their sufferings take a heavy toll on their present state of impoverishment.<sup>46</sup>

As for the Supreme Court, its data states:

From January to December 1998, the Supreme Court received a total of 4,371 new judicial cases (January - 430; February - 388; March - 344; April - 351; May - 337; June - 336; July - 450; August - 391; September - 401; October - 364; November - 312; and December - 267). For the same period, the Court received a total of 47,617 pleadings, such as comments and answers, replies, rejoinders, sur-rejoinders, motions for extension of time, motions for reconsideration, manifestations, compliances, etc.

As to dispositions during the same period, January to December, 1998, the Court resolved 4,380 judicial cases - 3,630 by minute

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<sup>46</sup> *Ibid.*, 32.

resolutions and 750 by full-blown (penned) decisions or extended resolutions (signed resolutions). The dispositions are broken down as follows:

*By Minute Resolutions:*

En Banc	-	181
First Division	-	1,260
Second Division	-	1,064
Third Division	-	1,145
Sub-Total	-	3,630

*By Penned Decisions/Extended Resolutions:*

En Banc	-	90
First Division	-	243
Second Division	-	219
Third Division	-	198
Sub-Total	-	750
Grand Total		4,380

As of December 30, 1998, there were a total of 5,829 pending cases - 5,626 were awaiting completion of pleadings and 203 were calendared for deliberation or submitted for decision.

The Court remanded a total of 3,497 cases to lower courts and agencies.<sup>47</sup>

The data is impressive; only 203 cases remain "for deliberation" or "for decision." Be that as it may, this number does not show the previous backlog, which, if my memory does not fail me, was, when I joined the Supreme Court on January 26, 1987 (I retired on October 8, 1991), something like more than 20,000 cases. Some of them at that time (1987) were more than 20 years already pending, like two cases then assigned to me, one involving U.S. biscuit company and another involving American Dollar Steamship Line. I decided these two cases with deliberate speed,

<sup>47</sup> Data received from the Supreme Court.

although the issues involved were quite complex. When I retired five years later, on October 8, 1991, the backlog of 20,000 cases which the Teehankee Court inherited was reduced to half - 10,000 cases.

The delays in adjudicating cases in the Supreme Court of the Philippines is explained by Justice Artemio V. Panganiban, incumbent Justice of the Supreme Court, thus:

### Delays in Adjudicating Cases

Invariably, people ask, "Why does it take many years for the Supreme Court to decide cases?" Indeed, many have the impression that it takes years and years before a case is finally decided.

To answer the question, I consulted the Annual Reports of the SC for the last three years, which yielded the following information:

Year	No. of Judicial Cases Filed	No. of Judicial		Of Total
		By Extended Resolution	Cases Disposed By Penned Decision	
1995	4,886	3,621	806	4,427
1996	4,545	3,925	922	4,847
1997	4,309	3,680	830	4,510
TOTAL	13,740	11,226	2,558	13,784
Average per year	4,580	3,742	852	4,594

From the above statistics for the last three years, it would appear that the Court is able to dispose or decide about as many judicial cases as are filed. Looking at the bottom line (average per year), I note that while 13,740 cases were filed, 13,784 were decided, showing that the input of

new cases is even slightly exceeded by the output of decisions, both by extended resolutions and by penned decisions.

One of the major problems of the Narvasa Court is that it has inherited a backlog of cases, which I estimate to be about 2,000 at present. By *backlog* I refer to cases that were deemed submitted for decision more than twenty-four months ago. Since these cases have already been given due course, and since the parties have already filed their memoranda more than two years ago, they cannot be decided by extended resolutions, but only by penned decisions. And because the Court averages only 852 penned decisions a year, it would indeed take some time before this backlog can be resolved. That is the bad news.

The good news is that the present Court recently promulgated a decision that will scale down the filing of new judicial cases, because judgments of the National Labor Relations Commission (NLRC) will now be reviewable by the Court of Appeals, concurrently with the Supreme Court. There are no available statistics, but by my own estimate, NLRC cases constitute about 20 percent of the Court's docket. I therefore expect that with this new doctrine, the number of new cases filed at the Court will be reduced by 20 percent. Thus, the Court will have a little more time to attend to its backlog of cases.

The labor sector may ask: Will the assumption by the Court of Appeals (CA) of jurisdiction over NLRC cases just unduly prolong their adjudication, inasmuch as CA decisions are appealable to the SC anyway? No. *First*, the CA, which is composed of 51 members divided into 17 Divisions of 3 members each, can act on these cases much faster than the SC. *Second*, not all CA decisions are actually brought to the SC by the parties. *Third*, the SC places great persuasive value on CA decisions. There are no statistics, but based on my own experience and observation, about 60 percent of all petitions from CA judgments are denied through minute resolutions of the SC in the First Round. Of the balance, another 20 percent are thrown out during the Second Round. Thus, only about 20 percent of appealed CA decisions mature to penned decisions in the Third Round. And of these, about one half are affirmed and the other half are reversed or modified. In other words, there is only a 10 percent chance that CA decisions may be reversed or modified by the S.C.<sup>48</sup>

<sup>48</sup> Justice Artemio V. Panganiban, *Battles in the Supreme Court*, pp. 31-33.

## Limited Budget of the Judiciary

It has been said that one of the causes of the delay is the "Limited Budget of the Judiciary that prevents it from adequately performing its mandate and instituting improvements in the dispensation of justice."<sup>49</sup>

Consider the budget of the Judiciary Relative to the National Government Budget, 1991-2000 (Obligation Basis: In Thousand Pesos):

Total Budget	The Judiciary	As Percent of Total Budget (%)	
1991	293,160,746	2,125,445	0.73
1992	286,602,815	2,334,013	0.81
1993	313,749,337	2,534,253	0.81
1994	327,768,086	3,031,418	0.92
1995	372,081,474	3,687,398	0.99
1996	416,139,474	4,342,431	1.04
1997	491,783,023	5,433,813	1.10
1998	537,433,273	6,446,803	1.20
1999	593,580,491	6,684,193	1.13
2000	651,000,000	6,969,360	1.07

*Source: Congressional Planning and Budget Office (CPBO) House of Representatives*

The table shows that instead of increasing the percentage of the budget for the Judiciary, the reverse is actually true: that relative to 1998, the 1999 budget has been reduced and that relative to 1999 the 2000 budget will be reduced further.

## Compensation of Justices and Judges

As previously shown, the budget of the Judiciary for the year 2000 consisting of a miniscule 1.07% of the entire budget of the Government of the Philippines in the amount of P651B, supports a staff of 30,174 men and women.

<sup>49</sup> *Enhancing Access of the Basic Sectors to the Judiciary*, 32.

For the entire judiciary, there are 2,135 justices and judges including the Chief Justice and 14 Associate Justices of the Supreme Court, one Presiding Justice and 14 Associate Justices of the Sandiganbayan, one Presiding Justice and 50 Associate Justices of the Court of Appeals, one Presiding Judge and 2 Associate Judges of the Court of Tax Appeals, 950 Regional Trial Court Judges, and Judges of the fourth level courts. Their respective salaries monthly are as follows:

Supreme Court:

Chief Justice	-	P40,000
Associate Justices	-	35,000

Judges:

RTC Judges	-	22,000
Shari'a Dist. Court	-	21,933
Metro Trial Court	-	21,090
City Trial Court	-	20,279
Mun. Trial Court	-	19,499
Shari'a Circuit Court	-	19,498
Mun. Circuit Trial Court	-	19,499

Sandiganbayan:

Pres. Justice	-	35,000
Associate Justices	-	25,000

Court of Appeals:

Pres. Justice	-	35,000
Associate Justices	-	25,000

Court of Tax Appeals:

Pres. Judge	-	25,000
Associate Judges	-	21,916

Considering the exchange rate of P41 to US\$1, would you consider the present salaries of our Justices and Judges fair or just compensation? How would these salary rates of our Justices and Judges compare with the Justices and Judges in your country?

## Decisions Rendered Are Erroneous

How erroneous are the decisions of the Courts?

Consider the death penalty cases which are imposed by Regional Trial Courts and pass through automatic review by the Supreme Court.

Commissioner (of the 1986 Constitutional Commission which drafted the 1987 Constitution), later Justice of the Supreme Court, now retired like me, Regalado, speaking before the Constitutional Commission in favor of the death penalty, would speak of safeguards in the imposition of the death penalty, among them the process of Supreme Court review. He would say:

I checked the records yesterday about the cases decided by a Supreme Court involving the capital punishment. From 1972 up to March 25, 1985, the record discloses that the Supreme Court passed upon 515 cases. The number of accused involved therein who were given the death penalty by the trial court involved 794. In the Supreme Court, the number of affirmations involve 226 persons or 28 percent of those who were convicted by the trial court. Also, of the total number of 794 persons sentenced to death by the trial court the Supreme Court modified the death sentences and lowered them to lesser penalties to the benefit of 548 of the accused. In other words, in 69 percent of the cases where the accused was sentenced to death by the trial courts, the Supreme Court lowered the penalty to either *reclusion perpetua* or *reclusion temporal* and, in some instances, *prision mayor*. The number of accused who were acquitted despite the death sentence imposed by the trial court was 75.<sup>50</sup>

Looking at Justice Regalado's statistics, the figures are frightening - of 794 persons meted the death penalty by the lower courts, only the convictions of 228 persons "or 28 percent of those who were convicted by the trial court" were affirmed. Seventy-five (75) accused - about nine percent, were acquitted.

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<sup>50</sup> 1 Record of the Constitutional Commission, Session of July 18, 1986, 746.

The figures today are no less reassuring. Consider these data from the Supreme Court:

*Death penalty cases* - Republic Act No. 7659, which took effect on December 31, 1993, reimposed the death penalty on certain heinous crimes. Death penalty cases are resolved only by the Supreme Court *En Banc*, the statistics of which are shown below:

Number of Death Penalty Cases (with complete records as of July 6, 1999)	614
Number of Promulgated Death Penalty Cases (as of July 6, 1999)	112
Number of cases with acquittal	12
Number of cases affirming penalty of death	34
Number of cases with nature of crime modified/penalty reduced	47
Number of cases remanded for further proceedings	51 7

Of the 112 promulgated death penalty cases, twelve cases (or a little more than ten percent) resulted in acquittals and thirty-four cases (more than thirty percent) had modifications.

*Enhancing Access of the Basic Sectors to the Judiciary* states, that:

Decisions rendered by the lower courts were not always just or fair. To address this concern, the court system instituted the process of appeal.<sup>52</sup>

As the data on the death penalty indicate, the appeal process (actually, automatic review in death penalty cases) is not very comforting.

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<sup>51</sup> Data from the Supreme Court.

<sup>52</sup> at 33.



I end this subsection by again quoting from *Enhancing Access of the Basic Sectors to the Judiciary*:

When an appeal is raised, higher courts can review the decision made by lower courts. There were several cases where the Supreme Court or the Court of Appeals overruled the decisions rendered by the lower courts or quasi-judicial courts involving the Basic Sectors. In some instances, however, the innocent party had to suffer the penalties imposed by the lower courts before justice is rightfully given them. The injustice and harm done to the poor sector may cause untold anguish. "The rich will always have means of redress, the poor will not."

In some cases, justice is already denied even at the start of judicial proceedings. From the point of view of the Basic Sectors, some laws that are used as bases for judgment are anti-poor. Any judgment that will be rendered therefore will be in favor of the other party. The only recourse for the Basic Sectors in the judicial system, in these cases, is to seek the intervention of the Supreme Court on the constitutionality of the law as it relates to their basic rights. Beyond the courts, however, the Basic Sectors can seek the intervention of Congress, which is empowered to amend or repeal anti-poor legislation.<sup>53</sup>

### **III. Fair Trial and the Prosecution**

The prosecution of cases is undertaken by the National Prosecution Service. A lawyer briefly discusses the prosecution procedure thus:

*The Prosecution.* The prosecution procedure requires the prosecutor to exercise his/her broad discretion in screening cases, deciding which would be instituted before the courts and which would be dropped, and in determining the legal modality and degree the crime which a law violator should be charged.<sup>54</sup>

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Agra, Integration of 2 Mandates: Local Autonomy and Administration of Justice, II (To Be Finalized).*

On April 23, 1994, these words were spoken at a convention:

Today, we find the legal profession beleaguered by complaints and criticisms from all sectors. They range from the pervasive problem of the slow grind of justice to allegations of incompetence, if not outright corruption among the members of the judiciary and the prosecution service.

The delay in the dispensation of justice has been a cause of tremendous dissatisfaction among our people, particularly those affected by litigations long pending before the courts. The insinuations of corruption have distressed judges and prosecutors. *We should be cordial enough to admit the existence of grievances against some judges and prosecutors.*

*I will be the first to concede that the processes of our criminal justice system require much improvement and revision. It is not difficult to realize that the criticism that we have two systems of such justice in this country - one for the affluent and influential and another for the indigent and powerless - is more than a perception. For this reason, we who belong to the same profession must act now and must act swiftly.*

We must not permit ourselves the luxury of rest, of procrastination. We cannot squander the opportunity presented to us. Innovation and reforms must be dynamic, continuous and attuned to the demands of the times and interests of our people. And remedial measures addressing whatever ails our criminal justice system cannot be superficial or mere panacea. (Emphasis mine.)

These words have been taken as merely one of those criticisms against the justice system that surface from time to time but I find these words significant because of the forum - the Second Annual Convention of the 11th House of Delegates, Integrated Bar of the Philippines - and the speaker, Secretary of Justice Franklin M. Drilon.<sup>55</sup> As Secretary of Justice, Mr. Drilon had charge of "the investigation of criminal complaints by the National Bureau Investigation, the prosecution of criminal cases by the

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<sup>55</sup> now Senator.

National Prosecutor Service, the extension of free legal assistance and counsel to the accused by the Public Attorney's Office, and the rehabilitation of convicted offenders by the Parole and Probation Administration, the Bureau of Corrections, and the Board of Pardons and Parole."<sup>56</sup>

The delays, the corruption - these are common complaints raised against the criminal justice system, and these have an impact on fair trial. For the Philippine Secretary of Justice to say that "We should be candid enough to admit the existence of grievances against some judges and prosecutors" and "I will be the first to concede that the processes of our criminal justice system require much improvement and revision" means that there must really be something wrong with the system.

What did the Secretary of Justice propose?

He proposed, among others, this solution:

Under the Action Plan for 1994 of the National Prosecution Service, our prosecutors have committed themselves to terminate and resolve the preliminary investigation of all criminal complaints within 60 days per complaint from the date of assignment. The prosecutors have also targeted a disposition rate of 90% for this performance indicator.

The prosecutors have also committed to dispose and decide of cases ordered by the courts to be reinvestigated within 30 days per case, unless the court fixes a shorter period. The prosecutors have likewise marked for disposition 90% of the cases received and assigned for reinvestigation.<sup>57</sup>

These periods, I understand, have been the subjects of Department of Justice circular.

To solve the problem of delay by fixing a period to resolve the case (a solution also undertaken as regards Judges) is a knee-jerk reaction to the problem and could create other problems. My own perception is that given sixty (60) days to decide a criminal case, the Prosecutor will opt to file the case with the court, throwing the issue of guilt or innocence to the court, instead of resolving the matter at the Prosecutor's level. Once in

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<sup>56</sup> in Mr. Drilon's speech.

<sup>57</sup> in Mr. Drilon's speech.

court, the problem is compounded because the tendency, given the period for decision, is to convict, thereby throwing the problem to the appellate court. I would think that my perception has been validated by the Supreme Court disposition on death penalty cases, earlier discussed.

#### **IV. Fair Trial and the Police: Police Investigations and Police "Investigations"**

It used to be that for a citizen in need of assistance, the police would most likely be the first person he would turn to. It appears that this observation is no longer so. I quote from *Asiaweek*:

Before, if you saw a thief, you would shout police," says a local businessm. "Now, if you see a policeman, you shout thief." Literally. The president of a large Filipino-Chinese bank says that the "cops were in cahoots with the robbers" during a botched hold-up at his Manila branch in December.

The horror stories abound. A 17-year old was raped inside a police station last week after police hauled her in and her husband for questioning. The capital's police chief sacked the entire 27-man detachment. On Jan. 13, George Baculiano, a suspended Pasay City police officer out on bail for murder, robbed a businessman of \$576. When police confronted him, Baculiano drew his gun, flashed his police ID and sauntered off with the cash. A Manila entrepreneur who was abducted last year bargained his ransom of \$120,000 down to \$28,000. When the kidnappers released him, he discovered he had been held in a police camp.

Cops out of control. Officers more concerned about getting their cut than getting their man.

Six of every ten families in the Philippines say they don't feel safe in their homes or on the streets.<sup>58</sup>

In a keynote address delivered at the De La Salle University, Aginaldo, Dasmariñas, Cavite, on September 3, 1993, on the occasion of

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<sup>58</sup> Susan Berfield and Antonio Lopez, "Where's the Law?", January 26, 1996, 22, 24.

the College Week, College of Law Enforcement, DLSU Aginaldo,<sup>59</sup> I myself spoke of these "horror stories" and defects in police work.

[A]bout two weeks ago, one station commander was in the newspapers in which he was shown parading a naked woman in his headquarters. The story had it that the night before, his men raided a strip joint in which the "performers" were hauled into the station. It is, of course, another story whether or not the raid was supported by a warrant, either of search or arrest, but let us presume that it was legal. The point is that the "bust", so to speak, having been carried out, there was no sense in showcasing the poor woman, unclothed and humiliated, in public. I submit that there was no sense there - except to make fun of her.

At this point, let me say a few words about yet another habit, be it of the police, military, or heads of agencies, of presenting suspects of offenses to the media, usually, after a successful raid. I do not mind the government announcing the breakup of a kidnapping ring or the arrest of a notorious drug lord. Yet it is another question to present suspects on television handcuffed or lined up against the wall, their names on tags on their chests - as if they have been found guilty. Of course, as a media event, the government gains a lot of political mileage but until a conviction is secured, it seems to me to be nothing else.

Now that we are at it, let us go further. I am sure that you are also familiar with the police procedure, quote, unquote, of inviting persons to police headquarters for questioning concerning an investigation. I doubt the legality of this procedure. The police, or any government agent for that matter, has no right to make people come down to the station, unless they have any information to volunteer. Of course, "invitations" may be turned down, but which civilian would dare risk turning down a police invitation?

I think that something ought to be done too, about law enforcers simply shooting down suspects, even if they were the country's most wanted. No, I am not talking about salvaging. I am talking about lawmen chasing suspects to be shot and killed. You remember, of

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<sup>59</sup> "Human Rights and Effective Law Enforcement: Some Thoughts and Concern."

course, Alfredo de Leon, of Red Scorpion fame, or infamy. My information is that de Leon was outnumbered when the police found him. He might have been armed and might *have* shot it out, but certainly, that is no excuse for what seems to me, as an execution, even if we were talking about Manila's public enemy no. one. Assuming that he was armed and might *have* shot it out, why shoot him dead? Why not just disable him?

The fact is that I saw on live television Alfredo de Leon running away, uniformed men chasing him and gunning him down mercilessly. It was not a pretty sight - either for de Leon himself or the image of law enforcement.

You also remember Charlene Sy. Charlene's abductors had been, of course, caught *in flagrante*, and evidently, cornered. What was the police's first instinct? Pepper the kidnapper's vehicle with bullets. Never mind if Charlene was inside. And never mind if a negotiation for a peaceful surrender was still possible.

An aspect of law enforcement that has continued to worry me is what I find to be many policemen's reliance on confessions rather than good detective work in solving cases (or as it is said, "closing" cases).

And this is so notwithstanding, that:

[T]he Philippine National Police claims to have solved roughly nine out of 10 crimes reported to the police in the first six months of the year.<sup>60</sup>

*Asiaweek* attributes the police problem as dating back to the Marcos era, with the constitution of the Integrated National Police but with the Philippine Constabulary, still considered as a major service of the Armed Forces of the Philippines, as the nucleus of the Integrated National Police.<sup>61</sup>

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<sup>60</sup> Gemma T. Cuadro, "Take it or leave it: PNP 'solved' 90% of crimes", *Manila Times*, August 11, 1997, 1, 4.

<sup>61</sup> Susan Berfield and Antonio Lopez, "Where's the Law?", *Asiaweek*, January 26, 1996, 22-23.

See Presidential Decree No. 765, "Providing For The Constitution Of The Integrated National Police And For Other Purposes" (August 8, 1975).

Under the 1987 Constitution however:

The State shall establish and maintain one police force, which shall be national in scope and civilian in character, to be administered and controlled by a national police commission. The authority of local executives over the police units in their jurisdiction shall be provided by law.<sup>62</sup>

This is a welcome development although, as *Asiaweek* notes, traces of the military hangover remain:

If it were just a matter of military men leading a civilian force, the situation might be tolerable. But the PNP training program turns policemen into combat soldiers, contends former Senator Rodolfo Biazon. Some of their commanders agree. "You have the temper of a martial approach in police work;" says Brig. Gen. Romeo Peña, PNP director for investigation. Part of the trouble is that the PNP has been given the military job of counter-insurgency, says Biazon.<sup>63</sup> After graduating from police academy, rookies are sent to the hills for three to four years to chase communist guerillas, and then brought to the city to patrol places like Manila's SM Megamall, "Their mindset when they come back is that of a soldier," says Biazon. "Take the high ground and defend it at all costs."<sup>64</sup>

Again, what is to be done?

One measure I find interesting, but short term and perhaps unique to the Philippines. I quote from the *Philippine Daily Inquirer* issue of March 24, 1997:

Manila policemen, perceived by many as corrupt and ruthless, have been ordered to go to confession during Holy Week.

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<sup>62</sup> Const., Art. XVI, sec. 6 (1987).

"The police force shall be organized, trained and equipped primarily for the performance of police functions. Its national scope and civilian character shall be paramount. No element of the police force shall be military nor shall any position thereof be occupied by active members of the Armed Forces", 2nd paragraph, sec. 2 (*Declaration of Policy*), Republic Act No. 6975.

<sup>63</sup> See section 12, Republic Act No. 6975 (1990).

<sup>64</sup> Susan Berfield and Antonio Lopez, "Where's the Law?," *Asiaweek*, January 26, 1996, 25.

The confession will cap a one-day spiritual recollection which, according to the order issued last week by Senior Supt. Avelino Razon, Jr., "aims to uplift the morale and spiritual well-being of our police and civilian personnel in time for the Lenten season."

Razon, who serves as director of the Western Police District, required the "strict compliance" of all officials, officers and civilian employees.<sup>65</sup>

These statistics I find more reassuring however:

What is being done about corrupt police?

We signalled our commitment in 1992 when we kicked out the PNP chief [Cesar Nazareno], followed by the early retirement in 1993 of 68 generals and colonels, an unprecedented number. Under Operation Reform from August 1993 to December 1995, we filed 10,465 administrative cases against erring uniformed personnel. More than 6,000 were successful, and various penalties were meted out; 2,000 were kicked out; the rest were either suspended or demoted and their pay forfeited. Which other government department has undertaken so massive a housecleaning housecleaning?<sup>66</sup>

Discipline is a solution to the police problem, and education is likewise another solution. I refer to Memorandum Order No. 20,<sup>67</sup> the companion piece to Executive Order No. 27. I quote these excerpts therefrom:

1. The Ministry of National Defense, the New Armed Forces of the Philippines, the Constabulary and the Integrated National Police are hereby directed to include as an integral and indispensable part of the education and training of all police, military and other arresting and investigating personnel, especially those in charge of detention and convicted prisoners, the study of human rights.
2. The ministry and agencies concerned, with the assistance of the

<sup>65</sup> Dona Z. Pazzibugan, "Manila cops ordered to confess."

<sup>66</sup> "Interview, Leaving the Hot Seat: On His Way Out, Alunan Defends His Record," *Asiaweek*, January 26, 1996, 26.

<sup>67</sup> "Education of Arresting and Investigating Personnel on Human Rights" (July 4, 1986).



Presidential Committee on Human Rights, shall forthwith institute a continuing education and training program on human rights for existing military, police and other arresting and investigating personnel, especially those in charge of detention and convicted prisoners, who have not received the education and training referred to herein. The continuance in office of the said personnel shall depend on their successfully completing the courses offered under said program.

3. In the formulation and setting up of educational or training programs to implement and carry out the directives herein, the ministry and agencies concerned shall consult and coordinate with the Presidential Committee on Human Rights and shall include in said program the study of the following:

- a) The Bill of Rights of the Provisional Constitution adopted by Proclamation No. 3 dated March 25, 1986, or of the New Constitution when ratified;

- b) Articles 124, 125, 126, 127, 128, 129, 130, 131, 235, 245, 267, 268 and 269 of the Revised Penal Code;

- c) Republic Act No. 857; (Footnote No. 11)

- d) Sections 1705 to 1751 of the Revised Administrative Code of 1917;

- e) The Rules for the Treatment of Prisoners adopted by the Department of Justice on January 7, 1959; the Ministry of Justice Manual on the general rules, policies and operating principles adhered to in the prison service.

4. In the setting up of the said educational or training programs, the ministry and agencies concerned with due regard to the demand and constraints of the work of the personnel involved, shall as far as practicable include therein the study of international conventions, agreements, covenants, and declarations on human rights, which were ratified by the Philippines or to which it is a signatory.

## **V. A) Fair Trial and the Community (Part I)**

Under Republic Act 6975, among the powers and functions of the Philippine National Police are:

- a) Enforce all laws and ordinances relative to the protection of lives and properties;
- b) Maintain peace and order and take all necessary steps to ensure public safety;
- c) Investigate and prevent crimes, effect the arrest of criminal offenders, bring offenders to justice and assist in their prosecution.<sup>68</sup>

The role of the National Prosecution Service is, of course, the prosecution of offenses, while that of the Judiciary is to decide cases.

One magazine article states:

But the citizenry has always been the one doing the job of preventing drug abuse in the communities. Much of the information against drugs has been the work of civic groups and religious organizations. Most drug treatment and rehabilitation centers are privately owned and managed. The government has only two treatment centers: the cramped Bicutan Rehabilitation Center of the Narcotics Command and the Tagaytay Treatment Center of the National Bureau of Investigation.<sup>69</sup>

Another magazine article reads:

Metro Manila's residents are most often spooked because they are more often at risk: 34% of kidnappings and nearly all of the bank robberies were committed in the area. "The perception is that the police and the military are behind many of the robberies and the kidnappings," says Teresita Ang See, spokeswoman for an anti-crime group. Manila Archbishop Cardinal Jaime Sin believes that unless the government shows it is serious about fighting cop crimes, people will take the law into their own hands. In 1995, gun dealers sold 30% more firearms to civilians than they did the previous year. "Civil

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<sup>68</sup> Section 24(a), (b), and (c).

<sup>69</sup> Susana O. Osorio, "Fact or Fluke", *Philippine Free Press*, August 23, 1997, 12.

war could start," warns the archbishop.<sup>70</sup>

It is comforting that "[t]he citizenry has always been the one doing the job of preventing drug abuse in the communities"; but in another sense, it can be viewed as the community response to what it perceives to be government - more specifically police - inaction or inability to perform fully its functions. But when the community responds in the direction stated in the other article - that there have been increased gun sales to civilians, the fear that "people will take the law into its own hands" could become a reality. The issue of fair trial is thus translated into an issue to be resolved by the community, and that community is not always fair.

Indeed, the Journalism Conference on Current Court Issues identified "(2) vigilante role or bias crusade for prosecution and conviction" as one of the four types of prejudicial publicity.<sup>71</sup>

## **B) Fair Trial and the Community (Part II)**

### **What is the role of the Press?**

In the opening remarks of Mr. Justice Leonardo A. Quisumbing at the Journalism Conference on Current Court Issues, he stated:

... [p]ermit me to share ideas with you on the work of our courts in relation to your own profession as journalists. We have basic doctrinal values like due process and rule of law. You have deeply held tenets of press freedom and pursuit of news accuracy. But all of us have abiding respect for the canons of professional ethics, whether journalistic or legal or judicial, that place a premium on honesty, objectivity, fairness and compassion for the poor underdog. (Emphasis mine).

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<sup>70</sup> Susan Berfield and Antonio Lopez, "Where 's the Law", *Asiaweek*, January 26, 1996, 24.

<sup>71</sup> Florangel Rosario-Braid, "Mass Media and the Judiciary: Highlights of the Issue Paper on Enhancing Communication Between the Judiciary and the Citizenry," a paper presented during the Journalism Conference on Current Court Issues sponsored by the SC-UNDP Technical Assistance to the Judiciary on Justice and Development and KBP.

The "deeply held tenets of press freedom and news accuracy" notwithstanding, the Journalism Conference on Current Court Issues found the following:

Four types of prejudicial publicity which could form the basis for do's and don'ts in media reporting were identified and they are the following: (1) sensationalized reporting where details are played up to arouse interest; (2) vigilante role or bias crusade for prosecution and conviction; (3) excessive publicity; and (4) publication of prejudicial materials,<sup>72</sup>

and also:

On the quality of media coverage, here are some of the findings:

- \* Most people's perceptions of the judiciary are shaped by the media and opinion leaders.
- \* Most respondents agree that media provides adequate media coverage of the judiciary.
- \* However, respondents think that the image of the judiciary that is depicted on the media is primarily negative.
- \* Among the criticisms raised against the media are:
  - focus on personalities rather than issues
  - bias for sensational cases
  - inaccuracy in reporting
  - lack of in-depth analysis
  - presentation of suspects by TV as convicted criminals.<sup>73</sup>

The press can thus determine, or deny a fair trial.

Earlier, I had referred to an article by Gemma T. Cuadro (Manila Times, August 11, 1997, pp. 1 and 4) which stated in part, that: "The Philippine National Police claims to have solved roughly nine out of 10 crimes reported to the police in the first six months of the year." The article from which I quoted is headlined "Take it or leave it: PNP 'solved'

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<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

90% of crimes". The first three paragraphs read:

Believe it or not. The Philippine National Police claims to have solved roughly nine out of 10 crimes reported to the police in the first six months of the year.

Statistics from Camp Crame showed that the PNP "solved" 31,645 cases out of 34,956 crimes reported to the police from January to June this year.

If the report is correct, this means that the PNP solved 90.53 percent of the crimes reported in the first half of the year.

Former Interior Secretary Alunan, in an interview with Asiaweek, acknowledged that the Philippine National Police suffered from a "credibility problem,"<sup>74</sup> due in part to "sensationalized news on crime."<sup>75</sup> The excerpts I quoted from Gemma Cuadro's article may not be a "sensationalized news on crime," but it shows how the press can affect an image. Note the headline "Take it or leave it." Note the opening paragraph - "Believe it or not". And note that the word "solved" in the headline and the second paragraph are enclosed in quotation marks. Of course it does not help also that Asiaweek reported, that: "[B]ut even his [Gen. Recaredo Sarmiento's] boss, Secretary Alunan, told Asiaweek that the PNP's numbers (on crimes reported) don't add up."<sup>76</sup>

As the Press can affect an image, so also can it ensure a fair trial.

Former Justice Secretary, now Senator Drilon echoes Secretary Alunan's comments, thus:

[H]owever, we should bemoan rampant condemnations of judges and prosecutors couched in mere generalities and based on conjectures which have found their way into news items and columns. These unfounded grumblings have demoralized those in the judiciary and the prosecution service who have adhered with total fealty to the canons of the lawyer's oath.

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<sup>74</sup> January 26, 1996, 26.

<sup>75</sup> *Ibid.*

<sup>76</sup> Susan Berfield and Antonio Lopez, "Where's the Law", *Asiaweek*, January 26, 1996, 24.

Unfortunately, the competency of the police to enforce laws, investigate crimes and apprehend criminals has to a large extent been discredited by the reports that the police themselves are involved in crimes. In this instance, the prominence given to the shenanigans of a few scalawags in the Philippine National Police not only vilify and tarnish the image of the entire police force, but also make the citizenry wary of most of the reliable members of the police who discharge their responsibilities with professionalism.

The credibility of the police should be restored. The PNP must exert sustained efforts to institute reforms to put an end to the continuing erosion of the people's confidence in their ability to prevent criminality, preserve peace and maintain order. The erosion of the people's confidence in the PNP could weaken the criminal justice system. And the system can only be as strong as its components.<sup>77</sup>

## **VI. A) Fair Trial and the Lawyer (Part I)**

The blame for the denial of a fair trial can be placed on many shoulders. Let us not forget that one of the shoulders on which blame rests is us, the lawyers.

Let me quote Secretary Drilon:

As practitioners, it is incumbent upon the members of the Integrated Bar to pursue - in coordination with the other components of the criminal justice system - a more expeditious manner of attaining and dispensing justice. However, some practicing lawyers, rather than assist in this task, contribute to the congestion of the court dockets and the delay in the resolution of cases.

The interest of the clients should be the first and foremost consideration of practitioners. Nevertheless, some practicing lawyers place their own selfish personal reasons over and above their clients' concerns. These lawyers do not actually seek the speedy trial and disposition of their cases. It is not uncommon to find

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<sup>77</sup> "The Lawyers' Commitment to Public Service and Social Responsibility," speech of Justice Secretary Franklin M. Drilon, Second Annual Convention of the 11<sup>th</sup> House of Delegates, Integrated Bar of the Philippines, Casablanca Hotel, Legaspi City, April 23, 1994.

lawyers who - due to the sizeable number of cases which they have accepted for considerable fees but which they cannot efficiently handle - repeatedly seek postponements and continuances on account of unpreparedness or even overlapping of scheduled hearings.

There are lawyers who without any qualm adopt techniques to intentionally delay the trial and resolution of their cases. And there are lawyers who readily render legal services to clients who are willing and able to pay their fees, but who, however, hesitate to accept litigants with valid causes whose capacity to pay they doubt. There are lawyers who fail to protect their clients' interests by undertaking timely procedural or legal remedies. These practices defeat the very ends of justice that all lawyers have sworn to uphold.

The members of the Integrated Bar could lead by example - simply by adhering to our oath and especially our sworn duty of employing only means that are consistent with truth and honor. Let no pecuniary consideration prevail over what is right and what is just. No financial gain should prove too attractive to be irresistible. Lawyers need only strong self-discipline to commit themselves to the imperatives of their oath. After all, the legal profession is not a profitable investment the success of which is measured by a rise in economic status. It is the noblest of professions that exact from its disciples service and sacrifice motivated by the lofty spirit which elevates it to a dignified public career. This is the essence of the legal service.

Many lawyers, however, seem to have forgotten that the profession of law involves principally service to the public. It saddens me to note that in certain far-flung provinces and municipalities, despite the presence of the lawyers of the Public Attorney's Office who have clearly been responding to the call for free legal aid, still a number of cases could not be prosecuted simply because not only are there not enough public attorneys but also there are not enough private practitioners who can act as legal counsel to defend indigent clients.<sup>78</sup>

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<sup>78</sup> *Ibid.*

## **B) Fair Trial and the Lawyer (Part II)**

### **Legal Aid**

a.

Diosdado P. Peralta gives a brief history of legal aid in the Philippines thus:

The free legal program of the IBP as an institution may be said to have been inspired by the initial efforts of government to provide legal assistance through a court-appointed counsel to persons accused of having committed crimes by virtue of General Order No. 58 promulgated in 1900, almost at the very onset of America's occupation following the Treaty of Paris of 1899. In 1914, laborers and servants were defended in court by the "Office of the Public Defender" created under the Bureau of Labor. Its function was later expanded to include those accused of crimes. The office was carried over during the Commonwealth regime (1935-46) as a chief social justice concern of President Manuel L. Quezon.

