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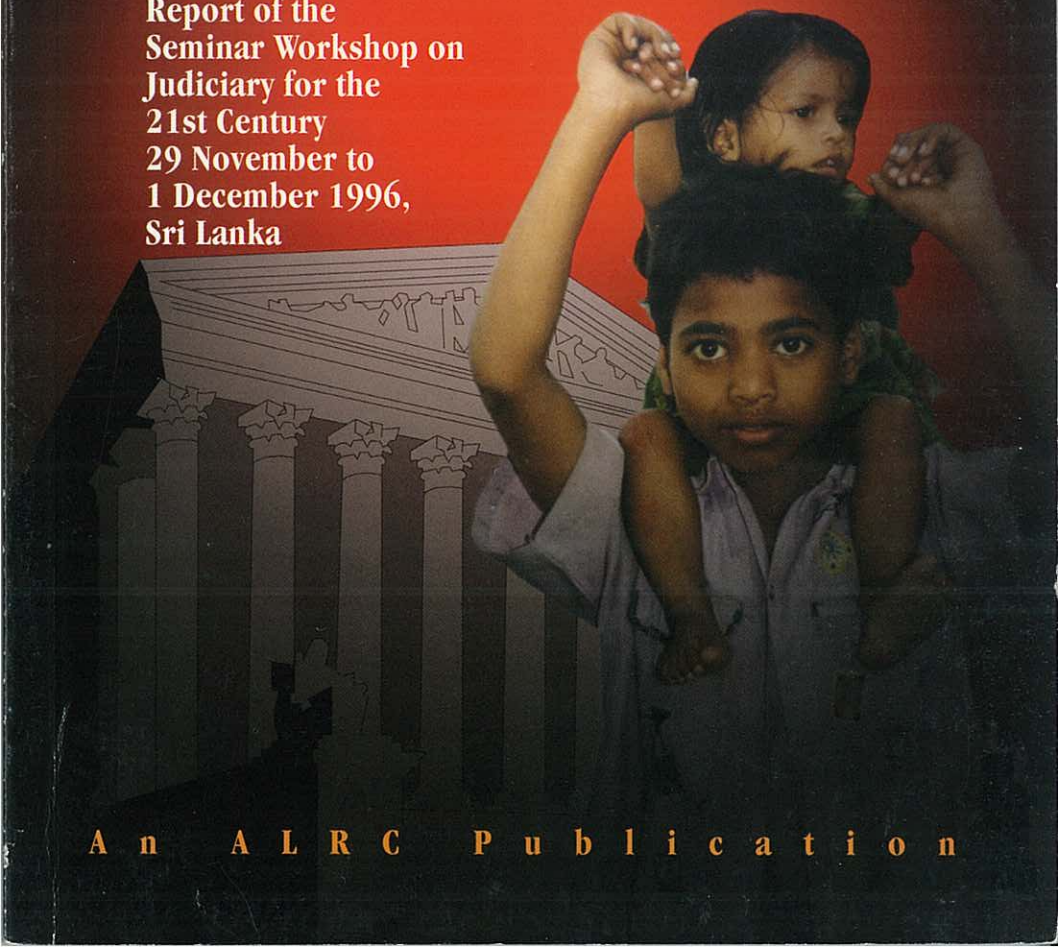
Social Justice and the Judiciary

Report of the
Seminar Workshop on
Judiciary for the
21st Century
29 November to
1 December 1996,
Sri Lanka



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Social Justice and Judiciary

Report of the
Seminar & Workshop
on

JUDICIARY
FOR THE
21ST CENTURY

29 November to 1 December, 1996
BMICH Colombo
and
Subhodi Institute, Piliyandala,
Sri Lanka

Organized by

Vigil Lanka Movement, Sri Lanka
in association with the
Asian Legal Resource Centre, Hong Kong

Social Justice and Judiciary

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INTRODUCTION

We are glad to present the report of the second workshop on Human Rights Related Legal Reforms in Sri Lanka. The specific theme of the second workshop was "Judiciary for the 21st Century." As a result of the first workshop, which was held in Bangalore, the Vigil Lanka Movement was born. The second workshop was organized by the Vigil Lanka Movement in collaboration with the Asian Legal Resource Centre based in Hong Kong. The second workshop was attended by participants from India, Bangladesh, Cambodia, Sri Lanka and Hong Kong.

These workshops are a result of the realization of several Sri Lankan lawyers that the legal system in Sri Lanka is in much need of fundamental reforms. The limitations of the system have been taken as a basic assumption. The workshops have provided a forum for serious discussions on the nature of the changes needed and for a comparison of experiences with other neighbouring countries.

The large number of eminently qualified persons in the field of law who attended the opening ceremony of the second workshop is an indication of the relevance of the issues raised by the Vigil Lanka Movement. The concerns expressed by the judges who addressed the opening session are a compliment to the social consciousness of the Sri Lankan judiciary. The two day workshop that followed included some exciting discussions on issues such as: judicial activism; the need for simplification of legal procedures to achieve the objectives of a proper administration of justice; a critique of the existing models of legal training which result in desensitizing the learners to the acute crisis that the administration of justice is faced with; the importance that should be attached to finding solutions to the problems of poorer litigants; the need for more informal mechanisms of finding redress; the requirements for appointment and disciplinary control of the judiciary; the need to introduce social action litigation and many other pressing issues.

These discussions are included in this report in two ways: sharing of experiences and final conclusions. The notes on sharing of experiences have been written by some participants reflecting some aspects of the discussion that took place and include the writer's own views. As the notes were prepared during the workshop itself they are sometimes short and brief.

The workshop's reports are published in order to share the participant's views with a larger audience. This way more persons may be able to discuss the issues raised. It is hoped that the Sri Lanka Bar Association, the Judges Training Institute and other organizations involved in promoting the rule of law and human rights may give due consideration to the views expressed and the proposals made at this second workshop.

The Vigil Lanka Movement and the Asian Legal Resource Centre hope to continue to have further workshops with the view to helping to improve the legal system of Sri Lanka so that equality before the law may not remain too distant a dream for too many Sri Lankans.

The organizers of the workshop thank all the participants and other persons who have contributed to the success of the workshop.

Basil Fernando
Executive Director
Asian Legal Resource Centre
Hong Kong
April, 1997

Judiciary for the 21st Century*

KEYNOTE SPEECH

by Justice V. R. Krishna Iyer

The twentieth century is reaching its sunset. Inevitably, if mankind survives, it has to think in terms of the 21st century. So it is the compulsion of the calendar that makes all of us think of the 21st century in the hope that all of us will survive. Why do I put this pessimistic touch? It has nothing to do with Sri Lanka. It has nothing to do with Asia. It has much to do with the new world human order.

The 21st century will be grateful to the Judiciary only if we as judges, lawyers and other committed activists, ensure a new world human order. You may even call it humane order. Are

* Excerpts from the Keynote Speech by Justice V. R. Krishna Iyer, Supreme Court Judge (retired), India, at the Opening Session of the Seminar & Workshop under the theme: Judiciary for the 21st Century, at BMICH, Colombo, Sri Lanka, on 29th November, 1996, organized by the Vigil Lanka Movement in association with the Asian Legal Resource Centre in Hong Kong.

we moving towards any thing which is humane or compassionate as in the Constitution of India where it is written in Article 51A as a Fundamental Duty of every citizen that he shall be compassionate towards all living creatures.

Are we moving towards that goal or seeing a world, a new cosmos, a compassionate cosmos, where every human being will be brother or sister of the other, where there will be no brutality, there will be no vulgarity, violence, there will be no total devotion to market friendly immorality, where each one will share and care for the rest of his community belonging to homo sapiens. So, the goal, broadly speaking, to my mind is not what is to happen to the Judiciary in Sri Lanka, or what is to happen to the Judiciary in India, or in Pakistan.

Everywhere there is some problem or other. In India, for instance, where I can speak with more liberty — I feel it very delicate to make any reference to the Sri Lankan situation — I could say that the Court in India has been fluctuating in its role vis-a-vis the human order. The world consists largely of the have-nots. The dialectic of the human situation near the tail end of the 20th century and the arrival of the 21st century reveals that there is injustice writ large. The law in its majestic equality may prevent or forbid everyone, rich or poor, not to beg in the streets, not to sleep under bridges, and that kind of thing, knowing full well that the rich do not sleep under bridges or beg in the streets, but that it afflicts only one class, the majority of humanity.

So they ask for justice. Blessed are they, if you can refer to the Bible in a way, blessed are they who hunger for right and justice for they shall be answered. The 21st century must answer those who hunger for right and justice. Who will answer? Who will adjudicate? Who will enforce this demand for right and justice? That is the objective. That is the challenge of the Judiciary all over the world, whether it be the United States of America, or the United Kingdom, Sri Lanka, or India, Pakistan or Bangladesh.

The real issue, therefore, is taking a global view of the present situation, are we going to have Jesus on the Cross and Barabbas set free? Bernard Shaw has a jibe at that. You must all have been familiar with the story of Jesus and Barabbas, both of them being brought to Pontius

Pilate, the Roman Empire's judge. Whether it is the United States' Pontius Pilate, or the Roman Empire's Pontius Pilate, is immaterial, for, Pontius Pilate's behaviourism is the same.

What did happen was that Jesus was brought because he talked of the kingdom of heaven and things like that and so he was asked by the judge, Pontius Pilate, "Did you claim that there is a kingdom of God?" He said, "You are speaking the truth." Then, the judge asked him, "What do you mean by truth?" And Bacon has it that the judge, Pontius Pilate, did not wait for an answer.

So, he had to be sent to the Cross. What about Barabbas the robber? He had also been brought and tried and found guilty. But the mob, including the priests, said, "We have the right to claim one man's freedom, and we claim Barabbas to be set free."

So, what did happen that day was the dialectic which applies immediately to our situation in the world today. The man who pleaded for non-violence—thou shall not kill, thou shall love thy neighbour—he was sent to the Cross! And the man who had been robbing and had been found to be guilty of robbery, was asked to be set free. "You go"! And what Bernard Shaw says is, we have today the fulfilment of the Barabbas order. I do not think he ever knew about the new economic policy which is wave after wave coming to country after country, where what we have is market friendliness, liberalism, hedonism and things like that.

Infatuated by an insatiable desire to have all the good things to themselves, leaving the vast masses of mankind without any shelter, without any food, without any clothing. They do not matter. They are not present. They are non-persons. This is not anything new. When the Americans passed their great Constitution, the first case which came before Chief Justice Taney's bench question was whether a slave could be set free. Taney who was otherwise a great judge said "No. A slave can be owned. He cannot own."

This sense of commoditisation is writ large in our order today, the social order of the world.

Women commoditised, children commoditised, juveniles

commoditised, labourers commoditised; there are commodities and commodities everywhere, humanity nowhere. There exists a "creamy layer" in each country, to borrow an expression which is popular in India because the Supreme Court currently used that expression although I was guilty of using it first in the 70s in one of my judgements — that was borrowed from an American judgement, so it is legitimate.

What happens in the United States certainly has a certain fascination for the rest of mankind. So I used the phrase in *Kerala v. Thomas* in the Supreme Court and it has suddenly been revived. Everywhere you find, "creamy layer," "creamy layer." The creamy layer has all the pleasures. The rest of mankind belongs to the downtrodden categories.

And so, there is a category of people who want to go to this creamy layer and make the most by way of market exploitation. The result is that the large number of people have nothing to live upon, to live by. To quote Gandhi, Mahathma Gandhi I mean, he said that "There is enough for the needs of all but there is not enough for the greed of all."

So, we have got this clear idea in our mind. That is the new order which we have got to be shaping in the 21st century. Are we going to be answering the needs of the many, or the greed of the few? Long years ago I have been deeply touched once when I was in Calcutta staying in the Raj Bhawan because the Governor happened to be a personal friend.

He came to me and gave to me a quotation from Abraham Lincoln. Abraham Lincoln long ago, two days before his assassination, said, "Corporations are coming in this country and growing in a big way. I am very worried about the power the corporations are commanding in this country. Will this Republic be destroyed by them? That is my worry, my anxiety." So said Abraham Lincoln then.

Later, Woodrow Wilson campaigning for his Presidency in 1918 or so, said "It is written on the pages of history intimately that the Government of the United States is shaped and run, not by the White House, but by the corporate power of the vested interests of the United States of America." Now, that applies to many other countries. So I am trying to emphasise before you the importance of humanism. Did Jesus live in vain? Did the Buddha live in vain? Did Ashoka, who after a victory,

said "No more of war. There shall be rock edicts which will speak compassion to all mankind." Is that the message that we must harken to?

To my mind, it is absolutely plain that if this cosmic order is to have any stability at all, if gourmandisation by corporate power is not to eat up all the resources available in the world for their own benefit, for their own profit, maximum profit being the motto, if that is not to be the goal and all people live together in togetherness, being happy, one large happy family, if that be the true goal, or the destination of mankind, then I suppose there has to be a great struggle, and that struggle involves peaceful approaches to issues. These peaceful approaches are possible only if you have a new understanding of the Rule of Law.

The International Commission of Jurists – fairly orthodox, not very radical, but at the same time has outstanding members on it – have repeatedly passed resolutions that the Dynamic Rule of Law means that there is sharing of justice that the goods shall not be monopolized but everybody's basic requirements will be attended to. This is what the International Commission of Jurists long ago said. Way back in 1957 or 1958 in Delhi it was the Delhi Declaration. It was repeated later on. Then we have again the Universal Declaration of Human Rights. Do we treat that as world jurisprudence?

The Universal Declaration of Human Rights contains all the human rights called fundamental freedoms or fundamental rights in various constitutions in the world. Now, those fundamental freedoms inscribed in the Universal Declaration followed by the two great International Covenants, that is the first generation of human rights. Thereafter the second generation, the third and the fourth generation of human rights. Environmental pollution means asphyxiation of humanity. There will be no India, no Lanka, no Pakistan if our atmosphere, our ecology, is to be destroyed, our environment is to be damaged and there is not going to be free air for man to breath or water to drink. That is the situation.

Just take the example of Ganga. In the good old days when people die, or when they go to the Ganga, they write a will saying, "I will not return but my body be floated in the Ganga." So when people die their bodies are taken and you see bodies floating in the Ganga. That was supposed to be a kind of spiritual satisfaction in the last moment of a

person's life, to die and to be buried or to be floated in the Ganga. Now, this sacred river of Ganga has become so polluted that if you want to die you take a dip in the Ganga! That is the end.

There was a time where in my State of Kerala, Kalady, where Adhisankara was born, there is a river where Adhisankara was taking his mother for daily baths. An old mother, a devoted son, spiritually ennobled, but still devoted to his duties as son. He used to bathe her in the Periaru river. Now there are so many factories that have come there – chemical factories. Those chemical factories are polluting Adhisankara's river to such an extent that there was a warning, there used to be a warning (I do not know if they have removed it), by the Municipality, "Do not take your bath here," because it is so deleterious to health."

Then, with these dark hues in the sky we have got to find out whether there is any solution for mankind for survival. Our ecology is being destroyed at a rapid pace: our natural resources are being taken away and then genetic changes made, patents made, intellectual property rights are all taken away – robbed. We are living in a rapidly changing world.

So, what do we do to save mankind in this given situation? The multinational corporations claim "liberalism." By liberalism they mean free access – "open sesame" into every country. We have various natural plants which are of rare healing power they take away from the Adhivasis (or you call them Aborigines, whatever language you may use), and pay them some little money. Take away and then make some little changes here and there and take a patent and nobody else can eat them, nobody can take them and nobody can have tumeric or things like that, because they have got patents. The free market world has suddenly become a monopolized world. Knowledge has been cornered. It looks as if Newton, when he saw the apple fall, should have gone, rushed to the patents office in England and then said, "I want a patent because I have seen the law of gravitation. Nobody else shall discover it." Similarly, Einstein when he found out the law of relativity, he must have immediately gone to the patents office. If this be the new world order there is no hope for mankind.