Before the outbreak of the Second World War in the Pacific in 1941, the (there) was no legal aid in the private sector, save for the Civil Liberties Union (CLU) which was really more concerned with political rights issues that may be involved in a case. However, when the Philippines was "granted" independence in July 4, 1946 by the United States of America, social unrest became evident in the countryside, spawned by inequities in the farmlands. To help alleviate woes of the farmers-tenants. In response, **Republic Act No. 1199**, otherwise known as "The Agricultural Tenancy law," was enacted, which provided, among others, the creation of an office for the specific purpose of providing legal aid to farmers-tenants who were taken advantage of by big landowners.

Not to be outdone, the **Philippine Bar Association (PBA)**, the oldest bar association in the Philippines organized the Citizens Legal Aid Committee (CLAC) with then **Senator Salvador H. Laurel** as Chairman. After a successful termination of numerous legal aid cases, the committee was swamped with requests for legal assistance. apparent, resulting in the formation of the **Citizen's Legal Aid Society (CLASP)**.



Women lawyers when they became numerous enough, too, organized themselves into legal societies and established legal aid clinics. Thus, in 1946, WLAP was born which later established its free legal clinic. Almost immediately thereafter, UP law alumnae organized themselves into WLOCI and later set up its own Legal Consultation Center. Later, the FIDA also put up its Philippine branch which also offered Free Legal Aid Services.

And so it was that when the Bar was integrated in 1973, the crying need of the poor and the marginalized litigants was among the first to be addressed with the mandatory establishment of the National Committee on Legal Aid in the IBP (Integrated Bar of the Philippines).<sup>79</sup>

Jesus I. Elbinias, the just-retired Presiding Justice of the Court of Appeals, continues:

In 1972, after imposition of Martial Law, P.D.<sup>80</sup> No. 1 was issued creating the Citizen's Legal Assistance Office (CLAO).<sup>81</sup>

According to Jose W. Diokno, a former Senator and Secretary of Justice, an eminent practicing lawyer, specially in the field of human rights, during martial rule in the Philippines, and the Chairman of the **Presidential Committee on Human Rights** organized by President Corazon C. Aquino immediately after dictator Marcos was ousted by the EDSA peaceful revolution of February 1986:

On September 23, 1972, martial law was imposed on the Philippines. The more than eight years of martial rule that have ensued have had an unintended, but nonetheless profound, effect on legal aid in my country.

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<sup>79</sup> "Legal Aid and the Integrated Bar of the Philippines".

Jesus M. Elbinias, *the Trial Complex: A Multidisciplinary Technique in Courtroom Advocacy* (1988), 193-194.

<sup>80</sup> Presidential Decree.

<sup>81</sup> At 194.

The Citizen's Legal Assistance Office antedated the Integrated Bar of the Philippines. The Citizen's Legal Assistance Office is now the Public Attorney's Office (PAO), Title III, Chapter 5, Section 14, Administrative Code of 1987.

Before martial rule, Philippine society was far from perfect. But it had a political system that was outwardly democratic; a constitution and laws that, at least in theory, recognized the rights proclaimed in the Universal Declaration as legal rights; an independent and generally upright judiciary; a congress that seemed to be making efforts though haltingly and mostly unsuccessfully, to solve some social ills; and a press that was one of the most free in the world. Given these conditions, relatively few lawyers and laymen 'questioned the system; what they sought was to make the system work as it should. So legal aid concentrated on enforcing legal rights, with occasional proposals to amend the law. Legal aid was in a word, apolitical.<sup>82</sup>

Diokno goes further:

- 1.1 Legal aid has traditionally viewed its function as providing legal solutions to legal problems of the poor by vindicating their legal rights. This is a valuable function in itself: every triumph of justice is cause for celebration.
- 1.2 Traditional legal aid is, in fact, the lawyer's way of giving alms to the poor. Like alms, which provide temporary relief to the poor but do not touch the social structures that keep the poor, traditional legal aid redresses particular instances of injustice but does not fundamentally change the structures that generate and sustain injustice. And like alms, traditional legal aid carries within it the germ of dependence that can prevent those it serves from evolving into self-reliant, inner directed, creative and responsible persons who think for themselves and act on their own initiative. Unless this danger is guarded against, traditional legal aid can retard rather than promote development: for above all else, development is human development.<sup>83</sup>

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<sup>82</sup> "Legal Aid and Development", Diokno developed the theme further in "Developmental Legal Aid in Rural Asean; Problems and Prospects, Working Paper for Committee V," International Commission of Jurists, Consumer Association of Penang, Seminar on Human Rights and Development in the Rural Area of the South East Asian Region, Penang, Nov. 30-Dec. 4, 1981.

<sup>83</sup> *Ibid.*

The emphasis on the poor in particular litigations is evident, for example, in the mandate of the former Citizens Legal Assistance Office (CLAO), now the Public Attorney's Office (PAO), that:

Sec. 20. The Citizens Legal Assistance Office shall represent, free of charge, indigent persons mentioned in Republic Act No. 6035, or the immediate members of their family, in all civil, administrative, and criminal cases where after due investigation the interest of justice will be served thereby, except agrarian reform cases as defined by Republic Act No. 3844, as amended, which shall be handled by the Bureau of Agrarian Legal Assistance of the Department of Agrarian Reform, and such cases as are now handled by the Department of Labor.<sup>84</sup>

The emphasis on the poor in particular litigations is also evident in the *Guidelines Governing the Establishment and Operations of legal Aid Officers In all Chapters Of the Integrated Bar Of the Philippines* dated 31 May 1974, section 1 of which states:

Section 1. **Public service.** - Legal Aid is not a matter of charity. It is a means for the correction of social imbalances that may and

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<sup>84</sup>Section 20, Letter of Implementation No. 20, "Relative to Part XXI On Administration of Justice and Other Pertinent Provisions of the Integrated Reorganization Plan."

In a Note: "In a Memorandum Order dated May 19, 1988, Secretary of Justice Sedfrey A. Ordoñez instructed the CLAO (now PAO) lawyers to extend free legal assistance to indigent laborers in meritorious labor cases, inasmuch as Executive Order No. 126 dated January 30, 1987, removed from the Department of Labor and Employment the function of representation of indigent laborers."

An excerpt from PAO Memorandum Circular No., Series of 1990 reads:

"I.B. "CASES NOT TO BE HANDED BY PAO LAWYERS -

1. To parties who fail to pass either the Merit or the Indigency Test of the Office.
2. To those who are already represented by de-parte counsel.
3. To landlords of residential buildings with respect to the filing of collection or ejectment suits against their tenants.
4. In cases where the PAO would be representing conflicting interests except by express consent of all concerned given after a full disclosure of the facts.
5. In the prosecution of criminal cases in court, except in criminal cases pending in Municipal Trial Courts not provided with a Prosecutor where the Provincial Prosecutor concerned certifies in writing that there is no Prosecutor available to

often do lead to injustice, for which reason it is a public responsibility of the Bar. The spirit of public service should, therefore, underlie all legal aid offices. This same should be so administered as to give maximum possible assistance to indigent and deserving members of the community in all cases, matters and situations in which legal aid may be necessary to forestall an injustice.

While Art. III, sec. 11 of the Philippine Constitution states:

Free access to the court and quasi-judicial bodies shall not be denied to any person by reason of poverty,

again emphasizing the poor in particular litigations, it is a comfort that this formulation has been enshrined in a Constitutional guarantee. As Arthur Lim, the present President of the Integrated Bar of the Philippines, states:

In a country like the Philippines where majority of the people are below the poverty line, the need for legal aid cannot be over-emphasized. In fact, the Philippine Constitution contains express provisions providing legal aid to those who cannot afford to pay legal counsel. Article III, of the 1987 Philippine Constitution provides: "Free access to the courts and quasi-judicial bodies and

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prosecute said cases. The authority to prosecute shall cease upon actual intervention of the Provincial Prosecutor or his assistant, or upon the elevation of the case to the RTC.

6. In agrarian reform cases which by law are to be handled by Bureau of Agrarian Legal Assistance."

A Memorandum from the Chief Public Attorney of January 17, 1995 reads:

"MEMORANDUM TO: All Lawyers

In view of the increase in the cost of living, as reflected by recent national economic surveys, an upward revision of our Indigency Test is called for.

Effective immediately, therefore, the following shall be considered indigents whose income is insufficient for their family subsistence and hence entitled to the free legal services of the Office:

- (1) Those residing in Metro Manila whose family income does not exceed P6,000.00 a month.
- (2) Those residing in other cities whose family income does not exceed P5,500.00 a month; and
- (3) Those residing in all other places whose family income does not exceed P5,000.00 a month.

adequate legal assistance shall not be denied to any person by reason of poverty.” This provision gives flesh to the due process clause of the Bill of Rights which upholds the rule of law, the foundation of democracy. Legal Aid, therefore, “is not a matter of charity,” it is a right granted by the Philippine Constitution to its citizens.<sup>85</sup>

b.

On April 12, 1996, I delivered a speech before the Integrated Bar of the Philippines during its workshop/seminar on Developmental Legal Assistance. In that speech,<sup>86</sup> I was not charitable; I said, in part:

Let me be candid. The problem with the Integrated Bar is that for too long, it stood for the *status quo*. On September 21, 1972, a power and wealth-hungry president proclaimed martial rule. Less than four months later, on January 16, 1973, the IBP was organized. Where was the IBP? I will tell you where. Behind the dictator himself, probably applauding. Fourteen years later, the people overthrew the dictator. As usual, the IBP was nowhere to be found, not until it was over.

I remember still, with much feeling of amusement and disgust, how the martial rulers herded IBP officers and leaders, other lawyers-members, justices and judges into the Malacañang social hall to pronounce their support to the anti-boycott campaign and the martial

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The term ‘family income’ has herein employed shall be understood to refer to the gross income of the litigant and that of his or her spouse, but shall not include the income of the other members of his or her family.”

It is not enough that a person be poor. Memorandum Circular No. 10-A, Series of 1980, provides:

“This office considers the aforementioned definition of the expression “in the interest of justice” applicable to the CLAO and hereby adopts the same. Accordingly, CLAO lawyers should extend free legal services to indigent parties, if after an assessment of the law and evidence at hand, it appears that such legal services will assist, or to be in aid or in the furtherance, of justice, taking into consideration the interest of the party and those of society. A contrario, CLAO lawyers must decide to conduct a civil cause or make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. (Canon 30, Canons of Professional Ethics)”

<sup>85</sup> “The Positive Contribution of the Bar Association to Legal Aid,” Paper submitted to the 16th Lawasia Conference, Seoul, Korea, September 7-11, 1999.

<sup>86</sup> “The State of the Judiciary and Prospects of Lawyering for the Poor.”

rulers' threat to jail the boycotters like Alejandro Roces and Reynaldo Fajardo. I saw on TV how a leader of the IBP and a "leading light" kuno of the Philippine Bar Association, then fumbled for his glasses - he had two or three in his coat pockets - and the paper he was going to read in condemnation of us boycotters. As a lawyer, I have never been as embarrassed. You now who that lawyer is. Many of you know him, I am sure; he wanted to be and campaigned for election as a member of the International Court of Justice a few years back.

More regretfully, the men who served the dictator - and served him well - are the same faces now occupying the juiciest positions in the Integrated Bar, if not now, then very recently.

Ten years ago, I told the Integrated Bar at the then Hilton Hotel, now Holiday Inn, Midtown:

"I grieve more over the fact that during those dark years [of martial law], when fighting for democracy and the rule of law was considered by the so-called practical men as aberrations of idealistic fools, only very few brave souls among us lawyers stood up. Even the Integrated Bar of the Philippines which is supposed to be the champion of the rule of law and fundamental human rights, kept its mouth shut or in very few instances, managed to mutter vague generalities, more often than not, couched in unintelligible circumlocutions. Nor had I heard of any bar association that joined the struggle against the dictatorship. From *Planas v. COMELEC*, *Javellana v. The Executive Secretary*, *Aquino v. COMELEC*, up to *Luneta v. Special Military Commission* and subsequent landmark cases, neither the IBP nor any bar association made any clear and definite stand. Perhaps they may have taken some kind of position on certain matters but I cannot recall of any occasion, except perhaps lately, to be more precise, after the assassination of Sen. Benigno Aquino, Jr. where they made a definite position against the dictatorship of Marcos. We were lucky there were the FLAG, MABINI and other human rights lawyers who kept the fire burning.

"Moreover, during those years of patronage and corruption, some of us who fought for integrity in our profession, witnessed brother lawyers collaborating with judges, fiscals, the litigants and

their lawyers, in a pattern of corruption that threatened that integrity. Lawyers, in giant law firms, too comfortable to feel those hardships of the nation, conspired with the powerful men of the past regime, lending them their "brilliance" and "expertise" to enable the plunderers to pursue their malevolent scheme to rob the country and its government of its wealth and patrimony.

"Now, it is safe, convenient and popular to sing hallelujah to democracy, human rights, and integrity, and to condemn the past dictatorship. Many who are mute before are now joining the chorus. Some have even become self-appointed composers and conductors. The so-called practical men have suddenly recovered their bravery and idealism. Indeed, how easily these opportunists change color!"

I am sorry. But let the facts speak for themselves.

The Integrated Bar was established to serve the public. What has been its track record on public service? It constructed a building, for one. It threw junkets, for another. It wined and dined its delegates.

Help the poor? Forget it.

In 1983, I, together with the late and lamented Senator Tañada, went to the Supreme Court to challenge the validity of Marcos' secret decrees and other presidential issuances numbering, as far as the research of my son, Atty. Mariano Sarmiento II shows, 10,586 only as far as known. I did not see any IBP representative around. I did not wonder why because for years, the IBP had tolerated these presidential issuances.

I made those observations as a member of the Integrated Bar of the Philippines - membership in the Integrated Bar of the Philippines is, after all, compulsory for all Philippine lawyers, but outside of the formal organization that is the Integrated Bar of the Philippines, as I have not held any office in the formal organization that is the Integrated Bar of the Philippines. I place here now observations of an officer of the Integrated Bar of the Philippines, Atty. Diosdado Peralta:

To the people of the Philippines, the declaration of Martial Law in September 21, 1972 over the whole country sounded the death knell for Democracy in which they have lived in relative peace

and freedom for more than half a century. During this crisis period, legal aid was put to its severest test.

In the early days of martial Law, no person, be he rich or poor, man or woman, young or old, knew not what was going to happen next. Detention camps were filled with opposition leaders, men and women of the Media, and countless student and worker activists. No one felt really safe, as "custodial investigation" was more known as an inquisition than a simple interrogation.

Although in its infant year at the time of the proclamation of martial law, the IBP Board of Governors, given the reported abuses committed during custodial investigations, adopted a resolution demanding that all those under custodial investigation should be done in the presence of lawyers of their choice or, at their request, supplied by the IBP. After the military authorities acceded to the demand, a virtual army of lawyers led by many distinguished law practitioners descended upon all military installations where investigations were being conducted.

As oppression and violations of the people's constitutional and human rights became intense and widespread, a motley group of lawyers banded themselves into *ad hoc* groups for a more collective effort, notable of which FLAG, MABINI, and BONIFACIO, acronyms with patriotic significance, the latter two being the names of Philippine national heroes. These groups of lawyers, without thought of personal dangers to themselves and without compensation, represented thousands detainees who otherwise could not afford the services of private counsel. Some of them were arrested and paid with their lives.

The result of the individual and collective heroic efforts of these groups and many unsung IBP members during Martial Law occupy only small pages in our history. But it was legal aid's finest hour.<sup>87</sup>

While I take exception to Atty. Peralta's observation of "a virtual army of lawyers led by many distinguished law practitioners descended upon all military installations where investigations were being conducted,"

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<sup>87</sup> "Legal Aid and the Integrated Bar of the Philippines."



I do agree with him that Martial Law was "legal aid's finest hour."

c.

It is not enough that we emphasize the poor in particular litigations. As Senator Diokno said:

1.3 To contribute effectively to development, legal aid should politicalize its traditional function. Legal aid lawyers should determine whether their clients' legal difficulties are personal problems, that is, whether they affect only their clients or an entire social sector or community. If the latter, they should involve their clients in seeking the specific social structure and social forces that generated them, and together attempt to work out both legal and social solutions. The resulting awareness of the social causes of injustice will evoke the determination on the part of lawyer and client alike to change law and society to correct injustice. And that is the beginning of development.<sup>88</sup>

He also said:

So development requires a different type of legal aid, one that will not supplant traditional legal aid but supplement it, concentrating on public, rather than private issues, intent on changing instead of merely upholding existing law and social structures, particularly the distribution of power within society. As Adnan Buyong Nasution, director of the Lembaga Bantuan Hukum (Institute of Legal Aid) of Indonesia well put it:

"... legal aid at the moment requires reorientation: legal aid has so far only been directed at the manifest needs of the poor while largely ignoring their latent needs, which in fact often are of more fundamental importance.

The most important problem that emerges is obviously the unequal control over political and economic resources, together with a monolithic political and economic structure. If this structure is left unchanged, it is useless to talk about a more equal distribution of the fruits of development; about democracy; and about basic human rights. Whatever its outcome, development will remain

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<sup>88</sup> "Legal Aid and Development", *supra*.

remote to the poor who are alienated from the decision-making process, the implementation of the policies, and the distribution of the benefits of development.

What can legal aid do to bring about change? This is perhaps the most fundamental question that has to be answered at this stage.

This new type of legal aid is needed because development is more than just feeding, clothing, curing, teaching and housing people. Many prisons do as much. Development is above all the people deciding what food, clothes, medical care, education and housing they need and how to provide them.<sup>89</sup>

I am gladdened that "the Developmental Legal Assistance Program of the Integrated Bar of the Philippines: A Proposal", that:

Developmental legal assistance, then is legal assistance which does not limit itself to the specific legal problems of a particular client but which also tackles the structural roots of such problems and emphasizes group-centered legal issues. For example, it is not just about the ejection case of one tenant but the issue of genuine land reform itself. It is legal assistance which does not foster the dependence of clients on their lawyers but which empowers the clients by enabling them to use the law to uphold and protect their interests. Finally, developmental legal assistance is legal assistance which is based not on absolute acceptance of the legal system in toto but on critical view of the law: it does not limit itself to what the law is but likewise emphasizes what the law should be. In this context, legal issues and legal battles are utilized as tools for organizing and empowerment, and as means of raising social awareness among the poor and the powerless.

Developmental legal assistance is legal assistance that concentrates on the following areas: (a) human rights; (b) assistance to disadvantaged sectors; and (c) public interest issues.

has been accepted by our Integrated Bar of the Philippines.<sup>90</sup>

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<sup>89</sup> "Developmental Legal Aid in Rural Asean: Problems and Prospects", *supra*.

<sup>90</sup> See, among others, Romeo T. Capulong, "Public Interest Lawyering: A Challenge to the IBP", Lecture during the 20th Anniversary of the Legal Aid Program of the IBP, June 4, 1994.

**PROBLEMS IN FAIR TRIAL AND ENSURING ACCESS  
OF THE BASIC SECTORS TO THE JUDICIARY,  
RECOMMENDATIONS THEREIN AND OTHER  
RECOMMENDATIONS; ENDING**

a.

*Enhancing Access of the Basic Sectors to the Judiciary* lists the following as "current judicial initiatives to improve access to Justice":<sup>91</sup>

1. Increasing physical access of the Basic Sectors through the setting up of structures and facilities that increase the accessibility of persons with disabilities and the elderly. This is in compliance with an early law, Batas Pambansa Blg. 344.<sup>92</sup>
2. Ensuring speedy disposition of cases through measures to address the clogging of dockets, such as the Mandatory Continuous Trial system, the establishment of special courts to address specific cases, and the issuance of circulars addressed to members of the Judiciary on, among others, punctuality and office hours, minimizing postponements, conferences on pending cases and inventory of cases.
3. Instituting reforms to address needs of specific sectors through the designation of specific branches to handle specific cases and the exemption of indigent litigants from the payment of docket, other lawful fees, and the Transcript of Stenographic Notes.
4. Enhancing capabilities of the members of the Judiciary through, for example, the provision of continuing training on legal education for judges in compliance with Republic Act No. 8557, the Philippine Judicial Academy Law.

The same document also identifies "current initiatives of other institutions to enhance the access of the Basic Sectors to justice", thus:

Various legal NGOs, lawyers' associations and the so-called "alternative" legal groups have initiated efforts to ensure that the

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<sup>91</sup> *Supra*, 46-47.

<sup>92</sup> "An Act to Enhance the Mobility of Disabled Persons by Requiring Certain Buildings, Institutions, Establishments, and Public Utilities to Install Facilities and Other Devices".

disadvantaged Basic Sectors are given greater access to justice. They are most active in assisting labor groups, indigenous peoples, urban poor, farmers, women, and students. They also provide legal assistance in the following areas of concern:

- \* the advocacy efforts of the Basic Sectors to pass critical social reform bills;
- \* the provision of free legal assistance to cases involving Basic Sectors;
- \* information campaigns on judicial processes, laws and basic rights;
- \* monitoring case involving Basic Sectors; and
- \* skills training for Basic Sectors that can serve as paralegals in their communities.

The Commission on Human Rights (CHR) has likewise initiated the establishment of barangay legal centers. These centers serve as paralegal support mechanisms to local communities and as centers for information campaigns on human rights.<sup>93</sup>

But much also remains to be done. Enhancing Access of the Basic Sectors of the *Judiciary* lists proposed actions requiring Judicial, Legislative and Executive Actions, as follows:

#### **A. Proposed Judicial Measures**

1. Institutionalize ADEQUATE judicial policy reforms to protect the Basic Sectors and poor communities

- \* Mainstream gender-sensitivity concerns in the Judiciary

Mainstreaming the women concerns and their participation in governance are major advocacy concerns of the various Basic Sector groups. These interventions are being promoted to ensure equal opportunities for women and to eliminate discrimination against them. The Judiciary may wish to initiate the review of gender profiling of the Judiciary at various levels and identify the policy issue that hinder women's participation and their career improvement. An empirical study on gender bias in the courts may

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<sup>93</sup> *Ibid.*, 48.

also be conducted. The Supreme Court may wish to link up and jointly undertake this review with the National Commission on the Role of Filipino Women (NCRFW) and the other Focal Points in various government agencies for Gender and Development.

- \* Mainstream customary or traditional modes of adjudication by Indigenous Peoples

- \* Conduct an assessment and analysis of the processes involved in death penalty cases

- \* Review the possible adoption of epistolary jurisdiction of the courts and other judicial reforms

The Judiciary may wish to conduct a study on experiences of other countries in handling cases involving the poor. One of these, which may be worth studying and adopting, is the "epistolary jurisdiction" of the Supreme Court of India. Poor litigants are allowed to just write a letter to the Court to serve as their petition to the Court. The letter will be used to move the Court even without the physical presence of the poor litigants.

Other policies that are worth studying for institutionalization in Philippine Courts are: (a) Exploring means for greater people participation in the administration of justice (e.g. having a jury, court monitoring by citizenry) to ensure check and balance; and, (b) Providing rules for prohibition to file certiorari from Regional Trial Courts to Court of Appeals by joining alleged abuse of discretion with the appeal.

2. Give ATTENTION to the Basic Sectors in judicial processes

- \* Give fair treatment to cases involving the Basic Sectors

Section 1, Rule 20 of the 1997 Rules on Civil Procedure gives preference to certain types of cases for prioritization in the calendar of cases. However, this provision does not include cases that involve the Basic Sectors. Sectoral displacement issues and other cases involving the Basic Sectors are growing in number. The Supreme Court may wish to prioritize these cases, in view of the fact that these involve their rights and survival. The use of color-coding scheme in the lower courts may facilitate the process in prioritizing cases.

As a special concern, the process of adjudicating cases involving overseas Filipino workers may be reviewed and the corresponding adjustments may be done. Furthermore, special assistance may be extended to persons with disabilities in bringing to court discrimination case.

3. Strengthen the ABILITY of justice-practitioners in handling cases of the Basic Sectors

\* Strictly implement Republic Act 8557, otherwise known as the Act Establishing the Philippine Judicial Academy; pursue the Legal Education Reform Act as a measure to implement mandatory legal education; and, upgrade the quality of legal education of law students; and, provide continuing legal education for judges and lawyers;

\* Upgrade the capabilities of justice practitioners on handling Basic Sector and social reform-related cases.

The Supreme Court may wish to require all law practitioners to undergo regular updating and orientation on the Basic Sectors and social reform-related laws to keep them abreast with present-day realities and emerging trends. In line with this, the Supreme Court or the national government may require the Philippine Judicial Academy, law schools and other institutions offering legal education to include the corresponding learning modules in their curriculum.

In addition, legal education institutions may adopt a redirection of emphasis from litigation to peaceful resolution of disputes. They may institute reforms in the legal education system, including the bar examinations, by emphasizing values of integrity and social responsibility over mere technical rules and by stressing practicum and clinical education over theories. Another reform initiative that they may promote is the use of Filipino and local languages in the practice of law. Lastly, the whole Judiciary and legal sector may adopt a program for continuing review and assessment of legal rules and procedure to assure quality legal decisions.

\* Undertaking continuing dialogue between the Judiciary, the Basic Sectors and alternative law groups to provide the opportunities for raising the level of awareness and participation of the Basic

Sectors in the speedy and efficient administration of justice;

- \* Set up the mechanisms for giving incentives to and recognition of good judges and legal practitioners aside from the Judicial Excellence;

4. Make AVAILABLE judicial structures, personnel and information to the Basic Sectors

- \* Establish legal centers for the Basic Sectors

- \* Disaggregation of data by Basic Sectors, sex and gender issues

- \* Improve the physical accessibility of the Halls of Justice for persons with disabilities.

- \* Conduct study on jurisdiction of courts vis-a-vis new laws and strictly implement these laws such as Republic Act 8369, otherwise known as the Family Courts Act.

- \* Fill-up the vacancies in the court system to ensure adequate delivery of legal services particularly in the Family Courts.

5. Ensure the cost of litigation to be AFFORDABLE to the Basic Sectors

- \* Create a guarantee system or legal insurance for Basic Sectors involved in court cases

- \* Require all law firms, law students and law practitioners to render free legal assistance to the Basic Sectors in poor and remote barangays

- \* Recognize and provide incentives to law practitioners giving support to Basic Sectors

6. ACCELERATE decision-making in the judicial processes

- \* Strictly implement Republic Act 8493, otherwise known as the Speedy Trial Act.

- \* Create Special Courts or Small Claims Courts to Handle Basic Sector-Related Cases particularly on Sectoral Displacement Issues

- \* Fully utilize alternative dispute settlement mechanism or arbitration

7. Ensure competent judges, whose decisions may be morally and socially more ACCEPTABLE

\* Conduct a review and analysis of the court decisions and mechanism for “weeding” out corrupt and incompetent judges, including filing of cases against them and applying appropriate sanctions after due process.

\* Conduct research and an assessment on the possibility of issuing a new or an Enhanced version of the existing Court Circular on current procedures for litigating death penalty cases from trial onwards including the qualification of defense and prosecution lawyers to ensure fair trial.

### **B. Proposed Legislative Measures to Enhance the Judicial System**

\* Increase budget of the Judiciary and the legal support for the disadvantaged through the Department of Justice

\* Pursue the passage of critical bills and review of existing laws to provide parameters in adjudication

### **C. Proposed Executive Measures to Complement the Judiciary’s Initiatives**

\* Strengthen the enforcement, implementation and the monitoring of compliance to social reform-related laws

\* Increase legal support for disadvantaged sectors and implement a “Lawyer to the Barrio” program

\* Strengthen local and agency internal mechanisms to prevent and mitigate effects of sectoral displacement

\* Conduct massive information campaigns at all levels on newly enacted laws and executive issuances<sup>94</sup>

which I submit for this conference’s consideration.

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<sup>94</sup> *Ibid.*, 49-60.



b.

In my Valedictory Speech on the occasion of my retirement from the Supreme Court on October 7, 1991, I said:

In the light of this seeming delay in the dispensation of justice, I respectfully submit the following recommendations.

First, reduce the Court's membership to nine members. A more compact court will force the Justices to concentrate on cases truly worth deciding. A nine-member court has worked effectively in our country from 1917 until 1932. The nine-man Supreme Court is working well in the United States.

Second, end the system of divisions, which has brought about four Supreme Courts: the First, Second, and Third Divisions and the Court En Banc. The present system has led to conflicting judgments among the divisions. A single Court will give more consistency to its judgments.

Third, limit the Court's jurisdiction to important issues involving the Constitution and difficult questions of law. Labor disputes, pleas for reinstatement by dismissed workers, problems surrounding appointments, and similar cases should be resolved by other judicial bodies. In this connection, give the Court far wider discretion to accept or reject cases. Non-legal questions or questions that pertain to facts such as ejectments of tenants of apartments, retrieval of stolen carabaos, slanderous statements uttered by squabbling housewives and a host of mundane questions that have tied down the hands of the Court should be delegated to inferior courts as a matter of strict policy.

Fourth, increase the appropriation for the Judiciary. In the Appropriations Act for the past years, only 0.6 percent or less than 1 percent of the entire government budget was given the Judiciary. This miniscule amount of 0.6 per cent represents only P1.7 billion for 23,000 employees. The salaries of Justices of the Supreme Court and all other members of the Judicial Department should be standardized and made at par with the salaries in other agencies of the Government, particularly the government-owned corporations.

Fifth, enforce the judiciary's fiscal autonomy guaranteed by

the Constitution. At present, the Court practically begs Mr. Carague (the Budget Secretary then) for the prompt releases of its appropriation; and

Sixth, the Chief Justice should be elected by his peers every year or once every two years. This election would certainly redound to the independence of the Supreme Court.

Eight years after my retirement, not a single one of my recommendations has been taken up. Will the same inaction befall the recommendations in *Enhancing Access of the Basic Sectors to the Judiciary*?

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## Acknowledgment

Without the assistance of Atty. Ismael G. Khan, Jr., Assistant Court Administrator and Chief, Public Information Office, Supreme Court of the Philippines, Atty. Rhodora M. Roy-Raferta, Project Manager, Supreme Court-United Nations Development Programme (UNDP), Atty. Ester Sison-Cruz, National Treasurer, Integrated Bar of the Philippines, Atty. Mariano Sarmiento II, my son, and Mr. Eleuterio P. Sarmiento, also my son, I would not have made this paper within the time you have given me.

I acknowledge likewise the great help that *Enhancing Access of the Basic Sectors to the Judiciary* (Emmanuel E. Buendia), *Enhancing Communication Between the Judiciary and the Citizenry*, and *Integration of 2 Mandates: Local Autonomy and Administration of Justice* (Atty. Alberto C. Agra), have provided.

There are others also whom I have not specifically mentioned but whose help have been invaluable.

To all of them, I express my thanks and gratitude.

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In ending, let me quote from *Enhancing Access of the Basic Sectors*

*to the Judiciary:*

*JUSTICE*

*...the idea of giving each person his or her fair due as a matter of right. A primary sense of justice is the fairness of a system of laws. Considerations of injustice often prompt social reform and can also illuminate the meaning of justice.*

*A claim that injustice has been done implies that some people have received less than their due, that the procedure itself has been unfair, or that perhaps the whole system is biased in the interests of some, while pretending to serve the interests of all. It follows that justice involves fair allocation, according to an impartial system, taking account of the interests of all.*



## **FAIR TRIAL ISSUES IN THE PHILIPPINES**

*Perfecto G. Caparas II*

The principles of fair trial and due process of law are closely intertwined. The essence of fair trial is anchored on the principle of due process of law. Its close observance make up the core of fair trial. Philippine jurisprudential principles on fair trial have the principles of due process of law as their solid bedrock.

The Supreme Court, applying this concept in judicial trial, ruled that:

“Admittedly, petitioner, like any other accused individual, is entitled to a fair trial before an “impartial and neutral judge” as an indispensable imperative of due process.<sup>6</sup>”

For the constitutional right to due process and to fair trial of the accused to be fully respected and observed, an exacting standard of impartiality is demanded of judges. Thus, the court continued: “Judges must not only be impartial, but must also appear to be impartial as an added assurance to the parties that the decision will be just. <sup>7</sup> However, this is not to say that judges must remain passive or silent during the proceedings. Since they are in a better position to observe the demeanor of the witness as he testifies on the witness stand, it is only natural for judges to ask questions to elicit facts with a view to attaining justice for the parties. Questions designed to clarify points <sup>8</sup> and to elicit additional relevant evidence are not improper. <sup>9</sup> Also, the judge, being the arbiter, may properly intervene in the presentation of evidence to expedite and prevent unnecessary waste of time. <sup>10</sup> [G.R. No. 110353. May 21, 1998.] TOMAS H. COSEP, petitioner, vs. PEOPLE OF THE PHILIPPINES and SANDIGANBAYAN, respondents.

The protection of fundamental human rights can only be ensured by a strict adherence by the courts and active vigilance among the human rights lawyer advocates in observing the tenets and principles of due process

of law. This basic principle of fair trial branches out to other sacred constitutional precepts found in our criminal justice system. Take for instance the right of the accused against self-incrimination as well as his right to remain silent.

## **Rights During Arrest**

Philippine laws theoretically ensure the protection of these rights beginning from the moment of arrest. Constitutional and legal safeguards exist to ensure their observance by lawmen. We have the Custodial Investigation Act that penalizes law enforcers or any person acting in his behalf who proceeds to conduct an investigation without first apprising a suspect about his constitutional rights to remain silent as well as to a competent and independent counsel of his own choice. This, since the suspect upon the moment of arrest has the right to be informed of such constitutional rights. Further, lawmen are duty-bound to provide a suspect with such a competent and independent counsel if the suspect has none under the said Act.

The constitutional safeguards are truly airtight such that these rights to remain silent and to counsel cannot be waived except in writing and in the presence of counsel.

Article III, Section 12 (1) of the Constitution provides that:

“Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.”

To add teeth to this constitutional guarantee, the Constitution provides that:

(2) No torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against him. Secret detention places, solitary, incommunicado, or other similar forms of detention are prohibited.

Further, in order to discourage lawmen from gaining any advantage from any transgression of these rights, the constitution provides for the inadmissibility of any evidence obtained in violation thereof. Thus,

(3) Any confession or admission obtained in violation of this or Section 17 hereof shall be inadmissible in evidence against him.

(4) The law shall provide for penal and civil sanctions for violations of this section as well as compensation to and the rehabilitation of victims of torture or similar practices, and their families.”

Failing to observe this rule, law enforcers who proceed to conduct an investigation without informing a suspect about his rights can be held criminally liable and even barred from public service under the Custodial Investigation Act. The enforcement of this Act is entirely another matter though inasmuch as the general lack of a human rights culture among the masses, brought about largely by their ignorance of their basic rights, makes it easy for some lawmen to disregard this law. These constitutional and legal principles conjure up the image of a criminal justice system characterized by civility and humanity. In reality, however, and in terms of actual practice, these provisions are honored more in the breach rather than in their observance. Take for instance the citizen's right to be informed of her/his right to remain silent and to counsel. In a 1994 LAWASIA Human Rights Committee report, 42 out of the 53 detainees surveyed in Manila reported that their arresting officers failed to inform them of their constitutional right to remain silent.

Forty two out of 51 detainees in Cebu City also complained that the police did not inform them of their constitutional right to remain silent upon being arrested.

Too, majority of people who were arrested and detained during the said period reported that their right to be informed of their right to counsel was not observed by the police. In Manila, 41 out of 53 detainees reported that they were not informed by the police of such a right. In Cebu City, 34 out of 51 detainees also complained that they were not informed of their right to counsel.