Here we have got to come therefore, back to the beginning where, shall I say, Loka Samastha Sugino Bhavantho. Our ancients have told us, whether it be in Tamil culture, or Sanskritic culture, or Buddhist culture, or Christian culture, or Islamic culture, which speak of world brotherhood, we have one thing — the common wealth of the cosmic community has to be taken care of as the responsibility of the togetherness of mankind. This is the Rule of Law. Translating the Rule of Law, the Bar has an active duty today to convert these principles in terms of law.

There is a beautiful quotation. Higginbottom of America writes to Mahathma Gandhi, "spirituality is three-fourths of economics" and Gandhi writes back to say, "Economics is three-fourths spirituality." But today, economics is savagery, not spirituality. Nobody would accept you if you say. "Be spiritual, preserve values." No. "Make the most of what you may and leave the rest to the devil." That kind of approach is being made.

This carnivorous approach, this cannibalistic approach, this has got to be changed by a new value order. That is what you call justice. The definition of justice is this new value order where man matters, woman matters, child matters. This is the thrust of the change we want in the 21st century. Can we produce that? Until we produce that we do not deserve to have title to the wealth of the world that we are heir to otherwise.

Then comes the real question: how do we achieve it?

When we talk in terms of the Universal Declaration of Human Rights, or the various Covenants, or the various Summits, — we have got the Beijing Summit for Women, we have got the Rio Summit for Environment, we have got the Copenhagen Summit Social Clause, we have got the Geneva Summit, we have got various other Summits under the auspices of the United Nations. But the United Nations is perishing. It is itself being wound up. It has really no power. It has no teeth. But to make believe, it is a new art. We have the make believe of the United Nations — illusion but not actualization. That is what is happening.

And, similarly, in each country, country after country, one country which has not signed the International Covenant on Social, Economic

and Cultural Rights, that is the United States of America, makes the most noise about human rights. They have not signed it. They have not ratified it. They have only ratified the International Covenant on Civil and Political Rights, but not the other yet. But we are time and again told that the social cause they are interested in seeing is that the Indian labourer gets more wages so that the multinational corporations may come and say, "Your cost is more than ours, therefore we will capture your market." This situation, this contradiction, how do we change this?

There are three instrumentalities: Montesquien that we have all inherited broadly speaking, with changes in various conditions local; the Executive, the Legislature and the Judicature or the Judiciary. The Executive executes. The Rio Declaration has been signed by a large number of nations. But pollution is on the increase. Which Minister has taken effective action, whichever the country, to arrest and stop pollution in terms of the Rio Declaration? Not at all.

Similarly, the natural resources of each nation belonging to itself, so that somebody else will not rob it. Is there any enforcement of that? Does the Executive manage to prevent it? I find no country whatever, which is effective in opposing this. You can give instance after instance of country after country where we have not been able to arrest ecological destruction. Tigers are vanishing. Elephants are being killed – poached for their ivory. Various kinds of fish are becoming extinct. These are all nature's abundance given to man as a gift. And they have a role to play – please do not think that the tiger only always kills. The tiger is necessary. It is a great genetic resource.

Now for aphrodisiac purposes they are killing the tiger and their bones or fangs, or whatever, will be very useful to excite your sex impulse. Some people in the North, or the West (the "West" is an obsolete expression, now it is the "North"), they want to have excitement all the time, sex excitement, there is the aphrodisiac: "Let us kill tigers; what does it matter?" "You talk of ecology. What, we do not care for ecology?" Similarly the environment. There are environment boards in many places but then, hardly enforced.

Then again, you go to human rights. There is so much of pressure

on the Prime Minister from the United States of America. Their concern for 95 crores of Indians is so much that their heart was bleeding all the time. They said, "There must be some machinery by which you can cut through." There is the Human Rights Commission in India. It is not effective. What could be done about it?

Once in a talk I delivered, I said that the Human Rights Commission was ineffective. I recommended that they should go and see a dentist. They were surprised. Why a dentist? I said "dentist" because the Commission had no teeth. After my talk someone asked me which dentistthey should go to. I told them the dentist is Parliament, to amend the law to give more teeth to the Commission.

The Judiciary must be independent. The independence of the Judiciary demands from the judge a price he can hardly pay.

Also a Judge must be alive to suffering. That is what makes a judge a judge. Then in the law, as Cardozo has told us in "The Judicial Process," you can write a long judgement, this way or the other. But very much depends upon your sensitivity, your perspective, your philosophy, which must tally with the Constitution, not your own philosophy. In fact, I have been criticized by a great jurist now no more, Seervai: "This Krishna Iyer thinks that his philosophy is the Constitution." May be. May be I was wrong. He is entitled to criticize me.

But I would only present this proposition, namely, that suffering which is sought to be put an end to, human rights which are sought to be defended, they must be read in terms of the international instruments into the Constitution and every judge must have that feeling. To quote the language of Swami Vivekananda; he says, "People talk of patriotism. I ask them, do you feel, do you feel until you head reels for the neighbours who are suffering for the last centuries." He was speaking about the Aborigines, the Adhivasis, the Harijans. Now I therefore say that public interest litigation is a necessary instrument.

It is the summons to the judiciary and to the bar: "You shall do justice for those who hunger for right and justice." How? Public Interest Litigation. Social Action Litigation. And then, informality in procedure. Helping the person who is handicapped to come to court and

have justice rendered to him. Capelletti, in his three volumes, begins saying, "Social Rights are perhaps the most important human rights today."

So, we must have a new perspective, philosophy, about human rights, as part of the jurisprudence of the world and therefore the jurisprudence of every country. The woods are lovely, green and deep, but each one of us must feel we have promises to keep and miles to go before we sleep.

Statements by the Participants

During the last three days we have discussed the theme of Judiciary in the 21st Century. As a group of persons seri ously committed to achieving justice we felt that the time has come to make our views known to the state and the public. The response we have received from a number of members of the judiciary and many members of the bar has been an encouragement. The contribution made by Justice Krishna Iyer, former Supreme Court Judge of India, was very unique. Several other judges and intellectuals from India, Bangladesh and Cambodia showed that the theme is very relevant to other countries in Asia.

We offer our views to the public and the state with the hope that it would lead to an informal discussion on these matters. We firmly believe that public debate is a vital aspect in moulding the nation to face the future and ensuring respect for human dignity.

A. Sharing of Experience

RIGHT TO LIFE AND LIBERTY

Justice H. Suresh *(retired)* and Melwin Herath

Under the American Constitution, Fifth Amendment:

> "No person shall be deprived of his life, liberty or property without due process of law."

The draftsmen of the Indian Constitution were reluctant to bring in the American "due process" as "due process" had been construed by the American Supreme Court as equivalent to "just cause."

Art 21 of the Indian Constitution says:

> "No person shall be deprived of his life or personal liberty except according to procedure established by law."

Under the Constitution of Sri Lanka there is no fundamental right to life as such. However, Art 13(1) 2/W Art 13 (4) should be considered as equivalent to Art 21 of the Indian Constitution.

Art 21 has three important concepts "life," "liberty" and "procedure established by law."

The Indian Supreme Court has so interpreted these three concepts as to guarantee almost all the human rights through Art 21.

Let us take each of these concepts. "Life" — what is the meaning of life? Is it mere animal existence or is it something more?

The Indian Supreme Court has said "we think that the right to life includes the right to live with human dignity, and all that goes with it.... "

This right to live with human dignity..... derives its life breath from the Directive Principles of state policy, particularly clauses (e) and (f) of Art 39, Art 41, 42 etc...."

Thus this Right to Life includes:

(a) Freedom from bonded labour;

(b) Right to shelter;

(c) Right to livelihood (subject to Art 41);

(d) Right to a decent environment;

(e) Right to education (up to the Age of 14 years);

(f) Right to health care,

Right to admission to a public hospital in cases of emergency;

(g) Right to environment;

(h) Right not to be delayed in execution of death sentences etc.

Similarly the meaning of the word "Liberty" has been expanded so as to include:

(a) Speedy Trial;

(b) Release of Undertrial Prisoners;

(c) Fair Trial;

(d) "Bail" is the rule and not "Jail;"

(e) Rights of Prisoners;

(f) Right not to be handcuffed;

(g) Custodial death;

— Right to compensation.

The expression "Procedure established by law" has been so transformed as to bring in the notion of "due process."

Initially, the Supreme Court only said that the expression meant only "ordinary and well established criminal procedure" and refused to look into anything else. It also read each Article in isolation and the Court was not willing to look into Art 14 (Equality clause) or Article 19 (Fundamental freedoms) while construing Article 21.

The change came gradually.

The Supreme Court construed Article 14 and said "Equality and Arbitrariness are sworn enemies..... Where an act is arbitrary, it is implicit that it is unequal both according to political logic and Constitutional Law and is therefore violative of Article 14. Article 14 strikes at Arbitrariness in State action and ensures fairness and equality of treatment....."

The Supreme Court (in *Maneka Gandhi* 1978) said firstly the law must be a valid law, secondly it must not violate any of the fundamental rights, thirdly Article 14 and Article 19 (Fundamental freedom) should not be infringed, and lastly in this manner, the "procedure" must necessarily be "right, just & fair" and the law which provides for procedure must also be reasonable just and fair.

That is how the American "due process" has been brought into the Indian Constitution by judicial innovation and activism.

The same approach can be had under the Sri Lankan Constitution —

(a) Liberty guaranteed under Art 13(1) should be read with Art 12 (equality)

(b) Fundamental freedom guaranteed U/Art 14 and the restrictions U/Art 15 should be read with the Directive Principles U/Art 27 (2) (a), (b), (f) and (g) and also clauses (7) & (9).

(c) Art 13(4) should be construed so as to guarantee the Right to Life. This has to be understood in the light of the basic provision in the

Constitution conferring no right on the state to kill any person.

(d) Under Article 126(2) the Supreme Court has no power to strike down a law as ultra vires the Constitution. However, the Court can strike down an action taken by the executive pursuant to such a law as unjust, unfair and violative of Art 12, R/W Article 13(1) or (4).

(e) Even in respect of Article 16(1), even though the Court cannot declare the law as ultra vires, but the action taken under such a law can be struck down as violative of Art 12 or 13 or 14 of the Constitution.

Under Art 4(d) it is the duty of all organs of government which includes the judiciary to respect, secure and advance fundamental rights. While a law may abridge a fundamental right, it is for the Courts to Consider whether it is arbitrary or not. Sri Lanka being a Democratic Socialist Republic, there can be no law which is arbitrary. An arbitrary law is violative of Article 12.

While the judiciary has no power to strike down a statute, it can declare an arbitrary action taken under an unfair legislation or an unjust law as ultra vires the Constitution.

JUDICIAL ACTIVISM

by Prof. Basheer Hussain

Judicial activism is a part of the world-wide movement for access to justice. In a traditional system, the benefits of human rights were available only to the privileged few. Justice was like the "RITZ HOTEL."

In theory it is accessible to all but in practice it is only for those who could afford it. Judicial Activism was a revolt against the traditional system of judicial process. It was introduced into the Indian Jurisprudence recently by Justice Krishna Iyer. Justice Bhagwati followed it up. Now it has become a vital aspect of the Indian judicial process. It has become a widely accepted ideology.

Judicial activism is a recently developed judicial concept. In this system more than the advocates the judges themselves play an active part in making the social and political rights available to the deprived sections of society. This is opposed to adversarial procedure. In this system a party which is weak is helped by the judge with the arguments as well as with the evidence. By this the fairness of the judicial procedure is enhanced. The judge under this system is not a neutral umpire as he is in the traditional procedure. He is not a mere passive listener to the arguments of the rival advocates but an active participant in the process of justice.

The traditional method of interpretation of written laws did not allow the judge any discretion and made the law static in a dynamic society. According to Montesquieu the only duty of the judge was to apply the law blindly like an inanimate being. No matter that the law be wise or foolish. For the enforcement of the new economic and social rights this method was unsuited. Besides, the laws, of the civil procedure code, the criminal procedure code and evidence, were found to be hindrances to access to justice. They were found to be inadequate to meet the new challenges of newly emerging economic and social rights. The judges were compelled to liberalise the traditional laws of procedure framed in the 19th century to serve the interests of humanity. By this liberalisation, justice became more easily accessible to the common people. The welfare of the "little men" became the measure of justice.

Judicial activism presupposes an independent judiciary composed of courageous and bold judges who could perform their duties fearlessly.

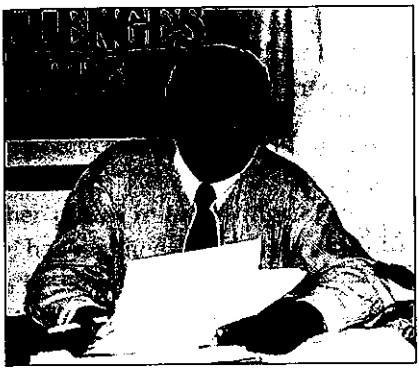
Sri Lanka has a fairly independent judiciary and an independent and vigilant bar. As India's neighbour, with the modern system of

communications, the Sri Lankan judicial system could not remain insulated from the happenings in India.

There is an awareness in the judicial community of Sri Lanka about the importance of public interest litigation in enforcing economic and social rights. There are cases of judicial activism in some of the recent judgments of the Supreme Court of Sri Lanka. There is a need to carry it forward.

JUDICIAL ACTIVISM IN SRI LANKA

by Kumar Ekaratne



In Sri Lanka there are 2 ways that a criminal case could be forwarded to court.

1. After the 1st information is reported by Police.
2. Under 136 (1) A of the Criminal Procedure Code whereby a private individual makes a complaint though an affidavit and when the judge is satisfied that a *prima-facie* case could be established.

In civil cases they are brought forward by plaint and affidavit according to the civil law of the land. But there have been other instances where NGOs or other public interest committees have brought certain complaints to the notice of the courts and where the courts have recognized certain matters arising out of those complaints.

Comparing the judicial activism that we have witnessed in India, it has to be said that in Sri Lanka there is hardly any material of judicial activism.

In one instance, a judge, to whom a Buddhist nun was produced by Police to be sent to an asylum to be treated for insanity, after going through her evidence, found out that this nun had been raped by railway guards. After obtaining the necessary information he sent the case to the Attorney-General for proper action.

Therefore, it is noted that for judicial activism, the Sri Lanka judges should be motivated, inspired and educated and shown how the Indian brother/sister judges go through the inquisitorial process and give locus standi to the poor citizens thereby meting out justice in the proper democratic process of law.

But in the Superior Courts we find that human rights activism has taken place with a very high level of performance after following the Indian judicial performance.

JUDICIAL ACTIVISM - AS I SEE IT

by G. R. Natraj

The concept of Judicial Activism has developed in recent times and has assumed new dimensions in our country. We the people of India gave ourselves a Constitution and have chosen a democratic system of government with a separation of powers (ie. legislative, judicial, ex-

ecutive). On the eve of independence we took an oath to adopt and live by the Constitutional provisions, establish the rule of law and take all such steps possible in building a "social welfare state" where people live with dignity and pride. In this context it is essential to examine whether, even after nearly 50 years, the people have been able to achieve that social welfare state, where the common citizen is free from poverty and hunger and can adequately obtain health-care, education and shelter and where life for himself/herself and his/her future generations is adequately comfortable etc.