Expectedly, 49 out of 53 detainees in Manila had gone through custodial investigation without the benefit of counsel. In Cebu City, 49 out of 51 detainees had been subjected to custodial investigation in the absence of counsel.

Concededly, constitutional principles put a premium to a citizen's fundamental right to liberty that judicial warrants ought to be secured first, as a general rule, before he can be arrested.

The Constitution thus provides:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized. (Section 2, Article III, Bill of Rights)"

To ensure that this constitutional right of the citizens would be safeguarded, the Constitution makes any evidence obtained in violation of this provision inadmissible in any proceeding. Thus,

"Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding."  
(Section 3(2), *ibid.*)

Warrantless arrests are only allowed under exceptional circumstances.

## **Police Invitations**

In reality, however, lawmen circumvent and go around this rule by resorting to the ruse of so-called invitation for questioning of crime suspects. Under this practice, persons accused of having committed offenses are accosted and invited for questioning by lawmen. The persons are then brought to the police station to be confronted by the complainant against him.



In the City of Manila, the LAWASIA Human Rights Committee reported in 1994 that as per the report of the police, out of a total of 16,907 people arrested in 1992, 16,447 were arrested without a warrant of arrest. Of this figure, only 180 arrests had been effected by virtue of judicial warrants. Out of the said 16,907 total number of persons arrested, 6,638 were reported to have been detained by the police. As a matter of practice, the police lock up the person in jail under the concept of preventive detention. He is then subjected to inquest proceedings.

The prosecutor has the power to order his continued detention if he is found to have been arrested validly even in the absence of a judicial warrant, that is, if he was arrested while about to commit, is actually committing, or has just committed an offense in the presence of the arresting officer, or a crime has just been committed and the person effecting the arrest has personal knowledge of facts indicating that the person to be arrested has in fact committed it. In practice, thus, owing largely to the ignorance by the masses of their legal entitlements under the criminal justice system, lawmen are able to effect the arrest and detention of suspects sans a judicial warrant by the ruse of this so-called invitation for questioning, which oftentimes leads to the detention and filing of cases against suspects. This often happens in violation of the rule that warrantless arrests can only be effected under the above-cited circumstances.

## **Lack of Assistance by Counsel**

Transplanted to an extremely strange world following their arrest, detainees who are not generally aware about their legal rights simply suffer in silence the myriad forms of violation thereof. Children, who are the most defenseless and vulnerable among detainees, suffer the most from such violations. During preliminary investigations conducted by prosecutors, for instance, majority of child detainees were not accompanied nor assisted by social workers or their parents, according to the 1994 study of the National Council of Social Development Foundation of the Philippines.

Based on the 1995 study of the Philippine Action for Youthful Offenders, a coalition of NGO and governmental organizations working for children-in-conflict-with-the-law, only 19 percent (44) of child detainees had lawyers while only 25.9 percent (60) had social workers.

Contrary to the provision of the law, only 34.5 percent (80) had actually undergone medical examination.

This too happens, notwithstanding the constitutional provision that:

“No person shall be held to answer for a criminal offense without due process of law”. (Section 14(1); *ibid*)

## **Illusory Right to Bail**

The procedure starting from the filing by the prosecutor of the information against the accused before the court, the raffling of the case before a branch of the court, and the transmission of record to the assigned court, is tedious.

Thus, before the accused can avail of his right to bail, he already has been deprived of his liberty over a significant period of time, usually lasting for a period of at least three to five days. That is, if he can afford to post bail and if he is lucky enough to have somebody go through the judicial maze in posting the needed bail for his release. The law allows the accused to post bail. The Constitution provides that:

“All persons, except those charged with offenses punishable by reclusion perpetua when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law. The right to bail shall not be impaired even when the privilege of the writ of habeas corpus is suspended. Excessive bail shall not be required.” (Section 13; *ibid*)

This constitutional right to bail of members of marginalized sectors, however, is illusory. In reality, some prosecutory practices outrightly prohibit the poor from availing of this constitutional right. Take for example the case of two street children, aged 14 and 16, accused of robbing a woman of her gold necklace worth 4,500 pesos (\$112). To be able to gain their temporary liberty, these two minors had to pay 100,000 pesos (\$2,500) bail. Being street children, the accused obviously cannot afford to post such an amount of bail. As a result, they simply rot in jail.

The situation is truly worse with suspects who are dirt poor. Although their crime is bailable, their poverty prevents them from posting the required bail for their provisional liberty.

A 16-year old street girl arrested for sporting the tattoo of a gang and for being an alleged member thereof has to languish in jail because she cannot pay the 2,000-peso (roughly \$50) bail. Yet, under the ordinance authorizing her arrest and detention, the imposable penalty for such an offense is only a fine of 25 to 200 pesos (\$1.60 to \$5) and/or imprisonment of 10 to 30 days. Is the prosecution department deliberately making it difficult for street children to go out of jail?

## **Presumption of Guilt?**

As if the anti-tattoo ordinance's being inherently unjust and violative of the child's constitutional right to freedom of association and of expression were not enough, the same ordinance does not require any proof of any commission by the child or any other adult for that matter of any wrongdoing but simply the sporting of such a tattoo mark to be convicted thereunder.

This precludes any chance for the accused to defend her/himself as the existence of such tattoos makes her/him liable under the ordinance. Yet, the Constitution provides that:

“No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.”

Detainees are confined in jails characterized by substandard living conditions. The jails are cramped, congested and lack ventilation and sanitary facilities. This makes the experience of detention extremely unbearable for detainees. Yet this problem shall only dealt with by law as per the constitutional provision on the matter.

## **Forced to Plead Guilty**

Following the filing of the information in court against him, the suspect, especially if he is indigent, is provided with a court-appointed public attorney if he so desires the services of one. But the accused in a number of cases simply plead guilty to the offense. It is estimated that 56 to 90 percent of child detainees plead guilty to the offense, according to a 1994 study of the National Council of Social Development (NCSD) Foundation of the Philippines.

The reason? Most of them - due to the snail-paced administration of justice - had already served more than the period of imprisonment prescribed for the offense. To assert their innocence amid this situation is a lose-lose situation for them since this would only spell prolonged agony of detention on their part as well as their loved ones. Only four percent of child detainees were accompanied by their parents during the hearing of their cases in court. Only 16 percent of the child detainees reported that the social workers assigned to them actually attend their court hearings, according to the NCSD.

The fact that courts suffer from acute congestion of their criminal dockets affects the issue of fair trial.

Even for detention prisoners, some courts take at least a month or two to again hear the case of the detainee.

It is due to these factors that typically, detention prisoners oftentimes ask whether the imposable penalty is already equal to or has already exceeded his period of detention. The remedy for him then would simply be to plead guilty to the offense. This too accentuates the problem of the lack of truly committed and competent counsels to assist detention prisoners.

Yet the Constitution outlines the fundamental rights cloaking an accused to protect him during all stages of the criminal proceedings. It provides:

“(2) In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustifiable.” (ibid)

As the right of the accused to be informed of the nature and cause of the accusation against him goes into the heart of his fundamental right to due process of law, the Supreme Court, in ordering the re-arraignment and

retrial of a death penalty case involving a deaf mute, pursuant to this provision, ruled that:

“The absence of an interpreter in sign language who could have conveyed to the accused, a deaf-mute, the full facts of the offense with which he was charged and who could also have communicated the accused’s own version of the circumstances which led to his implication in the crime, deprived the accused of a full and fair trial and a reasonable opportunity to defend himself. Not even the accused’s final plea of not guilty can excuse these inherently unjust circumstances.

“The absence of a qualified interpreter in sign language and of any other means, whether in writing or otherwise, to inform the accused of the charges against him denied the accused his fundamental right to due process of law. The accuracy and fairness of the factual process by which the guilt or innocence of the accused was determined was not safeguarded. The accused could not be said to have enjoyed the right to be heard by himself and counsel, and to be informed of the nature and cause of the accusation against him in the proceedings where his life and liberty were at stake.”

“All the foregoing studiously considered, the court is of the irresistible conclusion that movant richly deserves a re-arraignment and re-trial, to the end that only upon proof of guilt beyond reasonable doubt may he be consigned to the lethal injection chamber.”

The court, to safeguard the accused’s constitutional right to be properly apprised of the nature and cause of the charges against him, ordered that the accused be provided with a counsel and a competent sign language expert. (G.R. No. 121176. July 8, 1999.) THE PEOPLE OF THE PHILIPPINES, plaintiff-appellee, vs. MARLON PARAZO Y FRANCISCO, accused-appellant.)

## **Fair Trial and Publicity**

How about the active coverage by the press of sensational cases? Does this affect the accused’s right to an impartial trial? Time and again, the Supreme Court has ruled that a vibrant media coverage of high profile

cases is not anathema to the rights of an accused. In handling this sensitive issue, the Supreme Court ruled that: "Then and now, we rule that the right of an accused to a fair trial is not incompatible to a free press. To be sure, responsible reporting enhances an accused's right to a fair trial for, as well pointed out, "a responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field... The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Pervasive publicity is not per se prejudicial to the right of an accused to fair trial. The mere fact that the trial of the appellant was given a day-to-day, gavel-to-gavel coverage does not by itself prove that the publicity so permeated the mind of the trial judge and impaired his impartiality. For one, it is impossible to seal the minds of members of the bench from pre-trial and other off-court publicity of sensational criminal cases. The state of the art of our communication system brings news as they happen straight to our breakfast tables and to our bedrooms. These news form part of our everyday menu of the facts and fictions of life. For another, our idea of a fair and impartial judge is not that of a hermit who is out of touch with the world." (FRANCISCO JUAN LARRANAGA vs. COURT OF APPEALS, ET AL.; [G.R. No. 130644. March 13, 1998.]

Other constitutional provisions clearly safeguard the right to a fair trial of an accused.

Section 17 of the Bill of Rights states that:

"No person shall be compelled to be a witness against himself."  
The rule on double jeopardy is also enshrined in the Constitution, to wit:

"No person shall be twice put in jeopardy of punishment for the same offense. If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act." (Section 21)

Amid a backdrop of congested court dockets, the Constitution provides that:

"All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative

bodies." (Section 16; *ibid*)

Given however the jail congestion, detention prisoners find in simply pleading guilty to the offense a magic formula to secure their immediate release. Detention prisoners languishing in jail would simply prefer to plead guilty to the offense rather than rot further in jail. Confronted by this reality, the constitutional precepts of presumption against innocence, right to a speedy, fair and public trial by an impartial tribunal and other constitutional guarantees merely serve as empty rhetorics.

## **Overworked Public Attorneys**

The influx of crimes affecting the destitute sectors of society has opened the floodgates of clients for public attorneys who are mandated to serve indigent litigants. This, pursuant to the constitutional provision that:

"Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty." (Section 11; *ibid*)

Lawyers from the Public Attorney's Office, that is under the Department of Justice, could find nary a time to confer with their clients, much less study their cases. In some cases, they are only given a few minutes by the court to prepare for trial.

Among street children, a vicious law that is used against them is the so-called anti-vagrancy law which penalizes persons found loitering aimlessly without any visible means of livelihood. Confronted by lawmen in court, these street children stand no chance of any acquittal from the court.

The solution for them if they want to be released from detention is simply to plead guilty to the crime. In reality, the real score as far as a detention prisoner is concerned is not fair trial *per se* but what would enable him to secure his immediate liberty.

Even if the street children's lawyer would want to fight for their case due to their insistence on their innocence, the street children prefer to simply admit the commission of the offense just to regain their liberty. Never mind if their admission would entail their acquisition of a dark criminal record.

## Social Prejudice

Between a uniformed policeman and a street child, anyway, the latter stands no chance of securing a judgment of acquittal from the court. The street child has nothing but his plain insistence upon his own innocence. The moment the policeman testifies in court, due to the legal presumption of regularity in his performance of his official duties, he is generally believed by the court. Normally, street children have no other witnesses other than their sorry selves. Yes, they admit to sniffing solvents or rugby, or even to partaking of a role in petty crimes like robbery snatching. Yet, at the time of arrest, the kids were simply sleeping on the sidewalks, their home, and were committing no crime as they say. Yet, lawmen who are ordered to roundup the kids, in order to justify their detention, and as a means of clearing the streets of such so-called "eye-sores," slap charges of illegal possession and/or use of deleterious substances against them, for instance.

In Quezon City, street children get arrested and detained for simply sporting tattoo marks and for being members of street gangs. By virtue of these tattoos alone, lawmen arrest and detain them. In court, the street children could no longer defend themselves as the ordinance itself punishes mere membership as well as the mere sporting of the tattoo marks symbolizing membership in such notorious gangs. Never mind the constitutional right to be presumed innocent of these children. Never mind their constitutional right to freedom of association and of expression.

Unjust laws and ordinances engender a violation of the right of these children to fair trial.

Jurisprudentially, courts stand vigilant of the fundamental rights of the accused during trial. This, as borne out by the wealth of jurisprudence on this matter.

But what does justice for the man/woman in the street mean? When a citizen knows that lawmen carry out extra-judicial killings with impunity. That lawmen resort to torture and other third-degree methods in order to extract confession from suspects. That most people languishing in detention suffer this tragic fate not because of any wrongdoing but due to their poverty and incapacity to pay for good legal services. That double standard in justice - one for the rich and another one for the poor- exists. This, as

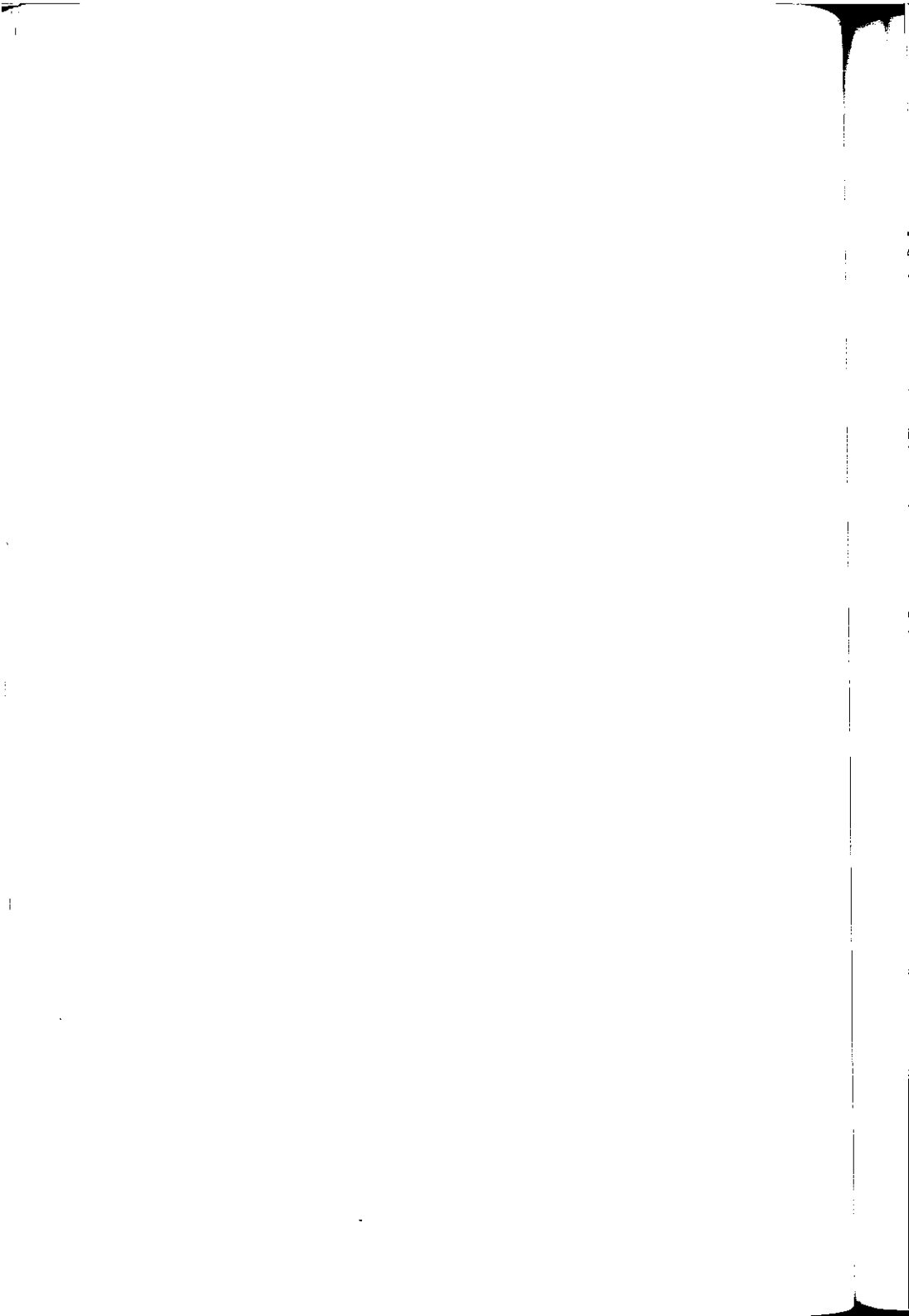


expressed in the Filipino joke that in the Philippines, there is no justice for the poor, just-"tiis", a Filipino word which means just endure suffering.

The ultimate test on the criminal justice system's ability to really dispense justice lies on the trust reposed upon its pillars by its foundation, the citizenry. It is this test that the system as a whole has to hurdle.

As the Supreme Court declared:

"our ability to dispense impartial justice is an issue in every trial, and in every criminal prosecution, the judiciary always stands as a silent accused. More than convicting the guilty and acquitting the innocent, the business of the judiciary is to assure fulfillment of the promise that justice shall be done and is done - and that is the only way for the judiciary to get an acquittal from the bar of public opinion." [G.R. No. 127262. July 24, 1997.] (HUBERT WEBB, ET.AL. vs. THE HONORABLE AMELITA G. TOLENTINO)



# FAIR TRIAL IN BURMA

*Burma Lawyers' Council (BLC)*

“Trial” has not been defined in any statute as the word “crime” has been defined as an act or omission in violation of criminal law. So we are free from its technical meaning. In a broader sense it means the proceeding where facts and law are placed in a court of law in respect of guilt or otherwise for the court to give its judgement. The concept of trial has changed through different periods of history from time immemorial, from trial by ordeal, trial by inquisition, trial by sooth sayers, trial by sages and what not. The dynamic force behind the change in stages is the growing awareness of people of values and conceptions of fairness. The end result is the unceasing efforts towards reform and democratization. And the word “fair” has come to mean not something abstract but specific. Fair trial is therefore no longer in the domain of perception, it is bound within the parameters of written law in consonance with natural justice.

In Burma the laws prescribed are the penal code, criminal procedure code for criminal cases, and civil procedure code for civil cases. The law of evidence is common to both. The object of these laws is to ensure for the parties in the proceeding a full and fair trial in accordance with principles of nature justice while enforcing various statutory laws.

## Conduct of Trial

To ensure fair trial in criminal cases three stages have been laid down as procedures to be followed and violation of these would result in illegal trial:

1. Preparing prosecution in respect of the crime committed. It commences with reporting.
2. Investigation
3. Prosecution of the crime (trial)

## **Pre-trial Procedure:**

The first stage relates to reporting to police. One has to give information to the police to set criminal law in motion and when this information is recorded it is called First information Report (F.I.R). The determinants of F.I.R are (1) not to be vague (2) disclose the commission of cognizable offence (3) by anybody (4) whether offender or witness is present or not (5) *and*, signed. Taking record as F.I.R is a regular procedure to start a cognizable criminal case properly.

Under the rule of the military junta in Burma, in many cases, the people were arrested by the military police without any F.I.R. It is a violation against the pre-trial procedure. Another violation is that after opening F.I.R under one section of criminal law, the military police transfers it to another section without shutting down the former case and without releasing the suspect being investigated under former criminal section. Then, in spite of the lack of enough evidence, without opening new F.I.R, the suspect continues to be detained under the 1950 Emergency Provision Act or 1975 State Protection Act. In that case, the fact of continued detention shows that there is no evidence against the arrested person to for the prosecution to proceed under criminal law and put him to trial.

When report has been made, before starting investigation, police has to identify whether the alleged offence is cognizable or non-cognizable. Criminal law has put crimes in two classifications of a non-cognizable offence for which a police officer has no authority to arrest without warrant. The classification rests on seriousness of the offence. There are two types of cases. They are "summons case" and "warrant case", which refers to the issuing of summons or warrant at first instance. The former is bailable and the other is non-bailable. When a report is made and the police finds that the alleged offence comes within the ambit of non-cognizable, he has to enter the substance of the information in a book called station or general diary and refer the person to file a direct complaint in court.

Police shall not investigate in a non-cognizable case without the order of the court. If he receives such an order he may exercise the same powers in respect of the investigation as in a cognizable case, except for arrest. Where a case relates to two offences of which at least one is cognizable, the case shall be deemed to be a cognizable, even though the other offences are non-cognizable.

The recent case which the National League for Democracy (NLD) had filed against the director of State Peace and Development Council (SPDC) Ministry of Home Affairs, related to both these type of offences. Taking advantage of this it was sent to the police for investigation.

In cognizable cases investigation should follow the following steps:-

1. recording of statements, collecting documents, articles
2. arrest/ visiting the scene of the crime and seizure.

Arrest can be made without warrant but the accused must be brought before the Magistrate within 24 hours. Arrest can also be made by order of court. In such arrest there are formal necessities such as two independent witnesses of locality (not stock witnesses) and their signatures. In respect of seizures, recovery memorandum has to be made in the presence of the occupant and two witnesses.

In Burma, all arrests particularly pertaining to the cases of political nature are arbitrary and using stock witnesses are common practices.

3. Submission of charge sheet to the court.

Charge sheet means all statements recorded by police during investigation, a narration of what the police proposes to use against -the accused during the trial.

## **Trial:**

1. Copy of police papers to be given to accused.
2. Examination of chief of prosecution witnesses.
3. Cross-examination of prosecution witnesses.
4. Framing of charge or discharge. If charged, defence can recall prosecution witnesses.
5. Statement by accused.
6. Cross-examination of accused and cross-examination of defence witnesses.
7. Arguments by parties.

8. Judgement and order. Either acquittal or conviction.

To ensure fairness in proceedings the above steps have to be realized and following remedies are available:

- (a) Revision application for quashing the proceedings or for quashing charge.
- (b) Transfer to another court
- (c) Appeal against conviction or acquittal. In death sentence confirmation by High Court is mandatory.

To ensure fair trial, delay has to be cut out. Delay is caused by remand. It means when investigation is not completed, prosecution goes on taking dates. *Justice delayed is justice denied.*

Delay is caused by giving decision on granting of bail. In all offences less than 7 years bail has to be given. Giving bail means the accused is not kept in jail. While giving bail the court imposes harsh terms in furnishing securities, thus defeating the very purpose of bail. Delay is also caused by refusing transfer of the case. For fair trial the sense of human dignity of the accused must not be destroyed e.g handcuffing, torture and refusing bail.

Anticipatory bail in High Court should be given and writ petition be allowed.

Law is a sleeping giant. The safeguards are guaranteed by the codes. Fair trial procedure includes due opportunity to defend the case of the accused by defense counsel. Wherever defense counsel is not available the state provides the defense counsel. In many countries, there are voluntary organisations such as free legal aid associations to provide legal assistance to the people. But it has not been the case in Burma. The basic piety of criminal justice is founded on the principle that punishment should fit the crime. This principle is grossly violated in Burma. In 1998, over two hundred students were sentenced to a total of 52 years imprisonment, each being accused of participating in peaceful demonstrations orchestrated by the NLD.

The golden rule "It is better that one thousand guilty persons should escape than that one innocent person should suffer" is flouted. Criminal trial is not like a fairy tale where one is free to give flight to one's

imagination and phantasy. The criminal justice system is based on the premise that the prosecution is forced to prove the guilt of the accused beyond any reasonable doubt. No burden of proof is placed on the accused to prove his innocence. He has only to rebut. "Benefit of doubt is to be given to the accused. Justice must not only be done but also it must appear to have been done."

The impact of free trial in society is far reaching. It acts as an instrument for social justice and leads to society's well-being and happiness.

The basic change require to promote the current criminal justice system is to modify the trial system of the Anglo-saxon or common law system of trial which is at the base of post independence criminal justice system. In this system, the judge is only an umpire and not an inquisitor between two contesting parties. He only gives his decision on the issues and evidence put before him. What is decided is whether the prosecution has proved the guilt beyond doubt. The procedures become paramount and lawyers try to find some lacuna in procedure to obtain acquittal. Unfortunately in this system of "trial as a contest" it is not establishment of truth but it is technical determination of guilt.

Remedies that can be adopted with regard to the criminal justice system are to ensure that laws are so drafted that their enforcement is facilitated and not made complex and difficult, delays in trial drastically reduced by streamling judicial procedures eg. limiting the number of appeals, restricting adjournments, putting constraints on remands, liberalizing sureties in bail matters so that bail is not reduced to jail, providing legal aid by enacting law to improve the prosecution system. Further, the role of police is to be brought within the four corners of statutory laws by amending the police act. It is also of paramount importance to amend the law on punishment to fit the criminal and not the crime. Last but not is to amend the trial procedure by converting it in one single procedure and simplifying the law.

The condition of fair trial in Burma which has been described above was a feature of the judicial system prior to the establishment of the military dictatorship which has been ruling Burma since 1962. This scenario has undergone a radical change worse than in any other repressive state. Fair trial has ceased to exist. All trials are conducted under the remote control of military intelligence service, an appendage of the military junta.

An example is the recent case where Daw Aung San Suu Kyi's National league for Democracy filed a criminal case against the Home Minister and others under section 500, 42, penal code- for defamation, criminal intimidation, and cheating.

It was sent for investigation and after a prolonged delay the Supreme Court dismissed the complaints on the ground that no further investigation was necessary. The various stages of investigation which have been outlined above have been violated. The complainant and his witnesses were not examined and merely on police report the matter was closed. Here it may be mentioned that the role of the police in all criminal cases has been diluted and it is just a shadow. The military intelligence service has now assumed the role of the police. In this trial the prosecution system of the military junta has been clearly exposed.

For the sake of fair trial the prosecution system in Burma earlier had been by persons who had- undergone legal training and had at least High School Final Education. Now this training has been converted in to a political training of recruits from the ranks of army sympathizers. In all important cases specially of political nature the military intelligence takes over the prosecution, staying behind the scene and preparing the case to be sent up before court. The judicial system in Burma prior to military rule had been based on judges legally qualified and recruited from from the higher ranks of the Burma judicial service.

At present the entire judicial system is a ramshackle. At the top level only a handful has legal qualifications for example U Aung Toe Chief Justice of Supreme Court, U Aye, a judge of the supreme court. All the rest have no legal qualifications and are handpicked by the Military Junta. Even the Chief justice has no experience of conducting cases. He has risen from the rank of district judge, Registrar of High court; his experience in practical handling of cases is very limited and his knowledge of law is restricted. No wonder he made a derogatory remark: "Lawyers are thieves". So the question therefore is, how one can get fair trial, when the present judicial system is headed by a person of such caliber? No wonder the case mentioned above was thrown out of court. Under the present regime another violation of fair trial is the case of Myo Myint Nyein & 22 in 1994. It was tried under section 5 (NYA). The case relates to political prisoners. A radio and some documents were seized in the Insein jail. The case was



tried inside the jail in an adjoining room. When the search was made the norms laid down for search were never complied with. The accused were not allowed to engage a lawyer.

It was a summary trial and the accused were given seven years imprisonment. There is another case, i.e of Nicholas who was a Swedish consul in Burma. A fax machine was seized because he had no license. He was kept under detention and he died in custody. There was no inquest and the body was not returned to his relatives / friends. In all political cases the stock witnesses are brought from the local committee members, informers and after holding a mock trial the maximum, most severe punishment is given. The cardinal principle that punishment should be commensurate with the nature of the crime is completely violated. Punishment is given to create fear in the minds of the people and is exercised as an instrument to perpetuate the rule of military dictatorship. In minor cases the courts are left to go their own way to enable judiciary to get corrupted and the real criminals are given liberal treatment so that they become the supporters of the judiciak authorities when they come out from jail.

U Tin Oo, chairman of the Central Legal Committee of the National League for Democracy (NLD), has summed up the situation thus:

*Not only are democratic activists charged unjustly under various laws and military decrees and denied fair trials and due process of law, the judicial system has been emasculated over the years. Court proceedings are not open to the public and defendants are very seldom allowed access to counsel. Moreover they are presumed guilty in advance and not given a fair chance to prove their innocence. There is no effective right of appeal to an independent higher forum due to the systematic interference of the military intelligence authorities. There has not been a single case where a political prisoner has been acquitted or given a lesser sentence by higher courts. Trials are a mere mockery of justice and punishments are far in excess of the so-called crimes. Moreover, most of the legal action taken against political prisoners falls into the *ultra vires* category.*

Another instance is the drug abuse cases. Burma has assumed an alarming position although there is legislation to take strict action. But junta's approach to this issue reveals how it has varied the concept of trial

not to speak of fair trial. There has been only a few cases booked under the Narcotic Drug Act although the law is very stringent. The junta has encouraged the insurgent groups in trafficking of narcotics. It is the best modus operandi to raise huge sums in a short time. The insurgent ethnic leaders have entered into cease-fires with the junta and they are allowed to trade in narcotics freely. They have also been encouraged to float companies in Rangoon and launder the ill-gotten money into other trades. Where stringent measures have been provided, the state has become a part and parcel of the narcotics system. And where innocent activists try to reach people to fulfill their aspiration, they are hunted and hounded and if not eliminated, are crippled, tortured and imprisoned without trial.

The guarantee of fair trial is not sufficient. There are several statues on law and trials. The rock bottom is the constitution. It not only gives guarantee of fundamental rights but ensures the liberties by way of writ in the Apex Court of the country, like Habeas Corpus and Mandamus. Anybody aggrieved that he is not given fair trial can come before the Apex Court to set right the wrong. The legal system in a democratic country is wedded to the Constitution. In Burma there is a divorce between the two. There is no constitution and admittedly the present military junta rules by martial law. And fair trial is the first casualty. Since 1922, thirty new acts (so-called laws) have been promulgated and the entire legal, judicial and military dictatorship has been integrated. All obstacles are eliminated. To illustrate this point, it may be mentioned that an independent Bar which is sine quo non for fair trial has been shattered. The Bar Council which was an elected body of practicing advocates has now been reconstituted by nominees of the military junta. There is no election but only nomination. Therefore an independent Bar is non-existent and the state of fair trial can be well deduced from this.

## **Conclusion**

The legal forum has receded in the background. The political struggle for democracy, the rule of law has become the focus. The issue of fair trial cannot be understood if it is divorced from the political system in a country. In broad spectrum, the bases of crime have been cultural conflicts, ill-tuned economic condition, economic deprivation, exploitation and outcry of the oppressed. This category of crime reflects issues of political legality,

social economic moorings, frequency of oppressions, repressions and suppression, the murmuring of the exploitative coterie. Such crime can be conquered by way of social political alternatives. Offences subverting the state are political crimes. These offenders are defined as criminals because of the interest of the ruling class to enjoy immunity and thus the subject class are penalized for violation. It diverts the attention of the exploited class from exploitation; It is a reaction to the life condition of social class.

There are three elements in criminal laws:

- (1) politicality
- (2) specificity
- (3) uniformity

In Burma the element of politicality has replaced all other elements. Politicality means that violation of which attracts penalty is made by the political superiors or the State. Crime is judged by interest and fancies of the elites holding power. Social change is inevitable. More so- now because of the wave of liberalization and globalization. Fair trial is a core component of a vibrantt social order.

## **Recommendations:**

In order to restore, at least symbolically, fair trial, the Burma Lawyers' Council recommends as follows:

- (1) human rights organizations, NGOs, and elected lawyers' associations must be inducted in the polity of Burma; civil society be encouraged to strengthen in Burma.
- (2) the international organizations should play more proactive role in a way that they interact, monitor, collect information and intervene in the matter of trials.

In the case of Burma, if these factors are realized, the basis of fair trial can become a reality in the transitional period from dictatorship to democracy. For this purpose, the international legal community and Asian Human Rights Commission are requested to form an ad hoc committee to engage SPDC to ensure fair trial irrespective of political motives of governance.



# TRIAL IN CAMBODIA

*Sok Sam Oeun, esq.\**

## Introduction

The world knows well about Cambodia. The Cambodian legal system suffers from the vestiges of an outmoded communist structure, from the havoc wrought by twenty years of war, and the recent political upheaval. Cambodia's modern history has created a severe lack of legal professionals in the country. Under the Khmer Rouge, approximately 80% of those who had worked in the legal system - judges, prosecutors and lawyers - were killed. Law books were destroyed and buildings that had formerly housed the courts and the law school were converted to other uses.

The current Constitution of the Kingdom of Cambodia, adopted in 1993, lays down that Cambodia is a liberal democracy and recognizes the international human rights instruments. Thus the concept of law enforcement under the constitution is one of an independent judiciary, and police force functioning under liberal democratic norms and standards. Yet, liberal democracy has not been applied due to the continued existence of laws adopted in the communist regime and a lack of political will.

Law enforcement mechanisms often fail to adequately protect the people. The Cambodian police force lacks basic training on law and investigation techniques, rules of procedure, an understanding of and respect for human rights and neutrality. As a result, the police often operate outside of the law, forcing confessions, holding pre-trial detainees beyond the legal 48-hour limit and committing other violations of international and Cambodian laws. Substandard prison conditions and a pattern of torture and beatings of detainees persevere.

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\* Executive Director of the Cambodian Defenders Project (CDP)

## **History of Legal Systems in Cambodia**

Cambodia was a colony of France for 90 years (from 1863 to 1953), during which time the French system was introduced in Cambodia. From 1975 to 1979, Pol Pot killed nearly three million people, including 80% of legal professionals. Therefore, the former Cambodian legal system was completely destroyed. In 1979, Pol Pot fell from power and a Revolutionary People's Council was established on 8 January 1979. From 1979 to 1980, there was no court system and judiciary power was vested in a Military Commission. The first written law after a gap in the legal system was written in May 1980. After that, from 1980 to 1993, a Socialist legal system was introduced in Cambodia. It was similar to the Chinese and Vietnamese systems. From 1989 to 1993, a court system based on Common law was established by the UN for the Cambodian Refugee Camps along the Thai border. In 1993, UNTAC was sent to Cambodia. A penal code and a court system were established. This system is similar to the common law system. At the same time, the State of Cambodia regime passed another Criminal Procedural Law. This new Law on Criminal Procedure added the Investigation Judge System. So, they think that the Cambodian system is based on the French system. But, in fact, the investigation judge in the Cambodian system does not function like the Investigation Judge in the French system. In contrast, the Investigation Judge in the Cambodian System acts like the Public Prosecutor in Russia, except that they have authority to prosecute.

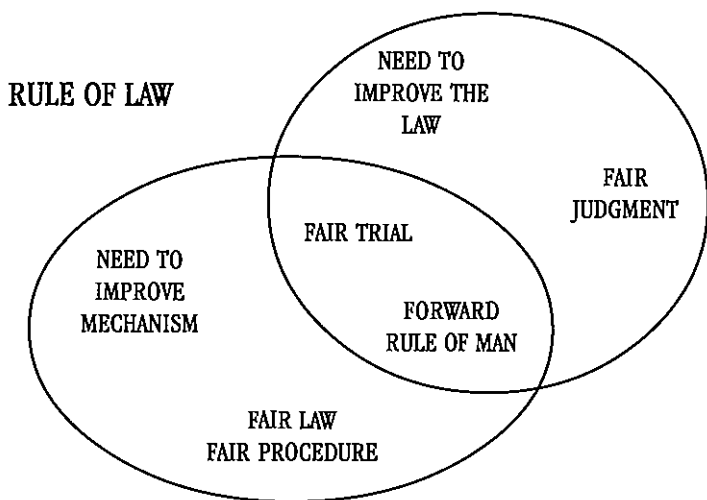
## **Fair Trial in Cambodian Context**

A "fair trial" does not mean fair judgment but it means, "Getting a fair judgment through legal means or due process". Means to get the truth includes the investigation conducted by the police, prosecutors, investigation judges, defense lawyers, and how to prove evidence during the trial.

The presumption of positiveness of the conduct of police, prosecutors, investigation judges and the trial judges could make people careless and make it easy for some to abuse the law, human rights and freedom of the people. The extreme nationalism makes the people forget that they are working in theory "for the people", but in fact, against their own people. As an example, Khmer Rouges killed millions of their own people, because

they thought that all government officials' decisions were right, the state interest was more important than the liberty of the people, and for example, that it was better to kill one hundred innocent people than to allow one enemy to escape.

Therefore, it is necessary to have the process for fair trial described clearly in procedural law. For a poor legal system like Cambodia with a lack of qualified human resources, it is necessary to have detailed rules of court proceedings, from the preliminary investigation to the final judgement of the Supreme Court.



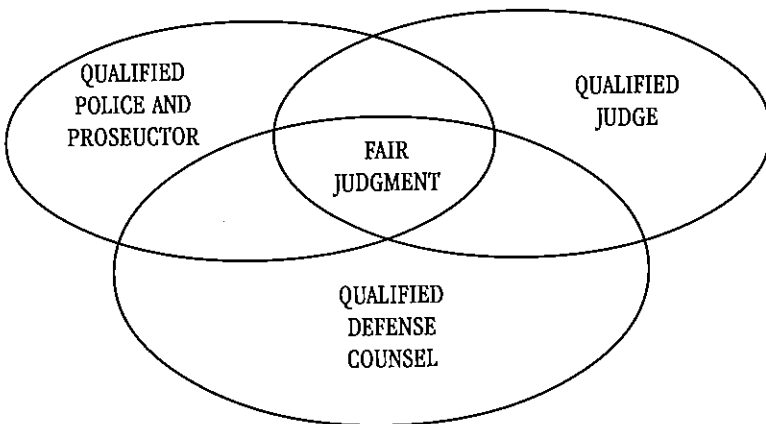
However, to be able to make fair judgments, the judges should be qualified. According to the International Covenant on Political and Civil Rights, in order to have a fair trial; the judge(s) should be competent, impartial and neutral. But in Cambodia, there is a problem of interpreting the meaning of the 'competent', 'impartial' and 'neutral'. Most Cambodian judges, in particular the judges in remote provinces, think that they do not need to study any more because they are competent enough to do their job. In a workshop, a judge said that he could use hearsay evidence. It will not impact his decision because he can analyze and decide what is wrong or what is right. They believe that the people who have high knowledge can keep his or her impartiality and neutrality.

**FAIR TRIAL = FAIR JUDGMENT AND FAIR PROCESS**

Therefore, regarding the Khmer Rouge Tribunal, Cambodian lawyers do not agree with the UN and the Cambodian Government, because they are talking only of how to set up a tribunal but they forget the other elements of fair trial. So, we, three legal aid groups in Cambodia, the Cambodian Bar of the Kingdom of Cambodia, the Cambodian Defenders Project and Legal Aid of Cambodia, have jointly released a press statement to reiterate and call for the minimum requirements for fair trial for Khmer Rouge leaders. We also need neutral, competent and independent prosecutor and investigators, and to protect the right to competent legal counsel.

**Fair Judgement**

The fairness of a judgment that is made by a judge depends on the judge himself, good prosecution is the result of good investigation and good defense. If the investigation is bad, the prosecutor will have nothing to say during the trial. If the Prosecutor is bad or weak, even if the police has a strong case, the accused will be acquitted. If the prosecution is strong but the defense is weak and as result the accused is convicted, we cannot say that the judgment is fair enough.





Therefore, all mechanisms of the trial including judge, prosecutor, police and defense lawyer should be equally strong. To be strong in judiciary field means that they should be competent, independent and impartial.

## **Problems Regarding Police Investigation in Cambodia**

We know that the Police have the duty to fight crimes and find the truth for the judge. However, they may not abuse any law in finding those truths. But, according to the experience in Cambodia, this is not enough. Some rules and some provisions of criminal procedural code abuse human rights which are protected by the Constitution. So, we also need fair laws and fair rules.

However, the police has a very important role in protecting life and properties of the people and preventing crimes. All activities of the people should impact on the liberty and freedom of the people, so it is necessary to state clearly in the procedural code what police can do and how much force they can use. Then the police should follow the rules strictly. They cannot use "finding the truth or state interest" as an excuse to abuse the law.

GOOD INVESTIGATION = LEGAL ACT + FINDING THE TRUTH

## **Cambodian Police**

### **A. Neutrality of the Police**

In 1993, when all Khmer factions joined together, each faction had its own military and police forces. Therefore, all police forces still favor their own political party. As a result, a coup occurred on 6 July 1997. Since the time of the Khmer Rouge, police forces are not civilian police but they are political police. So, they are more sensitive on political case

rather than with normal crime. In Cambodia, any Military and Police General can ask for special leave to join a political campaign and be Parliament Member until his or her termination of the mandate.

## B. Police Training

Now, there is no Police Academy in Cambodia. There are only short courses or seminars. Only judiciary police, which is a small group, is allowed to conduct criminal investigations. Therefore other policemen have no legal training.

## C. "Ghost" Police

Right now there are more than 60000 police officers, but there are also many "ghost" staff members. [Ghost staff are those who do not in fact exist, but are still listed on the pay roll and are paid.]

## D. Police Ordinance

There is still no Police Code in Cambodia, although a draft of such a law has been drawn up with the help of foreign experts. The National Police Department is under supervision of the Ministry of Interior. It is led by a General Director. He is not a police officer but a politician appointed by the ruling party.

The Police Law must create a Police Commission for the purpose of supervising and managing police reforms and police education. There are many such commissions in Asian countries. Such a commission could become a very useful instrument for achieving positive change within the police force.

Titles used for various ranks of police are still military terms. Beginning with 'three star general,' titles go down to 'assistant lieutenant,' which is the equivalent of constable in other countries.

Titles are usually given after appointments and not acquired by way of promotion. These titles show the military origin of the police force, when the police were used to fight in the civil war. In transforming the police into a modern police force it has become imperative to give up this

military past. As a part of that transformation the military-style titling must be abandoned.

## **Prosecutors**

### **A. Quality of Prosecutors**

As with judges, since the SOC regime, most prosecutors are appointed. The Communist Party of the SOC Regime appointed them. They have no legal background. Before 1993, the Prosecutor is an advisor of the court and acts as representative of the Political Party to oversee the conduct of the court.

### **B. Prosecutorial Structure**

In Cambodia, there is one Supreme Court, one Appeal Court, 19 Provincial Courts, 2 Municipal Courts and one Military Court. There is one office of Prosecutor attached to each court. Before 1993, all courts were under direct supervision of the Ministry of Justice. Because they had no legal background, they always got advice from the Ministry of Justice in all questions related with the law and judgment. The Court of Appeal was established in 1993, so the General Prosecutor of the Supreme Court and Appeal Court has no power to discipline any prosecutors. According to the new Constitution of the Kingdom of Cambodia, all judges and prosecutors are under control of an Independent Body named the Supreme Council of the Magistracy. But until now, it has not yet functioned.

### **C. Finance**

All Prosecutor's offices are funded by the court to which it is attached, and all courts are financed by the Ministry of Justice.

## **Independence of Judiciary**

### **A. Supreme Council of Magistracy**

The Supreme Council of Magistracy is a constitutional body, which has power to appoint, transfer and discipline the judges. In theory, it is an independent body separated from two other branches. But, seeing its composition - Minister of Justice, Chief General Prosecutor of Appeal Court and Chief General Prosecutor of Supreme Court, who are from Executive Branch, are the members of this council - this body cannot be independent. Besides, all members of this council have full time jobs, so this council cannot function effectively.

### **B. Court System**

In Cambodia, there is one Supreme Court, one Appeal Court, 19 Provincial Courts, 2 Municipal Courts and one Military Court. The provincial judges are under control of provincial governors. The Appeal Court and Supreme Court have no power over those judges.

### **C. Salary**

A judge receives only about US\$ 20 to 30 per month. When a judge is transferred to work in the province, she or he needs to rent a house, which costs more than his or her salary.

### **D. Quality of Judges**

CPP party appointed most judges since 1980's. Most of them have no legal background. They received only some short training organized by the Ministry of Justice.

### **E. Finance**

Ministry of Justice funds all courts. The courthouses are small and not comfortable.

## **Defense Counsel in Cambodia**

After the Pol Pot Regime, there were no professional lawyers in Cambodia. In 1993, UNTAC trained a number of Defenders to represent the poor people. After that some International Organization trained a few human rights activists to become Criminal Defenders. In 1995, a Bar Statute was passed which banned those criminal defenders from representing clients in court after 1997. A Bar Association has just been established in January 1996.

Because of a lot of corruption in court, the lawyers' business could not be successful. Some private lawyers have become mediators of bribery with the judge. Therefore, only lawyers who are working with the Legal Aid organizations, can keep their morale and professional ethics high.

## **Criminal Procedure and Problems**

### **A. Police Investigation**

According to UNTAC Law, Police can arrest a suspect if he or she has enough evidence. But, at the same time, the SOC regime passed another criminal procedural law, which states that the police can arrest a suspect without warrant only in cases of flagrant crimes. Even so, police still abuse the power of arrest in many cases because they interpret the 'flagrant crimes' wrongly.

According to UNTAC Law, Police can continue his or her investigation after 48 hours, but the Ministry of Justice interprets the law such that the police may not do anything unless requested by the Investigation Judge or Prosecutor. So, the interview of any witnesses of the case after 48 hours is considered 'procedural errors'.

The Investigation Judge does not dare to order or request anything from the police because the Police Chief has more power than the Judge does. Therefore, we have never seen any Investigation Judge requesting any police to do anything.

## B. Charging by Prosecutor

The police should report as soon as possible about the arrest of the suspect to the Prosecutor. The Prosecutor should examine the evidence collected by the police. Within 48 hours after the arrest, the Prosecutor should decide to charge or not. For misdemeanor and flagrant case, the Prosecutor can indict by himself and send the case directly to the Trial Judge, but in case of felonies or non-flagrant crimes, Prosecutor should send the dossier to the Investigation Judge for investigation.

## C. Investigation by Investigation Judge

In theory, the Investigation Judge should collect evidence for both sides and should not make any recommendation to the Prosecutor or Trial Judge. But in practice, it is very hard for a person to act neutral and accept two contradictory evidences.

The investigation judge and the trial judge are from the same group, they only rotate functions with each other. If a judge investigates any case, she or he cannot hear the same case. So, each judge acts as both investigation and trial judge. Therefore, one to five judges of each court has duties to investigate all cases and hear all kinds of cases of his or her province. So, it means a thousand police officers record cases for only one to five judges to investigate. Therefore, the investigation judge has never investigated by himself, only his clerk conducts the investigation. Several busy judges signed in advance on the interviewing sheet.

On the other hand, because the court has no budget for investigation, the clerk does not go to meet the witnesses and visit the scene, they only summon the witnesses to see them at the court, and he or she does not care if the witnesses do not appear.

After finishing his or her investigation, the Investigation Judge makes a conclusion and sends it back to the Prosecutor. The Prosecutor has no power to investigate in this case and cannot contact the witnesses. So the Prosecutor does not know his case well; he or she reads only the dossier made by the Investigation Judge. The Prosecutor also cannot prepare the examination of the witnesses well. The Prosecutor also has no responsibility in calling the witnesses to the trial, and that's why most prosecution

witnesses are absent during the trial.

## **Court Proceedings**

### **1. Court Room Appearance**

Most courts in Cambodia have only one courtroom for each court. So, each judge has only one day in the week to schedule all his cases; he should call all defendants of all cases at the same time for trial. In most courts, the tables of the Trial Judge, Prosecutor and the Trial Clerk are at the same height, and the table of the Defense Lawyer is a small, low and dirty one located at the corner of the room. However, after 1993 some courts changed their style by making the table of the Trial Judge taller than other tables, and the tables of the Prosecutor and the Defense Lawyer at equal height (Ex: Siem Riep Provincial Court, because it was build and the furniture provided by the UN and advised by the Cambodian Court Training Project<sup>1</sup>).

There is no witness box in the courtroom. The Defendant should stand in a Defendants Box in front of the Trial Judge, and the co-defendants are sitting beside him. Sometimes, more than twenty defendants are standing in front of the Trial Judge, and it can be very dangerous if any of them does something stupid. It is even more dangerous when exhibits, such as a gun or pistol, is placed on the evidence table close to the defendants. Even, though the weapons are not loaded, it gives a dangerous impression during the trial.

### **2. Opening of Trial**

During the trial, there is one court clerk who is responsible for organizing the courtroom. Before trial, the clerk should check the presence of all witnesses. After all present witnesses and audience are in the court room, the court clerk reads the courtroom rules and informs them that when they hear the word "Judge", everybody in the courtroom should stand up to respect to the judge.

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<sup>1</sup> This Project was closed after July 97 coup. It is a project of the International Human Rights Law Group and a sister project of the Cambodian Defenders Project.

The first bell rings. It is a signal that the Prosecutor is coming into the courtroom. A few minutes later after the Prosecutor has entered the courtroom, the second bell rings. It is a signal that the Trial Judge is coming into the courtroom.

After all the audience is sitting down, the trial judge asks the trial clerk: "*Are all concerned persons present?*" Then, the Trial Clerk reports to the Trial Judge about the presence and the absence of the defendant(s), the victim(s), and the witness(es). The trial clerk should also report to him or her about the reasons of the absences, if known. If there are a number of absent witness(es), the trial judge asks the Prosecutor and the Defense Lawyer whether the absence of those witnesses can impact the trial or not, and whether they should proceed the trial or not or either of them has any request or ideas. The most common question that most judges like to ask is: "*Mr. Prosecutor! Do you have any objections?*"

Both the Prosecutor and the Defense Lawyer have the right to request anything related with the cases. They can request to give more evidence, present more witness(es), petition to suppress evidence or not to read the statement(s) of absent witness(es), etc. All requests, verbal or written, should be recorded in the trial report by the court clerk.

There is no separate hearing for those petitions. So, most requests are only mitigating or aggravating factors.

After deciding that the trial can proceed, the trial judge announces the opening of the trial.

### 3. Instruction of the Defendant

After that, the Trial Judge asks all defendants of all cases to be tried on that day to stand up and asks them one by one about their identification. The Judge asks each defendant to confirm name, age, and present address. The Judge also asks whether the defendant has received the charge.

**Article 132 of SOC Law:** At the opening of the hearing, the judge calls the case to be judged. The clerk calls the parties the witnesses in the case, and checks their identification. Each party seats in the reserved place in the courtroom. The witnesses shall withdraw into a waiting room, which was reserved for them from which they cannot see, or



hear anything from the courtroom and in which they cannot communicate to each other.

After that, the Trial Judge instructs the defendants about their Rights to Counsel, Rights to Deny the Trial Judge, Rights to Speak the Truth, Rights to Request to examine the witness, and Rights to Say the Last Word at the end of trial.

**Rights to Counsel:** The Trial Judge usually knows whether the defendant has a Defense Lawyer. But the question should still be asked. Some courts announce directly the name of the Defense Lawyer. But if the defendant has no Defense Lawyer, the Trial Judge asks whether the defendant needs a Defense Lawyer. If the defendant says that he or she does not need any Defense Lawyer, the Trial Judge can proceed with the trial. However, in case of the Defendant is a minor without defense, or the accused person is mute, deaf, blind, or has a mental disorder, the accused person is accused of committing any felonies and is not able to afford a defender, the Trial Judge should appoint a lawyer for him or her. Normally, the Trial Judge or Investigation Judge should appoint a Defense Lawyer at least 15 days before the trial. In the event that a defendant who has no Defense Lawyer tells the Trial Judge that he or she needs one, the Trial Judge should postpone the trial and find a Defense Lawyer for him or her.

After finishing his or her questions related with identification and instruction about the defendants' rights, the Trial Judge asks all other defendants, except the defendants of the case to be heard, to stay in a Court Custody Room.<sup>2</sup>

#### 4. Instruction of the Witnesses

After finishing the identification of the defendants, the Trial Judge calls all witnesses to stand up and asks them one by one about their identification, checking their name, age, job and present address.

After that, the Trial Judge instructs the witnesses about their rights. Normally, the Trial Judge instructs them about Right to Say only the Truth and to say only what they themselves saw and heard.

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<sup>2</sup> Normally, there is no special room prepared for this in the court, but however the defendants are organized to sit in any room to wait for calling for trial.

Then, the Trial Judge orders all witnesses to go out of the Courtroom. In theory, all witnesses should stay far away from the courtroom so that they cannot hear any testimonies of other witnesses. But, there are no adequate arrangements for the witnesses, particularly the witnesses for the the prosecution, so witnesses can hear the testimony of other witnesses very easily.

The Trial Judge also orders his or her staff to bring any witnesses who have not yet been sworn in during the investigations stage to do so.<sup>3</sup> Regarding this, it is better to ask each witness to take the oath again, in particular right before his or her examination. It will be even better if there is any religious statue located in the courtroom. After testifying, the witness can sit in the courtroom.<sup>4</sup>

## 5. Charging by Prosecutor

After he has finished introducing the defendant(s) and the witnesses, the Trial Judge asks the Prosecutor to charge the defendant. The Prosecutor reads the charge and concludes that he or she has enough evidence to convict the defendant.

## 6. Examination

After the Prosecutor has finished reading the charge against the defendant, the Trial Judge starts to question the defendant. After the Trial Judge has finished his or her questions, the Prosecutor examines the defendant and last of all the Defense Lawyer questions the defendant. This proceeding is similar for other witnesses. The burden of proof does not exist in the Cambodian Legal System. The witnesses of the Prosecutor and the witnesses of the Defense Lawyer are not distinct. The Prosecutor does not consider any witnesses as his or her witnesses, because he or she was not involved in finding those witnesses. The invitation of the witnesses is the responsibility of the Trial Judge. That is why most prosecutor's witnesses are not present in court for trial.

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<sup>3</sup> Any witnesses whom sworn before giving statement to the Investigation Judge, does not need to swear again. But, in some courts, the Trial Judge asks all witnesses to swear again. The place for swearing usually locates out side of the courtroom.

<sup>4</sup> This procedure makes trouble if the witness is asked for reexamination.

**Article 137 of SOC law:** *“After questions and answers, the judge successively allows the plaintiff, the civilly responsible person, the accused, the lawyer or the defender of the plaintiff, the representative of the prosecution department, the lawyer or the defender of the civilly responsible person and the last one, the lawyer or the defender of the accused to speak. The accomplishment of the above formalities shall be indicated in the report of the court hearing and the court order, otherwise it shall be considered as null.”*

In the old criminal procedure from 1982 to 1993, the Prosecutor was the representative of the Political Party. Because there was only one political party at that time, the Prosecutor was also the representative of the Government and had responsibility to control the conduct of the judge during trial and give advise to the Trial Judge. The concept of the Examination-in-chief<sup>5</sup> (or Direct Examination) and the cross-examination<sup>6</sup> are not understood.

## 7. Examination of the Defendant

In the Cambodian legal system, the defendant should be examined first, and then other witnesses. The difference with other system is that the Trial Judge asks most questions. The Prosecutor always has very few questions.

A very common first question to the Defendant is: *“Now you have already heard the charge read by Prosecutor, do you have any evidence to show your innocent?”* This question shows that there is no **Presumption of Innocence**<sup>7</sup> but there is a **Presumption of Guilt**. The Presumption of Innocence disappears after the Investigation Judge presents his conclusion to the Trial Judge.

<sup>5</sup> This concept has not yet been existed in Cambodian legal system. It is the way that the Prosecutor and the Defense Lawyer questions his or her own witnesses. In Direct Examination, the Prosecutor and the Defense Lawyer can not ask the witnesses the Leading Questions.

<sup>6</sup> It is the questioning by the Defense Lawyer and the Prosecutor to the witnesses of other parties. In Cambodian legal system, this concept is not existed, because Trial Judge and Prosecutor should ask every witness first.

<sup>7</sup> Constitution states that “The accused shall be considered innocent until the court has judged finally on the case.”

**Article 132(2) of the SOC law:** *“Afterwards, the judge hears the accused person about the accusations made on him/her. After listening to the oral statement of the accused person, the judge starts to ask him/her questions useful to the case. This question shall be completed by the other party’s question through the judge.”*

The Trial Judge can ask any kind of questions including **Leading Questions**. Cambodia has no rules of evidence. As a result in some courts lawyers are not allowed to make any objections. In fact, **the Defense Lawyer sometimes can object even to the Trial Judge. However it is not possible to object to the questions by the Trial Judge, even if he asks leading questions, since this is perceived as embarrassing to the Judge.**

**If the defense lawyer objects to leading questions by the prosecution, such a lawyer will be criticised by the Judge in favour of the Prosecutor.**

## 8. Examination of Witnesses

The order of examination is the same as the examination of the defendant. Witnesses are not distinguished into prosecution witnesses and defense witnesses. The Prosecutor in Cambodian Legal System is not the same as the Prosecutor in common law, but he or she is quasi-advisor of the court. A smart Defense Lawyer should not consider the Prosecutor as the one who prosecutes his or her client but should consider him or her as the judge and should push him or her to be neutral. In fact, the Prosecutor is not the one who collects evidence, he or she is only the one to check the evidence collected by the Investigation Judge and then analyze them and give his or her opinion or conclusion to the Trial Judge.

## 9. Statement of Absent Witnesses

After all witnesses who are present at trial have testified, the Trial Judge usually asks the Trial Clerk to read the statements of the absent witnesses. The Licadho (21 July 1999) case is the first case wherein the Trial Judge agrees with the petition of the Defense Lawyers to deny the statements of all absent witnesses.

The smart Defense Lawyer should submit any petition to deny the statements of all absent witnesses, and/or request immediately during the opening trial to deny reading the statements of the absent witnesses. If the Trial Judge still insists on reading those statements, the Defense Lawyer should ask to examine<sup>8</sup> the statements. Otherwise, those statements become legal evidence without examination.

## 10. Closing Arguments

When the Trial Judge, Prosecutor and the Defense Lawyer have no more questions for examination, the Trial Judge asks first the Prosecutor to make his closing argument and then the Defense Lawyer. Both of them can make additional closing arguments to answer each other until there are no more arguments. Normally, the Trial Judge can stop the argument if he or she think that they have no more additional argument.

Most Prosecutors do not show evidence to support the elements of crime. Some of them say only "*Your Honour, I would like to keep my position in prosecuting the defendant,*" and then he or she sits down.

## 11. Last Word of Defendant(s)

After both Prosecutor and Defense Lawyer have finished their closing arguments, the Trial Judge asks the defendant to say his or her *last word*.

## 12. Judgement

After the Defendant has had his last word, the Trial Judge announces a break. After the break, the Trial Judge comes back to trial and announces his or her judgement.

There are no separate hearing and sentencing sessions. Therefore, it is very difficult for the Defense Lawyer to introduce any character evidence, because if it may make the Trial Judge feels that the Defense Lawyer is admitting his or her client's guilt. On the other hand, the Prosecutor can introduce the character evidence in trial. Actually, the Trial Judge, in his opening questions on the identity of the defendant, already asks about his

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<sup>8</sup> CDP develops a technique to examine the statements of the absent witnesses. It is called "Cross-examination of Statement."

or her criminal background.

## **Conclusion**

Rule of law means nothing in Cambodia. We need "Rule of Fair Law". Only Due Process is not enough; to ensure justice for the people, we need Due Process of Fair Law. A fair law is a law which is consistent with the Constitution and the International Human Rights Instruments. Even when we have a fair law, but the police or prosecutor is weak, we cannot fight against any crimes. When the Police and Prosecutor are strong and the prosecution has a strong case, but the Defense Lawyer is unqualified, we still cannot say that we have a fair trial. Prosecutor and Defense Counsel may be strong and have strong cases, but if the judge is unqualified, or not independent or partial, we will still not obtain a fair judgment.

So, a fair trial is a process to reach a fair judgment through legal means according to a fair law conducted by qualified mechanism.

Editor's Note - [A report on a recent workshop of Administration of Justice Relating to Police in Cambodia annexed as Appendix 1.]

# FAIR TRIAL: THE INDIAN SITUATION

*Dr. P. J. Alexander\**

It may be stated at the very outset that the Criminal Judicial System in India ensures fair trial. The roots of the system go back to the trilogy of Criminal Law: The Indian Penal Code (1860), the Indian Evidence Act (1872) and the Code of Criminal Procedure (1898 as amended by Act 2 of 1974). These three Codes and the Civil Procedure Code and related laws came from the same source - Lord Macaulay. India was then a colony in the British empire. However in fairness to the British it has to be conceded that the laws they enacted for India had in them rights which they did not enjoy in England and contained provisions for a fair trial and protection of the rights of the accused, almost parallel to present day concepts. The fact that these laws have endured, for so long in India, and not yet replaced except for some provisions of the Code of Criminal Procedure in 1973, testify to their continuing relevance even in a fast changing society such as India has. These laws indeed have anticipated our times, though drafted in the 19th century.

This Paper aims to summarise some of the salient features of the Criminal Law in India regarding fair trial and attempts to point out where, sadly, practice falls short of precepts.

2.1. The Indian Penal Code defines criminal offences and provides punishment for each offence. Offences are classified into two broad categories, cognisable and non-cognisable. A cognisable offence means, "an offence for which a police officer may arrest without warrant." In a non-cognisable offence, the police have to get the orders of a Court with jurisdiction to register the information and take further action.

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- 2.2. Offences are also classified into bailable and non-bailable. A 'bailable offence' means an offence shown as bailable in the First Schedule of the Code of Criminal Procedure and in which the accused can be enlarged on bail by the police themselves. In non-bailable offences the competent Courts alone are empowered to release the accused on bail. Usually the Court specifies in its order, conditions of bail - cash security, cash security plus surety of one or two respectable persons, or both, and other conditions on the conduct of the accused, i.e. not to enter the jurisdiction of the Police Station or District where the crime was committed, to report at a Police Station or before a Police Officer every day or once in a week etc. not to leave the jurisdiction of the Court, not to tamper with evidence, intimidate witnesses, surrender passport etc. Though bail is generally the discretion of the Court, it is well established in India that bail is the rule and denial the exception. This view stems from the recognition that to effectively defend himself, the accused must be free and should not be in custody.
3. A 'complaint' which means an allegation that some one has committed an offence can be made to the Police, at the Police Station level, or to higher police functionaries, or directly to the Court with jurisdiction. When the police receive such a report or information, the Criminal Procedure Code in S.154 enjoins them to register. Where the Police have registered an FIR, they collect evidence - statements from witnesses, documentary evidence and scientific evidence like finger prints, foot prints, blood stains, tools/implements/weapons etc. The matter is set as a First Information Report (FIR) and set the investigation process into motion. The Court can either take up the matter for trial by issuing summons to the accused or send the complaint to be investigated by the police. If prima-facie, they establish a case against the suspect, he is then arrested and if it is a bailable offence, released on bail or send up for remand, if the offence is non-bailable. Where the Court does not grant bail, the accused is sent to judicial custody. In all cases where punishment for the offence alleged is likely to be imprisonment for 7 years or for a lesser term, the maximum period an accused can be in judicial custody is limited to 60 days and in cases where the punishment is for over 7 years, 90 days. In exceptional cases the Court may remand the accused to police custody for the purpose of investigation for short periods.



- 4.1. The rights of the accused are well recognised and protected under the Indian legal system. India, it may be recalled is a signatory to the Universal Declaration of Human Rights and Convention for the Protection of Human Rights and Fundamental Freedoms etc. The Constitution of India, which came into effect on January 26, 1950 has enshrined in it particularly in Part III and Part IV the ideals and principles behind the Declaration. In this context, it is appropriate to reproduce Art.20, 21 and 22 of the Constitution of India to lay stress on the principles mentioned therein.

“20. Protection in respect of conviction for offences -

(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

21. Protection of life and personal liberty -

No person shall be deprived of his life or personal liberty except according to procedure established by law.

22. Protection against arrest and detention in certain cases -

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.....”

- 4.2. It may be mentioned here that the Constitution in Art.19 provides for basic freedoms viz., freedom of speech and expression, to assemble peaceably and without arms, to form associations or unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India and to practise any profession, or to carry on any occupation. These freedoms like other rights in Part III Fundamental Rights, are justiciable. Art.32 provides for the enforcement of these rights by the Supreme Court and the High Courts (Art.226) and these Courts have the power to "issue directions or orders or writs including writs in the nature of habeas-corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate for the enforcement of any of the right....."<sup>1</sup>
- 4.3. Over the years, the Supreme Court and the High Courts have expanded through various orders, judgements and interpretations, the scope of the rights and freedoms given under the different provisions of the Constitution, to make them more real and available to all citizens of India. The Courts have in fact infused fresh life into the letters of the Law and the Constitution. Today in India, death sentences are awarded only in the rarest of rare cases; the accused has the right to have his counsel by his side during interrogation (cf. Miranda Case of US) and right to have counsel for his defence in every Court<sup>2</sup> and compensation from State for injuries sustained.
5. Even before the Constitution of India was enacted (January 26, 1950) the Criminal Law had in it, most of the safe-guards provided in the Constution. These provisions are summarised below:-

#### 5.1. Provisions in the Code of Criminal Procedure:

Under Section 41 of the Code, Police officers may arrest certain categories of offenders without warrant. Section 49 specifically enjoins that such arrested persons shall not be subjected to more restraint than is necessary to prevent his escape.<sup>3</sup> Section 50 makes it obligatory on the part of the Police officer, arresting a person to inform

<sup>1</sup> The Constitution of India, Part III Fundamental Rights.

<sup>2</sup> Recently the Supreme Court remanded a case of Dacoity to the High Court since the accused did not have Counsel for effective defence at the stage of appeal before the High Court.

<sup>3</sup> A homologous provision is in S.29 of the Police Act of 1861.

him of the grounds of arrest and right to bail.<sup>4</sup> Section 56, directs that arrested persons may be taken before a Magistrate or Officer in charge of a Police Station and Section 57 specifically directs that an arrested person should not be detained for more than 24 hours, exclusive of time taken for journey. At this stage the arrested person can make a complaint regarding ill-treatment or assault or torture on the part of the Police personnel in whose custody he was, to the Court. After completing investigation, on the Police Report, a charge is laid before the Court. The Code in Chapter VI (S.62) provides for serving of summons from the Court, personally on an accused before trial commences. The Code provides for supply to the accused copies of police report and other documents free of cost (S.207). There are separate procedures for trial of Summons and Warrant cases. (Warrant case relate to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years and Summons Case is one in which punishments are for lesser periods). The Code defines the Charge, the contents of the charge and procedure for trial. The trial is always and invariably in open courts. Accused has the right to Counsel. Prosecution has to lead evidence, which can be re-butted by the defence. There is provision for cross-examination of prosecution witnesses. The accused is given opportunity to reply to the evidence marshalled against him, on the conclusion of prosecution evidence, by the Court (S.313). The accused can thereafter tender evidence on his behalf. After conclusion of defence evidence, the arguments for both sides are heard by the Magistrate/Judge, who enters a finding as

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<sup>4</sup> The Supreme Court has in a land mark judgement (D.K. Basu Vs. State of West Bengal, 1996 SC 581) has prescribed a procedure to be followed by the police, when arrests are made and have the same given wide publicity and exhibited at the Police Stations - cataloguing rights of the arrestee. The Court has discouraged arrest as a routine step in investigation and observed: "the existence of the power of arrest is one thing and the justification for the exercise of it is quite another. The officer must be able to justify the arrest. As arrest and detention could cause incalculable harm to the reputation and self-esteem of the person, no arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for an officer in the citizen's interest and in his own interest that no arrest should be made without reasonable satisfaction as to the genuineness and bonafides of the complaint and reasonable belief as to the person's complicity and the need to effect the arrest. A person is not liable to be arrested merely on the suspicion of complicity in an offence. Except in heinous offences, an arrest must be avoided. If a police officer issuing a notice to a person to attend the station house and not to leave the premises without permission would do."

to the guilt of the accused. The accused, if found guilty, is given an opportunity to plead for a lighter sentence or mitigating circumstances. On the sentence, there is provision for appeal, and appeal is treated as a continuation of trial, which ensures fair opportunity for the defence of the accused.

5.2. It can be seen thus that the law provides to the accused adequately effective opportunities for his defence under the provisions of the Criminal Procedure Code.

5.3. It may be recalled here that the Reports of the Law Commission of India had proposed amendments to the Code keeping in view the following basic considerations viz.,

“(1) an accused person should get a fair trial in accordance with the accepted principles of natural justice;

(2) every effort should be made to avoid delay in investigation and trial which is harmful not only to the individuals involved but also to the society and

(3) the procedure should not be complicated and should be the utmost extent possible, ensure fair deal to the poorer sections of the Community.”<sup>5</sup>

#### 5.4. Provisions in the Indian Evidence Act:

Though enacted in 1872, the Evidence Act contains safe- guards against violation of basic rights of the accused which are no doubt modern and progressive even according to present day standards of fairness. The most important provisions are summarised below:

Section 24 of the Indian Evidence Act makes inadmissible, confession of an accused caused by inducement, threat or promise. Section 25 states that confession to Police officer by an accused is not admissible as evidence against him. Section 26 further lays down that confession by accused while in custody of police is not admissible. Under Section 27 all information except that which leads to the discovery of any fact will be inadmissible in evidence.

<sup>5</sup> Introduction. The Code of Criminal Procedure Code 1973, Universal Law Publishing House, Delhi (1999), p.2.

Sections 24 to 27 of the Evidence Act, thus make all admissions and confessions of an accused to a police officer or while in custody inadmissible as evidence. These sections thus provide very effective checks against torture and third degree methods for extracting information/confession from the accused.