Even after working with the Constitution for 50 years and after much social Welfare Legislation has been passed, and with such vast resources of land, human resources, intellectual giants, and a great cultural heritage, the common citizens' aspirations of having a decent dignified life has remained a distance dream.

Corruption in higher places (especially when the politicians of our country have set a very bad example by coming to power by all corrupt practices) has given rise to degeneration in all walks and departments of life. Revenue loss, due to corrupt practices and corruption in higher places in two wings of democracy, i.e. legislature and executive, has resulted in a failure of administration and denial of the benefits to the common citizens of our country, giving rise to a situation of frustration and anguish.

In this background, the common citizen is anxiously looking for some kind of help from the remaining wing of the system of democracy – the Judiciary.

This is where the judiciary, comprising the bench and the bar, must realize its responsibilities and the role that it has to play in setting new moral and legal standards in helping the society to march towards an age and stage of an utopia, where the common citizen if free from hunger, grief, poverty, and a decent dignified society where constant improvement in the quality of life is everybody's concern, where sugar and honey is in plenty and abundance is to be shared and enjoyed by all as a matter of right – thus I feel is the ideal Human Right as enshrined in the unwritten Constitution of the humanity, the dimension of which is a sacred obligation and duty with which each one of us

who are occupying this place on the face of this planet, having no regard to the caste, community, religion, breed or nationality.

Having due regard for the due process of the law of nature, we the members of the legal profession, the bench and the bar, should be able to help support any cause or litigation which is brought to the notice of the Commissions.

Any cause or action, which is brought to the notice of the Judiciary should be given all the due attention and importance without consigning it to the courtroom routines, which is likely to cause enormous delay — and which may ultimately result in the denial of justice.

The anxiety and concern shown by any group or individual in petitioning the courts must be given proper care and encouragement. After all, that individual or the groups who take up such causes are also genuinely concerned in their hearts about the social evils which are malignant to the development of the society in which they are living. This probably is the other dimension of the entire process of which we should be reminded about. This probably is the most sacred human right that all of us should be concerned about.

With this back-drop I would like to mention about my personal experience with you all about a Public Interest Protection Foundation of which I happen to be the Founder/Convenor.

Judicial activism which was very latent was given a new dimension and meaning by doyens like Justice V.R.Krishna-Iyer and Justice Bhagwati with their pioneering judgements and new meanings that they tried to read into the Constitution which probably is the philosophy of the Constitution of India and the various statues which came to be passed. This crusade of disciplining the executive and the administration has been continued by the Judiciary ever since, but only at the higher levels like the High Courts and Supreme Courts. But the Judiciary at all levels must be able to respond wherever they get an opportunity to do so, on the very lines on which the Superior Courts are laying down the law and precedents, to make justice accessible to the common man at the lower court level.

In Bangalore Karnataka, India we have started a Public Interest Pro-

tection Foundation by the name "KECHHU" which in simple terms means pride with valour. When expanded it means KARNATKA, ENVIRONMENTAL, CONSUMER, HUMAN RIGHTS, CIVIC AMENITIES CORRUPTION IN HIGH PLACES, ECOLOGICAL BALANCE, PROTECTION FOUNDATION.

This movement comprises individuals from all walks of life like advocates, doctors, engineers, government officials (retd) as well as in-service Police Officers, Law Teachers and Professors.

This is a NON-POLITICAL, NON RELIGIOUS, PUBLIC INTEREST PROTECTION FOUNDATION, formed as a voluntary organisation founded by the member's donations. The main purpose and objects are to receive, process and prepare the complaints from the public and present them in the form of a repetition before the High Courts and other Courts for such relief as they deem fit in the circumstances of the case.

I must thank Mr. Justice M.N. Venkatacheliah, former Chief Justice of India and present Chairman of the Human Rights Commission of India who is the inspiration and motivator behind this movement.

A few petitions have already been filed within the short period of this foundation coming into being.

FUNDAMENTAL RIGHTS UNDER THE INDIAN AND SRI LANKAN CONSTITUTIONS: A COMPARISON

V.S. Mallar & Nimal Dassanayake

The purpose of codifying the Fundamental Rights is to ensure that the state and its instrumentalities do not violate them. It is intended therefore that Fundamental Rights are a limitation on the power of the state. The Indian Constitution under Article 12 expressly defines the state and this definition has been expanded liberally by judicial interpretation. There is no specific article in the Sri Lankan Constitution which defines the state. However, "state," in the context of the use of the expression, "Administrative or Executive action" under Article 126 would include executive and state controlled or state-sponsored institutions.

The Supreme Court and the High Courts in India are empowered to strike down any law, delegated legislation, custom and usage having the force of law within the territory of India if they are found to be violative of the fundamental rights. (ARTICLE 13 (3) read with ART 13 (1) & 13 (2)). The laws would include pre-constitutional law also. Art 16(1) of the constitution of Sri Lanka categorically states that all existing laws and unwritten laws shall be valid and operative not withstanding any inconsistency with the fundamental rights chapter.

Under the Indian Constitution, there are what are known as "Group Rights" (ARTICLE 26 and ARTICLE 30). Subject to public order, mo-

rality and health, every religious denomination on any section thereof shall have the right:

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and,

(d) to administer such property in accordance with law.

ART 29 (1) Any section of citizens within the territory of the India or any part thereof having a distinct language, script, or culture shall have the right to conserve the same.

ARTICLE 30(1) All minorities, whether based on religion or language, shall have the right to administer educational institutions of their own choice.

Under the Sri Lankan Constitution such group rights are not expressly mentioned.

With regard to the interpretation of fundamental rights the Supreme Court of India earlier followed what is popularly called, "The Theory of Exclusivisity of Fundamental Rights," according to which if any law satisfies any one of the fundamental rights it would be upheld (*A. K. Gopalan vs State of Madras* AIR 1950 SC 27). But now the Supreme Court has rejected this theory and has adopted a Composite Code theory (*Maneka Gandhi vs Union of India* AIR 1978 SC 597).

Under the Indian Constitution a person would include a citizen, foreigner and also juridical entities. A citizen would not include the legal personality but the Indian Courts held that a legislative measure or an executive action might affect the interest of both the Company and its shareholders. In such case, the Courts would not refuse to give relief to the shareholders (*Bennett Colman & Company vs Union* of India AIR 1973 SC).

Courts in India have in appropriate cases involved the following doctrines in the context of interpretation of fundamental rights:

(a) doctrine of eclipse;

(b) doctrine of laches;

(c) doctrine of severability;

(d) doctrine of prospective over ruling;

(e) doctrine of basis structure;

(f) doctrine of harmonious constructions.

In India in the context of Judicial Activism the scope & content of the fundamental rights have been enriched by the Supreme Court in the following ways:

(1) The expanding of the definition of "state" under Art 12 to include agent or instrumentalities of the state;

(2) Article 21 of the Charter of unenumerated and unarticulated rights;

(3) The liberalization of the concept of locus standi;

(4) The invocation of epistolary jurisdiction (by letters and telegrams);

(5) Holistic interpretation of Fundamental Rights directive principals of state policy and Fundamental duties.

THE SCOPE FOR INTERPRETIVE INNOVATION UNDER THE CONSTITUTION OF SRI LANKA

1. By reading Art 4 (d), Art 27 (2) (a) and Art 28 (2) together an attempt may be made to relax the concept of locus standi.
2. A combined reading of Art 27 (15) with chapter III, may help in the matter of assimilating international instruments on Human Rights within the legal system of Sri Lanka by humane interpretation.

The objection of ART 29 can be met by observing "the non-justiciability does not mean non-judicial cognizability."

(3) The Invocation of the "Doctrine of Basic Structure."

CAMBODIAN EXPERIENCE

by Lao Mong Hay

The role of the judiciary as the "last resort" or the role of the judiciary as the provider of justice?

If "last resort," then we should concentrate on the following:

1. Attributes required:

a. Institutions: Structure of the judiciary;

b. Procedures for the workings of the judiciary;

c. Staffing: appointment, removal and retirement of judges

- moral qualities: personal qualities vs. value system and conscience of the society;

- practical experience;

- erudition.

2. Legal education

3. Environment in which the judiciary is working:

a. National interests;

b. Society's value system;

c. The other branches of government: executive and legislature;

d. The well-being of the people;

e. The law: interpretation and judicial activism;

f. The international community and human rights.

4. Reactions and responses of judges to the environment.

Is the role of the judiciary enough to ensure the rule of law and the well-being of human beings?

- dependence of the judiciary on the executive to implement and enforce its rulings.

PROPOSALS GEARED TO IMPROVING LEGAL EDUCATION

by Joe Silva, M. Lathika Nath, N. Manohar and Lao Mong Hay



This group has considered the ways and means to improve the quality of legal education by improving the curriculum in the Sri Lanka Law College. The following proposals were made:

A. Course Content

Develop a syllabus with Human Rights perspectives particularly in the subjects of:

Jurisprudence;

Constitutional Law;

Administrative Law;

Criminal Law (substantive and procedural);

(All these subjects should be value based and involve a comparison with various systems of law and approaches and internal and indigenous Jurisprudence.)

Labour Law and Justice delivery systems -- justice and equity based -- Humane Approach; and

International Law -- more elaboration on Human Rights Instruments.

A substantial practical training programme for the professional stream and for the academic system and other research oriented programmes should be included.

B. Teaching Approach

1. Up-to-date legal materials to be prepared (teaching materials and course materials).
2. Method of teaching must be based on a complex = lecture + problem oriented-solving method and critical evaluation of cases to stimulate originality in students' thinking processes plus CLS - awareness.
3. Orientation courses / refresher courses for value based legal education.
4. Interdisciplinary (treatment of law) teaching of law.

PROPOSALS GEARED TO IMPARTING A SOCIALLY RELEVANT LEGAL EDUCATION

The Bangalore Declaration and Plan of Action adopted by the International Commission of Jurists (ICJ) at the conference on Economic, Social and Cultural rights and the role of lawyers categorically stated

that,

> "An independent judiciary is indispensable to the effective implementation of economic, social and cultural rights. While the judiciary is not the only means of securing the realisation of such rights, the existence of an independent judiciary is an essential requirement for the effective involvement of jurists in the enforcement, by law, of such rights, given that they are often sensitive, controversial and such as to require the balancing of competing and conflicting interests and values."

Jurists have a vital role in such attainment as stated in the UN Basic Principles on the Role of Lawyers.

The effective action towards attaining the goal of Human Rights would be an increase in the sensitisation of judges and lawyers. Government officials and all those concerned with legal institutions, Universities, law colleges, judicial training courses and the general media have a fundamental responsibility to promote a greater awareness of human rights and their legal and moral content.

Keeping this in view the law courses should be so adopted to be in tune with Human Rights values. Human Rights and Humanitarian law should be part of the syllabuses. The orientation which a legal scholar or a legal practitioner should undergo must be in the values of humanism and humanitarianism. Until now the Human Rights elements in the legal curriculum have been taught at higher levels as only part of international law and constitutional law. The time has come to include and treat many other subjects in the light of Human Rights values at the basic foundation level itself.

Considering the imminent need for a human rights oriented and value based legal education, it is proposed that the following course content, along with the existing pattern or models of law learning and law teaching both for professional and academic streams of legal education systems in Sri Lanka be formulated. Today's law students are tomorrow's lawyers, judges and jurists. A socially relevant education is a must, with a proper understanding of human rights values environmented in various instruments to realise what the dignity of the individual is. Instead of making legal literates in the legal vegeta-

tive process the legal education system should impart the human spirit in the course content to create self-respect and independent "legal statesmen" who would serve the people and country committed to human rights causes and values.

Thus the proposal to improve the present system begins with the introduction to the subject of Jurisprudence. Students should be taught the merits and demerits of the old theories and the new theories.

As jurisprudence is a component of various subjects like Constitutional Law, Administrative Law, Criminal Law and Civil Law its content must be carefully shaped to imbibe them with the human rights related doctrines, theories, concepts and values.

Constitutional Law, Administrative Law and International Law, being the subjects of Public Law shall bring in the highlights of the universal values of human rights. The natural component in all these subjects must be the realisation of individual, social and group rights. Therefore, the students should be given Public Law. As some of the Constitutions are weak in providing effective judicial review of legislation post enactment challenges when it affects citizens rights, the teaching emphasis should be on Administrative Law with Human Rights Jurisprudence in mind. Such shaping of Administrative Law Jurisprudence forming part of the nation's legal system would restrain executive arbitrariness.

Criminal Law, both substantive and procedural, should be attuned to attain the higher altitudes of the "rule of law" which reflect the make-up of the civilizations of the peoples of a country. The course content must give pride to the student when he learns his country's Criminal Law. Labour Laws and Industrial Relations Laws have to be shaped according to the standards and norms advised by the ILO and the student should be taught the underpinnings of the exploitative "contract system" which "commodifies" labour. Labourers are to be valued by a country and require fair treatment under the Law.

In so far as International Law is concerned, an elaboration based on the values behind the important Human Rights instruments should be included in the syllabus. Humanitarian Law is getting a new thrust today in troubled countries all over the world and it should be included

along with Human Rights Law.

Any profession, whether medical, engineering or legal, requires practical training as part of the education or learning process. Such training shapes the professional to gain confidence and gives him an independent mind. It should liberate himself from all influences until he completes the course as a dependent learner.

TEACHING APPROACH

The legal education system should allow both the teachers and students to continuously learn to keep up-to-date of the Law's development.

Teachers should have teaching materials and a clear plan and program for the course. The course material must be provided well in advance and the classroom learning must be interactive (ie Student-teacher interaction, debates, question-answer, argumentative etc.) These things normally should be preceded by a lecture and the lecturer must apply every method to increase the ability and skill in solving the problems in actual fact-law situations. Moot courts, periodical seminars and exposure to external scholars are added advantages to the learning process in creating legal scholars and professionals.

All attempts shall be made to stimulate originality in the thinking processes of students.

Pure legal learning while having certain advantages does not equip the law student with the social, economic and political understanding and the repercussions and impact on the Law. The teaching method and content of the curriculum must therefore be premised on non-law subjects, ie. the social services/humanities. An inter-disciplinary treatment of the subject and interactive treatment while teaching law would inculcate in his student's mind objectives for his career.

Apart from regular institutional learning to create a lawyer concern must be shown to continuing education, through bar councils, by organising periodical workshops for lawyers, and similar programs for lower judiciary and also for higher judiciary if needed. This could be done by interacting with the legal academics. The focus should be on

Human Rights and Humanitarian Rights.

To keep pace with the developments in law, national and overseas (transnational) law teachers should be given orientation/refresher courses and periodical workshops to improve their teaching techniques by modern methods.

The value based system of legal education is understood here to mean the discussion of learning of the subjects in the light of ethos, social & cultural values. In the real situation and in the context of the South Asian situation, knowledge about public interest litigation jurisprudence needs to be introduced to law students to equip them to work for the human rights cause which is going to be the new dawn of the 21st Century's Justice delivery system.

PROPOSALS AIMED AT IMPROVING LEGAL EDUCATION

A. Course Content

The present syllabus needs to be changed relating to its course content in order to improve the standard of legal education being imparted. In order to achieve this it is necessary to:

a. update the curriculum

b. incorporate human rights provisions/perspectives - for eg.

- Constitutional Law	- International Human Rights Instruments
- Criminal Law	- Right to Life/Liberty Substantive/Procedural
- Public International Law	- Human Rights (UDHR, ICCPR, ICESCR)
- Environmental Law	- Right to life, Right to a clean & healthy environment
- Comparative Legal Systems	- Practical papers as seen in clinical legal education,

Moot Courts, drafting/pleadings etc.