- 5.5. Substantially similar safe-guards are available in Chapter XII of the Code of Criminal Procedure dealing with police investigation. A police officer can in writing require the attendance of persons acquainted with the facts and circumstances of the case being investigated by him and such a direction has the sanction of law (S.160). Such persons are required to answer truly all questions, other than questions, the answers to which would have a tendency to expose him to a criminal charge or a penalty or forfeiture" (S.161). Statements given to the police need not be signed (S.162). Police Officers are barred from offering, or causing to offer inducement, threat or promise as mentioned in section 24 of the Indian Evidence Act" (S.163).
6. Thus it can be seen that prima-facie, the law dealing with relevance and admissibility of evidence, and the law dealing with procedure, impose, severe restraints on the police and safe-guard the rights of the accused. But it has to be pointed out that ground realities are entirely different and disclose at every stage precedents and practices to short circuit the provisions of law as discussed above. There is scope for denial of fairness to accused at pre-registration stage of crimes, at the stage of registration and at the stage of investigation and trial. These may now be very briefly discussed.
- 6.1. The Code of Criminal Procedure in S.154 lays down that reports of commission of all cognisable offences to the police, whether oral or written, must be registered. In practice occurrence of all cognisable offences are not reported by the public to the police due to a number of reasons of which apathy, ignorance, fear of the police, fear of likely expenses, inadequacy of relief etc. are prominent. The police on their part do not register all cases reported either. This is known in police parlance as 'burking' or selective registration. There is scope for malpractice at the stage of registration - cognisable sections of law may be incorporated to make a non-cognisable offence cognisable

and the ingredients of a serious crime, split under different complementary sections of law, eg: Robbery into assault, restraint and theft - to make the offence substantially the same, but under higher sections of law and thus eliminate scrutiny by higher levels. Similarly value of property involved may be reduced, as superior. Police Officers are enjoined to investigate and/or supervise only serious offences and cases in which the property involved is substantial. Cases also may not be registered immediately, but preceded by informal investigation and registered only when there is good chance of detection. Out of corrupt, dishonest or partisan motives, at the stage of registration, witnesses who may support the case of the accused or turn hostile to the prosecution may be introduced as key witnesses and the number and identity of accused tampered with. There is also discriminatory police response in respect of complaints from weaker sections. Those who cannot bring to bear on the police, some influence, have to hang around the police station for long or pay bribes, or provide facilities like vehicles etc. to make them act. There is strong and widespread belief that some expenses are inevitable at the Police Station level, from every one - complainant, accused and witnesses. If considerations other than what are permitted by law, can influence initial police response, it can also shape police response. Political influence play a big role here in view of the exclusive power of the party in office to transfer/harass police officers who resist interference. Where political parties have stakes or vested interests, such interests influence police response even at the very initial, or pre-registration stages. Distortions at this stage affect fair investigation and fair trial.

- 6.2. As has been indicated above the very basic document, the First Information Report (FIR) can be tutored. What follows would also be, as a result, suffer from dishonest practices - preparation of scene mahazar (description) collection and preservation of forensic evidence, search and recovery of important pieces of evidence, questioning of witnesses etc. There is also delay, some times owing to pressure of work and some times, deliberate. To assuage the sentiments of the public and the complainant or to meet the pressure from the media, the suspect is taken into custody and detained on the pretext of questioning, illegally for several days, and not shown as arrested or

send up for remand. Clever police officers would some times show such persons to have hired rooms in their own names in hotels, and stayed there while they were actually in police custody. Arrest while not an essential first step, is in practice resorted to as basic police response-package and the suspect put in police lock-up which lack privacy and facilities for basic needs. The suspect is often kept in his under garments. It is forgotten that the moment a suspect is arrested, he becomes an accused and the presumption of innocence receives a severe jolt, - he is from that moment not regarded as innocent, but guilty, a sad negation of one of the basic assumptions of the Accusatorial System of crime management. It is reported that such arrestees are assaulted, abused and treated with contempt and sarcasm in violation of basic considerations for human dignity. Some times when a suspect cannot be located, the members of his family, including females are compelled to be present at the Police Station, and are threatened with physical abuse to force the accused to surrender. Instances have come to notice where to break-down the resistance of a suspect or make him "co-operate with the investigation" - an euphemism for abject surrender to the pressures of the investigating agency - female members of his family are brought to the police station and threatened that they would be stripped, molested, paraded in the nude or raped. Physical assault or torture, known as 'third degree' methods of investigation are reported to be habitually resorted to, though confessions and admissions are inadmissible in evidence. The police take advantage of the saving proviso of S.27 of the Evidence Act. Custodial deaths, and suicides are not uncommon. There are reports, of fake encounters and elimination of violent criminals. The State condones and selectively practices, terrorism to curb violence and to maintain order.

It is widely believed that at the stage of investigation there is padding of evidence. The police supply the missing links through manufactured evidence, and witnesses. As a result, the Police Report that is sent up against the accused would not be true, but packed with false evidence, with the sole object of getting a conviction. Witnesses are tutored and coached to give evidence in Courts. Where the accused is rich or influential, it can of course, operate to his advantage. In either way police investigation is not free from corrupt, illegal and

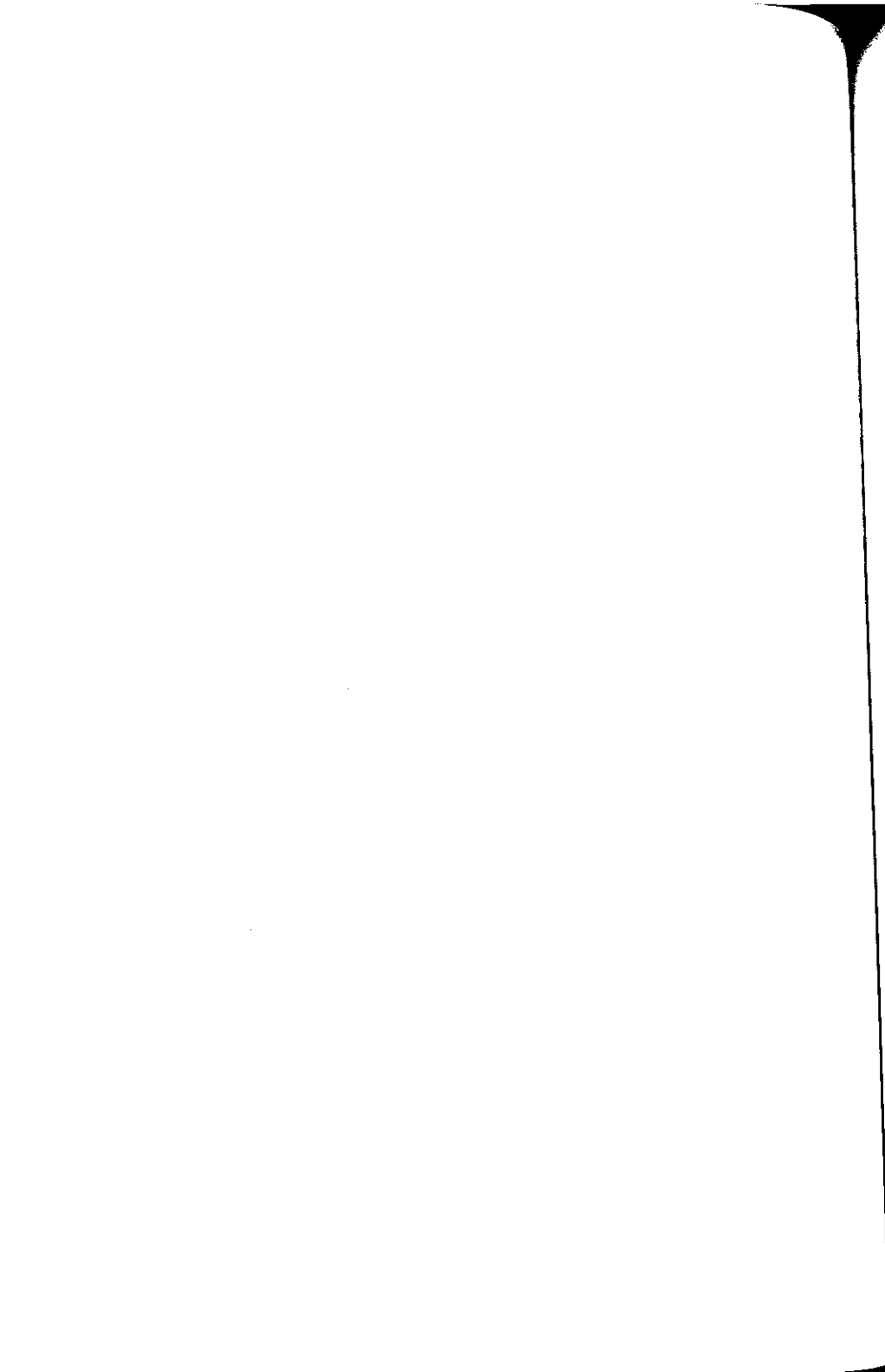
unfair practices. Needless to say such malpractices adversely affect the concepts of fair trial. Trials and police cases require large amounts of money, which the poor do not have. They are thus handicapped in their defence.

- 6.3. There is enormous delay in disposal of cases in Court. Many accused undergo long periods of incarceration as under trials since they are too poor to satisfy bail conditions. Figures published by the National Crime Records Bureau show that 70 percent of India's prison population are under trials, and of these a little over 4 percent are women. Awaiting trial, they go through hard times; being poor and in prison the prospects of engaging a good counsel for their defence are quite dim. Passage of time makes testimony of witnesses unreliable and Police Officers in charge also leave on transfer. Consequently the rate of acquittals is high, seriously affecting cost-effectiveness and dispensation of justice to the victims. The practice of appointing nominees of political parties as Prosecutors has not contributed to functional efficiency. But the practice continues as a 'spoils' package.
7. Fair trial is not something in which the accused alone has a stake. The victim and the entire Criminal Justice System have vital stakes in it. Failure of the system would spawn alternate sources of securing justice - private reprisals, hired assassins, extortionists, mafia, terrorists, drug and gun runners etc. all thrive where the system fails to deliver. It is therefore in the interest of all who care for order in society to ensure that the system delivers. Justice should not only be done, but manifestly, appear to have been done.
8. The Indian situation is thus a classic case of adequately effective provisions in the statutes, but wanton disregard for all such provisions in practice. The divide between precepts and practice is too wide and invite frequent strictures from the Judiciary and also from the media and the public. The bane appears to be the unwillingness of the political executive to make the police machinery accountable to the law and to make it function to further the cause of rule of law. Their choice appears to be proximate benefits and not the larger interests of the country. In recent times the Apex Court stepped in to provide some functional independence to the premier national investigating agency - the Central Bureau of Investigation (CBI). Such



independence has to be extended to the police forces in the States also to enable them to resist political pressures and be accountable to the law. The Report of the National Police Commission (1977) which recommended sweeping changes in the system of police functioning is gathering dust for the last about two decades, exposing the hollowness of the promise of police reforms by the different political parties coming to power. However, there is a glimmer of hope in that the Higher Judiciary has been steadily chipping away at the aberrations, with desired effect. However what is of paramount importance is to reform and strengthen the lower judiciary. A recent plea for reforming the judiciary ends thus: "From the dizzy heights of the higher judiciary, when we climb down to the lower judiciary the picture that presents itself is dismal and disappointing. The Courts have no convenient buildings or physical facilities. The pay of the functionaries was, till recently, too poor. The stifling, undignified working environment has made a cultural osmosis, that has no doubt a deleterious effect on the quality of justice dispensed with. It is an open secret that results of litigation can be bargained and settled. It is not the High Courts and the Supreme Court to which the poor man runs for help, at least at the first instance. Improving the quality of justice dispensed with by these basic institutions deserves the highest priority. It should form the bed-rock of any attempt at judicial reforms."

It may be added in conclusion that reforming the judiciary at the base level is essential to ensure the basics of fair trial. The Indian paradox, of a sound theoretical frame work, and unsound and unwholesome practices can be resolved only through reforming the police and subordinate judiciary.



# ADMINISTRATIVE DETENTION IN MALAYSIA - A BRIEF OVERVIEW

*Charles Hector*

## Introduction

Administrative Detention, as opposed to judicial detention, has been defined as detention without judicial intervention. This form of detention, amongst others, may be due to detention by the police for purposes of investigation and also preventive detention (which is commonly known as Detention Without Trial (DWT)).

In this report, we will consider two of the forms of administrative detention that is found in Malaysia, mainly: -

- a) Administrative Detention by the police for purposes of investigations prior to being charged; and
- b) Detentions Without Trial (DWT) or Preventive Detentions.

When we talk about detention, we will not limit ourselves to old narrow interpretation which would only consider detentions of persons in prisons, lockups and/or detention centers. We will be looking at "detention" from a broader interpretation which would include the imposition of any forms of restrictions and conditions without judicial intervention.

## Redefining "Detention"

For a long time the word "Detention" has had a narrow meaning, that is to only mean detention in prisons, police lockups and/or other detention centers.

Detention has to be redefined and given a broader interpretation that will includes the imposition of restrictions and/or conditions on an individual's freedom of movement, association, speech and expression. Restricting a persons freedom of movement to the confines

of a lockup or detention centre, and the restricting a persons movement to a specified area is no different except in the former there are physical walls and "barbed wire".

Specifically, when we talk about detention without trial, we should be talking about the meting out any form of punishment, be it detentions in detention centers or the impositions of restrictions and/or conditions on a person's movement and other freedoms.

An individual is "punished" without the benefit of a fair and open trial. Many a time, these "punishments"(hereinafter referred to as Detention Without Trial or DWT) are imposed and/or withdrawn on the discretion of one person, being the Minister (that is the Home Minister). Amendments to laws that allow for DWT (or preventive detentions) have been amended so as to oust the jurisdiction of the courts to review this exercise of the Minister's discretion. Only procedural aspects of the imposition of these detentions can be reviewed by the courts.

## **Administrative Detention in Malaysia**

In Malaysia, generally under the Criminal Procedure Code administrative detention is only allowed for a period **not exceeding 24 hours** after a person has been arrested.

In Part II of the Federal Constitution which carries the heading "Fundamental Liberties", in particular Article 5(4), it is enshrined that "where a person is arrested and not released he shall without unreasonable delay, and in any case **within 24 hours** (excluding the time of any necessary journey) be produced before a Magistrate and shall not be further detained in custody without the magistrate's authority.

However the provisos of Article 5(4), creates two exceptions, that is:-

(1) to the arrests or detention under the existing law relating to restricted residence<sup>1</sup>,...

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<sup>1</sup> Referring to the **Restricted Residence Act 1933**, which gives very broad powers to Minister to restrict residence and/or inhibit movement if "...there are reasonable grounds for believing that any person should be required to..."(see s.2(i) of the Act). This Act unlike the other laws that allow preventive detentions does not specify any

(2) to arrests of "...a person, other than a citizen, who is arrested or detained under the law relating to immigration..."<sup>2</sup>

Article 5(5) creates a further exception being **enemy aliens**.

Part IX, the heading of which is: ... in particular Art 149 and 150 provides further exceptions and allows for the enactment of **laws that allow for preventive detentions**.

Pursuant to Article 149, two acts have been enacted that allow for preventive detentions being:-

(1) **Internal Security Act 1960**

(2) **Dangerous Drugs (Special Preventive Measures) Act 1985**

Pursuant to Article 150, the **Emergency (Public Order and Prevention of Crime) Ordinance 1969**, allows for preventive "administrative" detention, have been enacted.

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grounds or reasons why a person should be so restricted an/or inhibited. The Internal Security Act 1960, for example, allows for preventive detentions if, and only if, the Minister is satisfied that it is "...necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof..."

\* The case of **Loh Kooi Choon v Government of Malaysia (1977) 2 MLJ 187**. Here the appellant had been arrested under a warrant issued under the provisions of the Restricted Residence Act 1933, and thereafter he was not produced before the Magistrate within 24 hours as required by Article 5(4) of the Federal Constitution. Before the appeal was heard by the Federal Court, the Federal Constitution was amended whereby Article 5(4) was amended by the Constitution (Amendment) Act 1976, and declared not to "apply to the arrest and detention of any person under the existing law relating to restricted residence". This amendment was backdated to 31.8.57, the Independence Day of Malaysia. (*Detention Without Trial: Has The Time For Abolition Come? - by Dato' Dr Rais Yatim*)

<sup>2</sup> In this case, the proviso itself clearly states that the words "*within twenty four hours*" is replaced with the words "*within fourteen days*". The application of this can be seen in the **Immigration Act 1959/63** [see s.51(5)(b)].

## Part I

# Criminal Procedure in Malaysia

## A. Arrest

1. Any police officer may without a warrant<sup>3</sup> arrest any person who has been concerned with a seizable offence when there is a reasonable complaint or based on credible information or on reasonable suspicion that the said person is concerned with the said offence.
2. A seizable offence<sup>4</sup> is where a police officer may ordinarily arrest without a warrant and the said offences are set out in the third column of the First Schedule of the Criminal Procedure Code. Generally it means offences that carries a sentence of imprisonment for three years or more.
3. Any private person may also arrest any person who in his view commits a non-bailable offence and seizable offence. After that without unnecessary delay, he shall hand over the said person to a police officer, who shall the rearrest him.<sup>5</sup>
4. Persons arrested are taken to the police station and are held there in police lock-ups.<sup>6</sup> During this period, the police are required to begin their investigations.
5. After a person is arrested, he/she can be kept in police custody for no longer than 24 hours. This is a right that is enshrined in Article 5(4) of the Federal Constitution.

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<sup>3</sup> S. 23(1) Criminal Procedure Code

<sup>4</sup> S.2(1) Criminal Procedure Code, see also First Schedule Criminal Procedure Code.

<sup>5</sup> S.27 Criminal Procedure Code

<sup>6</sup> The stay in the police lock-up is governed by the Lock Up Rules 1953, which amongst others state that suspect has to be returned to the lockup before 6.30pm and shall remain in the said Lock Up until 6.30am. What this means that during this time, the suspect can be subjected to interrogations and/or no cautioned statement can be recorded. In the recent case of the 128 persons that were recently arrested for illegal assembly, the court was informed that cautioned statements were recorded after the accused were arrested, some at about 1.00am. It is my opinion that this is a breach of the Lock Up Rules, but the court was of the view that there was no breach since the persons arrested had not yet been sent to the police lock-up and therefore the Lock Up Rules do not apply.

6. After arresting a person, the police can do one of the following:-
  - a) Release the person
  - b) Release the person on police bail
  - c) Bring him to Court to be charged
  - d) Bring the suspect before the Magistrate for an application for extension of time under s.117 of the Criminal Procedure Code.
7. If option (d) is taken, then the Magistrate may order for the further detention of the suspect for a term .not exceeding 15 days from the date of arrest. The Magistrate may not give an order for the detention for a further 14 days in one go, but may order detentions for a shorter period. When a shorter period of remand is ordered, e.g. 5 days, the police may still go back before the Magistrate with a further application for extension of remand. A person cannot be detained for a period exceeding 15 days from the date of arrest.
8. During the period of remand, the police may do one of the following:-
  - a) Release the suspect;
  - b) Release the suspect on Police Bail
  - c) Bring the suspect to court to be charged.

## **B. The Police Bail**

9. The police is empowered to release a person on bail (normally referred to as Police Bail). A person may be released on a personal bond, but normally there is a requirement of one surety. Usually a bail sum is stated but there is no requirement to deposit any money with the police.
10. Release on Police Bail, comes with the condition of appearing on a fixed date at the Police Station, and sometimes in Court. When the suspects appear at the police station on the fixed date, the Police Bail may be renewed repeatedly. Note that there is no judicial intervention at this stage.
11. The Police Bail procedure, can be said to be a form of "administrative detention", because there is no requirement for the suspect to be brought before a Magistrate. The right to renew repeatedly the Police

Bail seem to be with the police and this may be abused because the suspects normally on presenting himself, together with his surety, on the said date is only asked to come back on another date and another Police Bail is executed. Judicial intervention in this area need to be campaigned for.

## C. Remand Proceedings Under Section 117 Criminal Procedure Code

12. The Criminal Procedure Code provides that when a person is arrested and detained in police custody and it appears that further detention is needed, then he shall be brought before a Magistrate within 24 hours after he was arrested.
13. Thereafter, if the police is able to satisfy the Magistrate that further detention is needed for the completion of the investigation and that "there are grounds for believing that the accusation or information that formed the basis for the arrest and detention is well founded"<sup>7</sup>, the Magistrate can authorize the said suspect be detained further for a "period that shall not exceed a term of 15 days from the time of arrest."<sup>8</sup>
14. During the remand proceedings, there is a strict requirement that the police must transmit copy of the entries of the investigation diary<sup>9</sup>. The Criminal Procedure Code stipulates that the investigation diary must contain day by day entries containing amongst others, the time at which he began and closed the investigations, the places visited by him; and a statement of the circumstances ascertained through his investigations.<sup>10</sup> The failure of the police to transmit the investigation diary in the requisite form is fatal to the application for remand, and the accused shall be released.<sup>11</sup>
15. In the case of **Re The Detention of Sivarasa & 9 Ors**, the High Court also went further to state that there was also a need for the First Information Report and also a Statement of the circumstances

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<sup>7</sup> S. 117(1) Criminal Procedure Code

<sup>8</sup> S. 117(2) Criminal Procedure Code

<sup>9</sup> S. 117 Criminal Procedure Code

<sup>10</sup> S. 119 Criminal Procedure Code

<sup>11</sup> In **Re The Detention of R.Sivarasa & 9 Ors** (20/11/96)



ascertained through the officer's investigation.<sup>12</sup>

16. After this period of further detention, the suspect would either be:-
  - (a) Released unconditionally,
  - (b) Released on police bail with conditions attached requiring the said person to present himself at the police station/court at a required time and day, or
  - (c) Brought to court to be charged.
17. What happens usually if the suspect is not brought to court to be charged, is that he is released on police bail just before the expiry of the remand period. Now note again that there is no need that the said suspect be brought to court and be released on police bail. Therefore, the act is merely administrative, without judicial supervision.

#### **D. Police Investigation**

18. During detention by the police, the suspect is subjected to interrogations and usually a cautioned statement is recorded by a recording officer, who shall be a police officer of or above the rank of an inspector, who is not involved in the arrest and the investigation.<sup>13</sup>
19. The making of this caution statement must have not been caused by any inducement, threat or promise, and there is a requirement that if the statement is made by a person after his arrest that a caution be administered to him in the following words or words to the like effect:-

“It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence”<sup>14</sup>
20. There is thus the right of not saying anything or the right of silence.
21. After the caution statement is recorded, the statement should be read back to the suspect, and thereafter the suspect will usually be required to place his signature/fingerprint on the said statement.

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<sup>12</sup> S. 119(1)(d) Criminal Procedure Code

<sup>13</sup> S. 113(1) Criminal Procedure Code

<sup>14</sup> S.113(1)(a) Criminal Procedure Code.

22. It should also be noted that there is also the possibility that more than one caution statement be recorded from a detainee during the period of police investigations. There is also other kinds of statements that the police may obtain from the detainee, mainly what is commonly known as "intelligence statements" but what is provision in law that justifies the taking of such statements is not at all clear.
23. The police cannot beat or torture a suspect whilst in police detention<sup>15</sup> but alas this happens. The case of Datuk Seri Anwar Ibrahim is an example of such a case. Usually the beating occurs whilst the suspect is blindfolded preventing the suspect from later identifying his assailant. A suspect who was beaten has the right to make a police report and/or make a complaint to the Magistrate - but when the assailant cannot be identified, the complainant runs the risk of being charged with making a false police report/complaint.
24. Rule 46 of the Lock Up Rules do provide that a police officer cannot hit or use physical force against a detainee unless it is for the purposes of self defence and/or in defence of any other person.
25. During the period of police investigations, photographs, fingerprints and/or identification parade are other things that may happen.

## **E. Charged In Court**

26. The suspect is brought to court and the charge is read and explained to him. Thereafter, he is asked to enter his plea. If he claims trial, a mention or trial date is fixed. The accused person may then be released on Court Bail. Usually there is a requirement for a surety or two, and the bail amount need to be deposited in Court.
27. If the accused pleads guilty, then the facts of the case is read and

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<sup>15</sup> "Dr Munawar Ahmad Anees, 51, speech writer of Anwar, convicted and sentenced to six months' imprisonment for being sodomised by Anwar had given an affidavit in the presence Malaysia's Commissioner of Oaths, on Nov 7, 1998. He revealed how he was arrested, tortured by the special branch. "They degraded me and broke down my will and resistance, they threatened me and my family; they frightened me; they brainwashed me to the extent that I ended up in court on September 19, 1998 a shivering shell of a man willing to do anything to stop the destruction of my being." he said."- Bangkok Post, 3 March 1999

explained to him. If he agrees with this facts, the exhibits of the case is adduced and the accused will be required to confirm it. After this, the court will convict the said accused. Thereafter mitigation by the accused(or his lawyer) and a reply by the prosecution will be done before the court sentences the accused.

## **F. Rights Upon Arrest and Detention by the Police**

### **a) Right To Be Informed of The Grounds of His Arrest**

28. Article 5(3)of the Federal Constitution provides that a person who is arrested has the right to be informed of the grounds of his arrest and shall be allowed a right to a lawyer.

Art.5(3)

“Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a lawyer of his choice.”

### **b) Right to Consult and be Defended by a lawyer**

29. When a person is arrested and detained by the police, the detainee does not have a right to contact his family or his lawyer. Eventhough Article 5(3) of the Federal Constitution provides that “where a person is arrested he...shall be allowed to consult and be defended by a legal practioner of his choice, this right is denied because the detainee does not have the right and/or opportunity to contact anyone, let alone his lawyer.
30. In the case of **Ooi Ah Phua v Officer-in-Charge of Criminal Investigation Kedah/Perlis (1975) 2 MLJ 198** and in **Hashim bin Saud v Yahya bin Hashim & Anor (1977) 2 MLJ 116**, the then Federal Court said that although the right to counsel arises immediately on arrest, such rights should not impede police investigation and the administration of justice.

31. With regards to the section 117 CPC, the case law is clear that the detainee has the right to be represented by a legal practitioner of his choice during the remand proceedings.<sup>16</sup> However, many a person detained without the knowledge of family and friends find this right denied.
32. Even when the family and friend are aware of the arrest and detention, and do retain a lawyer to represent the detainee, problems have cropped up recently in that the courts have attempted to deny the access of this lawyer on the ground that the lawyer has not been retained by the detainee himself. Suddenly, the wordings of Article 5(3) are referred to where it says “**a legal practitioner of his choice,**” and therefore a lawyer appointed by the family or friends can sometime have a hard time getting access to the detainee. Some Magistrates of late, when aware that a lawyer has put himself on record as acting for the detainee, has taken the step to ask the detainee whether he has a lawyer - of course, in most cases the detainee who is unaware of the fact that his family and/or friends have retained a lawyer for him, will answer in the negative. One judge even went so far as saying that if we allow family members and/or friends to retain lawyers for the detainee, we might end up in a situation where there are many lawyers, appointed by different family members/friends turning up. In Malaysia, there is now a beginning of a dialogue between the judiciary, the Bar and the Attorney General’s Chambers to resolve some of these difficulties.
33. When a lawyer is retained, and puts himself on record with the police and the courts, the lawyer is many a times not given the information as to before which Magistrate that the detainee will be produced and when exactly will he be produced. That means that the lawyers will sometime just hang around, sometimes the whole day, monitoring the movement of the Magistrate (applicable when there is only one Magistrate) to find out when the said detainee is brought before the magistrate for an extension of remand. When there are more Magistrate’s, then a whole elaborate wait and follow exercise involving many family members/friends will need to be organized. Someone may be just hanging around the gates of the police station to follow

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<sup>16</sup> *Saul Hamid v PP* (1987) 2 CLJ 257; *Re the detention of R Sivarasa & 9 Ors* (1996)

the police car of the said detainee to find out before which Magistrate, the said detainee is brought before.

34. After all this hassle, and when finally the said detainee is brought to the Magistrate, the police generally do not allow the lawyer access to his client to get instructions. The lawyer will then have to apply to the Magistrate for time to get instructions from his client.
35. Now if the detainee is not represented, many a time this whole remand application becomes administrative with the police getting the number of days that they apply. The saving grace is that there are some Magistrates who actually take the time to scrutinize the Investigation Diary and consider judiciously the validity of the police application for more days.
36. Now, if there is no Magistrate or the Magistrate is on leave, and there is no replacement Magistrate to be found the detainee can be brought before an ex-Officio Magistrate. This would include, among others, Court Registrars, State Secretaries, District Officers and Assistant District Officers in charge of Sub Districts. The problem when it comes to these Ex-Officio Magistrates, is that the police application is generally allowed administratively, without much judicial consideration. The contents of the Investigation Diary and the reasons for the application for further remand is normally glanced at, if at all, and the number of days given is usually given according the practice.<sup>17</sup> Many of these ex-Officio Magistrates do not have legal background, and will thus not be able to apply the law when they make their decisions. Lawyers then can to be evaded when the applications come before the ex-Officio Magistrates, and even if lawyers are present, their lengthy submissions may only fall on ears that "do not get the points being made."
37. This raises the question, whether the period of remand, that is after the first 24 hours is really judicial detention. Although a Magistrate is involved, but considering the manner in which this proceedings are carried out one should possibly still consider this "administrative detention."

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<sup>17</sup> In my reason experience, a Kajang Assistant District Officer did inform me that as a matter of practice, 3 days are give when the police make an application under s.117 Criminal Procedure Code.

### c) The Risk of Losing One 's Job

38. The detainee also do not have the right to contact his employer, and this risk of him losing his job for an employer have the right terminate his employment if he absents himself for more than 48 hours<sup>18</sup> without prior permission and/or notice.
39. Therefore if a person is arrested and detained, many a time he just disappears from the rest of the world for the full period of his detention, which could be up to 15 days from the date of his arrest. This happens many a time. Even if the family and friends try contacting the police station to enquire whether the said person has been detained, the police may withhold this information.
40. The police however do have the discretion to allow family visits during the period of detention. The police have also the discretion to allow the family and friends of detainees, the opportunity to pass to the detainee a change of clothings, medicines, etc.

## Part II

### A. Detention without Trial (DWT)

1. There 4 laws in Malaysia that allow for DWT are:-
  - a) Internal Security Act 1960 [ISA }
  - b) Emergency (Public Order and Prevention Crime) Ordinance 1969 [E(POPC)O]
  - c) Dangerous Drugs (Special Preventive Measures) Act 1985 [DD(SPM)A]
  - d) Restricted Residence Act 1933

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<sup>18</sup> S.15 Employment Act 1955

2. With regard to the first three, as long as police the minister is satisfied that reasons for the detention or the imposition of a restriction order, as provided by the respective Acts exist, he can make one of the two(or three) orders available, that is:-
  - 1) Detention Orders
  - 2) Restriction Orders
  - 3) Suspended Detention Orders
3. The length of these orders can be up to two years, but note that all these Acts also empower the minister the power to renew these 2 year-orders for an unlimited period.
4. The police has the power to arrest and detain a person under these Acts for a period which shall not exceed 60 days, provided that there is at the very least exist "reason to believe" that there are grounds which would justify his detention (i.e. that the Minister would be satisfied to make a Detention Order or Restriction Order.
5. Upon arrest, the person detained has no right to an open trial. He has however the right that his detention order be reviewed<sup>19</sup> by an Advisory Board at least once every six months. The findings and the recommendations of this Board will be submitted to the Minister. The Minister will have the final say. There seem to be no such review by any Advisory Board when it comes to Restriction Orders.
6. There is however the right to seek a writ of habeas corpus pursuant to arrest and detention. In 1989, the laws that allow for DWT was amended, and judicial review of Ministerial Acts have been removed, save for non compliance with any procedural requirement in these Acts governing such act or decision.

## **B. As Long as the Minister is Satisfied...**

7. Any person may fall prey to DWT as long as the Minister is satisfied. The ISA, E(POPC)O and the DD(SPM)A provides that the Minister

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<sup>19</sup> There seems to be no review when it comes to a Restriction Order.

should be satisfied for specific different reasons why a person should be subjected to DWT, but since the courts have no power to review the basis for the Minister's satisfaction which brought about the imposition of a detention or restriction orders, there is always possibility of abuse of this power.

8. History has shown that these unfettered powers have been utilized in the past to suppress dissidents and opponents of the ruling elite, party and/or coalition. In 1987, some 106 opposition party members, NGO activists, trade unionist, church workers, academicians were arrested under the Operation Lalang under the ISA.
9. With regard to the E(POPC)O, in 1995 two worker leaders were arrested and subjected to restriction orders under this act on baseless allegations that they were members of a gang.
10. Therefore as long as the Minister is satisfied, a person may fall victim to the laws that provide for DWT. Was the decision making process a bona fide act or not? Was there any justification at all to subject a person to DWT? These questions have no answer, because as of 1988, amendments were introduced to all the abovementioned Acts to the shut the door on judicial review of the exercise of this Ministerial discretion.<sup>20</sup>
11. What the Minister needs to be satisfied is illustrated below. Note that there is no mention of any requirement of evidence to be presented to the Minister, there is also no listing of matters that the Minister must consider before becoming "satisfied." The discretion of the Minister could therefore be exercised arbitrarily.

"If the Minister is satisfied that the detention of any person is necessary with a view to **preventing him from acting in any manner**

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<sup>20</sup> s.8B Internal Security Act 1960, [s.8B, amongst others, was inserted by the Internal Security (Amendment) Act 1989(Act A739) which came into effect on 24.8.89]

s.7C Emergency(Public Order & Prevention of Crime) Ordinance 1969 [inserted by the amended by Emergency (Public Order and Prevention of Crime) (Amendment) Act 1989(Act A740) which came into effect on 24.8.89]

s.11C Dangerous Drugs (Special Preventive Measures) Act 1985, [s.11C, amongst others, was inserted by Act A738 around the same time as the two above.



prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years.”

*- s.8(1) Internal Security Act 1960*

If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a “detention order”) directing that that person be detained for a period not exceeding two years.

*- s.4(1) Emergency (Public Order And Prevention of Crime)  
Ordinance 1969*

Whenever the Minister... is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a “detention order”) direct that such person be detained for a period not exceeding two years.

*- s.6(1) Dangerous Drugs (Special Preventive Measures) Act  
1985*

12. When it comes to the Restricted Residence Act 1933, the wordings that are used are very wide. All that seems to be required is that there “are reasonable grounds for believing that any person should be required to reside in any particular area...”. There is no mention about the reasons why such an order, take as for example the DD(SPM)A whereby it is stated that “such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs...” Hence, the power accorded to the Minister under this Act is ver wide.

“Whenever it shall appear to the Minister on such written information

and after such enquiry as he may deem necessary that **there are reasonable grounds for believing that any person should be required to reside in any particular area or be prohibited from entering into any particular area or areas** the Minister may issue an order..”

- s.2(1) *Restricted Residence Act 1933*

### C. Arrest and Detention by the Police

13. With regards to arrest and detention, with regard to laws that provide for DWT, the police (and in the case of the ISA and the E(PCPO)O), even any member of security forces) may arrest without warrant. The arrest may be done if the said arresting officer has reasons to believe that there are grounds which would justify an issuance of a detention order/restriction order. An example of the provision that provides for arrest is as follows:-

“**Any police officer may without a warrant arrest and detain pending inquiry any persons in respect of whom he has reason to believe (i) that there are grounds which would justify his detention under section 8, AND (ii) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia ... or to the maintenance of essential services...**

- s. 73(1) *Internal Security Act*

### D. Administrative Detention by the Police

14. Thereafter the police may detain the said person **for a period** not exceeding 60 days, but there are requirements of the authority of differing ranks of police officer for the differing periods of detention. Extracts of the Internal Security Act 1960<sup>21</sup> is set out below, as an example, to enable a better understanding of the powers of administrative detention by the Police.

“**Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention** having made

<sup>21</sup> The provisions for the 60 day detention period is similar in all the laws that provide for DWT.

in respect of him under section 8:-

Provided that-

(a) he shall not be detained for more that **24 hours except with authority** of a police officer of or above the rank of a Inspector;

(b) he shall not be detained for **more than forty-eight hours** except with the authority of a police officer of or above the rank of Assistant Superintendent; and

(c) he shall not be detained for **more that thirty days**<sup>22</sup> unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector General or to a police officer designated by the Inspector General in that behalf, who shall forthwith report the same to the Minister.”

- s.73(3) *Internal Security Act 1960*

## **E. During the Period of the 60-Day Detention**

15. During the 60 day period, the detainee do not have the right of access to his family, friends and even to his legal counsel. The police, even on inquiry by the family members, sometimes do not even confirm that the said person has been detained by the police. Where the said person is being detained is also a “mystery” to the family, friends and even legal counsel..
16. From the experiences of ex-detainees of DWT laws, it is said that during this period of detention, the detainee is subjected to interrogations and even torture, mentally and/or physical. Detainees have been subjected to solitary confinement, beatings with pieces of wood, stripping,<sup>23</sup> etc.. Below are extracts taken from sworn testimonies by four detainees who described their treatment in detention during their application for a writ of habeas corpus. These

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<sup>22</sup> With regard to the Dangerous Drugs (SPM)A, the word “thirty days” is replaced by the words “fourteen days.”

<sup>23</sup> The case of Anwar Ibrahim, the former Deputy Prime Minister of Malaysia should also be considered.

extracts<sup>24</sup> should serve to give the reader an idea of some of the things that happens during the 60-day detention period.

“During the first two weeks of my detention, I was inter-rogated very vigorously by Special Branch officers about my personal faith and my religious activities. I was not allowed sleep for days at a stretch and was warned that I would not get my food if I did not cooperate. One Inspector threatened to disturb my girlfriend...On one occasion, I was knocked down to the ground and I injured my back. Since then, I have been passing blood in my urine and have suffered pain in my lower back constantly...On one occasion, Inspector (name withheld) forced me to strip naked and enact the crucifixion of Jesus Christ. [He] also forced me to crawl on the floor in a naked state...”

“The cell was windowless, the only ventilation being some holes in the upper portion of a wall. It was lit by a single light which was kept on all night...For a full month...my entire bedding was a thin plywood sheet on a cement slab. I was beaten with a stick....about 1cm x 4 cm x 120 cm on my legs and the soles of my feet several times...and was also slapped on the face with the back of my hand....”

“A police officer put fear in me...by saying, “If I squeeze your balls, how long can you last?”...I was also subjected to the cold treatment during interrogations with very cold air directed through louvres onto my head causing me to shiver...[i] experienced hallucinations and woke up in cold sweat. For two or three nights, I hallucinated that a big cobra was crawling beside me ...It was under such harsh and oppressive circumstances that I was requested to make statements...”

“I was forced to stand on a leg with arms outstretched and head bent backwards for long periods until I collapsed onto the floor...Immediately I was kicked by the police officer to stand up again on one leg, and this was repeated many times...I was forced to walk blindfolded towards the wall resulting in knocking myself against the wall and this was repeated many times. The police officers stamped on my toes and fingers causing excruciating and prolonged pains. I

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<sup>24</sup> Malaysia: “Operation Lallang”: Detention Without Trial Under the Internal Security Act - Amnesty International (December 1988), Preventive Detention (Restrictions) Laws In Malaysia - an article that was published in ALIRAN on or about December 1994.

was subjected to the "cold treatment" which consisted standing in front of a very cold air conditioner either naked or half naked several times...and on one occasion the police officer had thrown cold water all over me...I was forced to strip naked. A police officer...rolled a bundle of newspapers, lit one end and threatened to burn my genitals [by] bringing the lighted end close to my genitals...A police officer stated that he would ...make sexual advances to my wife..."

17. The detainee is also many a time alleged to have committed outrageous acts but since there will be no trial, these will remain bare allegations. The detainee has no right to an open trial, let alone any trial at all. The police and/or the prosecution therefore do not need to produce any evidence, let alone prove the allegations beyond any standards of proof.
18. In the case of Dr Syed Husin Ali,<sup>25</sup> who was detained for about 6 years, he was asked to admit that he was associated with the Communist Party of Malaysia and to implicate Dr Mahathir Mohammad, the Prime Minister of Malaysia. The Home Minister<sup>26</sup> at that time was Tan Sri Ghazali Shafie.

"They wanted me to use the communist bogey on Mahathir and Musa[the then Deputy Prime Minister]...they told me that I would be released if I implicated Mahathir and Musa. They slapped me, denied me sleep, spat in my face, told lies about my wife and even placed a pistol in front of me. It was a terrible lie and being a Muslim, I would not be part of it."<sup>27</sup>

19. In a recent case, it was alleged that one former Youth leader of a political party was arrested and detained apparently to make him put

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<sup>25</sup> Mentioned by Dr Syed Husin in many of his discussions. He has documented his experiences in detention under the ISA in a recently published book entitled "Two Faces".

<sup>26</sup> Thereafter, I believe that the position of the Home Minister has been held by the Prime Minister, until this year Abdullah Ahmad Badawi, the new Deputy Prime Minister has taken over this portfolio.

<sup>27</sup> Jocelin Tan, "An Old Warrior", *Malaysian Business*, 1 June 1994, p.34. Dr Syed Husin Ali, now the President of Parti Rakyat Malaysia (PRM) was an ISA detainee for six years (1974-1980). After the 60 day detention period, he was also subject to reinterrogation after being sent to the Kamunting Detention Camp. Usually, after the first 60-days, detainees are no more subjected to interrogations by the police. (Also see *Detention Without Trial: The Malaysian Experience - by Dato Dr Rais Yatim*).

in a letter of resignation from his post.<sup>28</sup>

20. In some cases, one wonders why persons are detained under laws that provide for DWT. Is it because there is insufficient evidence to prove that the person is guilty beyond reasonable doubt. Or is merely to protect others who might be in high positions of power, who are linked to some serious offences? No definite answers can be given, for we will never know for sure because there is no trial in open court. Former victims of the laws that allow for DWT many a time do not talk about what happened to them whilst in detention - and the main reason for this is the fear that they might be re-arrested and made guests in the detention centres under the same kind of laws.
21. Documentation of persons detained under the laws that allow for DWT is also scarce because for many there is no publicity in the media or otherwise. Families many a time are 'conned' by the police into silence, by the empty promises of quick releases if the family do not make an issue of the detention of their loved ones. Lack of legal awareness and fear for their loved ones, many a time would result not only in silence of the family, but even requests by these families to others, be it NGOs, human rights activist and/or politicians, to not raise the issue at all.

## **F. After the 60-day Detention by the Police:- Detention/Restriction Orders**

22. After the 60 day Detention by the police, the Minister usually issues a Detention Order or a Restriction Order.

### **F(1) Restriction Order**

23. Besides the Detention Order, the Restriction Order is an alternative DWT order available to the Minister under the ISA, E(POPC)O and the DD(SPM)A. In my opinion, this is a more repressive order, because a breach of the conditions or restrictions makes a person liable to a criminal offence which on conviction is punishable with imprisonment

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<sup>28</sup> This information and the condition of many others who have been detained under the ISA can easily be obtained on the Internet.

up to two years. The RRA only allows for the imposition of a Restriction Order.

24. To appreciate, the kind of restrictions and conditions that can be imposed on a person subjected to a Restriction Order, the following section 8(5) ISA is set out below:-

“If the Minister is satisfied that for any of the purposes mentioned in subsection (1) it is necessary that control and supervision should be exercised over any person or that restrictions and conditions should be imposed upon that person in respect of his activities, freedom of movement or places of residence or employment, but for that purpose it is unnecessary to detain him, he may make an order (hereinafter referred to as a restriction order) imposing upon that person all or any of the following restrictions and conditions:

a) for imposing upon that person such restrictions as may be specified in the order in respect of his activities and his places of his residence and employment;

b) for prohibiting him from being out of doors between such hours as may be specified in the order, except under the authority of a written permit granted by such authority or persons as may be so specified;

c) for requiring him to notify his movements in such manner at such times to such authority or persons as may be specified in the order;

d) for prohibiting him from addressing public meetings or from holding office in, or taking part in the activities of or acting as adviser to, any organizations or association, or from taking part in any political activities; and

e) for prohibiting him from traveling beyond the limits of Malaysia or any part thereof specified in the order except in accordance with permission given to him by such authority as may be specified in such order.”

-s.8(5) Internal Security Act 1960

25. In the case of the E(POPC)O, the conditions and restrictions which covers similar areas, are elaborated even further and one significant addition is the inclusion of Police Supervision Orders.<sup>29</sup>

“If the Minister is satisfied that for any of the purposes mentioned in section 4(1) it is necessary that control or supervision should be exercised over any person or that restrictions or conditions should be imposed upon that person in respect of his activities, freedom of movement or places of residence and employment, but for those purposes it is unnecessary to detain that person, he may make an order (hereinafter referred to as a “restriction order”) imposing upon that person (hereinafter referred to as a “restricted person”) all or any of the following restrictions and conditions:

- a) that he shall be subject to the supervision of the Police for any period not exceeding two years;
- b) that he shall reside within the limits of any State, districts, mukim, town or village specified in the restriction order;
- c) that he shall not transfer his residence to any other State, district, mukim, town or village, as the case may be, without the written authority of the Chief Police Officer of any State concerned;
- d) that except so far as may be otherwise provided by the restriction order, he shall not leave the State, district, mukim, town or village within which he resides without the written authority of the Chief Police Officer of the State concerned;
- e) that he shall at all times keep the Officer in Charge of the Police District in which he resides notified of the house or place in which he resides;
- f) that he shall be liable, at such times or times as may be specified in the restriction order to present himself at the nearest police station;
- g) that he shall remain within doors, or within such area as may be defined in the restriction order, between such hours as may be specified in the restriction order, unless he obtains special permission to the

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<sup>29</sup> Sentence of Police Supervision and the obligations of persons subject to supervision are probably the same as those provided in s.295 and s.296 of the Criminal Procedure Code.



contrary from the Officer in Charge of the Police District;

h) that except in so far as may be otherwise provided by the restriction order, he shall not enter any State, district, mukim, town or village specified in the restriction order;

i) that he shall keep the peace and be of good behavior;

j) that he shall enter into a bond, with or without sureties as the Minister may direct and in such amount as may be specified in the restriction order, for his due compliance with the restrictions and conditions imposed on him by the restriction order.

- s.4A, Emergency (Public Order and Prevention of Crime) Ordinance<sup>30</sup>

26. The length of the Restriction Orders is not clear, but s.4A(2) of the E(POPC)O seem to imply that this period could be up to five years. But note that in the DWT laws, the Minister also has the power to renew the detention/restriction orders for periods of not more than two years at a time, for an indefinite period.
27. As was mentioned earlier, a contravention of a restriction or condition would result in a commission of an offence, and if this contravention is proved, the said person "shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years and not less than two years"<sup>31</sup> under the E(POPC)O. Under the DD(SPM)A, he can "be punished with imprisonment for a term not exceeding five years and not less than three years."<sup>32</sup>

## F(2) Suspended Detention Orders

28. This third kind of Order is provided by s.4B E(POPC)O<sup>33</sup> and a reading of this section as set out below is sufficient to understand this kind of order.

<sup>30</sup> Similar provision as s.6(3) Dangerous Drugs (Special Preventive Measures) Act

<sup>31</sup> S.4A(4) Emergency(Public Order and Prevention of Crime) Ordinance

<sup>32</sup> S.6(7) Dangerous Drugs(Special Preventive Measures) Act

<sup>33</sup> Also see S.10 Internal Security Act

“The Minister may at any time direct that the operation of any detention order be suspended subject to all or any of the restrictions and conditions he is empowered to impose by a restriction order.”

- s.4B Emergency(Public Order and Prevention of Crime)  
Ordinance

### F(3) Detention Orders

29. Detention Orders are provided for under the ISA, E(POPC)O and the DD(SPM)A and as mentioned above, all that needed before a Detention Order is made is that the Minister must be satisfied of certain matters. The words used in describing these matters are so wide, that any mildly creative individual could ensure that satisfaction is achieved.
30. The Minister can order that a person be detained for any period not exceeding two years,<sup>34</sup> but note however just the Restriction Order, the Minister is empowered with the power that the Detention Orders be extended for such further period, not exceeding two years at a time.<sup>35</sup> This can be done based on the same grounds and/or on different grounds. Some persons in our Malaysian history of DWT laws have been arrested and detained for periods even exceeding 10 years.<sup>36</sup>

### F(4) Detention Centres

31. The detainee will be placed in Detention Centres and this detention will be governed by the Internal Security (Detained Persons) Rules, 1960.<sup>37</sup>

<sup>34</sup> s.8(1) Internal Security Act, s.4(1) Emergency (Public Order and Prevention of Crime) Ordinance, s.7(1) Dangerous Drugs (Special Preventive Measures) Act

<sup>35</sup> s.8(7) Internal Security Act, s.7A Emergency (Public Order and Prevention of Crime) Ordinance, s.11A Dangerous Drugs (Special Preventive Measures) Act

<sup>36</sup> R. Gunaratnam, a Party Rakyat Malaya member, was detained for 11 years 8 months beginning from 4.11.70 until 1982.

S. N. Rajah, the executive secretary to United Malayan Estate Workers (UMEW) was detained

<sup>37</sup> s.8(4) Internal Security Act 1960, s.4(3) Emergency(Public Order and Prevention of Crime) Ordinance also provides specifically that the Internal Security (Detained Persons) Rules 1960 shall apply to every place of detention and persons detained under this Ordinance. ined for 11 years 2 months, beginning on 16.11.70 until 18.1.81.

32. Now a perusal of these rules seem to imply that there are two kind of detention camps, one being the ordinary detention camp and the other being a special detention camp.<sup>38</sup> The rights and privileges of the detainee varies depending on the kind of camp that he is placed in.
33. When it comes to the special detention camp, there are increasing rights as the length of the detainee increases and the Superintendent (of the Detention camp) is satisfied that he has been of good behavior, and if so satisfied the detainee will slowly move from the First Stage until the Third Stage. The difference of the rights, for example is the right to send a letter, whereby a detainee in the first stage can only send and receive one letter from friends or relatives once in three(3) weeks, whereas if he has been promoted to the Third Stage he has a right to send and/or receive one letter once every week. The privileges affected are, amongst others, the frequency of receipt of parcels, frequency of visits by relatives/friends, amount of time let out of the cell, the rate of pay, the quality of meals and the number of times the detainee is allowed to visit the canteen for the purpose of purchasing articles sold there.
34. A detainee in a detention camp<sup>39</sup> shall be entitled to visits<sup>40</sup> from his relatives and his legal advisers. For visits from friends, special permission of the Camp Superintendent is required. A detainee is entitled to one visit a week, and not more than two persons shall be admitted to visit a detained person at any one time. These visits shall not last for more than 30 minutes. How can the detainee even brief his legal counsel in 30 minutes?

## **G. Judicial Review or Judicial Intervention**

35. Since the coming into force of the amendments<sup>41</sup> to the laws allowing for DWT, judicial review has been limited to questions of compliance

<sup>38</sup> Rule 86 Internal Security (Detained Persons) Rules 1960, also see Rule 2 which gives the definition of "special detention camp" as meaning a place declared to be a special detention camp under Rule 86.

<sup>39</sup> Would also be similar for detainees kept in special detention camps who have been promoted to the Third Stage.

<sup>40</sup> Rule 81 Internal Security (Detained Persons) Rules 1960

<sup>41</sup> S.8B Internal Security Act 1960, [s.8B, amongst others, was inserted by the Internal Security(Amendment) Act 1989(Act A739) which came into effect on 24.8.89]

with any procedural requirement in this Act.

36. The Prime Minister when tabling the Internal Security (Amendment Act) said as follows:-

“The interventionist role of judicial decisions and the trends of foreign courts should not be copied because such actions was against the concept of separation of powers between the executive and the judiciary which was upheld in Malaysia. If the courts can reverse executive’s decision, it would make it impossible for the executive to make any decision for fear that the courts would intervene. The ruling party would then be waiting for the decisions of the courts and the results of appeal to higher courts”<sup>42</sup>

37. The meaning of judicial review was defined by s.8C Internal Security Act<sup>43</sup> to “include proceedings instituted by way of (a) an application for any prerogative orders of mandamus, prohibition and certiorari; (b) an application for a declaration or an injunction; (c) a writ of habeas corpus; and (d) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Yang di-Pertuan Agung or the Minister in accordance with this Act”
38. By virtue of s.8B Internal Security Act,<sup>44</sup> judicial review was ‘limited to any question on compliance with any procedural requirement in this act governing such act or decision.
39. Section 8A further limits this, and the said section is laid out as follows:-

“No detention order shall be invalid or inoperative by reason -

(a) that the person to whom it relates-

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s.7C Emergency(Public Order & Prevention of Crime) Ordinance 1969 [inserted by the amended by Emergency (Public Order and Prevention of Crime) (Amendment) Act 1989(Act A740) which came into effect on 24.8.89]

s. 11C Dangerous Drugs (Special Preventive Measures) Act 1985, [s.11C, amongst others, was inserted by Act A738 around the same time as the two above.

<sup>42</sup> Extracted from a paper by Karpal Singh entitled Administrative Detention In Malaysia.

<sup>43</sup> s.11D Dangerous Drugs(Special Preventive Measures) Act, s.7D Emergency (Public Order and Prevention of Crime) Ordinance

<sup>44</sup> S.11C Dangerous Drugs(Special Preventive Measures) Act, s.7C Emergency (Public Order and Prevention of Crime) Ordinance

(i) was immediately after the making of the detention order detained in any place other than a place of detention referred to in section 8(3);

(ii) continued to be detained immediately after the making of the detention order in the place in which he was detained under section 73 before his removal to a place of detention referred to in section 8(3), notwithstanding that the maximum period of such detention under section 73(3) had expired; or

(iii) was during the duration of the detention order on journey in police custody to a place of detention referred to in section 8(3); or

(b) that the detention order was served on him at any place other than the place of detention referred to in section 8(3), or that there was any defect relating to its service upon him.”

40. By virtue of section 8D<sup>45</sup>, section 8B and 8C was made applicable to any proceedings instituted by way of judicial review whether such proceedings were instituted before or after the coming into force of the amending Act. Only proceedings in respect of which a final decision of the court had been given and/ir to any appeal or application to appeal against such final decision survived.
41. An analysis of the applications of judicial review, revealed that the mode used had generally been by way of a writ of habeas corpus.
42. Even before the coming into force this new amendment, the courts were reluctant to go into the question of whether there existed any reasonable cause for a person to be detained under the laws allowing for DWT for it was a matter of opinion and policy, a decision that only the executive could make. The court also did not want to evaluate the facts/evidence, if any, that led to this executive “satisfaction” and ultimate decision. The court was also of the opinion that the executive have no obligation to even disclose facts that led to believe that detention was needed. To get a brief picture of the judicial sentiments, extract of judgements of some of the pre-amendment cases are set out below.

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<sup>45</sup> S. 11E Dangerous Drugs(Special Preventive Measures) Act, s.7E Emergency (Public Order and Prevention of Crime) Ordinance

**Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia** [Federal Court - 25.04.69](1969) 2 MLJ 129] - "whether there was reasonable cause to detain a person under Section 8(1) of the Internal Security Act 1960 [ISA] was a matter of opinion and policy, a decision on which could only be taken by the executive, and which therefore the courts could not go into..."

**Re Tan Sri Raja Khalid bin Raja Raja Harun; Inspector-General of Police v. Tan Sri Raja Khalid bin Raja Harun** [Supreme Court(1988) 1 MLJ 182] - "the detaining authorities are not obliged to disclose the facts which led them to so believe nor are they required to prove in court the sufficiency or adequacy of the reasons for such belief in any proceedings for habeas corpus instituted by the detainee. It is sufficient if the detaining authorities show that the person has been detained in exercise of a valid legal power. The onus is then on the detainee to show that the power has been exercised mala fide or improperly or for a collateral or ulterior purpose..." It was also held that "where the detaining authorities invoke national security as the grounds for non-disclosure of facts leading to the making of an order of detention, the test to be applied by the court in any proceedings for habeas corpus would be a subjective test. The court cannot in those circumstances compel the disclosure of such facts."

**Minister for Home Affairs, Malaysia & Anr. v. Karpal Singh** [Supreme Court,(1988) 3 MLJ 29] - "...while the grounds of detention stated in the order of detention were open to judicial review, the allegations of fact upon which the subjective satisfaction of detaining authority was based were immune from judicial scrutiny..."

**Theresa Lim Chin Chin & Ors. v. Inspector General of Police** [Supreme Court (1988) 1 MLJ 293] - "police power of arrest and detention under Section 73 of the ISA could not be separated from the ministerial power to issue an order of detention under Section 8 thereof..." It was also held that "in the matter of preventive detention the executive alone is the best judge and that the court will not be in a position to review the fairness of the executive's decision-making process having regard to the Constitutional bar on disclosure of the relevant information by the executive" This case also held that "the ISA was a valid piece of legislation and that there was nothing in the

wording of the Act to show that its operation was restricted to persons suspected of communist activities.”

43. Although judicial review has been restricted to the question of compliance with any procedural requirement, writs of habeas corpus continue to be filed and some of it have been successful. An example of the issues raised in these applications is in the case of *Haji Omar Din bin Mawaidin v Minister for Home Affairs, Malaysia & Anor* (1990) 3 MLJ 435 High Court - where the issue was whether the Minister can revoke a restriction order and substitute it for a detention order with first complying the requirements of the act.
44. Now the case of *Karpal Singh*, who was successful in his application for a writ of habeas corpus, and was released by the court only to be subsequently rearrested again under the ISA. This indicates that a successful judicial review may not be sufficient, as these laws that allow for DWT can be used again to arrest and detain again.

## **H. Review by the Advisory Board**

45. According to the DWT, there are provisions for the setting up of a Advisory Board whose function is to review every order or direction made or given by the Minister not less than once every six months but said to say that all that they are empowered to do after that is to “submit to the Minister a written report..., and may make therein such recommendations as it shall think fit.”<sup>46</sup> make recommendations.
46. In the case of *DD(SPM)A*<sup>47</sup>, the detainee has the more explicit rights<sup>48</sup>, like the right to be informed of his right to make representations, and if he chooses to do so, the Advisory Board shall sit within 3 months<sup>49</sup> from the date of receipt of the said representations. There is also similar provision where every order and/or direction be reviewed not earlier

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<sup>46</sup> S. 13 Internal Security Act

<sup>47</sup> Similar provisions found in the E(POPC)O but the powers of the Board recommendations seems to be less or more like the ISA. The frequency of a review/order is also not stated and is left to the discretion of the Chairman of the Advisory Board [s.7(1) E(POPC)O]

<sup>48</sup> S.9 Dangerous Drugs (Special Preventive Measures) Act

<sup>49</sup> S.10 Dangerous Drugs (Special Preventive Measures) Act

than 12 months from the date of such order/direction.<sup>50</sup> Here, the opinion of the Advisory Board carries more weight as seen in s.11(3)<sup>51</sup> which is set out below:-

“When the Advisory Board has reported that in its opinion the detention or restriction should cease, the Minister shall revoke the detention or restriction order.”

- s.11(3) Dangerous Drugs (Special Preventive Measures) Act

## **I. Concluding Remarks**

47. For a long time too much attention had been focused on the “evil” of the ISA, but today more attention is being placed on all laws that allow for DWT. Previously, attention was only given to the detention of persons in detention camps but today there is more and more awareness about the Restriction Orders, which at times can be said as more unjust.
48. On 6 December 1997, participants of the Bar Council Human Rights Seminar on ‘Detention Without Trial: Has the time for Abotllition Come?’ adopted the position that all laws providing for arrest and detention without trial, and for restriction of residence and movement of persons are contrary to the rule of law, international human rights standards and established religious values and norms, and called for the repeal of all laws that allow for DWT. The Bar Council chose to be silent on this matter, and only at the Extra Ordinary General Meeting in 1998 did the Malaysian Bar adopt a similar position..
49. The campaign against preventive detention or DWT laws in Malaysia have taken a long time and this is primarily due to the lack of awareness or conscientization. Similarly, the campaign to create awareness of administrative detentions and its possible abuses will take a longer time.

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<sup>50</sup> S.11 dangerous Drugs (Special Preventive Measures) Act

<sup>51</sup> See also s.11(4) Dangerous Drugs (Special Preventive Measures) Act



50. The ISA which was originally enacted against persons suspected of communist activities<sup>52</sup>, has been used more and more against political and/or personal opponents to the powers of the day.
51. Similarly, the E(POPC)O was supposed to be used against gang crimes and crimes of violence, but history has shown that it has been used against worker leaders as well. The DD(SPM)A is supposed to be used as a weapon to combat the offence of drug trafficking but alas there is always the room for abuse, for after all a person arrested, detained or restricted under any of these DWT laws do not have the just recourse to a fair and open trial.
52. All these laws that allow for DWT has to be repealed. The doctrine of separation of powers should not be negated even for these laws. All actions of the executive should be subjected to judicial review and it is most important that there be no exceptions.

### **Part III**

## **Fundamental Liberties**

### **Article 5 Federal Constitution**

- (1) No person shall be deprived of his life or personal liberty save in accordance with the law.
- (2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into that complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.
- (3) Where a person is arrested he shall be informed as soon as may be

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<sup>52</sup> **Theresa Lim Chin Chin & Ors. v. Inspector General of Police** [Supreme Court (1988) 1 MLJ 293]. This case also held that "the ISA was a valid piece of legislation and that there was nothing in the wording of the Act to show that its operation was restricted to persons suspected of communist activities"

possible of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

- (4) Where a person is arrested and not released he shall without reasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:

Provided that this Clause shall not apply to the arrest or detention of any person under the existing law related to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day:

Provided further that in its application to a person, other than a citizen, who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words "without reasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)" the words "within fourteen days":

And provided further that in the case of an arrest for an offence which is triable by a Syariah Court, references in this Clause to a magistrate shall be construed as including references to judge of the Syariah Court.

- (5) Clauses(3) and (4) do not apply to an enemy alien.

# FAIR TRIAL IN MALAYSIA

*Special Correspondent on Malaysia*

One of the key elements that is imperative for a Fair Trial is an Independent Judiciary.

There is a saying:

“They who deserve justice are those who will defend it”

In the history of many countries the existence of an independent judiciary can be attributed to the efforts of individual lawyers and the Bar to ensure that litigants / victims and accused persons have access to Fair Trial by resisting any attempts to stifle the Independence of the Judiciary.

## Why we need an Independent Judiciary

The answer to this is best illustrated by a quote from the Hon Justice Michael Kirby -Commissioner of the International Commission of Jurists - in his Foreword to the book ‘Mayday for Justice’:

*“Political scientists can trace the gradual erosion of the power of parliament from those heady days when A. V. Dicey traced all sovereign power in British affairs to the Imperial Parliament at Westminster. If ever Dicey’s theory of parliamentary sovereignty was right it has certainly suffered a battering this century. There has been a gradual loss of power of parliament to the cabinet and to the bureaucracy. Even within the cabinet the features of the modern state and of modern means of communication have led to an erosion of Executive power to the Prime Minister. Wars and other pressures associated with the post-colonial era have exacerbated these tendencies.*

The result of these developments has been the emergence of governments and heads of government who are fundamentally out of sympathy with the notion of sharing power with an independent judiciary.

Yet that sharing of power tempers absolute power. Looked at in sociological terms it spreads the responsibility for important decisions, promotes observance of proper forms, provides opportunities for the reconsideration of important matters, reduces the risks of oppression and tyranny and enhances the continuity of institutions in times of rapid technological and social change. These are some of the functions protected by an independent judiciary. They are endangered by the Executive Government - elected and unelected - when it forgets or underestimates, the utility of the judicial function. They are at risk when impatience, pride or unwillingness to brook opposition lead the Executive Government to challenge the judiciary or individual members of it”.

## **Background of the Malaysian Judiciary**

No comment on the judiciary of Malaysia is complete without mention of the events of 1988 which eventually led to the setting up of two tribunals, i.e., one against the Lord President Salleh Abas who was eventually dismissed and the second against 5 Supreme Court Judges for alleged misconduct which led to two of ‘the Supreme Court Judges being dismissed.

Much has been written about these events including the book May Day For Justice by Tun Salleh Abas and a report by the Lawyers Committee for Human Rights entitled *Malaysian Assault on the Judiciary*.

The writer does not intend to go into these events. Suffice to say that prior to the setting up of the Tribunals many people were of the view that the tenure of a Judge was adequately safeguarded by constitutional provisions.

However the events of 1988 showed that the removal of a Judge from office was a relatively simple exercise.

## **Events After 1988**

Malaysian cases have been very much in the international limelight after 1988. Foremost amongst these is the Ayer Molek case which led to the publication of an article in the International Commercial litigation magazine speculating on Justice in Malaysia. The comments made by

various lawyers in the article led to a series of defamation suits. One of the suits involved the United Nations Rapporteur for Independence of the Judiciary. His preliminary application that he was immune to prosecution was unsuccessful in the Malaysian Courts. The matter went before the International Court of Justice where his immunity was recognised.

At the time of writing this paper the suit against him in Malaysia is still pending.

The notable point about these defamation suits is the quantum of damages claimed which runs into millions of ringgit [US \$1 =MRinggit \$3.80].

Another well-documented case is that of a journalist, Murray Hiebert, charged for contempt of Court in connection with an article he wrote.

Mr Hiebert has since served the sentence of 6 weeks and has left Malaysia. It has been argued [including in the *Asian Wall Street Journal*] that the crime of "scandalizing the court" is archaic and incompatible with the principle of free speech and with the due process principle.

Similarly it is submitted that damages awarded in defamation suits should be reviewed. As stated by Justice Dato Mahadev Shankar in his paper 'Freedom of Expression. Its extent and limits and the Problems it encounters' at the 12<sup>th</sup> Commonwealth Law Conference in Malaysia in September 1999.

"Obviously the time is ripe for us to review our libel laws. The entire onus of proof is now on the Defendant as to the truth of the publication. Where the complainant is a public or corporate figure who is entrusted with the management of public funds should it not be enough for the Defendant to show that it exercised reasonable diligence to ensure that the fact published were objectively credible and the comment thereon was fair and made in good faith? Where Plaintiffs are given a fair opportunity of rebuttal should the damages if any be moderate? There is a need here to find the right balance because the current scale of damages being claimed and awarded have produced severe distortions in the entire field of tort compensation".

## **The Way Forward**

Security of tenure is the cornerstone for an independent judiciary. Much has been written about what constitutes this security, including

- 1) the need to prevent arbitrary transfer of judges;
- 2) the need for systematic promotion of judges based on seniority;
- 3) the need for a Global Disciplinary Board of Judges to enquire into alleged Judicial misbehaviour.

The ICJ's adoption of an International Code of Ethics for Judges and the Latimer House Guidelines for the Commonwealth Parliamentary Supremacy and Judicial Independence [discussed in June 1999], a major initiative directed towards the effective implementation of the principles of good governance, democracy and human rights embodied in the Harare Commonwealth Declaration of 1991 would be invaluable if the Judiciary were made self-regulatory in matters of Discipline. According the right to a Global Judicial Body would ensure that security of tenure of judges would not be subject to executive action in any Country.

# FAIR TRAIL: STILL A LONG WAY TO ACHIEVE IN NEPAL

*Yubaraj Sangroula<sup>1</sup>*

## A Brief Historical Overview of Criminal Jurisprudence in Nepal

Moulding of Nepalese legal and justice system began as back as 4th Century (AD), with Lichhavi dynasty of rulers ousting the Kirats. Lichhavis introduced "*Hindu Verna Baybasthas*" (cast system based on societal hierarchy), and with it was initiated a process of Hinduization of Nepalese Laws- the customs and usage. The ancient Hindu Religious scriptures like Manu Smiritis, Narad Smiritis and so on had been taken as authoritative basis for interpretation of local customs and usage. Religion and law had therefore not been separated as different domains. The Lichhavis were replaced by Malla dynasty.

The first so-called code of law - Code for Human Justice- was promulgated in 14th Century (AD) by a King named Jayasthiti Malla. This code was a response to anarchy created by lack of specific rules of positive laws governing the conducts of subjects. Nonetheless, It was nothing but a compilation of rules of positive morality laid down by the ancient Hindu scriptures. As such, the codification process marked an effort of institutionalization of Hindu societal values. The procedures established were essentially feudalistic, and the penal system cast-discriminatory. Death sentence was common form of panel consequence for several crimes.

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The King himself and his courtiers acted as judges. The penal system effectively recognized the social distinction and gender of offenders. Obviously, the intensity of the offence was not judged based on what consequence it made in the society or the victim, but on who was the offender.

Muluki Ain (Law Code of the Land) was a first so-called secular code law, an attempt to distinguish religious rules from positive rules of law. However, it too failed in effecting changes in the system based on cast and gender disparity in dispensation of justice. The penology and the procedures adopted by the previous code prolonged as usual in substance. The New Muluki Ain, 1964, abolished the system of justice based on the cast system, but continued with gender disparity in many matters. The overview of the history of justice system in Nepal prior to 1964 can be summed up as follows:

- \* The system of justice followed a course of inquisitorial practice as the judges themselves acted as investigators as well.
- \* Judges acted as executive servants, not as an independent "justice maker".
- \* Concept of free and fair trial was therefore a myth in Nepal until recent past.

## **Departure from Inquisitorial to Adversarial System**

The departure from inquisitorial to adversarial system commenced with promulgation of Apex Court Act, 1952, which envisaged to separate the judiciary from executive, and the judges had been relieved of the responsibility of conducting investigation. In stead, a peculiar system of informer of the crime being put on burden to prove the guilt was introduced. The enactment of the State Cases Act 1961 was positive progress towards "defeudalization" of the system as it conceived the emergence of Police as an institution of investigating the offences for prosecution. This Act virtually separated the three processes of criminal proceedings-investigation, prosecution and adjudication - to be carried out by three different institutions. This Act thus formally introduced the adversarial system as the prosecutor was envisaged to prove the guilt, and the court



played only a role of "umpire". Thus, the court of law ceased to act as executive institutions. The salient features of said State Cases Act, which was instrumental in introducing the adversarial system, can be summed up as follows:

- \* Categories of cases to be prosecuted by state had been defined and classified, thereby relieving the informer from burden of proving guilt. The burden was virtually shifted to the state, and the informer was taken as most prominent witness of the state.
- \* The State was thus obliged to be sensitive to the offences as it was its responsibility to commence investigation immediately.
- \* The victims, who generally were the informers, had been relieved from hassles of collecting evidence to get the culprit punished.

With the promulgation of the State Cases Act, 1964, the following three development in the criminal justice system became crystallly spectacular:

- \* The adversarial system replaced the indigenous inquisitorial practice, which was essentially encumbered by feudal notions of justice.
- \* The modernization of criminal justice system followed the changes made in socio-economic and political fields.
- \* The concept of independence of judiciary from executive government emerged as a value of justice in Nepalese society. Even during the dark period of party-less system in the country, the rulers could not destroy some of the essential natures of an independent judiciary. This is evident the Supreme Court's interpretation of the "Preventive Detention Act", which allowed detention for unspecified reason. The Supreme Court in several cases denied that the government could detain a person without stating the grounds for.

The promulgation of Evidence Act, 1974, largely improved the standards of the criminal justice system. The following provisions of the Act provided a good ground for criminal justice system enhancing the standard for free and fairness:

- \* To be admissible as evidence, the confession needs to be given in a state of consciousness.
- \* Confession extracted by use of torture, or force, or threat, or inducement would not admissible as evidence.

- \* The prosecutor is obliged to prove the guilt imposed on accused beyond reasonable doubt.
- \* No deposition of witness is acceptable as evidence where it is not testified by the court.