Additional training must be given to the student in order to develop a critical appreciation of the role of law/ rule of law according to present day conditions.

B. TEACHING OF LAW

Those with an aptitude for teaching must be chosen by the University/Department.

An integrated teaching method would give the student various dimensions of the law (eg: sociological, political etc).

A discussion-oriented and problem-solving approach must be adopted. A critical evaluation of cases would stimulate the originality of the student and help develop an appreciation for the litigation process (both adversarial and inquisitorial).

DETENTION AND BAIL

by K. Sivaapalan, P. Samararatne, Ms. Senaratne, Ms. Maheswary, Ang Udon

1. Under the normal laws magistrates are reluctant to exercise their discretionary power in favour of the suspects. They would rather use it in favour of the state. In the process eventually bail is rejected and the man is kept in remand. Refusal of bail is the order of the day and granting of bail is an exception.

2. Some members felt that in certain instances remanding of the suspect is desirable for the following reasons:

(1) to facilitate the investigattion, and

(2) to protect the witnesses.

3. It is felt that the magistrate has no power under the Emergency Regulations. The magistrate should be able to review the situation and act accordingly.

4. The amount of bail should be reasonable and within the means of the suspect.

5. If the detention of a person is for no reason or without any basis the judge should have the power to compensate the person accordingly.

6. Once a detainee is discharged by a competent court they shall be released forthwith. Detention orders of the Secretary to Defence Ministry should cease to exist.

7. In a Habeas Corpus application when the state recommends release for want of evidence, the court shall make an order releasing the person forthwith without allowing any other authority to detain the person again.

EXPECTATIONS FROM THE JUDICIARY: A FEW QUESTIONS

by Basil Fernando

1.a. Is it enough to be a conscientious judge ? This would only mean doing the duty according to the rules already established in accordence with one's conscience. What if the rule established by law is itself wrong? (For example section 55ff 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 these 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?

1.b. How could a conscientious judge deal with the issue of restrictions to judicial review brought about by way of legislation and particularly by the Constitution itself ? Can he escape from accepting the limitations ? Would it not require the acceptence of other norms like inherent powers of the judiciary and universal norms established by UN conventions to deal with such situations ?

2. What is the difference between a courageous judge only and a judge involved in judicial activism? What are the basic norms of judicial activism?

3. What is the link between justice and the work of a judge ? How could he deal with legally sanctioned injustice ? What is the link between equity and the law from the point of view of a judge?

4. Is the legal culture of our country one of restrictive interpretation? If so how did it come about?

5. Has there been compromised practices between the local judiciary and the executive? (ie. Criminal Justice Commission (1971), Commissions relating to removal of civil rights? The judgment on the referendum issue ?)

6.a. All the spokespersons at the opening session agreed on the view that out of the three branches of the government, the judiciary is the last resort that people have. The executive and legislature were seen not only as less reliable but also sometimes as dangerous. Is the judiciary playing this role as the people's last resort? Could the executive undermine this role by executive action and the legislature undermine this, by bringing legislation to curtail and limit the role of the judiciary as the people's last resort? Has there been such a trend? If so could we trace how that developed ?

6.b. Do the public in this country perceive judiciary as the last resort ? Does not the idea of limited and narrow jurisdiction conflict with the idea of judiciary as the last resort?

Responses from The Participants to "Expectations from the Judiciary"

This document was read together and discussed at the plenary session. Following are some of the responses:

Justice Krishna Iyer said that the first question, "Is it enough to be a conscientious judge?" implies that being conscientious or acting according to one's conscience has been dealt with as an ideal. However, this could be misleading. There are many leaders who have done much harm while acting according to the best beliefs of their conscience. Even Hitler may have acted according to his conscience and the same thing could be said of Pol Pot . In countries which have fundamentalist traditions, a lot of discrimination against women is taken as right and in accordance with the conscience of that society. A lot of terrorists too may be acting in accordance with their conscience.

Thus, conscience alone is not enough. There has to be commonly agreed values, norms and standards and the laws and procedures which are in keeping with these values, norms and standards.

In the modern world there are the United Nations instruments which have laid down values, norms and standards after discussions involving representations from various countries. These United Nations Declarations and Conventions need to be made part of each county's law. For this it is not necessary to wait until these documents are incorporated into the national legislation. The judges could bring in the norms and standards set out in the United Nations instruments into the law of the country by incorporating these in their judgments. In India this has been done very extensively in the area of human rights law. The judiciary, while exercising the power of judicial review, could incorporate the provisions of the United Nations Conventions.

In this regard the superior courts of the country could play a great role by setting judicial precedents on the basis of United Nations Con-

ventions. When the higher judiciary does this it will enable the lower judiciary to follow the precedent set by the high courts and discharge justice.

For this purpose it is necessary that the higher courts become aware of the enormous development of the human rights law that has taken place in other parts of the world. There needs to be a more in-depth knowledge of human rights among the higher judiciary. The steps that can be taken in this direction will contribute a great deal to set the values, norms and standards that bind a particular nation and could constitute the inner structure of this nation.

It is only when there is such an inner structure which is recognized in the outer structure of the law that a judge could act conscientiously.

B. Recommendations

1. The 21st Century offers tremendous possibilities of achievements of justice for everyone. It is the judiciary alone that could ensure the fulfilment of these possibilities. It is a heavy responsibility cast on the judiciary to improve the lot of the humanity in its search for justice. If the judiciary fails to exploit all the possibilities that the coming century offers to achieve the age old dream of total justice by active involvement, this century may repeat the patterns of injustice which have prevailed in the 20th century while causing greater destruction than the earlier century.

2. The concern for the poor, the unfortunate and the marginalised must be considered as the central issue of justice for the 21st century if this century is to bring to an end the cynicism with which justice has been viewed so far as a privilege of the affluent and more fortu-

nate people in society. Thus, if the judiciary is to play the noble role it ought to play as the guardian of justice, equality before the law needs to be realised in fact with equal access to justice.

3. For the judiciary to play this role, much transformation has to take place in its philosophical outlook determining the basic tenets of the jurisprudence that guide them in their approach to the administration of justice. The criticisms that had been levelled in the earlier centuries in the prevailing system need to be taken with the utmost seriousness if the potential offered by the 21st century is to be fully realised. A backward philosophical outlook remains one of the major stumbling blocks for the discharge of justice.

4. The limited concepts of justice which have found expression in the constitutions, the laws and even some of the customs and traditions are a major barrier that is placed against the judiciary so as to limit judicial intervention based on professional ideals. The legal profession and the public opinion must play a crucial role in removing these legal barriers.

5. Judicial activism needs to be established as a central part of the tradition of the administration of justice. The Third World condition in which we live is a further reason for integrating judicial activism into our tradition. The traditions of more affluent countries, where much more comprehensive mechanisms exist for redressing wrong, cannot be imitated in countries like these in South Asia, which have different social conditions and less material resources. Judicial activism is a product of South Asian genius. This needs to be recognized as a proud aspect of our judicial traditions.

6. A restrictive legal culture which stresses limiting the power of interpretation acts as a barrier for developing a local jurisprudence able to deal with the vital issues relating to our society. A borrowed jurisprudence from an alien legal culture can result in creating considerable alienation. There does exist such an alienation. The achievements of the South Asian jurisprudence needs to be assimilated into our own legal culture.

7. In this light the following articles of the Sri Lankan Constitution need to be abolished or suitably amended:

7.1. Section 16 (1) of the Constitution is repugnant to the norms of the Universal Declaration of Human Rights and other related Covenants. This provision should be deleted from the Constitution.

7.2. Locus standi in fundamental rights applications (Section 17 and 126 (2)) should be enlarged. Any interested person should be able to file a fundamental rights application.

7.3. A time limit of one month in Section 126 (2) should be enlarged.

7.4. A right to challenge laws and regulations, written and unwritten, should be provided in the new Constitution.

7.5.a. A minimum qualification for appointment to the judiciary should be provided.

7.5.b. The method of appointment also should be revised.

7.6. Provisions should be made for legal aid in the Directive Principles of the State Policies and the Fundamental Duties Section.

7.7. Provisions should be provided for Social Action Litigation /Public Interest Litigation.

8. A tremendous lobby in Sri Lanka is engaged in a vociferous propaganda campaign against human rights. Often human rights have been ridiculed. Human rights have been portrayed as an obstacle to development. This "anti-human rights culture" and propaganda, also campaigns against judicial activism. The destructive nature of this propaganda needs to be countered effectively.

9. Part of this propaganda is to create an artificial dichotomy between duties and rights. Modern human rights leaves no room for such a dichotomy. The human rights culture includes social responsibility. It is the idea of limited concepts of the judiciary that encourages justice only for the affluent.

10. Restrictions imposed by the Sri Lankan Constitution on judicial review is a major obstacle to proper administration of justice. These restrictions need to be removed forthwith. Enlightened public opinion needs to be created to constitutionally recondition unlimited judicial review to remove the existing limits.

SOCIAL ACTION LITIGATION

11. The proposed amendments to the Constitution of Sri Lanka to make way for Social Action Litigation have not been introduced to the Parliament. As these amendments could be brought before the parliament by way of consensus between the government and the opposition there does not seem to be any reason to delay introducing these amendments into the Constitution. The legislature needs to be urged to assist the people to have greater access by speedily making these amendments.

12. The judiciary must become sensitive to the public outcry and outrage on injustice. It is only in that way that public confidence in justice could be maintained. Particularly, the issues of extra-judicial killings, torture, dislocation of people, and abuse of women and children require a genuine response from the judiciary.

13. Since the provisions of the Mediation Board Act 22 of 1988 lead to a denial of access to justice to persons who have suffered serious injury at the hands of assailants, it is strongly recommended that at least Sections 315, 316 and 323 of the Penal Code be deleted from the schedule to the said Mediation Board Act.

14. The absence of a time limit for hearing and concluding the Habeas Corpus application causes much delay and it is desirable to have a time limit fixed.

15. The emerging regulations are formed in Gazettes and the gazettes containing these regulations are not made freely available. They must be made freely available.

16. One magistrate must be kept updated about all regulations enforced under Emergency Regulations. Otherwise, blatant violations of human rights could take place.

17. NORMS FOR THE APPOINTMENT AND REMOVAL OF JUDGES

MINOR JUDICIARY

(i) Appointments to the Minor Judiciary

By the minor judiciary is meant the District Courts, Magistrates' Courts, Primary Courts, Labour Tribunals and other inferior courts and tribunals.

The appointing authority could continue to be the Judicial Service Commission (JSC) constituted as at present. However, such Commission should appoint only on the recommendation of a body consisting of senior judges of original courts. It is suggested that this body could be called the Judicial Service Advisory Committee (JSAC), and that it should comprise five members as follows:

(a) two Judges of the High Court of Sri Lanka;

(b) two District Judges; and

(c) the Chief Magistrate of Colombo.

They should be appointed by the Chief Justice for a period of two years and should be eligible for reappointment for further periods of two years. A member of the Committee should cease to hold office by resignation or by ceasing to hold office as High Court Judge, District Judge or Chief Magistrate. One of the members of the Committee should be nominated by the Chief Justice to be its Chairman.

It is important to involve senior original court judges in the appointment process of the minor judiciary as they will know at first hand those best suited for appointment, judging by performance in court, reputation at the bar, and moral character.

The Secretary to the JSC should be appointed by the JSC itself. The appointee should be a senior, if not the most senior, District Judge. The Secretary of the JSC should function also as the Secretary of the JSAC.

When the need arises for appointment to the minor judiciary, applications shall be called for by the Secretary on the direction of the JSC. The JSC should conduct a written examination for all qualified appli-

cants.

The written examination shall be on the procedure (both Civil & Criminal) and the Law of Evidence. Emphasis should be made of the candidates knowledge and sensitivity towards human rights issues.

No person other than an Attorney-at-Law having not less than five years professional experience in court practice shall be eligible for appointment to the minor judiciary.

Those qualifying at the written examination stage should be examined by the JSAC regarding their professional experience, ability, character, conduct and temperament. Thereafter the JSAC should make its recommendation to the JSC for appointment. The number recommended should not be more than the number to be appointed.

Removal or retirement

A judge of the minor judiciary may be removed by the JSC on the grounds of proved misbehaviour or incapacity. Any judge of the minor judiciary reaching the age of sixty years shall retire.

The order of removal or retirement of a judge at any level should not affect his right to a full pension and/or any other benefit allowed to a judge on retirement in the normal course.

(ii) Appointments to the High Court of the Republic

The President of the Republic should appoint as a High Court Judge any person from amongst persons recommended to him/her for the purpose by a Committee consisting of the Chief Justice, the President of the Court of Appeal and the Senior Most High Court Judge and be presided over by the Chief Justice.

District Judges and Attorney's-at-Law with not less than 15 years of active practice are eligible to be appointed to the High Court. However, it is recommended that weightage should be given to career judges.

(iii) Appointments to the Court of Appeal of the Republic

The President of the Republic should appoint as a Judge of the Court of Appeal any person recommended to him/her by a body composed of five persons including: (a) Chief Justice (who shall be ex officio Chairman), (b) the next most Senior Supreme Court Judge, and (c) President of the Court of Appeal. A view was strongly expressed that two members, appointed by the Bar Association, ad hoc, also be included in the Committee. This Committee shall be called the Court of Appeal Appointments Advisory Board (CAAAB).

The Registrar of the Supreme Court could function as the Secretary of the CAAAB and convene it when directed to do so by the Chief Justice.

The two representatives of the BASL should be nominated by the Bar Council on an ad hoc basis and such nomination shall be valid for a period of two months only. However, a person may be re-nominated as a representative of the BASL in the CAAAB for further periods of two months on an ad hoc basis. Preferably, lawyers who practise exclusively in the original courts should be so nominated by the Bar Council with a clear direction regarding which name or names should be proposed at the CAAAB with a view to having it recommended for appointment.

(iv) Appointment of the President of the Court of Appeal

The CAAAB shall recommend three names for each single appointment to be made.

The most senior Judge of the Court of Appeal should be appointed as the President of the Court of Appeal by the President of the Republic.

(v) Appointment of Judges of the Supreme Court of the Republic

We further recommend that the appointment to the Supreme Court should be made by appointing the most senior Judge of the Court of Appeal.

But in the exceptional circumstances an Attorney-at-Law who has not less than 25 years active practice could be appointed to the HSC with the written consent of the CJ and the two most Senior Judges of the Supreme Court.

(vi) Appointment of the Chief Justice

The President of the Republic should appoint the Senior Most Judge of the Supreme Court as the Chief Justice.

TRANSFER OF JUDGES OF ORIGINAL COURTS

The present provisions in the Constitution regarding the transfer of Judges of the High Court by the President of the Court of Appeal can continue.

The power to transfer judges of the minor judiciary can continue to be vested in the JSC. On the understanding that the Secretary of the JSC shall be appointed by the JSC and that he/she shall be a senior (if not the most senior) District Judge, the present provision in the Constitution that the JSC may delegate to the Secretary the power of transfer, can continue.

DISCIPLINARY CONTROL OF JUDGES

The provisions of the Constitution relating to disciplinary measures against Judges of the Supreme Court, Court of Appeal and the High Court should continue to apply.

Every complaint against a member of the minor judiciary or a Judge of the High Court should forthwith be acknowledged by the JSC. The JSC should without delay cause a preliminary investigation to be held regarding such complaints. If the JSC decides that the preliminary investigation reveals a prima facie case against such judge, the JSC should without delay cause a disciplinary inquiry to be held. Steps should be taken to impose appropriate punishment to a judge found guilty of a breach of discipline. The JSC should publish every two years the statis-

tics of complaints received as well as the findings of every disciplinary inquiry where a finding of guilt was entered, together with the punishment imposed, giving the name of the judge so punished. This will be an effective deterrent against breaches of discipline by judges of the original Courts.