## **Weakness sub-standardizing the Criminal Justice System in Nepal**

The concept of fair justice was thus largely institutionalized by 70s. However, it was not easier to act on with so many scattered legislation. The New Muluki Ain prevailed as a common law where there was no specific legislation available. This made quite difficult for actors to ascertain what particular of procedures to apply in the given case. Considering the difficulty and resulting inefficiency and low standard of system, a Law commission was instituted in 1972 to draft a "Comprehensive and Uniformed Code of Criminal Procedures". The assignment was effectively and efficiently carried out, but mysteriously the code never came into practice. The lack of adequately formulated free and fair procedures together with acute lack of sensitivity on the part of the actors of criminal justice subjects the criminal justice system of Nepal to the following weakness and gaps:

### **Investigation**

- \* The assignment of the investigation of the crimes has not yet been recognized as a professionally specialized responsibility of the police officer.
- \* The tendency of delegating or shifting the responsibility to the new, inexperienced and junior level of officers is a common practice in police.
- \* Formality of procedures outweighs the importance of expertise during the investigation. Hence, innovation in the investigation technique and process has less scope to flourish.
- \* Crime investigation has not been considered as one of the most sensitive responsibility of the police. The investigation is carried out not as a matter of responsibility of state to free and fair justice; rather it has been taken as a part of the regular responsibility to law and order.

- \* Police personnel are little sensitive to the human dignity of the detained persons.

### Distribution of Police Officers by Posts Involved in Investigation

S.N.	Designation	Interrogation and deposition of suspected persons	Site investigation	Witness deposition record
1.	Supt. of Police	0.5%	0%	0%
2.	District Supt. of Police	2%	1.5%	4%
3.	Inspectors	64%	23%	26.5%
4.	Sub-inspectors	18%	39%	36%
5.	Asst. inspectors	4%	15%	13%
6.	Immigration officers	1.5%	1.5%	1.5%
7.	Unidentified designations	10%	20%	19%

*Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.*

- \* Detention precedes the interrogation as a rule. In this connection, the procedural formalities outweigh the value of fundamental rights of suspects.
- \* A wrong conception that confession is inevitable and trustworthy evidence for conviction exists as an institutionalized perception among the investigators, and thus much more concentration is given to extract the confession than have innovative approach to discover evidences through other means.
- \* Torture has been used as a means to extract the confession, so that the investigation can be completed without much more sophistication. Extraction of confession relieves the investigators from going into other means of discovering evidences.

### Distribution of Cases by Stages of Torture for Confession

Total number of respondents	Respondents reporting enticement or suggestions for confessing the crime	Respondents reporting the enticement or suggestions for co-accusing other person	Respondents reporting torture for signing the prepared document of confession
Number of respondents	112	20	214
Percent	34.89	6.23	66.67

*Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.*

### Distribution of Cases by Suspects put into Lock-up with or without Interrogation

Total number of respondents	Suspects produced before the Investigating Officers before being locked up	Suspects not produced before the Investigating Officers before locked up	Interrogation carried out before producing to the Judicial Authority
Number of Cases	100	221	192
Percentage	31.15	68.85	59.81

*Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.*

- \* The practice of forging or making evidences prevails over use of means and approaches to discover evidences.
- \* Tendency of evading the constitutional rule of producing the suspects before the judicial authority within 24 hours of arrest and detention is common practice in police.
- \* Access to remand for detaining the person under investigation for full period of 25 days is exercised as a general practice, and is conceived a privilege.

**Distribution of Cases by Kind of Torture and Ill-treatment**

S.N.	Particulars	Number	Percentage
1.	Use of force during arrest	123	38.32
2.	Written order for arrest produced	14	4.36
3.	Verbal abuse during arrest	112	34.89
4.	Forceful entry at home	23	7.17
5.	Threatened torture	109	33.96
6.	Family members humiliated	20	6.23

*Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.*

**Distribution of Cases by Forms of Torture**

S.N.	Modes of torture	Number of persons subjected to	Percentage
1.	Beating	215	66.98
2.	Threat of harm to family	23	7.17
3.	Starvation	14	4.36
4.	Electrical shock	12	3.74
5.	Exposure to hot and cold	21	6.54

*Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.*

## Prosecution:

- \* Random prosecution of the detained persons is a common practice. The Government Attorneys do not exercise the legal power granted by the State Cases Act 1993 in order to scrutinize the individual situation of the detained persons.
- \* Framing of charge sheet is not practical and scientific. The procedural formalities weigh more than the need of respecting and protecting the fundamental rights of the detained persons. No individual situation of the offender is examined and the law is applied accordingly. Tendency of applying law in random irrespective of the individualized circumstances of offence and situation of the offenders is phenomenal. This means that no charge sheet is framed based on critical scrutiny and analysis of the available evidences and documents.
- \* The right of the detained persons is never considered seriously while the charge sheet is framed. No kind of consideration is given to the diversity of the offenders' characters and situation while proposing the sentence. The Government Attorneys move with a mission of subjecting detained persons to the hardest possible penalty, and this has been taken as the best compliance of the obligation. Prosecuting randomly with application of law providing stiffer penalty has been considered as the best representation of the state in matters of prosecution.
- \* The accountability of the prosecution for discharging the burden of proof beyond reasonable doubt is manifestly neglected. The Government

S.N.	Particulars	Persons arrested before FIR is lodged	Suspected persons produced before the judicial authority:		Investigating proceedings show likely manipulation of documented date of arrest
			within 24 hrs of arrest	after 24 hrs of arrest	
1.	Number of Cases	38	139	83	11
2.	Percentage	17	63	37	5

Source: CeLRRd, *Analysis and Reforms of Criminal Justice System in Nepal*.

S.N.	Particulars	Whilst proposing the sentence the prosecutor proposed:	
		Requested for the accused's age and character to be considered	Did not request that the accused's age and character be considered
1.	Number of Cases	59	163
2.	Percentage	27	73

*Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.*

Attorneys generally fail to corroborate the allegation made in charge sheet by supplying the essential evidences.

- \* The Government Attorneys are not serious enough to produce prosecution's witnesses to the court.

## Adjudication

- \* Remand for detention of the suspects has been granted without scrutiny of progress and need of the investigation. The judges are generally not interested in scrutinizing the process of investigation and its situation while granting the remand for extension of the period of detention.

S.N.	Particulars	Remand for detention granted:		Remand for detention denied
		Without scrutiny of investigation process and grounds	With Scrutiny of investigation process and grounds	
1.	Number of Cases	193	21	8
2.	Percentage	87	9	4

*Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.*

- \* The detained persons' right to be heard during the remand process is not taken care by the judges. Hence, no proceeding of hearing for extension of remand detention takes place. Obviously, the right to be

defended by a legal counsel is very much neglected by the trial courts too.

- \* Courts are not bit concerned with the situation of the detained persons during detention for investigation. The detained persons are never interviewed whether they had been provided with humane treatment in the custody or not. The perception that the remand to detain suspects till legally sanctioned duration, irrespective of the nature of the case and the condition of detained persons, is a privilege of the police prevails in the trail court too. Obviously, it is not the fundamental right of the detained persons but the request of the investigating agency for extension of remand for detention is considered seriously by trail courts.
- \* The courts are not serious to oblige the prosecutors to discharge the burden of proof beyond reasonable doubt. The trail courts are not serious to require the prosecutors to discharge the accountability of onus of proof. The attitude that the detained persons must discharge the onus

### Distribution of Cases by Privilege Given for Legal Assistance

S.N.	Particular	Number	Percent
1.	Detainees allowed to consult and be defended by Legal Practitioner before produced at the Judicial Authority	0	0
2.	Detainees privileged to consult Lawyers after two days	192	59.81
3.	Detainees not consulting the Lawyers at all	129	40.19

*Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.*

of innocence is common among the trial judges, only with negligible exception.

- \* The rampant denial of the constitutional rights of the accused be defended by legal practitioner of choice during the police detention does not concern the courts. The concept that denial of the right to consult the legal practitioner impinges the fundamental rights of the detained persons and as such impairs the access to free and fair justice



has not been a matter concern for trail judges.

- \* Courts are not concerned with the proper representation of the detained persons, as no copies of the documents are made available during the pre trail session.

## Defense Lawyering

- \* Lawyers are not interested of representing the persons during the police detention. The perception that the representation only means appearance in the courts for arguments in matters of verdict is prevalent among the lawyers. The Bar's insensitivity towards the denial of the right to the detained person to consult the lawyer is an obvious instance of the perception.
- \* Lawyers are vulnerable of practicing unethically as there is no mechanism of control for misrepresentation. The lawyers are not accountable to the misrepresentation made. The trail courts are devoid of any control over lawyers for unethical or misrepresentation of the accused persons.

S.N.	Particular	Lawyers involved	Percent
1.	Money asked during the detention	11	3.43
2.	Asking for deposit in addition to fees	3	0.93
3.	Asking money for something unknown	20	6.23
4.	Asking money for gifts for someone	7	2.18

*Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.*

- \* Professional expertise of practicing criminal law is generally absent. No specialization training for lawyers are available. No basis criteria for practice of criminal law are laid down. The awareness that the liberty

and life of the accused person might be put into jeopardy by inability or incapacitation of lawyer for representation is something not considered so far.

## **Political Commitment**

As it is clear from the various previous chapters, the State has manifestly flunked to present the stronger political commitment to reform the criminal justice system. It is apparent from the following facts:

- \* The State has failed to realize the importance of impartial, free and fair investigation system. The lack of adequate initiatives to professionalize the investigation system has greatly negated the possibility of implementing the Article 14 of the Constitution. Therefore, the reform of the criminal justice system has become a snag greatly because of the lack of political commitment of the State. The widespread weaknesses or gaps apparently existing in the criminal justice system could have been resolved through raising professionally specialized investigators with sole accountability of investigation and adequate sensitivity to the fundamental rights of the detained persons. The State's role in this respect is not promising.
- \* The State has very seriously flunked in its responsibility of ameliorating working conditions of the prosecutors. The Attorney General's office has confessed that its failure rates exceed 57 percent of the cases. The proportion is woeful. The situation clearly indicates to political unaccountability of the State towards free and fair criminal justice. The adjudication process is obviously impaired by the pitiable condition of the prosecution system. The proper training and facilities needed for efficient prosecution is overshadowed overwhelmingly.
- \* The judiciary is one of the severely neglected institutions of the Sate in Nepal. The financial budget the judiciary is provided with is extremely low to accommodate the physical and logistic needs for speedy and free and fair trail. The perception that investment in justice system is unproductive is strongly concretized in the mind of the politicians. Hence, the judiciary is rendered crippled to carry out the accountability with efficiency caused by unavailability of the adequate financial resources.

\* The lack of political commitment is also apparent from inadequate legislation. The following instances can better reflect on the situation:

\*\* No legislation concerning compensation of the victims of offences exist so far. The pecuniary penalty paid by offenders goes to the state's revenue. Hence, the victim is left without any kind of support or compensation.

\*\* The procedures relating to investigation, prosecution and adjudication are lengthy and archaic in nature. The need of enactment of the appropriate legislation was felt quite long ago. The commissions were constituted to draft adequate legislation to govern the matters of criminal procedures and punishment. However, the state did not show interest to promulgate those draft codes. Thus, the State has forced the criminal justice system being dwindled as an archaic feudal system.

\*\* There are several laws promulgated in the past that are manifestly contradictory to the recognized principles of criminal justice. These Acts unduly enable the quasi-judicial institutions to act as investigators, prosecutors and adjudicators at a time. Many of such legislation effectively disregard the jurisdictions of the court of laws to review the judgements thereof. These Acts apparently stand against the Article 84, 85 and 86 of the Constitution. Thus the State has failed to its role of promoting a society through rationalizing the legal system in accordance with the constitution and international human rights law.

As it can be seen from above, widespread violation of the human rights during detention has caused a serious lack of confidence of people upon the credibility of prevailing system of criminal justice. In absence of scientific approach to investigation, the potentiality of the prosecution of an innocent and escape of offenders looms large. In such a circumstance, the adjudication process is bound to be defective leading to miscarriage of justice. The criminal justice is a three-pronged process- investigation prosecution and adjudication. Any weakness in the process of investigation necessarily implicates the whole process. The system of investigation being dependent on confession of the detained person as a vital proof for conviction, the prosecution and adjudication systems are necessarily impaired. As established by the research findings, the unconstitutional and illegal incarceration of the suspects, infliction of torture and cruel, degrading and inhuman treatment and direct and effective denial of the

right to be defended by the legal counsel exist tainting the credibility of the whole system of criminal justice. What is more deplorable is the situation of prosecution and adjudication, where the government advocates and judges never scrutinize what takes place in the policy custody. This is a problem of acute insensitivity to the rights of accused persons.

## Causes and Factors Behind the Weakness and Gaps

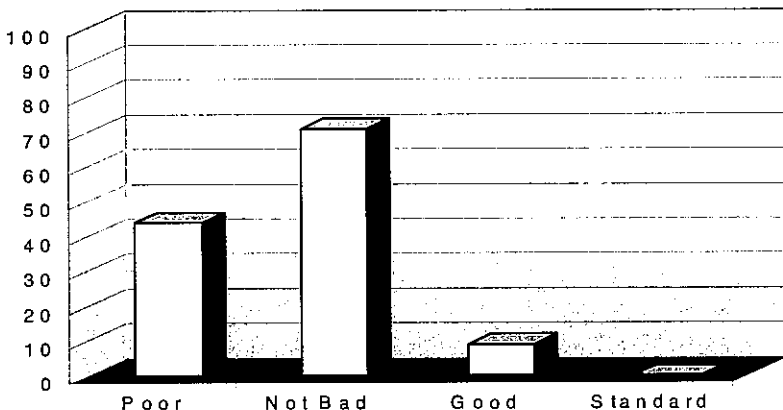
The interview with lawyers, judges, police officers, government attorneys and the political personalities was separately carried out in order to explore the conditions of the criminal justice system in Nepal. The findings are based on interview with 125 respondents.

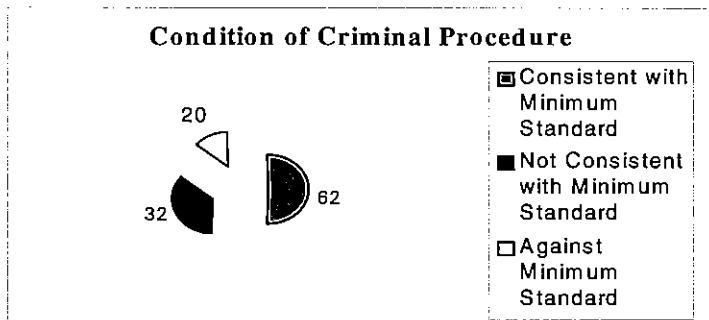
### Judgement of the Criminal Justice System

S.N.	Poor	Not Bad	Good	Standard
Number	44	71	9	0
Percent	35.2	56.8	7.2	0

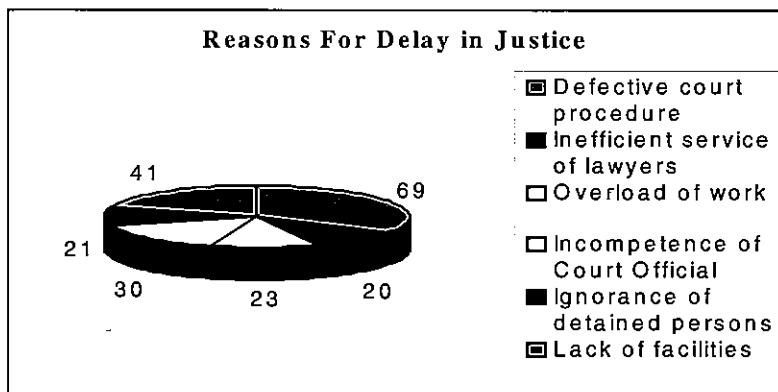
Source: CeLRRd, *Analysis and Reforms of Criminal Justice System in Nepal*.

Condition of Criminal Justice System





Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.



Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.

### Reasons for Ineffective Justice:

S.N.	Particulars	Number	Percent
1.	Lack of communication between Judges and Lawyers	13	10.4
2.	Lack of a well devised system	43	34.4
3.	Non-professionalism among Lawyers	21	16.8
4.	Non-professionalism among Judges	16	12.8
5.	Under developed of Legal Profession	19	15.2

Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.

### Competence of Legal Profession to Address the Contemporary Problems

Particulars	Numbers	Percent
Competent	10	8
Partially competent	67	53.6
Not competent	49	38.4

*Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.*

### Competency of the Judiciary in Addressing the Contemporary Needs

	Competent	Partially competent	Not competent
Number	18	57	50
Percent	14.4	45.6	40

*Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.*

### Reasons for Incompetence of Legal Profession

S.N.	Particulars	Number	Percent
1.	Lack of appropriate education	17	13.6
2.	Lack of intellectual resources	16	12.8
3.	Lack of training	27	21.6
4.	Lack of defined code of conducts	19	15.2
5.	Due to apathy of Courts	8	6.4

*Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.*

**Reasons for Incompetence of the Courts**

S.N.	Particulars	Number	Percent
1.	Lack of adequate number of judges	17	13.6
2.	Lack of adequate facilities	10	8
3.	Lack of training to Judges	21	16.8
4.	Inappropriate procedures	16	12.8
5.	Inadequacy of Law	11	8.8

*Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.*

**Reasons for Incompetence of Investigation System**

S.N.	Particulars	Number	Percent
1.	Lack of proper training and orientation	38	30.4
2.	Lack of technical facility	47	37.6
3.	Lack of commitment	29	23.2
4.	Lack of facility	16	12.8
5.	Lack of adequate and good laws	13	10.4
6.	Lack of appropriate procedures	25	20

*Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.*

### Competency of the Prosecution System to Address the Contemporary Problems

	Competent	Partially competent	Not competent
Number	13	49	63
Percent	10.4	39.2	49.4

*Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.*

### Reasons for Incompetence of the Prosecution System

S.N.	Particulars	Number	Percent
1.	Lack of proper training and orientation	34	27.2
2.	Lack of technical facility	17	13.6
3.	Lack of commitment	24	19.2
4.	Lack of facilities	16	12.8
5.	Lack of adequate and good laws	14	11.2
6.	Lack of appropriate procedures	21	16.8

*Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.*



**Political Commitment to Improve Criminal Justice System**

	Commitment exists	Commitment partially exists	Commitment does not exist
Number	20	27	78
Percent	16	21.6	62.4

*Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.*

**Changes Required to Improve Criminal Justice System**

S.N.	Particulars	Number	Percent
1.	Changes in the law	30	24
2.	Changes in the procedures	23	18.4
3.	Changes in the existing form used in Court	15	12
4.	Changes in the existing forms used for investigation	30	24
5.	Changes in the existing forms used for prosecution	18	14.4

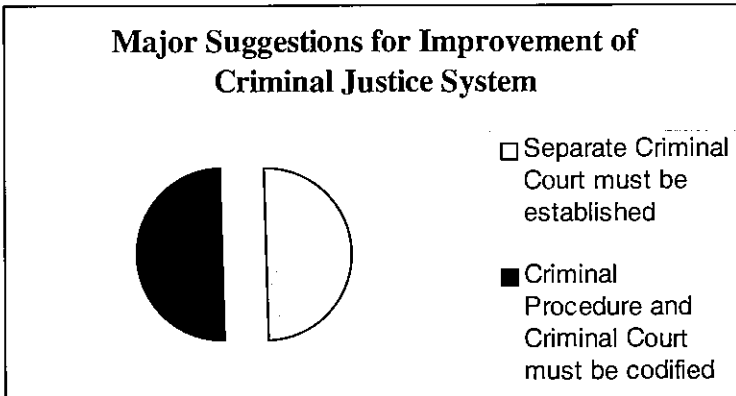
*Source: CeLRRd, Analysis and Reforms of Criminal Justice System in Nepal.*

## Major Suggestion to Improve the Criminal Justice System

Nepal has not separated the criminal and civil jurisdiction of the courts. The same court exercises both the jurisdictions simultaneously. Obviously, the judges like prosecutors and defense lawyers are not specialized in administering the criminal justice. There is a quest for separation of the jurisdiction so that the required specialization could be geared up. The survey in this regard suggests as follows:

	Separate Criminal Courts need to be established	Need of codification of criminal and criminal procedure codes
Number	107	111
Percent	85.6	88.8

Source: CeLRRd, *Analysis and Reforms of Criminal Justice System in Nepal*.



Source: CeLRRd, *Analysis and Reforms of Criminal Justice System in Nepal*.

Similarly, the feeling, commitment and tendency to honor the fundamental human rights of the accused should be developed among all the actors responsible for dispensing criminal justice. Every accused should be given the opportunity to consult with his/her advocate. New laws advocating free and fair justice should be enacted.

The other very important thing is the training. From private attorney to police personnel, advocates and judges all need from very basic to a very professional and technical training on the procedure of criminal jurisprudence. The various forms used by the court should be reformed keeping in mind the consistencies required by the management of the modern information system and procedures should be simplified.

The facilities in the jail should be improved and the accused should not be put together with terrible criminals.

The prevailing corruption among police personnel, government attorneys, private attorneys and even among judges can be reduced only when their morale would be boosted up and a positive attitude towards job would be created among them. For this an effective career development programs followed by incentives, salary as per subsistence theory, security against inflation, training opportunity both in the country and abroad and the inventories, facilities and laboratories required for an effective investigation should be provided with. Justice and police personnel working in remote areas should be provided with special benefits

All these could be possible only when there is a commitment on the political level. The political persons should know and be conscious thereof that a democratic system could be developed only when the general people have faith in the government and its functioning aimed at delivering justice to the people. A democracy in political system has no meaning unless the entire judicial system is democratized and equipped with modern thought and procedures.



# FAIR TRIAL ISSUES IN SRI LANKA

*Anthony Fernando\**

## Introduction

Today's concept of Fair Trial is the concept of an ideal mechanism for dispute resolution, between individual and individual and between the State and individual, by the process of hearing the disputing parties before a court tribunal, the dispute being resolved (terminated) by the decision of such court or tribunal to be given after the hearing. Such decision will, subject to any alteration of such decision in due course of appeal, bind the disputing parties who were heard, and that is why one can say that the dispute was resolved (terminated) by such decision.

Today we are amused by the primitive and not-so-primitive mechanisms for dispute resolution, such as trial by battle and trial by ordeal, which basically were appeals to the divine to show the disputing parties and the authorities concerned where the truth lay and what the just resolution of the dispute is. In Sri Lanka (called Ceylon before 1972), the indigenous system of Kandyan Law utilized trial by the snake and trial by hot oil. Also gone are the days of the Dutch Government in the coastal areas of Sri Lanka where no conviction for a capital offence could be entered against an accused unless and until he confessed to his crime, and until he did so, he was subjected to torture, in order that the moral responsibility of the Court for condemning a human being to death is made lighter by his own confession.

Sri Lanka is an island nation lying a few miles off the tip of the Indian sub-continent. Its legal culture has been enriched by different legal systems of the world at different times in its long history. There are several races of people inhabiting the island and the main religions of the world are well represented among its people. Looking at the modern legal system

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of the country, a Sri Lankan judge once observed that "Law, like race, is not a pure-blooded animal."

The substantive law of Sri Lanka is made up of different systems of law. The field of private law (especially the Law of Persons and Law of Property) is a true amalgam of about three systems of indigenous Asiatic laws and two systems of European law, namely the Roman Dutch law and the English law. (Commercial law is almost totally English law.) The field of public law, including constitutional law, administrative law and criminal law, is basically the English law, with changes effected in keeping with modern ideas in different parts of the world. The English law came to Sri Lanka during one and a half centuries of British rule of the island until its independence from Britain in 1948. Prior to the British the Dutch ruled the coastal areas of the island for one and a half centuries.

The adjectival law of Sri Lanka namely the law of procedure and evidence, applicable in civil and criminal trials, is basically English law with certain later modifications. The same law of procedure and evidence was introduced by the British into the Indian sub-continent, which is today India, Pakistan and Bangladesh.

Thus, Sri Lankan law strongly retains the common law legal tradition with reference to public law and the law of procedure and evidence. Sri Lankan law of court procedure in both civil and criminal litigation gives effect to the concept of adversarial as opposed to inquisitorial procedure. The right to be represented by a lawyer in civil and criminal litigation, and the traditional right to make submissions on questions of law as well as questions of fact through his or her lawyer is inherent in every litigant. Sri Lankan law upholds the principle of the independence of the judiciary and security of tenure for judges. Every accused has a right not to incriminate himself. The principle of the presumption of the innocence of the accused until he is proved on legally admissible evidence to be guilty beyond a reasonable doubt generally operates in criminal trials. As a rule, there is always an appeal available to an accused who is convicted of a crime, and frequently, there is more than one appeal.

True to the common law legal tradition, the principle of legality is deeply rooted in the law of Sri Lanka. Accordingly, nothing is criminal or punishable except what is expressly prohibited and made so punishable by statute law of Sri Lanka. *Kachcheri Mudahyar V. Mohamadu* (1920) 21

NLR 369. Further, every official is entitled to act only within the confines of the powers entrusted to him by law, and if by transgressing beyond those limits should an officer violate the law and commit an offence constituted by statute law, he is liable to be punished therefore in the ordinary courts of law.

Punishment for a crime in Sri Lanka is prescribed by statute and could be the extreme death penalty, or other punishments such as imprisonment with hard labour or without hard labour, for a period of up to 20 years, or a fine, or confiscation of property, or whipping. No sentence of death has been carried out in Sri Lanka after 1977, but at the moment, there are certain sections calling for enforcing the death penalty on the ground that crime is on the increase. The Government of Sri Lanka has also issued a statement to the effect that the death penalty will not hereafter, as a matter of course, be commuted by the President of Sri Lanka to imprisonment, but that each case will be examined and decided on separately.

Another problem that is gradually gaining the attention of the public eye in Sri Lanka today is a general distrust of the criminal justice system in Sri Lanka, more especially the way it operates in practice. The feeling seems to be gaining ground among some sections of the public that justice can be bought and sold. There is a feeling that lawyers, especially for the defense, coach witnesses, instruct the manufacture of false evidence and thereby distort the truth, which they have no right to do, and which is contrary to law and to all standards of legal ethics. In the modern form which the criminal trial takes, there is no appeal to the divine to show where the truth is, but the truth must be ascertained by oral and documentary evidence. Justice can be rooted only in the truth, and if the truth is distorted and the untruth is upheld in a court of law as being the truth, the result can only be injustice. Due to the prevalence of such notions, there have been public agitation against lawyers appearing for persons accused of certain particularly brutal crimes. In the recent past, in the Rita John rape and murder case, in the Hokandara quadruple murder case, and within the last one month, in a case where a little boy of 9 years was abducted on a demand of a huge ransom and whose body was later discovered in a cesspit, there was public demonstration against lawyers appearing for the accused. Defense Counsel in such cases have received threats. It is ironical that in the Rita John rape and murder case some of the demonstrators were

themselves lawyers! In the last mentioned case of the abduction and murder of a little boy, an estimated crowd of about 5000 persons, led by Buddhist and Christian clergy, demonstrated at the court house and the crowd was finally dispersed by the use of tear gas by the Police. The Mercedes Benz car in which one of the senior counsel for the defense arrived in Court had its windshield smashed by the angry demonstrators.

Perhaps lawyers themselves must take serious note of the distrust some sections of the public seem to be having about the credibility of the criminal justice system, and take steps to inspire greater confidence in the method of the criminal trial under the adversarial system where the accused is presumed innocent until proved guilty and is entitled to be defended in person or by counsel and to be heard fully before a verdict is entered against him. Lawyers, especially the more senior criminal lawyers who appear as defense counsel, must hold themselves up as priests serving Truth at the altar of Justice and not as those resorting to distort the Truth in the practice of their noble and learned profession.

Given below is the position in Sri Lanka applicable under the general law, and apart from such special statutes as Emergency Regulations promulgated under the Public Security Ordinance, and the provisions of the Prevention of Terrorism Act. The position under these special statutes is quite different to what is set out below, in certain respects.

## **Guarantees of a Fair Trial under the Constitution of Sri Lanka**

The following Fundamental Rights of persons suspected or accused of crimes are enshrined in the Constitution of Sri Lanka.

Article 11. - No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 13 (1). - No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.

Article 13 (2). - Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law,



and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.

Article 13 (3). - Any person charged with an offence is entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.

Article 13 (4). - No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment.

Article 13 (5). - Every person shall be presumed innocent until he is proved guilty: Provided that the burden of proving particular facts may, by law, be placed on an accused person.

Article 13 (6). - No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed. Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of the law recognized by the community of nations. It shall not be a contravention of this Article to require the imposition of a minimum penalty for an offence provided that such penalty does not exceed the maximum penalty prescribed for such offence at the time such offence was committed.

Article 13 (7). - The arrest, holding in custody, detention or other deprivation of personal liberty of a person, by reason of a removal order or a deportation order made under the provisions of the Immigrants and Emigrants Act or the Indo-Ceylon Agreement (Implementation) Act, No.14 of 1967, or such other law as may be enacted in substitution therefor, shall not be a contravention of this Article.

Under Article 15 of the Constitution, the Fundamental Rights under Articles 13(1), 13(2), 13(5) and 13(6) shall be subject to such restrictions

as may be prescribed by law in the interest of national security, etc.,

Where a Fundamental Right enshrined in the Constitution of the Republic of Sri Lanka is violated by "executive or administrative action", the only remedy available is to make, within one month of the violation, an application under Article 17 read with Article 126 to the Supreme Court of the Republic of Sri Lanka for relief or redress. An important point in this regard is that an application to the Supreme Court for relief or redress can be made only by the very person whose Fundamental Right has allegedly been violated (or by an Attorney at law on his behalf) and not, for instance, by his wife or by any other family member of his. This rule has a drastic effect on the Fundamental Right enshrined in Article 13(4), that no one shall be punished with death except upon an order of a competent court. Where a person "disappears" while in the custody of officers or agents of the State (that is, he is put to death by 'executive or administrative action'), no one has *locus standi* to obtain redress or relief in respect of that violation of Article 13(4), for the only person who could have come to the Supreme Court (either by himself or by his Attorney at law) is dead. It must be mentioned that between 1988 and 1990 there have been over 26,000 disappearances officially recognised in Sri Lanka, many of which perhaps caused by 'executive or administrative action'. Unofficially the figure is about 60,000. [Sri Lanka: DISAPPEARANCES & Collapse of the Police System, an AIIRC Publication, 1999]

By the following provision the Constitution has provided that as a rule all trial shall be held in public:

Article 106 (1). - The sittings of every court, tribunal or other institution established under the Constitution or ordained and established by Parliament shall subject to the provisions of the Constitution be held in public, and all persons shall be entitled freely to attend such sittings.

Article 106 (2). - A judge or presiding officer of any such court, tribunal or other institution may, in his discretion, whenever he considers it desirable

- (a) in proceedings relating to family relations,
- (b) in proceedings relating to sexual matters,
- (c) in the interests of national security or public safety, or

(d) in the interests of order and security within the precincts of such court, tribunal or other institution, exclude therefrom such persons as are not directly interested in the proceedings therein.

By the following provisions found in the Judicature Act, No.2 of 1978, the law aims at an unbiased judge:

Section 49 (1) - Except with the consent of both parties thereto, no Judge shall be competent, and in no case shall any Judge be compellable, to exercise jurisdiction in any action, prosecution, proceeding or matter in which he is a party or personally interested.

Section 49 (2) - No Judge shall hear an appeal from or review any judgment, sentence or order passed by himself.

Section 49 (3) - Where any Judge who is a party or personally interested, is a Judge of the Supreme Court or the Court of Appeal, the action, prosecution, proceeding or matter to or in which he is a party or is interested, or in which an appeal from his judgment shall be preferred, shall be heard or determined by some other Judge or Judges of the said Court: Provided that in every other case some other Judge of the High Court, the District Court, Family Court, Magistrates' Court and Primary Court, as the case may be, of any adjoining zone, district or division shall have jurisdiction to hear, try and determine such action, prosecution, proceeding or matter.

In addition it must be mentioned that Sri Lanka has acceded to the U.N. Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and that the Parliament of Sri Lanka has enacted the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment Act, No.22 of 1994. Under this Act, "torture", which is defined, is made a punishable offence, and it is also made an extraditable offence.

If the above provisions in the Constitution and in statute law are to have a salutary effect on the justice system, and are to achieve their desired effect of a fair trial, law enforcement officers must be made aware of them. At the present time, there is inadequate education of law enforcement officers about the above provisions, resulting in avoidable and frequent violations of the law, thus resulting in fairness in the justice system more

difficult to achieve.

## **Investigation of Criminal Offences**

The Police Department, which is a department of State under the central Government of Sri Lanka, is generally responsible for the investigation of criminal offences constituted by various statutes. In addition, there are other departments of Government which are responsible for the investigation of offences under specific statutes, such as the Excise Department, Customs Department, Forest Department, etc., It is therefore of the utmost importance that in carrying out their functions of investigation of crimes, officers of these Departments of Government, and more especially of the Police Department, should be free to carry out their functions and to exercise their powers without being unlawfully and unduly influenced by any such considerations as political influence, personal influence of other higher officers, personal considerations, and financial considerations.

In this connection, it must be mentioned that there is much to be desired in the impartiality of Police officers involved in criminal investigations. In Sri Lanka (as in certain other parts of the world) the politicians attempt to run the Police Stations, creating untold problems. Police Officers who do not do the bidding of the politician run the risk of being transferred to distant or difficult Stations, or to be victimized in the matter of promotions, scholarships or other benefits. The punishment for not obeying the politician's bidding could be a disruption of family life by a transfer to an inconvenient area, or to an area where the security risk to police officers is high, such as terrorist infested areas. Police Officers will be prevailed upon by politicians either to discontinue investigations of crimes where the suspect is a supporter or financier of the politician, or else to investigate and "fix" some opponent of the politician so that he could be stigmatized as a criminal or otherwise harassed, if not actually convicted and made to undergo punishment. Due to such illegal and criminal conduct of politicians, the morale of the entire Police Department is kept low and the officers lack motivation.

In Sri Lanka it is no secret that criminals and leaders of criminal gangs align themselves with politicians, so that they could do "dirty work" for the politician or else help him financially and thereby help him to stay

in power or to get into power, so that, in turn, that politician will protect and shield the criminal so that he can continue their criminal activities without hindrance from the Police. In this way, the entire system of criminal justice can be undermined, for, it is the Police who have to initiate criminal proceedings by conducting proper investigations into reported crimes.

The only remedies now available to a police officer who is being victimized for being upright and for doing his duty are: (1) to appeal to the Public Service Commission, and (2) to challenge the victimization (be it a discriminatory transfer, or the deprivation of a promotion or other benefit) before the Supreme Court in an application under Article 17 read with Article 126 of the Constitution, as being a violation of the Fundamental Right to equality and to the equal protection of the law under Article 12 of the Constitution.

As a more effective and long term remedy, the institution of an independent Police Commission has been proposed, but this proposal has not yet seen the light of day. The Police Commission Act, No.1 of 1990, passed by the Parliament of Sri Lanka nearly a decade ago, has yet to be brought into operation by the President of Sri Lanka on a day to be appointed by the President by Order published in the Government Gazette. The Act provides for a three-member National Police Commission, consisting of the Inspector General of Police, a person nominated by the Public Service Commission in consultation with the President of Sri Lanka, and a person nominated by the Chief Justice of Sri Lanka. It is vested with the power of appointment, transfer, dismissal and disciplinary control of the National Division of the Sri Lanka Police force. The Act also provides for a Provincial Police Commission for each Province in Sri Lanka, also consisting of three members, as follows: the Deputy Inspector General of Police of that Province, a person nominated by the Public Service Commission in consultation with the President of Sri Lanka, and a person nominated by the Chief Minister of that Province. As the Chief Minister is a politician, there is much force in the suggestion that the nominee of the Chief Minister should be replaced with a nominee of the Chief Justice.

Quite apart from the external influence of a politician, a bribe-giver, a friend or a relative, a police officer may not properly conduct an investigation to realise its aim and objective because of personal reasons, such as sadism or other psychological disorder.

The law has provided for certain safeguards against misuse or abuse of police powers in the course of a criminal investigation. These safeguards are in addition to the provisions of law set out above, relating to the Fundamental Rights of accused or suspected persons, and torture being a crime punishable by law. These safeguards are provided as follows:

### Code of Criminal Procedure Act. No.15 of 1979

Section 110 provides that the police officer making an investigation into an offence shall not administer an oath or affirmation when taking a statement from some person who is supposed to be acquainted with the facts and circumstances of the case. Such a statement could be used at the trial "in accordance with the provisions of the Evidence Ordinance except for the purpose of corroborating the testimony of such person in Court", and such a statement made by the accused "shall only be used to prove that he made a different statement at a different time" and for the purposes of s.27 of the Evidence Ordinance. All persons examined by the police during an investigation are bound to answer truly all questions put to him, except those that tend to incriminate him.

Section 111 provides that the police officer conducting the investigation shall not offer any inducement, threat or promise to any person charged with an offence in order to induce him to make a statement. But the police officer should not prevent, discourage or caution any person examined against making a statement of his own free will.

### Evidence Ordinance

Section 24. - "A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and with his sanction, and which inducement, threat or promise is sufficient in the opinion of the Court to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

Section 25 (1). - "No confession made to a police officer shall be proved as against a person accused of any offence."

Section 25 (2). - "No confession made to a forest officer with respect to an act made punishable under the Forest Ordinance, or an excise officer with respect to an act made punishable under the Excise Ordinance, shall be proved as against any person making such confession."

Section 26 (1). - "No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person".

Section 26 (2). - "No confession made by any person in respect of an act made punishable under the Forest Ordinance, or the Excise Ordinance, whilst such person is in the custody of a forest officer or an excise officer, respectively, shall be proved as against such person, unless such confession is made in the immediate presence of a Magistrate."

Section 27 (1). - 'Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.'

Section 27 (2). - "Subsection (1) shall also apply mutatis mutandis, in the case of information received from a person accused of any act made punishable under the Forest Ordinance, or the Excise Ordinance, when such person is in the custody of a forest officer or an excise officer, respectively."

Police officers engaged in criminal investigations are to some extent supervised and assisted in their investigations by Magistrates who are judicial officers. Once an arrest is made during the course of an investigation, the person arrested must be produced before the Magistrate of the division and he will consider any applicable for release on bail. At that stage he has the responsibility of seeing and observing the person under arrest, and to consider whether there is a sufficient case against him on statements already recorded by the police, for his further detention pending conclusion of the investigation, and if so, to remand him to fiscal custody, namely, to order

his detention by the Prisons Department. It is the Magistrate who will issue warrants of arrest and search warrants where on the material placed before him, he is satisfied that the issue of such a warrant is necessary for the purposes of such investigation.

Although the police officer carrying out an investigation interacts with the Magistrate, it has been felt that the supervision and assistance by the Magistrate is insufficient for an effective and impartial investigation. Often, police investigations lack proper depth and direction. Effective and impartial investigations are especially needed in politically sensitive crimes. For example, in quite a few cases those responsible for attacks on the life and property of journalists showing sympathy to political parties and individuals opposed to the Government in power in the recent past in Sri Lanka have remained undetected.

Perhaps, proper training and discipline of the investigator, and finances to equip him sufficiently with necessary techniques, skills, instruments and facilities, will also help in improving the quality of criminal investigations in Sri Lanka.

Another area within the field of criminal investigations by the Police that needs urgent attention is the adequate protection and security of the suspect arrested by the Police. In spite of all the laws against torture, the practice of torture as a method of criminal investigation is quite widespread in Sri Lanka even today. The Police resort to torture of especially the poorer sections of society who are arrested on suspicion, and sometimes who are not suspected of the crime but are said to be witnesses to it, in order to elicit information or to extract a confession. Sadly, even the more informed and more educated sections of society in Sri Lanka almost tacitly approve of the practice of torture as a permissible method of criminal investigation, and this is one of the biggest reasons why it is difficult to minimize the use of torture in the field of criminal investigations. The suspect in Police custody must be given a statutory right to consult a lawyer and lawyers must have the statutory right to be inside police stations and to observe suspects in custody. As said before, investigating officers in the Police Force must be better trained in investigations, and must be better educated about the unacceptability of torture and that torture is a crime. At present, lawyers who accompany suspects to Police Stations find that they are not welcome there. Such lawyers find, not infrequently, that



undertakings given by the Police not to harm or torture the suspects are not honoured. There have been a few instances in the past where the accompanying lawyer was also subjected to criminal force at the hands of Police officers at the Station, or at least humiliated and otherwise harassed by them.

## **Prosecuting Crime in Court**

The High Court of the Republic of Sri Lanka has jurisdiction to try an accused for any crime, however grave or minor, and on conviction to impose any lawful sentence including death. The other important type of court having original criminal jurisdiction are the Magistrates' Court, established at the rate of one in each judicial division, and having criminal jurisdiction in respect of minor offences and having restricted powers of imposing punishments. Magistrates' Courts also perform the function of conducting non-summary inquiries in respect of major offences in respect of which lacks jurisdiction to hold a trial. The purpose of a non-summary inquiry is to see whether there is sufficient evidence against an accused to put him on his trial in the High Court. Primary Courts, also established at the rate of one in each judicial division, also exercise minor criminal jurisdiction, but their jurisdiction is very minimal.

The sole right to prosecute before the High Court is vested in the Attorney General of Sri Lanka. Thus, he plays a major role in the criminal justice system in Sri Lanka. Thus, however serious a crime committed may be, however clear the evidence may be, if the Attorney General does not indict the accused to stand trial in the High Court, there is little the private citizen can do about it. For this and other reasons which will presently be seen, the Attorney-General occupies a uniquely important position in the administration of criminal justice in Sri Lanka.

Prosecutions in a Magistrate's Court could be initiated and conducted by a police officer, or other type of officer or by even a private person. In conducting non-summary inquiries the Magistrate is under the direct supervision and control of the Attorney General. The Attorney General has the power to direct the Magistrate to discontinue a non-summary inquiry and to commit an accused to stand trial in the High Court, or else to discharge such accused and not to commit him to stand trial in the High Court. Even if an accused is committed by a Magistrate to stand trial in

the High Court, to indict him in the High Court lies within the discretion of the Attorney General.

The fact that even a private citizen is entitled to initiate and conduct a criminal prosecution is an important privilege of the citizen in a liberal and democratic society. However, the Attorney General has the power to see that this privilege is not abused by private citizens who may wish to harass officials by bringing them as accused persons before the Magistrate's Court of the area. Where a prosecution has been initiated against 'an officer or employee of the State in respect of a matter connected with or relating to the discharge of the official duties of such officer or employee' the Attorney General has, under s.191(2) of the Code of Criminal Procedure Act, the right to appear for the complainant without the latter's consent. This provision enables the Attorney General to appear for the complainant and to secure an acquittal for the accused by withdrawing the prosecution or by refusing to lead evidence for the prosecution. It has been observed that this provision "is procedural and is intended to secure the proper administration of justice and it is therefore essential that it should be made to serve and be subordinate to that purpose. If therefore an attempt is made by the Attorney General to exercise the right given to him by this provision male fide and for an improper purpose in respect of a private prosecution, it is... open to a Court to refuse to permit it: "fair and careful consideration ... is usually given to all.... matters touching the administration of justice by the Attorney General and/or the officers of his Department." *Attorney General V. Suntharalingam* (1971) 75 NLR 527,528.

By and large the greater number of prosecutions are initiated in Magistrates' Courts, and this is usually done by police officers. As the legal advisor to the Government, the Attorney General advises all Departments of Government, including the Police Department and police officers with regard to prosecutions.

The system of Police Prosecutions still in operation from the British colonial times, is based on the British model, as against the French model where an investigating magistrate is involved in the investigations and at the level of deciding whether to prosecute or not. Some basic changes in the present system would benefit the justice system and lead to more impartial and more efficient criminal justice.

The most important change that can be proposed is the taking away from the Police the function of prosecuting and handing over that function to legal officers from the Attorney General's Department. Such a legal officer could be appointed on the basis of one officer for each Magistrate's Court, so that Police officers in that area can place before him the evidence collected during investigations and leave it to him to decide to prosecute or not. If he decides to prosecute, he will conduct the prosecution in that Magistrate's Court.

That it is desirable that the prosecutor be totally independent of the investigator and the witnesses, is not an idea that has been often appreciated. Even when the opportunity presented itself to the courts to pronounce on the matter, the decision has gone the other way. Over fifty years ago the question arose whether a police officer who is a material witness for the prosecution, could conduct the prosecution himself (under s.199 of the Criminal Procedure Code then in operation, now s.191(1) of the Code of Criminal Procedure Act, No.15 of 1979.) Surprisingly, it was held (1942) 46 NLR 380, that he can.

It would be even better for such legal officers to form a separate Department of State, to be headed by a Director of Public Prosecutions, and such Director, like judges of superior courts, should enjoy security of tenure during good behaviour. In contrast, at the present time, the Attorney General does not enjoy such security of tenure.

## **The Criminal Trial**

There can be no fair trial unless it is held before an impartial and independent court or tribunal. There can be no fair trial unless the court or tribunal was professionally competent. In Sri Lanka, public confidence in the impartiality and professional competence of judges seems to be deteriorating.

There can be no fair trial unless the accused has sufficient notice of the charge or charges he had to meet. The charges must be explained to him in a language he understands. He must thereafter have sufficient time to prepare his defense and a sufficient opportunity to obtain legal assistance and/or representation in Court, and to summon and produce witnesses and documents. Ordinarily he must be permitted to be present in person when

evidence against him is produced in Court and he must be able to understand the nature of the evidence against him which he has to meet. He must be afforded an adequate opportunity to cross-examine the witnesses against him. The criminal trial must as far as possible be held in public where the public (including the press) can conveniently attend and observe the proceedings. The judgment must always be delivered promptly, and, except where given by a jury, must always contain reasons, and must be declared in public and made available to the public. These basic requirements for a fair criminal trial are provided for by different statutes, including the provisions in the Code of Criminal Procedure Act, No.15 of 1979, and are generally adhered to in practice in Sri Lanka.

The presumption of innocence is, as seen above, a Fundamental Right in Sri Lanka and is in practice adhered to. It is well recognised here that the burden of proving the ingredients of the offence with which the accused is charged, lies on the prosecution, although the burden of proving facts constituting a general exception or a special exception to criminal liability lies on the accused. *The King V. James Chandrasekera* (1942) 44 NLR 97.

Any accused is entitled to appear and defend himself in person. He also has a statutory right to be represented by Counsel under s.41 of the Judicature Act, No.2 of 1978. There is also provision for legal aid for accused persons. In the High Court of Sri Lanka, before the commencement of trial, every accused (irrespective of his economic standing) is asked in open Court whether he requires a counsel at the expense of the State. If he does, a counsel is assigned to defend him and such counsel is paid a modest fee. The most junior lawyers get preference in these assignments. Legal aid at the Magistrate's Court is in a less organized state. The Legal Aid Commission, the Legal Aid Committee of the Bar Association of Sri Lanka, and certain lawyers' organizations provide legal aid in the Magistrate's Court in a less organized manner on condition that the applicant for such aid is indigent.

## **Appeals**

There is in Sri Lankan law an elaborate system of appeals in criminal cases. Against a conviction or sentence passed in the Magistrate's Court an appeal lies on a question of fact or a question of law to the Provincial High Court in the area. Against the judgment of the Provincial High Court a final appeal lies to the Supreme Court of the Republic of Sri Lanka

(which is the highest court in the land) on a question of law provided Special Leave to appeal is granted by it on the facts and circumstances of the particular case.

Against a conviction or sentence entered by the High Court of the Republic of Sri Lanka (which is a countrywide court having unlimited original criminal jurisdiction) an appeal lies first to the Court of Appeal of the Republic of Sri Lanka. Against the judgment of the Court of Appeal a final appeal lies on a question of law to the Supreme Court after obtaining Special Leave to appeal.

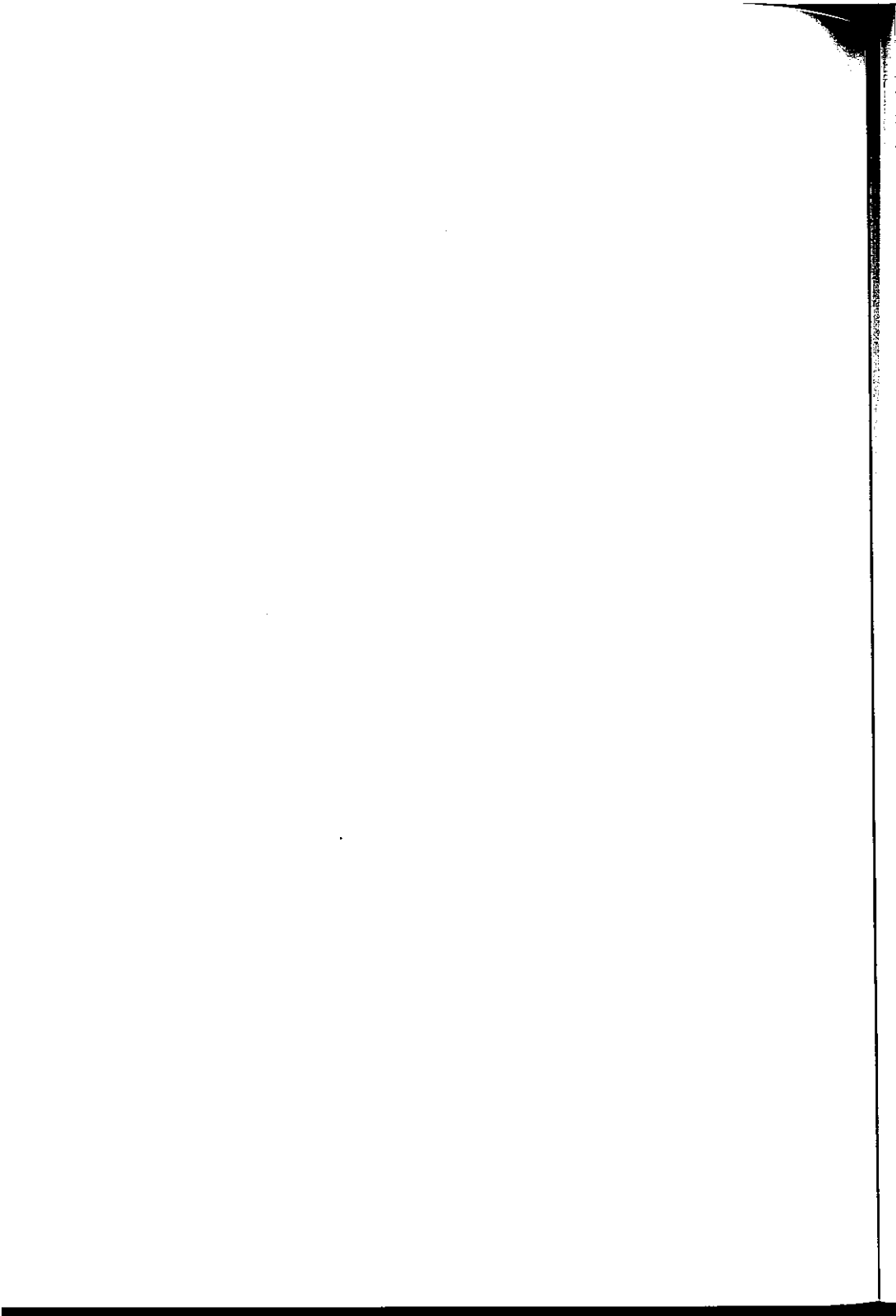
Against an acquittal entered by a Magistrate's Court there is no right of appeal as of right, but an appeal can be made to the Provincial High Court with the sanction of the Attorney General of Sri Lanka. However, even without such sanction, an application in revision can be made to the Provincial High Court against an acquittal. Against the judgment of the Provincial High Court a final appeal lies to the Supreme Court on a question of law after obtaining Special Leave to appeal.

The Attorney General, who is the sole prosecutor before the High Court of the Republic of Sri Lanka, is entitled to appeal against an acquittal to the Court of Appeal. Against the judgment of the Court of Appeal a final appeal lies to the Supreme Court on a question of law with Special Leave to appeal first obtained from the Supreme Court.

There is provision for assignment of Counsel to appear for the accused (irrespective of his economic standing) in the Court of Appeal in appeals from the High Court of Sri Lanka, and frequently this is done unless a particular accused indicates that he does not need a counsel to be assigned by the Court. Assigned counsel are paid by the State and appear for the accused appellant side by side with counsel retained and paid by the accused appellant himself, and in the event of the retained counsel not appearing for any reason, the assigned counsel must be ready to argue the appeal.

*(N.B. The citation "NLR" refers to "New Law Reports" containing decision 5 made in Sri Lanka/Ceylon.)*

[Editor's Note - A report relating to disappearances submitted by Asian Legal Resource Centre (ALRC) to the UN Commission of Human Rights is annexed as Appendix 3]



## APPENDIX 1



### List of Participants

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## APPENDIX 2

# WORKSHOP ON REFORM OF ADMINISTRATION OF JUSTICE RELATING TO POLICE IN CAMBODIA

## SEVENTH WORKSHOP ON DUE PROCESS IN CAMBODIA

*22-24 January 2000*

*Siem Riep, Cambodia*

*Organized by the Cambodian Defenders Project/IHRLG (CDP)*

*Coordinated and supported by*

*the Asian Human Rights Commission (Hong Kong) and Danish Center for Human Rights*

## Statement of the Participants

The participants included five Senior Officers from the Ministry of Interior, four Cambodian Lawyers belonging to Legal Aid NGOs and four foreign consultants from abroad who met at Siem Riep from 22<sup>nd</sup> to 24<sup>th</sup> January 2000 to discuss some pressing problems relating to police reform and administration of justice in Cambodia. This workshop was organized by the Cambodian Defenders Project, the Asian Human Rights Commission and the Danish Center for Human Rights. After the careful consideration and much discussion, the participants unanimously agreed on following recommendations:

### Abolition of office of Investigating Judge

The participants of this workshop are unanimously of the view that the office and function of the Investigating Judge needs to be abolished completely as soon as possible. This office of the Investigating Judge remains an impediment and creates many obstacles to the administration

of justice in Cambodia. The further continuance of this office will result only in continuing dysfunction and miscarriages of justice. Further, we are firmly of the view that the continuation of this office does not make any positive contribution to the administration of justice and maintenance of the rule of law. For all practical purposes, it hinders the police investigation into crimes and severely reduces the effectiveness of the Prosecutor's function.

Other than the practical problems, this office does not also have any constitutional mandate and therefore lacks legitimacy. Article 131 of the Constitution recognizes the office of Prosecutor. Nowhere in the Constitution is there any mention of the office of the Investigating Judge. Article 158 of the Constitution (as amended) specifically abrogates those institutions which are contrary to the spirit of the Constitution. The office of Investigating Judge, having become an obstacle to achieving the ends of justice, has thereby become contrary to the spirit of the Constitution, which aims among other things to restore Cambodia to an island of peace based on a multiparty liberal democratic regime guaranteeing human rights and the respect of law.

For the purpose of abolishing the office of Investigating Judge, articles 68 to 95 (Chapter 4) of the State of Cambodia Law on Criminal Procedure, dated 29 January 1993, need to be repealed. We strongly suggest the removal of the articles mentioned, and the amendment of any other article which directly or indirectly makes any reference to the office of the Investigating Judge.<sup>1</sup>

Those persons who at present function wholly or partially as Investigating Judges would, from the date of abolition of that office, thereafter function entirely as presiding or trial judges. This transition will cause no practical difficulties, as the roles of trial judge and investigating judge have been interchangeable for some time.

Deletion of Chapter 4 of the said law will not create any insurmountable difficulties in the investigation and prosecution of crimes

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<sup>1</sup> The following articles of the SOC Criminal Procedural Code need to be consequentially amended: Articles 55, 60 (the cases must go back to the police for further investigation and the police can ask for this in their report to the prosecutor), 62, 64, 65, 66, 67, 98, 99, 101, 102, 107, 108, and in relation to appeals, articles 192, 199, 202, 203, 204, and 205.

because, pursuant to chapter 3 of the said law, the Public Prosecutor Department has the backing of the Constitution. On the contrary, the abolition of the office of the Investigating Judge will help to improve the relationship between the police and prosecutor and add a great deal of speed and efficiency to the process of bringing criminals to justice.

## 48-hour Rule

The participants observed that there seems to be a great deal of confusion regarding the operation of the 48-hour rule for producing the accused before the court. This provision has sometimes is misconceived to mean that all criminal investigation into a crime must be completed within 48 hours. This is neither intended nor desirable (or possible). The 48-hour rule only starts to run from the moment of arrest. An accused should be kept in police custody for the shortest time necessary for the police to complete their questioning (but in no case longer than 48 hours, not counting transportation time) and thereafter should be handed over to judicial custody. Keeping an accused for over 48 hours in police custody is illegal.

Despite the limitations on police detention of the accused, there are many aspects of a criminal investigation that the police investigator has to carry out before a trial, which is the final initiative before the court of law. If a criminal investigation is not conducted properly, it will have serious consequences for both the complainant as well as the accused. In order for the criminal investigator and the prosecutor to make a fair assessment of the need for proceeding against the accused by way of the trial all the material facts relating to the case need to be investigated and studied. Thus the investigation should continue as long as is necessary independent of a decision on detention. However, a suspect should never be arrested unless the police or prosecutor has reasonable grounds to suspect that s/he has been involved in the commission of an offense. Clearing of this misunderstanding relating to the 48-hour rule will benefit both the accused as well as those who are involved in investigation of crimes.

## Detention

Within 48 hours of the arrest of a person it is the duty of the police to produce him/her before a judge of the Court of the First Instance. At the

time of producing the accused before the judge the police shall submit a report indicating the circumstances under which the suspect/accused has been arrested and the crime/s are of which s/he is suspected. If the police object to granting of bail to the suspect/accused the police shall state the reasons for such objection. It will be the function of the judge to make the relevant orders for detention/bail of the suspect/accused. The police can seek further time to continue with their investigation into the offense/s committed by the suspect/accused.

## Prosecutor

Article 112 of the Constitution says that only the Department of Public Prosecution shall have the right to file criminal suits. Thus, the function of the police is to do the criminal investigation and the function of the Prosecutor is to file suit on the basis of the criminal investigation done by the police.

Articles 49 to 67 of the SOC Law on Criminal Procedure<sup>2</sup> has many references to activities of the Prosecutor that are outside the constitutional function of the prosecutor, which is confined to filing of the criminal suit. What is the most contradictory to the constitutional function of the prosecutor is the mention of the investigative function given to the prosecutor. However, in practice the prosecutor in Cambodia does not conduct criminal investigations. Criminal investigations are conducted solely by the police. The actual practice of the prosecutor in not attending to criminal investigations is very much in conformity with the Constitution. Therefore, it is essential that, in the draft of the new criminal procedural code, all references to the investigative function of the prosecutor should be omitted. The existing confusion of function between the police and the prosecution will be removed by a clear statement that the criminal investigative function belongs solely to the police. Such a statement will also reinforce the existing practice.

## Police and Prosecutor

The function of the prosecutor during the criminal investigation is to receive reports of investigation from the police, and to give legal advice

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<sup>2</sup> This law was drafted in 1991 and was adopted in 1993.

on further investigation by the police. It is also the function of the prosecutor to make representation to court on behalf of the police on pretrial matters such as the detention of the suspect/accused pending trial.

The prosecutor in his/her first appearance before court will file a preliminary report submitted to him/her by the police of the investigation done so far together with the suspect/accused if the suspect/accused has been arrested. The police will then be granted further time to continue with their investigation. Until the police complete their investigation they will file a report informing the court of the progress of their investigation. When they have completed their investigation they will inform court of that fact through the prosecutor. The prosecutor will make a charge/s against the suspect/accused only after the completion of the criminal investigation by the police.

The relationship between the police and the prosecutor has to be a professional one. It is the duty of police to place all the findings of their inquiry before the prosecutor. They must place before the prosecutor not only the facts which are against the accused, but also those which may be in favor of the accused. Where the police need legal advice they should be able to seek such advice at any time from the prosecutor. Where the prosecutor finds that there is no sufficient evidence to proceed against the accused s/he must release the opinion to the police thereby giving the police an opportunity to look for any further evidence. Decisions made by the prosecutor in a secret manner will be open to challenge and allegations of impropriety and may deprive the police of the opportunity for further investigation. However, the prosecutor can set reasonable time limits for a completion of an inquiry by the police. Thereafter, s/he should make his/her assessment in an objective manner by process of legal reasoning.

## Need for Penal Code

In Cambodia, the law does not provide for the crime of "kidnapping". But allegations of kidnapping are quite common. This is just an example. The number of defined crimes in Cambodia are around fifty (as provided by the UNTAC Law in 1992). From 1982 up to 1992, there were only eight recognized crimes. However, before 1975 there was a comprehensive penal code. The operation of that code ceased in 1975. Thus at the moment Cambodia lacks a comprehensive penal code, which is now available in

almost all countries. The absence of a comprehensive penal code is a great obstacle to the development of a criminal justice system in Cambodia. A penal code is a first step in the making of a criminal justice system. The people of Cambodia have a right to know what are the crimes recognized in Cambodia. The law-enforcement officers also have the right and duty to know the recognized crimes. It is the existence of defined crimes that give the law-enforcement officers the right to investigate any acts which amount to crimes. A penal code which defines crimes also sets a limit to the investigation of law enforcement officers, in that they have no right to proceed on acts which are not crimes. Thus, the absence of a comprehensive penal code is a grave gap in the law of Cambodia.

In recent times a draft of a new criminal procedure code has been available for review, but so far no penal code has been made available for review. The introduction of a criminal procedure code before the penal code would create serious difficulties in the administration of law. We recommend that the penal code and the criminal procedure code be taken together for discussion and introduced to the legislature at the same time. If one law is to come before the other, it must be the penal code that should be introduced first.

## The Drafting of the Criminal Codes

The present Constitution introduced liberal democracy into Cambodia, but the present criminal laws were drafted before this Constitution even came into force. These laws are from a bygone era and are wholly inadequate to give effect to the law enforcement and human rights standards required by the Constitution. There is an urgent need for modern criminal codes to give effect to the principles embodied in the Constitution. In particular, Cambodia must have an adequate penal code, and criminal procedure code.

For these codes to meet the needs of the criminal justice system, their drafting must be done in consultation with representatives of all those engaged in criminal investigation and law enforcement: judges, prosecutors, police, lawyers, etc. Because laws on crimes and criminal procedure are a matter of fundamental importance to the public, the public must be given all opportunity to make representations from the beginning of the drafting process to the end.

Unfortunately, the current draft of the criminal procedure code is merely an extension of the same outdated criminal procedure that is giving rise to the problems in law enforcement and the administration of justice mentioned above. Therefore, this current draft code should be drafted with consultation. As a result, the pressing concerns of many of those involved in the criminal justice system have not been addressed. In fact, in many instances, the provisions of the current draft conflict with the present day needs of the Cambodian democracy.

## A Police Act

The Police in Cambodia need a Police Act to give them a legal base. The Police Act should provide for the organization, function, powers and duties, discipline and control of the police as well as their recruitment, training and deployment, the relationship with the Prosecution/Judiciary in their functioning and also the administration for pay, transfers, leave, etc. Such an Act would give legitimacy to the police in Cambodia, and would lead to professionalism in the police.

## Investigation of Crime and the need for Developing Scientific Techniques and Forensic Evidence/Medicine

Chapter III of the Constitution lays emphasis on the rights and obligations of the citizens. Article 31 promises respect for human rights. Article 38 forbids physical abuse, provides for protection of life, honour and dignity of citizens, forbids prosecution, arrest or detention except in accordance with law, coercion, physical ill-treatment, or any other mistreatment of detainees/prisoners, and makes confessions obtained by physical or mental force inadmissible in evidence. The accused is given the benefit of doubt and, is presumed to be innocent till convicted. The accused has the right to defense through judicial recourse. Article 40 lays down that any search of a house, materials or body shall be in accordance with the law.

These provisions of the Constitution emphasize the pressing need for police to insist on investigative techniques, which do not rely on a confession for detection. Investigation is a search for truth and should move from the crime to the criminal. Police forces everywhere are now

employing scientific techniques in investigation, from fingerprints and footprints to DNA analysis. In investigation, police in Cambodia must be encouraged to lay stress on the collection, and analysis of forensic evidence. The Law of Criminal Procedure and other laws must provide for admitting such findings as evidence. There is a need for exposing police officers, particularly those associated with investigation, to scientific aids to investigation through appropriate training programs.

## Judiciary Police

The Articles 35 to 48 of the SOC Law on Criminal Procedure deal with the Judiciary Police. The Participants are of the view that several amendments are necessary in order to facilitate the Police Officers dealing with the Criminal Investigation at present to be recognized as Judiciary Police, as the present provisions include only few high ranking police officers and leave out those officers who are in fact engaged in investigating into crimes. The omission of such categories of police officers works against the actual criminal investigation and thereby creates great practical difficulties in administration of justice. Thus, for the purpose avoiding such obstructions we suggest to amend to article 36 of Law on Criminal Procedure.

## Law and Order functions of the Police

The criminal investigation function of the police should be clearly distinguished from their function of maintenance of law and order. In relation to maintenance of law and order the police must seek instruction from their lawful superiors. However, the police are always bound to act within the law and to uphold the constitutional rights of the people.

It is essential that resources be allocated for the establishment and maintenance of an effective police force. The making of a police force in Cambodia is still in its initial stage. As neither the police structure, nor the police powers, nor their training, sufficiently qualify them to function as the main law enforcement agency in the country. This situation needs to be rapidly remedied. However, given the present state of resource allocation the police cannot achieve the transformation that is necessary. Thus, it is an imperative for law enforcement in the country to increase allocation of



the resources for the police on a planned basis. Specifically, resources must be allocated for police training, for establishment of the forensic facilities, for computerization and computer literacy and for efficient communication facilities. If foreign assistance is needed for such purposes, such assistance should be sought as soon as possible. Such assistance should include foreign expertise for training and other purposes where necessary.

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## APPENDIX 3

# Enforced and Involuntary Disappearances in Sri Lanka

*Written statement submitted by the Asian Legal Resource Centre (ALRC), a non-governmental organization with general consultative status, to the 56th Session of the UN Commission on Human Rights*

1. In the communications of the Asian Legal Resource Centre (ALRC) and the Asian Human Rights Commission (AHRC) we have exposed the situation relating to disappearances in Asia and in particular, in Sri Lanka.
2. According to United Nations Working Group on Enforced and Involuntary Disappearances, Sri Lanka is second only to Iraq in terms of number of disappearances caused in a country. In terms of official statistics three government appointed commissions have reported on about 26,000 cases of disappearances. A further commission, which is still continuing inquiries into another 10,000 cases, has completed inquiries of about 4,000 cases. The government claims that the prosecutions are underway for about 400 out of the 4000 cases. Even this figure is disputed by many organisations in the country. Even if it were true it is just a handful of cases out of the total number quoted above.
3. The major obstacle to the prosecution of the perpetrators is that there had been no criminal investigations into the disappearances when they occurred. The criminal investigation was prevented by special emergency regulation laws, which were passed to create the background for causing large-scale disappearances. The provisions of the criminal procedure code relating to criminal investigations were suspended through special laws. The bodies were allowed to be disposed of without any report being filed before courts or without any inquest. As most of the bodies were burnt there is no possibility of examination of bodies during belated inquiries. Further, as the alleged perpetrators are the

law enforcement officers themselves there is no possibility of conducting credible inquiry into disappearances by the normal process of criminal investigations through the agencies of the police. The demand for the appointment of a special agency for investigating into disappearances has not been heeded.

4. Added to all this is the general collapse of the criminal justice system in Sri Lanka.
5. As is well known, mass disappearances affects large numbers of people who are relatives, neighbours, friends and other acquaintances of the disappeared person; besides this it affects the society at large and shakes the moral foundation of a given society. As a result of the public indifference to the fate of disappeared persons, the families of these disappeared persons have become demoralized and have had to resort to their own means to deal with the consequences of disappearances. As many efforts by them over a period of around 10 years have borne so little result the families of the disappeared have lost faith not only in the legal system but even in the civil society which has failed to respond adequately to the grave injustices done to them.
6. It remains a fundamental human obligation towards the families of the disappeared to respond to the issue of disappearances and make it a fundamental issue of concern to the community at large as well as to the state.
7. The most likely outcome of the present situation is that except for a very few number of cases no prosecutions will be instituted. The reason is that there had been no criminal investigations into these cases. So, in spite of many protests by the local people and organizations, by the international community, by the UN Working Group on Enforced and Involuntary Disappearances and the UN Commission on Human Rights itself in several of its sessions, the matter of prosecution of offenders of over thirty thousand offences has reached a dead end.
8. If the matter is to be resurrected, the first step to be taken is to appoint an independent and credible commission for criminal investigations into disappearances cases. A credible inquiring commission needs to have an adequate legal mandate and resources. Sri Lanka has in many ordinary criminal cases sought the assistance of foreign criminal

investigation expertise, for example, from Scotland Yard. In some investigations into mass graves, Sri Lanka had invited foreign experts. Therefore there is no reason to prevent foreign participation in the criminal investigations into cases of disappearances. In fact, such participation will add credibility to such a criminal investigation commission.

9. However, the appointment of such a commission can only happen if the international community, UN Working Group on Enforced and Involuntary Disappearances, UN High Commissioner for Human Rights and the UN Commission on Human Rights itself take a serious interest in this matter. They have every reason to take such an interest; what has taken place in Sri Lanka in terms of mass disappearances is a crime against humanity. The local commissions have concluded that most disappearances, which occurred in Sri Lanka, were killings after arrest; they have further concluded that disappearances were carried out as a part of plan approved by the highest political authorities. In terms of number of persons dead, the situation of Sri Lanka is much worse than that of East Timor. It is also much worse than the situation of Chile under the dictator Pinochet.

*(Above is a written submission submitted to the UN Commission On Human Rights Fifty-sixth Session under Item 11 (b) of its provisional agenda)*

This book comes out at a crucial time when threats to fair trial are visible in all Asian countries. In fact, there are very good reasons to suspect that the importance of fair trial is diminishing fast in this region. If Cesare Beccaria was to be alive, he would have, unhesitatingly, declared that most of the present practices called ' trials' are barbaric.

.... The danger of returning to the primitive times in dealing with crimes or alleged crimes is very real for any one who cares about the maintenance of the civilized practices in the administration of justice. The changing practices gravely challenge the role of judges and lawyers. Often lawyers are expected to be intermediaries between the unscrupulous law enforcement officers and the alleged criminals. The lawyers have to bargain for concessions from such officers rather than obtaining redress from court. In the context of such out of court dealings, the judges are pushed to a position of helpless on-lookers. Therefore, there is good reason for judges and lawyers to protest and contribute to the restoration of proper practices in the administration of justice.

... It is time for an Asia wide movement to signal the collapse of the system and register protest against the abuse of the legal process. If the administration of the law mechanisms is allowed to collapse as it is happening now, human rights, democracy and rule of law will have little place in the Asian region.

- from the Introduction



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