A judge who was removed from office on disciplinary grounds or who resigned from office pending a disciplinary inquiry against him/her, shall be thereafter disqualified for all time from holding office as a judge.

INDEPENDENCE OF THE JUDICIARY

In order to prevent the Judiciary being bribed by the President of the Republic, the Cabinet Ministers or any others who operate State funds, the following words should be added at the end of Article 108(1) of the Constitution:

> "No payment of any kind (whether called an allowance or not) shall be paid to any Judge of the Supreme Court, the Court of Appeal, or of the High Court, or to any judge of the minor judiciary, from the President's Fund or from any fund other than the Consolidated Fund."

For the fuller independence of the judiciary, the words "may be required" in Article 110(1) of the Constitution should be replaced with the words, "may, with the prior consent in writing of the Chief Justice and of such Judge, be required. "

In order to reduce the dependence of the Judges of the Supreme Court and Court of Appeal on the President of the Republic, Article 110(2) should be amended by the repeal of the following words found there:

> "or with the written consent of the President."

If necessary, legislation should instead be introduced within the meaning of the words "by written law" in Article 110(2), to enable Judges of the Supreme Court and of the Court of Appeal to accept other offices or places of profit or emolument, such as positions on interna-

tional adjudicatory bodies or tribunals.

For the greater independence of the judiciary, the following new provision should be enacted as Article 110(4) of the Constitution:

> "No person who has held office as a permanent Judge of the Supreme Court or of the Court of Appeal may, after he/she ceases to be such Judge, hold any paid office or place of profit or emolument under the State, a public corporation or public company the majority of the shares of which are held by the State."

It is strongly recommended that a Code of Ethics for Judges based be formulated and adopted. In this regard, attempts made by several International organizations, including the ICJ which have adopted an International Code of Ethics for Judges, may be referred to.

Likely Course of Justice in the Twenty First Century

*by Prof. M. Basheer Hussain**

> If as a profession we respond to the needs of society and show by our practice and thinking that we have a so cially relevant and helpful contribution to make to the management and regulation of our society, as it prepares to enter the twenty-first century, we shall be wanted and respected." (Sir Leslie Scarman, Hamlyn Lectures: English Law - New Dimensions)

"Total Justice," said Aristotle, "is the greatest of all virtues, and neither evening nor morning star is so wonderful." None of the centuries since the time of Aristotle have been able to attain

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this ideal. However, every century has, in its own way, struggled to achieve Aristotle's Utopia.

There are three distinctive features of the second half of the twentieth century:

1. Human Rights revolution;
2. Emergence of the Judiciary as the most powerful organ of the state; and
3. Revolt against the formalism in the judicial process.

These three features represent the major trends of this century and have played a significant role in empowering the "little man." These trends are so powerful that they are likely to dominate in the next century also.

It will be a great tragedy if mankind were not to learn any lessons from its bitter experience with Nazi and Fascist regimes. The emergence of these tyrannical regimes has shown how democratic institutions can be perverted into engines of oppression and genocide. They have given a mortal blow to the majoritarian principle.

The Watergate Scandal in the United States, involvement of politicians in corrupt practices in countries like Italy, Japan, India and Pakistan and its consequences has taught one lesson to all politicians: unless law and politics are based on morality, they would be risking their own survival as well as the future of their countries.

The *laissez-faire* State emerged in the 19th century. In the *laissez-faire* State the role of the State was that of a night watchman. Its basic philosophy was non-intervention of the State in the individual's life, property and enterprise. The twentieth century witnessed the emergence of the socialistic or welfare State.

In the welfare or socialistic State the role of the State is positive in character. It believes in the intervention of the State to regulate economic activities of the individual in the interest of public good. The welfare State was the product of "Socialistic Philosophy" which laid stress on economic and social rights along with political and civil rights. In the second half of this century new social rights, like the right to

clean air, the right to pure water and the right to a healthy environment emerged.

The Magna Carta and the French Revolution were the milestones in the history of human rights in the previous centuries. The Universal Declaration of Human Rights was the epoch-making event of this century. Its message is that law should be used for the promotion of people's welfare.

Nazi Germany and Fascist Italy have reminded us that uncontrolled power will convert the state into an apparatus of monstrous destruction of the cherished values of mankind. Besides, the emergence of Nazi and Fascist regimes has undermined the faith of the people in the majoritarian principle. People have lost confidence in the wisdom of the parliamentary majority. Even the Indian experience during emergency demonstrates that parliament can be enslaved by the executive. The Jarkhand Mukta Morcha case in India, in which the legislators were alleged to have been bribed to vote against the no-confidence motion against the Prime Minister, has shown how parliamentary majorities can be won and lost. Because of the party discipline and lack of public interest among the members of parliament who belong to the majority party, there is very little meaningful debate either in the party forum or on the floor of the house. The thread between the elected representatives who sit in the parliament and make decisions and the voters who elect them is becoming longer and longer, particularly in large constituencies. There is virtually no direct contract between the voters and their representatives.

Political decisions no longer reflect the consent of the Community's sense of fairness. Political scientists have demonstrated that the concept of consent of the governed in political branches has faded away. As a result, people have been disillusioned with the representative government. They are approaching the judiciary for the resolution of their problems. Because of the loss of faith in the other branches, the judiciary has emerged as the most powerful organ of the state. "All through the century the modern system of government has penetrated into larger areas of human activities and such a powerful trend is far from running out of steam... Judicial power is a necessary instrument to provide the balance," says Prof. Cappellatti.

Further, the increased governmental activity has made the bureaucrats more powerful than they were at any time before. The bureaucratic apparatus of the modern state has become a dreadful monster. Before its omnipotent menace of autocratic power an ordinary citizen feels a sense of impotence. The concept of service-mindedness has virtually disappeared, if ever it was there, among bureaucrats.

Under these circumstances, judicial control of the legislature and the administration emerged as a barrier against the abuse of power by the legislatures and the executives. This trend which was started by Chief Justice John Marshall in Marburgh V.Madison gathered momentum with the unconscionable misuse of power by the Nazi and Fascist rulers. The movement to put barriers against the abuse of political power in writing in the form of a constitution became a necessity. Both Europeans and non-Europeans in the second-half of this century embarked upon a path taken by the Americans long before. Higher Law or Fundamental Law was to be incorporated in the constitutions and they were made difficult to amend. The judiciary was to be the instrument for assured conformity to Higher Law or Fundamental Law.

The Indian Supreme Court in Keshavananda has ruled that there are certain basic features of the constitution, mostly fundamental rights, which cannot be amended even by a constitutional amendment. These basic features are not defined. In India and Pakistan dissolution of State Legislatures by the executives, in certain cases, have been declared to be unconstitutional and have been restored. All this required a courageous and independent judiciary.

The emergence of the judiciary as the powerful third force is not free from criticisms. No system is flawless. There is a fear, like with all political branches of the government, that the judiciary may also abuse its power. Besides, it lacks democratic accountability. It does not possess techniques of trained administrators to deal with the administrative problems. It also lacks democratic legitimacy to deal with the problems of legislatures. Some of these shortcomings have been met by setting up quasi-judicial tribunals which are manned by specialists in labour laws and taxation laws. The fact is any solution to the human problems involves a question of choice. It has been found by experi-

ence that the judiciary is the least dangerous of all the branches of the government. Professor H.J.Spaeth in Supreme Court Policy Making, states:

> "... though I have often disagreed with specific rulings of the Court, I nonetheless believe that on the whole, the policy made by the Court has been qualitatively superior to that of either legislators or executive officials. If this stance signifies a lack of devotion to majority rule or participatory democracy I stand convicted."

The judiciary is bound to be a major force in the political life of the community in the years to come.

Another trend in modern states which is not likely to die with this century is the explosion of economic and social rights, like the right to work, the right to housing, the right to social security and the right to clean air, water and the environment. To give content and meaning to these rights requires judicial action as other political branches owing to various kinds of pressures may not be able to implement these rights. In many countries, more particularly in India, judicial activism has emerged to make these rights more real than formal. It is in this sphere, that the judiciary is playing a more dynamic role. It is the activist judges who have given flesh and blood to these rights. Justice Krishna Iyer says:

> "The life of remedial justice is not remote promise but ready performance."

Along with the emergence of new social rights, new rules of interpretation of written laws have emerged. The nineteenth century rules of interpretation were based on semantics and logic and did not allow discretion to the judges. According to Montesqueue the only duty of the judge was to apply the law blindly like an inanimate being. No matter that the law be wise or foolish. That is no concern of his. Now it is realised that the human problems cannot be resolved by semantics and logic. The judge has to use his discretion and if need be modify and expand the laws to meet the social needs. O.W. Holms wrote:

> "The life of law has not been logic but experience. The felt necessitates of time, the prevalent moral and political theories institutions

> of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

For example, the Indian Supreme Court has ruled that the right to life includes the right to live in consistency with human dignity even in prison. It also includes rights to pursue one's traditions and culture which give meaning to one's life. Lord Denning says while interpreting a judge should not examine the words in meticulous details nor should he look to grammatical sense. He must "look to the interest."

Earth shaking revolutionary changes are taking place in the judicial procedure in the Third World Countries. In India, an activist judiciary has "judicialized non-judicial procedure" and has opened the doors of the "RITZ HOTEL" to the poor and deprived sections of the society. The law of Evidence, the Civil Procedure Code and Criminal Procedure Code, which embodied the nineteenth Century procedural laws which were a hindrance to access to justice have undergone drastic changes. They were found inadequate for the enforcement of new social rights, like right to clean air, pure drinking water and a pollution free environment. In an epoch, whose chief slogan is access to justice, the strict applications of procedural laws have become irrelevant. For instance, according to the 19th century procedural law, the right to sue belonged to the person or persons whose rights have been infringed. The classical case of the right to sue or locus standi which is called "standing" in the United States is illustrated by *Tilestone vs Ulman* (1943) in which Dr. Wilder Tilestone challenged the constitutionality of Connecticut's anticontraception law. Dr.Tilestone argued that the law if applied to him would prevent his giving advice to several of his female patients whose life would be endangered by bearing children. The United States Supreme Court unanimously dismissed his suit because the physician's patients were not made party to the litigation. Consequently Tilestone himself had no standing to secure the adjudication of his rights. Next the physician and his patients challenged. Again the Court refused to decide, holding that the plaintiff had suffered no injury. Only when the physician was convicted in 1961 did the Court by a majority of 7 to 2 admit the suit and declare Connecticut's law as

unconstitutional as it invaded the privacy of married persons. This law cannot be applied to the newly emerging rights like the right to clean air or water. These rights have no holders. Today every member of the public has the right to bring action in a Court of law for the enforcement of these rights which cause offence to the entire community. The very survival of the humans depends upon the protection of these rights. This is known as public interest litigation. An activist judiciary in India has allowed individuals or voluntary organisations to bring action against the jail authorities for the ill-treatment of prisoners in jails, sexual abuse of children in jails, the administrators of womens' protection homes for the ill-treatment of women in those homes, the drug manufacturers who were manufacturing sub-standard drugs, and against the employer's who were using bonded labourers illegally for quarrying. Justice Bhagwati has stated that the procedural laws are but a "hand maiden of justice" and "the cause of justice can never be allowed to be thwarted by procedural limitations."

The problem is if public spirited individuals and organisations who are described as "Ideological Plaintiffs" are not allowed to bring action for the enforcement of public rights, then who should bring the action? If these rights are allowed to become extinct by their non-use and non-enforcement then law ceases to serve any useful purpose. It is true, Attorney's General should initiate action for the enforcement of these public rights. But Attorney's General are appointed by the Government and unless the Government desires they will not move the Courts. Experience has shown they have never initiated any action for the enforcement of public rights.

The Chief features of Public Interest litigation are: 1. Liberalisation of Rules of Locus-Standi 2. Adoption of non-adversarial procedure 3. An activist judge 4. Relaxation of Procedural laws relating to the right of notice to the parties to be present at the time of evidence and their right to be heard 5. Treating letters written to the Judges as Writ Petitions, and 6. Suo-moto interference of the Court on the basis of press reports or even letters written to the Editor and published in a newspaper. It is only by liberalising the procedural laws that the judiciary is able to police the corridors of power. Public Interest Petitions have also been filed in the Indian Courts against corrupt politicians and bureau-

crats. The Indian judiciary is busy cleaning the Augian Stables. It has directed the bureaucrats to do their work properly and has even sent them to jail for not implementing its orders. It has directed the Central Bureau of Investigation (CBI) to speed up investigations against top politicians. In some cases it has taken upon itself the job of supervising the work of CBI. It has ordered the closure of industrial units for polluting the environment.

Justice Ahmadi, the Chief Justice of India, while delivering the Dr. Zakir Hussain Memorial Lecture recently said:

> "Inevitably the process of degeneration of parliament's conduct has had its effect on the institutions..... In recent years, as the incumbents of parliament have become less representative of the will of the people, there has been a growing sense of frustration with the democratic process. The ordinary citizen has reacted in either of the two ways. One group has chosen to look upon those developments as an unavoidable feature... The other group has chosen to achieve its object through judiciary... The Supreme Court is left with no choice but to act."

The range of judicial activism may vary from Country to Country and from time to time. In India, today, it is more pronounced than in any other country in the world. Pakistan appears to be catching up with India, though a little slowly.

Prof. Cappelletti who has made a comparative study of judicial review in his Judicial Process in Comparative Perspective says that judicial activism is a world-wide movement. It is likely to generate more steam in the years to come.

The above thoughts are the straws which are currently in the wind and may prove to be the harbinger of the new dimensions of justice in the twenty first century.

Human Rights: From Illusion to Actualization

*by Justice V. R. Krishna Iyer**

"I am a man, I count nothing human alien to me."

—TERRENCE (QUOTED BY MARX).

Let us be clear about a few fundamentals in our discussion on Human Rights and the means whereby they may, as a fact, belong to and be actualised by every individual, group and humanity as a whole. Firstly, here is an integrality about human rights, holistically viewed, but is, "We murder to dissect" (Wordsworth). The truth, as we perceive it, in its beauteous one-

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ness, is this:

> "We cannot enjoy civil and political rights unless we enjoy economic, cultural and social rights, anymore than we can insure our economic, social and cultural rights. True, a hungry man does not have much freedom of choice. But equally true, when a well-fed man does not going hungry." (*Human Rights Reader* by ED GARCIA)

This basic position is confirmed in numerous UN documents and Summit pronouncements. The focus is on the human being whose personality cannot be vivisected into dignity that invests homo sapiens with the rising spiral of Creation necessarily compels us to adopt a unitise perspective and summons society and state to recognise and aerena this exited status sans which man becomes but a savage. The world has, thro' history, beheld brutality, vulgarity and barbarian conquerors; but thro' mankind's zigzag march, civilisations have emerged, punctuated, often, by massacres and wars and infliction of suffering uniting by, compassion and fraternal feeling. Today, half a century after the United Nations was midwifed, an audit in retrospect is a desideratum. The noblest of every member and group is our great and the cynosure of global development. Thinkers world-wide, and common humans everywhere, will agree:

> "No cause is more worthy than the cause of human rights are more than legal concepts: they are the essence of man. They are what make man human. That is why they are called human rights: deny them and you deny man's humanity..." (ibid.)

Growth of corporate power diminishing or destroying human personality leads to a species of technology which spells thanatology. Mere science, not geared to the ascent of homo sapiens is disastrous. Warned Winston Churchill, in a different context, of the insane consequences of excessive industrialisation through homo-lethal, market-manic technology:

> "The dark ages may return - the stone age may return on the gleaming wings of science; and what might now shower immeasurable material blessings upon mankind may even bring about its total destruction. Beware, I say 'Time may be short.'"

Science for man, not man for science, is our human rights emphasis.

The constellation of international instruments and the wealth of rights and thoughts they embody, the many earth summits and global meetings where humanity, thro' nations and N.G.Os, discussed and declared the measures needed for advancing the progressive cause of our dear planet's inhabitants to live in fraternity with opportunity for their faculties to flower, sharing the work, wealth and happiness of all, are an inspiration for a quantum jump towards a heaven here.

These propositions take wings only if global social consciousness is mobilised and national laws give this cosmic vision meaningful legislative locomotion. Law cannot go it alone. States, on their own, cannot operate human rights jurisprudence without sensitive cadres, effective infrastructures, committed rulers and activist judges.

Let me illustrate my point with two instances, one benignant and the other malignant. The sublime human heights reached during the great days of Emperor Asoka, a disciple of the Buddha, deserve mention as indicative of the potential of World Order without violence and rich with compassion. Here was an Emperor who, after victory, abjured for the real needs of human welfare. Of him H.G. Wells says:

> "Amidst the tens of thousands of names of monarchs that crowd the columns of history, their majesties and graciousness and serenities and royal highnesses and like, the name of Asoka shines, and shines almost alone, a star. From the Volga to Japan his name is still honoured. China, Tibet, and even India, though it has left his doctrine, preserve the tradition of his greatness. More living men cherish his memory today than have ever heard the names of Constantine or Charlemagne." (The Outline of History by H.G. Wells, p.402)

The other extreme of terror and horror caused by the battle of World War II also reminds us that Peace world-wide is not easy to achieve . World War II was a cosmic conflict, as it were, leaving bleeding disasters and poignant distresses the likes of which no eye had been seen, no heart conceived and no human tongue can adequately tell. The Atom Bomb, dropped on Hiroshima by an American plane at dawn, wiped out countless innocent lives and wounded many more. The world has yet not banned this breed of genocidal weapons stock-pilled in satanic arsenals and so, the world has the Damocles sword of nu-

clear anger hanging over its head with perilous potential for Globoshima.

Millions died and more millions were wounded and sensitivity for human rights never deterred the Powers that went to war from perpetrating the ghastly holocaust. However, mankind, thro' its sane leaders, turned towards a constructive effort to build a New World Human Order. Thus sprang into existence the United Nations and the determination to create a charter in the name of 'We the Peoples of the United Nations,' to save succeeding generations from the scourge of war and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person and an egalitarian system where men and women could live in peace and unfold their finer being.

Then came the Universal Declaration of Human Rights, the paramount charter which, if implemented, would herald a glorious era of 'exist and co-exist' and manifest the perfection and divinity already inscribed in the DNA of everyone born to rise to his full stature. Principles and Resolutions are 'ineffectual angels beating their wings in the void in vain' unless a dynamic people's power triggers these values into operational fulfilment.

As Amodous-Mahter M'Dow, former UNESCO Director-General, put it:

> "To know one's rights is a step towards obtaining their recognition. For the men and women who are aware, at this moment, that they still have to struggle, sometimes at the risk of their lives, to try to exercise their basic rights, could not do so with any hope of success unless they could draw comfort and moral and intellectual inspiration from the certainty that the principles underlying these rights are now adopted by the whole International community." (Address to the International Congress on the Teaching of Human Rights in Vienna, Austria, 12 September 1978, ibid. page xi)

Here comes the functional need of U.N Declarations and Covenants, to be internalised by national legislation and implemented by Courts as sentinels, ombudsmen, catalysts and punitive implementors. For whom do the United Nation's Human Rights bells toll? Yes; for the marginalised, victimised, terrorised and suppressed chunks of society

et al. Awareness is the cornerstone of conscientised action. Once aware communities come into being, they realise their right to enjoy, if at all they do, and then proceed to seek redress for the denials, distresses and disabilities of these diverse group who constitute the preponderant majority of deprived humanity. Is it not time to remind ourselves, amidst the norious noises about market freedom to rob the poor by the global giant corporations germanising maximum profits using mareecha propaganda, political pressure and GATT tactics, that the first thing we belong to is humanity, not moneyocracy? Human rights and democracy can hardly survive in a closed society or corporate-controlled economic power system. Listen to Solzhenitsyn:

> "Just the same, it is time to remember that the first thing we belong to is humanity. And humanity is separate from the animal world by thought and speech and they should naturally be free. If they are fettered, we go back to being animals.
>
> "Publicity and openness, honest and complete - that is the prime condition for the health of every society, and ours, too. The man who does not want them in our country is indifferent to his fatherland and thinks only about his own gain. The man who does not want publicity and openness for his fatherland does not want to cleanse of its diseases, but to drive them inside, so they may rot there." (AMERICA INC.- By Morton Mintz and Jery S. Cohen - At Page 109)

Then again:

> "The concentration of economic power, opinion power and political power creates a sort of closed loop. Political must raise money from corporations in order to pay the networks the enormous cost of television time. Corporate advertisers call the network tune. And the networks must curry favor with the successful politicians to assure their franchise. The open society seems to be closing - not by conspiracy, but by this mutual dependence." (Kingman Brewster, Jr., president of Yale University, 6 December 1969, p. 195)

The great Judge William O Douglas asks for decentralisation if individuals are to matter:

> "Industrialised power should be decentralised. It should be scattered into many hands so that the fortune of the people will not be dependent on the whim or caprice, the political; prejudice, the emotional stability of a few self-appointed men. The fact that they are not vicious men, but respectable and social-minded is irrelevant. That is the philosophy and command of the Sherman Act. It was founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it."

Remember too that the rule of law is not a weapon to protect the vested interests or solace its blue-eyed boys nor to stall or slow down the march of the lowliest, the lost and the last in society. For whom is the right to Development meant and what is its context? Then we come upon the democracy of legal remedies and examine whether they are available only verbally or actually. For whom do the bells of the UN or the Constitution toll? For whom do the judges' robes offer hope? Human rights are myth if inhuman wrongs afflict the macro-sector of the masses. If the right to full personality is denied to anyone he/she stands alienated from the social order. And if such deprived and destitute segments escalate and agitate and turn desperate, social stability and political tranquillity reach the vanishing point.

> "Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,"
>
> "Disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.
>
> "It is essential, if man is not to be compelled to have resources, as a last resort to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." (Preamble to the Universal Declaration of Human Rights)

Even so establishment-oriented an organisation as the I C J, with leading legal lights in it, have categorically stated:

> "The enjoyment of the totality of human rights calls for the organisation and mobilisation of the poor in developing countries for self-reliant development.... Development should be understood as a process designed progressively to create conditions in which every person can enjoy, exercise and utilise under the Rule of Law all his human rights, whether economic, social, cultural, civil or political." (From conclusions to the 1981 ICJ Conference on Development, Human Rights and the Rule of Law)

The rule of law, viewed in its progressive perspective, has thus a radical mission. The International Commission of Jurists, in moderate diction, expressed what lawyers must professionally proclaim:

> "The Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspiration and dignity may be realised."

Absent this constellation of imperatives, law is but abracadabra and rule of law mere razzmatazz.

Where fair processes of justice are stultified or stifled there will be chaos in the cosmos unless formidable instrumentalities, administrative, legislative and forensic, move into redressive action . If the hunger for human justice of the humblest is ignored or their title to litigate, on reasonable terms of access and speed, thwarted or the right of the last, the least and the lost to meaningful legal services and locus of remedies from judicial tribunals, fearless and fair and firm on fundamentals, for securing human rights is frustrated, the world human Order will prove to be a teasing illusion and promise of unreality. May I say, with a biblical flavour, that so long as law Asia is functional, blessed are they who hunger for right and justice through the rule of law, for, they shall be fulfilled. The credal essence of Asian humanity's claim for socio-economic justice shall be answered if the multi-millions of shackled and subordinated people of our ancient continent are to survive with their basic needs met and life with dignity and integrity assured. The Asian Charter vision of universal human rights and its faith in the democracy of judicial remedies, must be passionately pursued.

The task is to win for the common human a firm faith in fiat justicia in all its developmental dimensions and compassionate implication. Law and Justice must fertilize each other. Law without justice is blind and justice without law is lame. And for both to flourish, great non-governmental organizations for the people are a must. The subordinated human aggregations of Asian nations, lying scattered and shattered, need to be liberated and their human bondage broken. Will this happen? Quo Vadis our ancient continent?

To-day, Asia is caught in a dialectical contradiction which has landed our nations in a dangerously dilemmatic quandary. Take the case of India (it applies, mutatis, to Sri Lanka et al.). The Constitution, the supreme lex, opens with the evocatively eloquent and politically paramount expression, "We the People of India," signifying their sovereignty. This sovereign polity has, in effective rhetoric pregnant with people's puissance, created a Sovereign Democratic Republic. Likewise, the social order, fundamental in the governance of the country, is geared to justice social, economic and political. A human rights regime must be rooted in a social order where fraternity and dignity of the individual is assured. Fraternity is a profound idea. Dr. Ambedkar, in his final address to the Indian Constituent Assembly observed:

> "We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognised liberty , equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them. We must begin by acknowledging the fact that there is complete absence of two things in Indian society. One of these is equality. On the social plane, we have in India a

> society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognising the principle of one man one vote and one vote value. In our social and economic structure, we continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up."

The core of humanness is dignity/divinity and spiritual ascent. Dr. Ambedkar has made a penetrating observation:

> "The question is not whether a community lives or dies; the question is on what plane does it live... this is a gulf between merely living and living worthily. To fight in a battle and to live in glory is mode: to beat retreat, to surrender and to live the life of a captive is also a mode of survival."

The realities of life, what with the vast masses in daily misery, economic bankruptcy, social alienation and cultural degeneracy, are a flagrant contradiction of the dream of a humanised earth where are inscribed the high values we treasure.

Currently, cynicism, scepticism, privation and despair haunt the lands and peoples and a creamy layer is happy in five-star luxury along with foreign tycoons, compradors and quislings for whom xenophobic open sesame is progress and home-spun appropriate technology is primitive economic policy. True, the UN instruments do inspire but the eloquent text by itself cannot alter the pathetic state of the populace when elite anti-social cabals corner power and pelf. How then can the rule of law transform the rule of life?

We must, as dialectical analysts, study, in inevitable consternation, our socio-economic ground realities, examine the galaxy of human rights and explore the creative strategies for the actualisation of a social justice system where democracy, decentralised and nationalities-and-tribal specific, will be the living reality, not phoney philosophy. India (or Asia, for that matter) today is many India's, (many Asias) with a multitude of contradictions. If a literary deja vu of this shocking dichotomy between the affluent and the indigent et al is permissible, Charles Dickens in *The Tale of Two Cities* is apt:

> "It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair. We had everything before us, we had nothing before us, we were all going direct to heaven, we were all going direct the other way."

Yes, those intoxicated with political power or drunk with affluent pleasure, without a trace of angst, do not see this contradiction until the people in anguished anger, fuelled by despair, blow up the country's 'Bastille' of oppression and seize power, exposing the baloney of 'poverty alleviation' rhetoric of the politician and the market-friendly unfeeling 'Marie Antoinette nostrum'; of 'let them eat cake if they have no bread,' drink more scotch if there is no water, live in sky-scrapers if they have no huts nor pavement space to lie and die. We are told of use world's nest cars where the Indian creamy layer may roll in Rolls Royce, though without roads even for bullock carts. Our pot-holed, rickey tracks and streets are grave-yards. We have fast roads and coke on tap and sex tourism (boys and girls, mark you) but no cash to buy grain, no youthful flesh to sell, no place for fresh air where pollution, through MNC invasion, has not made noxious; we have no medicine to forbid dengue deaths because some life-saving item is held up by import – by a heartless Finance Ministry and have no doctors who have left for the States or the Middle East since Governments in India run hospitals without doctors or life-saving drugs. Whose life? The poor do not matter and the rich have Apollo hospitals.

We have green revolution and green starvation. We have white revo-

lution and babies without milk. We have Foreign Direct Investment in dollars and our rural destitution shocks our conscience. John Steenbok speaks:

> "The fields were fruitful, and starving men moved on the roads. The granaries were full and the children of the poor grew up rachitic, and the pustules of pellagra swelled on their side. The great companies did not know that the line between hunger and anger is a thin line."

This is India, that is Bhatat. Every demand for autonomy or cultural identity or share in work, wealth and happiness is shot down as terrorism or secession Democracy sans decentralisation and cultural bastardisation masked by nationalism and developmental glitter distorted by hunger for profit and corrupt circus fobbed off as growth-oriented governance is authoritarian Centralism alienating the populace and undermining the egalitarian rule of law.

Bonded labour and blindness of the young, infant mortality and maternity casualty, easily avoidable disabilities by State Action and remedies for maladies wherever available are insouciantly linked at or hidden by misleading State propaganda. Experiments with Untruth are the truth of the establishment's lies world-wide: Human adversities, in myriad forms, are masked by cosmetic economics and glitterati market methodology. The rulers, with M N C cut-backs and other cute praxis, bury their heads in fertile sands, believing themselves to be unseen as they rob our material resources and rise hawala-rich or, when caught, enjoy super-V.I.P. venue for trial unseen: This is the dialectic of North (Private) Inc. versus South (Have-nots) Unlimited.

His decadence of human values is universal but the South is more vulnerable and victimised and the Fourth world within the Third World suffers most. India is better off than some other nations but I speak here for Asia, for the other exploited countries are more bleak. On the surface, sweet things are seen but I refer to the unfortunates who are swelling the world's numbers. (14-15)

MNC economic is the spectre that haunts developing countries with Fund-Bank and GATT ghosts possessing our finance wizards. And yet, Gandhi is ceremonially and sanctimoniously wreathed on his com-

memorative days by V.I.Ps with mystic squints and Ram-dhun tunes. What was the Mahatma's economic fundamental, now buried five fathoms deep? Let me cite an exchange between Higginbothom and Gandhi:

> "Spirituality to be meaningful should be three-fourths economics." (US economist Sam Higginbothom to Gandhi)
>
> "Economics too, to be useful, should be three parts spirituality." (Gandhi to Higginbothom)

Liberalised political economy, globally market-friendly and infatuating the middle classes with extravagant purchases is hostile to spiritual-moral integrity.

This blistering backdrop may enliven the basic discussion on the lot of the marginalised masses, the homicide of their human rights, the compassionate Constitutional mandates and the potential for fire-fighting and rescue operations by Judicial therapeutics when the people are massive victims. The dominant paradigm of mega-development, dehumanised and maximum of profit-oriented, denies the fundamental freedoms and the worth of the human person; and this contradiction needs to be judicially examined because the Court, under the Rule of Law (human law and human justice) has an obligation, by oath of office, to uphold the paramount principles tuned to the humanist jurisprudence woven by UN instruments. When people die by State's neglect or are done to death in State custody of fake police encounter or other state-sponsored torture for the sum of demanding their human rights, Courts have to act. For me, while on the High Bench, the life of the little Indian did matter. "Any man's death (or wound unjustly inflicted) diminishes me, because I am involved in Mankind. And, therefore, never doubt for whom the bell (of justice) tolls; it tolls for thee (and me)," if I may adapt Donne's great wisdom.

Judicial activism is a Constitutional command and the Court's constituency is the people (940 crores strong in India and five billion and more on our planet). It follows that human rights condensed in Constitution and international deeds shall be enforced by the forensic process, regardless of the plurality of votes of a Party in power and its polices. Corruption esq. and corporate barton bestride the narrow world like a

Colossus and human rights have not even a dog's chance unless the judicature commands the mafia, political and other, to respect the public law of people's rights.

India today, (why, most developing countries) is a projection of this poignant scenario. No solution to social injustice, now writ large on our policy, can be found without a firm grasp of the character of the conflicts and the forces fighting for domination. Then the Court, without fear or favour, must take over control of people's rights and its writ will run with public backing. If the judges become the sentinels of human rights the world will five them credit and claim it the finest hour of the judicature. Never in the field of human conflict, mankind will gratefully agree, was so much owed by so many to so few. But judges must do and deserve this tribute. How? By transforming the robes into vigilant artists of costumed justice, broadening liberally the rules of access to justice, discovering innovative public interest litigation and affirmative action creatively crafted to deliver relief and remedy, and simplified, inexpensive processes thereby actualising human rights to the corrupt agencies of maflos. Indian experience in this jurisprudence of social justice is rich and rewarding.

Interpretative creativity is also an important factor in perfecting this Third World Jurisprudence. Illustratively, let us turn briefly to the Indian Courts' semantic exercise, say regarding the right to life— the foremost human right.

Jurists will agree that the right to adequate shelter is a human right and imperially expansive and enormously expensive palaces of princely politicians and luxurious mansions of business billionaires are robbery of distributive justice by predatory operators. The Supreme Court has indicated that the right to life includes "the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter." (AIR 1981 SC 746). Pathak C.J. used lofty language in *Vikram Deo Singh* (AIR 1988 SC 1782) and observed:

> "We live in an age when this Court has demonstrated, while interpreting Article 21 of the Constitution, that every person is entitled to a quality of life consistent with his human personality. The right

> of every Indian citizen, and so ... the State recognises the need for maintaining establishments for the care of those unfortunates, both women and children who are the castaways of an imperfect social order for whom, therefore, of necessity, provision must be made for their protection and welfare."

In *Olga Tellis* (AIR 1986 SC 180) the right to life, livelihood in shelter proximate to the place of employment were considered together. In *Shantistar Builders* (AIR 1990 SC 630) the Court took a holistic view of right to life and wrote:

> "Basic needs of man have traditionally been accepted to be three— food, clothing, and shelter. The right to life is guaranteed in any civilised society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body; for a human being it has to be a suitable accommodation which would allow him to grow in every aspect— physical, mental and intellectual.

Hansaria J. (now on the Supreme Court) has in his exhaustive book "Right to Life and Liberty under the Constitution," (Page 28) reinforced on the claim to shelter by reference to Article 25(1) of the Universal Declaration of Human Rights, 1948, in which "housing" has been specifically recognized as one of the rights relating to living. Article 11.1 of the International Covenant on Economic, Social and Cultural Rights, 1966, also recognizes "housing" as a part of the right to adequate standard of living. Reference has been made to these documents because they do provide some guide to understand the width of our fundamental rights and the Supreme Court had on many occasions referred to them.

One may conclude this part of judicial discussion with a quote from Sawant J in *Delhi Transport Corporation* (AIR 1991 SC 101):

> "The right to life includes right to livelihood. The right to livelihood, therefore, cannot hang on to the fancies of individuals in authority. The employment is not a bounty from them, nor can its survival be at their mercy. Income is the foundation of many fun-

damental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limbo of undefined premises and uncertain applications. That will be mockery of them."

The status of shelter for the homeless living on the pavements and hiding their nudity and natural needs is shocking, elegant judicial eloquence notwithstanding. The governments, without shame, agree that the Urban Ceiling Law of long ago is hardly implemented except for the corrupt purpose of granting exemptions. Without seizing such surplus land under the Act, no housing space for the poor is possible. Urban squalor, ugly agrestic conditions, the horror of women having to live without privacy, children being robbed of their childhood are the chronic pathology of the Indian 'housing for all' legislations. Some of us had done a draft bill granting access to housing as a human right and empowerment of the people from the Panchayat level and village saphas as the modus operandi. No displacement without just habitation must be the rule when public projects and private industrialise are planned. Indian earth is the common asset of all Indians. The challenge of homelessness and filthy slums, breeding plague and dengue and the staggering backlog of housing escalating every year — is this Development? The New Economic Policy looks at high-rise buildings while poverty, low income, and environmental degradation deprive the millions of the basic claim to rest in a little hut of their own. Statistics of rural and urban homelessness is frightening and increasing. Where is the political will to empower the poor? So the court must compel the Executive to find dwellings for the have-nots. This is judicial activism commanded by our humanist constitutionalism.

The right to education is integral to dignity and citizen participation in the public affairs of a democratic polity. A passage from *Mohini Jain* (1992) 3 SCC 666) is luminous:

"Right to life" is the compendious expression from all those rights which the courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from the right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accom-

panied by the right to education."

Mohan, J. in *Unnikrishnan* (1993 I SCC 645), argued:

> "that education is a preparation for living and for life here and hereafter and that education is at once a social and political necessity, and that victories are gained, peace is preserved, progress is achieved, civilisation is built up and history is made, not in battlefields but in educational institutions which are seed-beds of culture, where children in whose hands quiver the destinies of the future, are trained. (See paragraph 148). It was then observed in paragraphs 175 and 176 that education is enlightenment; it is the one that lends dignity to a man and if right to live means right to live with dignity, the word 'life' has to take within its fold the right to education.:"

At this point, the right to health deserves notice when dengue fever kills the poor in Delhi and dalit children die of under nutrition at Kalahandi:

> "Right of livelihood is also a part of this article. Now, how can man earn livelihood if he is not healthy? So, the health of a person, more particularly of a worker, would become an integral facet of his right to life. Article 25(2) of the Universal Declaration of Human Rights, 1948, assures that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family ... including medical care, sickness and disability. Article 7(b) of the International Convention on Economic, Social and Cultural Rights, 1966, recognises the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular, safe and healthy working conditions. Article 39 (e) of our Constitution enjoins upon the State to direct its policies to secure the health and strength of workers. Relying on these provisions, it was held by Ramaswamy, J. in paragraph 30 of his dissenting judgement in *C.E.S.C. Ltd* v. *Subhas Chandra* (1992 1 SCC 441), that the aim of fundamental rights being to create an egalitarian society and to make liberty available to all, to the tillers of the soil, wage-earners, labourers, wood-cutters, rickshaw-pullers, scavengers and hut-dwellers, the civil and political right to physical and mental health is to be treated as an integral part of the right to

> life." (Right to Life and Liberty under the Constitution, by B.L.Hansaria, p. 34)

In *Vincent* v. *Union of India* (AIR 1987 SC 990), the Apex Bench observed:

> "As pointed out by us, maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society which the Constitution makers envisaged. Attending to public health, in our opinion, therefore, is of high priority – perhaps the one at the top."

Womanhood is facing a crisis. The girl child is sold for its flesh. They are commodities kidnapped, enslaved in brothels, raped and killed. A commodity when used up is thrown out.

Development is now a dangerous word with its western connotation and focus on affluent gluttony, ignoring Gandhiji's caveat; 'In so far as we have made the modern materialised crese our goal, so far are we going downhill in the path of progress.' Multiplication of material wealth for the creamy layer engaged in the current gold rush is not – repeat not – development.

"The goal of development should be not to develop things, but to develop man," says the Cocoyoc Declaration "Development must be aimed at the spiritual moral and material advancement of the whole human being, both as a member of society and from the point of view of individual fulfilment." Says UNESCO. For example, the right to work, Cocoyoc suggests, involves "not simply having a job but finding self-realisation in work," and implies the right not to be alienated by production processes that use human beings as tools.

The model of development as material growth gets most of its fuel from the Third World's desire to close the wealth gap with the West, in a possessions race almost as futile as the arms race. The Cocoyoc participants rejected the idea of gaps: "The goal is not to catch up, but to ensure the quality of life for all." *(The Third World Tomorrow*, by Paul Harrison, p. 41)

The Third World today is the victim of development. Ask Madha Phath or Sundarlal Bahuguna or B.D. Sharma about the victims of development, the perilous processes of environmental injuries, the polluted rivers, the disappearing mountains, the depleting mineral resources, the uprooted tribals, the submerged mother earth, and that vast multitude of marginalised human beings who are appalled by the terrorism of development and await their turn to be sacrificed at the inexorably market hungry altar of poignant, irrevocable "blood and iron" Development Maniacs. An iron curtain has descended to divide the people from Development MNC style.

Several rulings resulting from a series of litigation's creatively engineered by M.C. Mehta, an activist Advocate, has heped the Court weave a fine garment of environmental jurisprudence. The Stockholm Conference (1972), and the Rio-de-Janeiro Conference (1992) have apparently transformed the Indian Supreme Court and some High Courts into crusaders supportive of Nature with missionary zeal battling against lethal pollution and ecological destruction.

The unconscionable industrialisation, unpardonable deforestation and inhuman extermination of living species betray an exploitative brutality and anti-social appetite for profit and pleasure incompatible with humanism and conservationism. The Rig Veda praises the beauty of the dawn (ushas) and worships Nature in all its glory. And yet today a bath in the Yamuna and Ganga is a sin against bodily health, not a salvation for the soul. So polluted and noxious are these 'Holy' waters now. The words of Rev. Martin Luther King Jr. ring true that our scientific power has outrun our spiritual power and that we have guided missiles and misguided men.

The biosphere is being bashed by multinational Corporations which have no body to be burnt nor soul to be damned. As Maneka Gandhi once wrote:

> "Our government thinks that the unemployment problem in the country will get solved when these multi-nationals set up a number of industries here. The fact is, they are not going to set up labour oriented industries in the first place to solve the unemployment problem. Secondly, they are not interested in setting up their fac-

tories in underdeveloped areas. The third and the most important danger is, they are coming out with those projects which are banned in their countries for environmental reasons. In effect, we are giving a red carpet welcome to those industries which have been banned in the developed countries. They will pollute the entire atmosphere and we will be compelled to drink polluted water and breathe polluted air. If these indiscriminate sanctions for environmentally hazardous industries continue, India will be doomed forever. We cannot allow that to happen." (Interview with Maneka Gandhi - Sunday Communicator, 20 August 1995.)

We live in a world of depletion of natural resources of desertification, of air pollution, of dangerous radiation, of chemical breakfasts, lunches and dinners more noxious than nutritious. Nature is in tears, while exploitation of resources is exasperating. As our callous century advances, nature wounded, retreats. This great contradiction is growing; and now, with GATTastrophe accompanied and the Uruguay Round completed, M N Cs have open sesame everywhere. Their rapacious activities have involved all of nature's sub-system - the biosphere, atmosphere, hydrosphere and lithosphere - inflicting mortal wounds on 'homosphere' where humans live. Science will become the enemy of progress the balance between man and nature is shaken. Sustainable development, therefore, must restrain the terrorism of technology.

Juridical radicalism, running a creative course, can provide fail-safe social justice, given the will and intelligence both of which the south does possess! It is unfortunate that our law-makers have flopped.

I hope all legal activists, legislative patriots and administrative statesmen will agree that 'to wipe every tear from every eye' is the conscience of our Global Order. The Bhopal tragedy is the last? Industrial pollution shall be halted and its price made too dear even for the Union Carbide. The law must keep its promise to the people.

National Human Rights Commission, Women's Commissions and Dalit Commissions are but statutory absent extensive investigative, adjudicative, punitive, compensative and 'contempt' powers and total autonomy now enjoyed by the highest court. Justice is what justice does.

Nations survive only if nuclear bombs are banned. Human rights

are a mirage if terrorism is not abolished. Here see the views of the International Court of Justice recently expressed.

An Afterword About Nuclear Danger

The International Court of Justice has given its advisory opinion on 8th July 1996. A few excerpts from it will indicate how human rights are hollow for the peoples of the earth if nuclear terrorism is cornered by a few big powers with the single Super-Power at the head.

> "25. The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant, whereby certain provisions may be delegated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialise, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deducted from the terms of the Covenant itself.
>
> 26. Some States also contended that the prohibition against genocide, contained in the Convention of 9 December, 1948 on the Prevention and Punishment of the Crime of Genocide, is a relevant rule of customary international law which the Court must apply. The Court recalls that, in Article II of the Convention genocide is defined as `any of the following acts committed with intent to destroy, in whole or in part, a national, ethical, racial or religious group, as such:
>
> 1. Killing members of the group;
>
> 2. Causing serious bodily or mental harm to members of the group;
>
> 3. Deliberately inflicting on the group conditions of life calculated to being about its physical destruction in whole or in part;

4. Imposing measures intended to prevent births within the group; and

5. Forcibly transferring children of the group to another group.'

"It was maintained before the Court that the number of deaths occasioned by the use of nuclear weapons would be enormous; that the victims could, in certain cases, include persons of a particular national, ethnic, racial or religious group; and that the intention to destroy such groups could be inferred from the fact that the user of the nuclear weapon would have omitted to take account of the well-known effects of the use of such weapons.

"The Court would point out that regard that the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required by the provision quoted above. In the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case.

"29. The Court recognises that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognises that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of State to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

"30. However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict."

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the envi-

ronment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that: "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary."

> "31. The court notes furthermore that Articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of attacks against the natural environment by way of reprisals. These are powerful constraints for all the States having subscribed to these provisions." (International Court of Justice Advisory Opinion, 8 July 1996 at p. 17-18 and 19-20)

As long as nuclear annihilation and the consequent Globoshima are a potential threat the cosmos of Human Rights is never a safe World Order.

Independence of the Judiciary and the Need for Police Reforms

Sri Lanka: Far Reaching Legal Reforms Envisaged—Police Reforms Needed

*by Basil Fernando**

The twentieth century with its automobiles, air planes and space travel transformed the speed of movement in the world as it had not happened in any other Century. The twenty-first century will change the speed of all social institutions with it unimaginably speedy communication changes. Already computers, the fax, e-mail, and various sorts of world wide webs have transformed the nature of communications, even in the remotest parts of the world. The backwardness of one's communication system is no excuse any more to keep these rapid changes out. In the context of a legal structure of a country like Sri Lanka, which had not even properly entered the 20th century,

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it may be mind boggling to think of the required changes necessary to come to terms with the 21st Century. Out of all such changes one stands out prominently as far as Sri Lanka is concerned. That is the need for police reforms. The issue of police reforms is linked among other things to the issue of independence of the judiciary in a country like Sri Lanka where due to many factors the rule of law has suffered seriously in recent times.

Professor G. L Pieris, Minister of Justice and Constitutional Affairs, has revealed that the government has sought the assistance of the World Bank and the International Development Association (IDA) to effect a series of broad based legal reforms (The Island, 18 October 1996). The recognition of the need for reforms and attempts to raise the required funding is laudable. In several other countries too such reforms have been considered an integral part of the modernization process and attempts are being made to come to grips with them. In Sri Lanka in the past the excuse given for not attempting the necessary changes has been the lack of funds. However there are many sources for funding for improvement of the institutions linked to the administration of justice. Thus lack of financial resources should no longer hinder the discussion on massive changes that are necessary to make the system of administration of justice relevant to our times and to make it capable of changing from being outdated. Outdatedness itself is a course of injustice.

These areas of reforms spoken of by Professor Pieris, include state institutions such as the Registrar of Companies, the Land Registry, the Securities and Exchange Commission (SEC) the Colombo Exchange Commission, the Judiciary, the Judges Institute, the tertiary institutions which deal with legal education such as Colombo University, the Open University of Sri Lanka and the Law College. This is a very limited list given the problems of administration of justice faced by the country in recent times. If the administration of justice system is to gain the confidence it needs to function there are many other aspects that need fundamental reform. Mere changes relating to commercial law will not be sufficient to face up to the problems of a system, which had proved to be so capable of being manipulated. The system fell to is lowest depths making extra-judicial killings possible by the thousands, the display of

bodies in the most uncivilized manner and every possible rule of a civilized legal system was broken in a colossally ugly manner. Thus the reforms need to address the issue of the collapse of the rule of law. The reinstatement of the rule of law is not purely a matter of political change. It has many technical aspects too. If these are not addressed the promise of changes will remain mere promises and the security of the people will remain as endangered as before.

Judging from the list given by the newspapers, the reform of the police is not a part of the proposed legal reforms. When viewed from the point of view of recent history no aspect of Sri Lankan institutions is more in need of legal reforms than the police. In the practical operation of the law, judicial reforms will have little effect without correlated legal reforms relating to the police. The sort of crisis that the system is faced with cannot be changed by the mere transfer of some policemen. Disciplinary action against the police is difficult and prosecuting the police is nearly impossible. Some stray successes here or there do not alter the public perception of the colossal danger that the police system, as it stands today, forces to the life and the liberty of the people. The lessons need to be learned from countries like South Africa which is making a genuine attempt to change a ruthlessly bad police system which is in many ways similar to ours, though the causes of brutality of the South African system may differ from ours.

It may be useful to discuss the ways by which the issue of the need for police reforms could be brought within the agenda of the needed legal reforms so that it could be included in the package mentioned by the Minister G. L. Pieris.

First there is a need for a public discussion on the issue. The commissions which had functioned in recent times on Disappearances, and on a number of politically motivated murders have provided the public with a massive amount of information on the workings of the police system. The people who have seen and experienced massive violence in recent times and are traumatized by such happenings need to be given opportunities to emerge out of such trauma. A political and a social commitment to assist the people to air out the deepest fears that are hidden in the inner layers of their unconscious is a paramount need. For this purpose the opportunities need to be opened up, perhaps in

the manner of the South African Truth Commission. Till such an institution comes into being the civil society organizations could provide a forum for such discussions. Persons experienced in dealing with trauma may conduct sessions for this purpose as done in many other countries.

Among those who are in need of healing are the perpetrators of violence themselves. Many would have to live with the big burden of the memory of what they have done. Some may well have carried out the commands of others and some may given in to their own sadistic instincts. The experience in other countries have shown the long term effect such violent behavior has on the people who have done such acts. Killing of children, women, burning houses, putting burning tires on the people, raping and killing girls etc. and similar other acts as were common, would have resulted in making many persons disturbed. For them too opportunities for speech could create an opportunity to face themselves. The insights of these persons as to what went wrong in the system could provide vital information necessary to effect the required changes.

There are many others who due to their official duties or for other reasons had to deal with the situation of such violence. Among them are judicial officers, medical officers, prison officers, legal officers (such as the persons who worked for the Task Force which was dealing with detainees), lawyers who had been involved in various types of litigation, monks, nuns and priests of various religions and many other persons.

POLICE REFORMS AND INDEPENDENCE OF THE JUDICIARY

Sometimes factors relating to independence of the judiciary of more affluent countries ("first world countries") with more elaborate systems of administration of justice and those of poorer countries are discussed in the same manner. For example the topics discussed are the manner of their appointment and retirement, the security of tenure, the salaries and similar topics. To this the moral and intellectual calibre of the judges too is added. However, the presumption behind such

discussions is that if these conditions are fulfilled judges can act independently. However, what the judges could do is also determined by the entire system that administers justice as a whole. If there is a malfunctioning police system the judges could often do nothing, even if they want to. The situation is even worse if the judges have to fear for their lives if they were to push the police too much and find fault with them too often. The ground reality of the administration of the justice system is controlled by the police. If they do not bring cases to court or are bringing them in a such a messy state or bring them too late, or if police do not conduct inquiries properly or carry out instructions of court only barely so as not to come under actions for contempt of court, what could judges do? They could find fault in few cases but if the quality of police work is very low as rule, there is nothing on which they could base their judgments. These peculiar problems of the third world and of those countries which had undergone civil war need to be considered seriously if independence of the judiciary is to become a reality. A serious and a comprehensive police reform is a sine qua non for actualization of independence of judiciary in countries like Sri Lanka.

List of Participants

OPENING SESSION

SPEAKERS

S. Anandacoomaraswamy, Judge of the Supreme Court, Sri Lanka

V. R. Krishna Iyer, Justice of the Supreme Court (retired), India

Sunil Gamini Perera, Judge of the District Court, Sri Lanka

P. R. P. Perera, Judge of the Supreme Court, Sri Lanka

Parinda Ranasinghe, Rtd. Chief Justice of Sri Lanka

C. Wigneshwaran, Judge of the Court of Appeal, Sri Lanka

OTHER JUDGES PRESENT

G. P. S. de Silva, Honourable Chief Justice of Sri Lanka

S. W. B.Wadugodapitiya, Judge of the Supreme Court, Sri Lanka

A. S. Wijetunga, Judge of the Supreme Court, Sri Lanka

D. P. S. Gunasekera, Judge of the Court of Appeal, Sri Lanka

Asoka de Silva, Judge of the Court of Appeal, Sri Lanka

Douglas Wijeratne, Rtd. Judge of the Court of Appeal, Sri Lanka

WORKSHOP

Ajantha W. Atukorala, Attorney-At-Law, Vigil Lanka Movement, Sri Lanka

Sunil F. A. Cooray, Attorney-At-Law, Vigil Lanka Movement, Sri Lanka

Nimal Dassanayake, Attorney-At-Law,Vigil Lanka Movement, Sri Lanka

D. L. Dharmaratne, Attorney-At-Law, Sri Lanka

Neil Dias, Attorney-At-Law, Sri Lanka

Kalinga Ediriwickrema, Attorney-At-Law, Sri Lanka

Kumar Ekaratne, Justice of the District Court, Sri Lanka

U. M. A. D. S. Ferdinandsz, Attorney-At-Law, Sri Lanka

W. P. Anthony Fernando, Attorney-At-Law, Vigil Lanka Movement, Sri Lanka

Melwin Herath, Attorney-At-Law, Sri Lanka

Gamini Jayasinghe, Attorney-At-Law, Vigil Lanka Movement, Sri Lanka

K. D. C. Kumarage, Attorney-At-Law, J.P.U.M., Sri Lanka

Padmasiri Nanayakkara, Attorney-At-Law, Vigil Lanka Movement, Sri Lanka

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Vijayanthimala Senaratne, Attorney-At-Law, Vigil Lanka Movement, Sri Lanka

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Douglas Wijeratne, Rtd. Judge of the Court of Appeal, Sri Lanka

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Sanjeewa Liyanage, Information Officer, Asian Legal Resource Centre, Hong Kong

M. Basheer Hussain, Former Dean of the Faculty of Law, Bangalore University, India

Dr. V. R. Krishna Iyer, Judge of the Supreme Court (retired), India

V. I. Itty, General Secretary, Vigil India Movement, Bangalore, India

V. S. Mallar, Professor of Law, National Law School of India, Bangalore, India

G. R. Nataraj, Advocate, India

Lathika Nath, Lecturer, Law College, Bangalore University, India

N. Manohar, Senior Lecturer, Dept. of Law, University of Madras, India

H. Suresh, Judge of the High Court (retired), India

K. M. Subhan, Judge of the Supreme Court (retired), Bangladesh

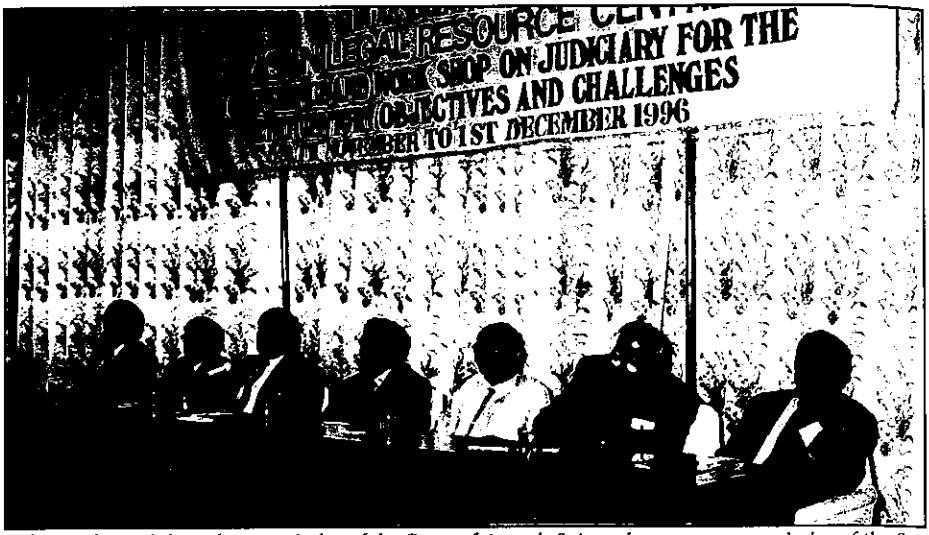
Dr. Lao Mong Hay, Director, The Khemer Institute of Democracy, Cambodia

Sok Sam Ouen, Human Rights Task Force, Cambodia

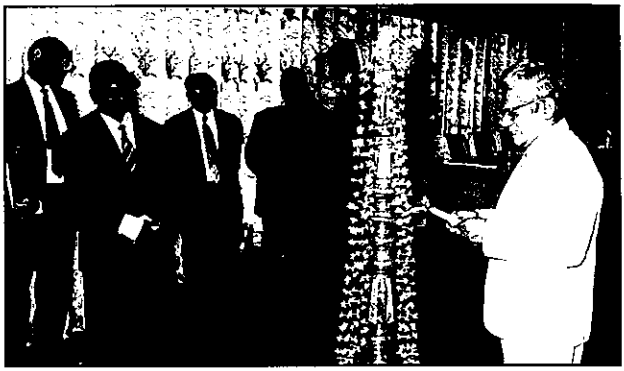
Sam Sophal, Human Rights Task Force, Cambodia

Ang Udom, Human Rights Task Force, Cambodia

OPENING SESSION



(left to right) C. Wigneshwaran, Judge of the Court of Appeal, S.Anandacoomaraswamy, Judge of the Supreme Court, P.R.P.Perera, Judge of the Supreme Court, Aloy Ratnayake, President's Counsel, G.P.S.de Silva, Honourable Chief Justice of Sri Lanka, Dr. V. R. Krishna Iyer, Rtd. Judge of the Supreme Court of India, Parinda Ranasinghe, Rtd. Chief Justice of Sri Lanka



Justice V. R. Krishna Iyer delivering the keynote speech

Attorney Sunil F. A. Cooray delivering the welcome address

S.Anandacoomaraswamy, Judge of the Supreme Court

Parinda Ranasinghe, Rtd. Chief Justice of Sri Lanka

Sunil Gamini Perera, Judge of the District Court, Sri Lanka

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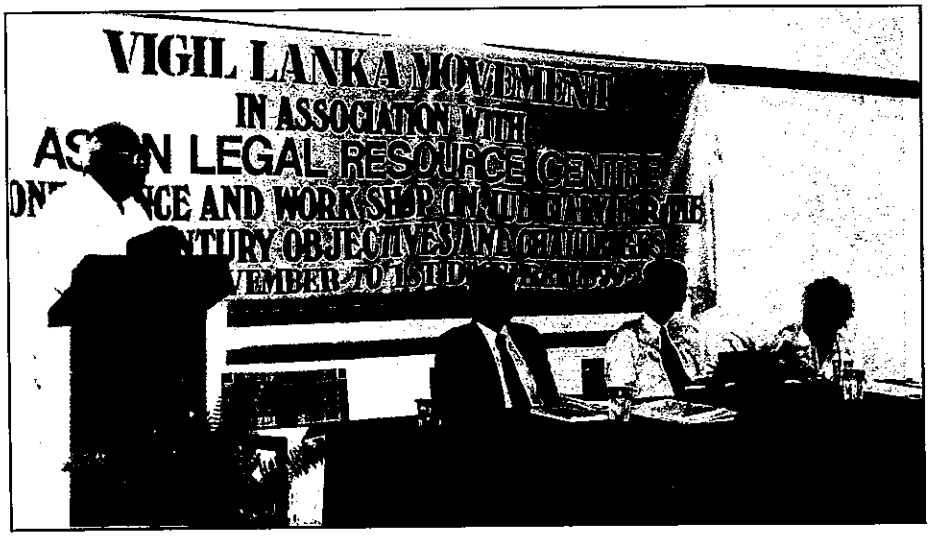
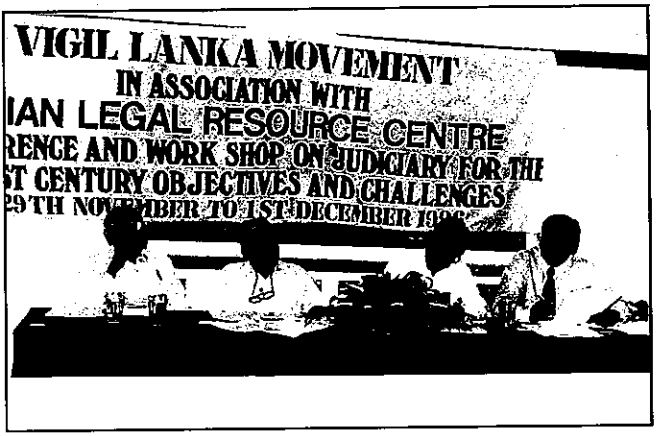
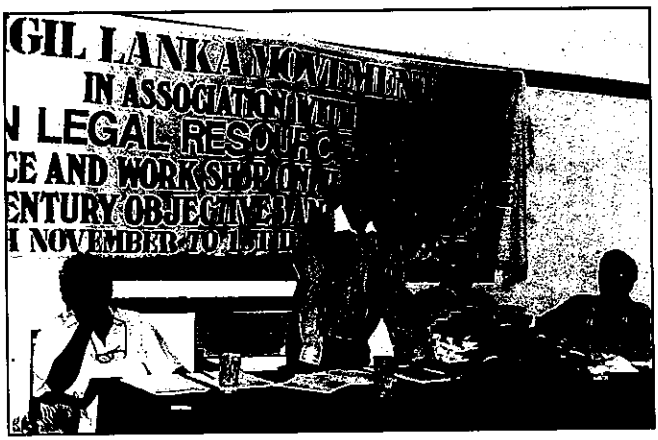
WORKSHOP





Workshop in session

Justice K. M. Subhan, Retd. Supreme Court Judge, Bangladesh, making a point



Anthony Fernando, Secretary of the Vigil Lanka Movement making the final address

The Judiciary must be independent. The independence of the Judiciary demands from the judge a price he can hardly pay.

– Excerpt from the keynote speech by Justice V. R. Krishna Iyer

The 21st Century offers tremendous possibilities of achievements of justice for everyone. It is the judiciary alone that could ensure the fulfilment of these possibilities. It is a heavy responsibility cast on the judiciary to improve the lot of the humanity in its search for justice. If the judiciary fails to exploit all the possibilities that the coming century offers to achieve the age old dream of total justice by active involvement, this century may repeat the patterns of injustice which have prevailed in the 20th century while causing greater destruction than the earlier century.

– Excerpt from the Recommendations of the Workshop

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