

AHRC THINK TANK Papers



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AHRC Paper on Endangered Legal Systems

There are several ventures that have been specifically designed to assist lawyers who are in danger. This applies to a lawyer, or number of lawyers, who have become targets of attacks by the state directly or indirectly, through parties that have been encouraged or assisted by state agencies. The purpose of the attacks is to prevent such lawyers from performing their professional services for their clients.

In these ventures, an area of special interest is lawyers who are engaged in human rights work and who thereby become targets of such attacks. Among these are particularly those lawyers who defend persons with dissenting views that a particular State or government wants to suppress. As a part of the suppression of dissent, lawyers are also targeted. This is a way of blocking dissenters from accessing justice and legal protection.

This article recognizes the importance of the work of protecting lawyers and is also appreciative of all such attempts to protect the professional integrity of lawyers to enable them to do their professional work in order to provide the possibility of legal protection for their clients. In fact, such protection not only helps the clients, but is also a very important aspect of protecting freedom within societies. The freedom of expression for diverse views is very much part of an open society. It is also important from the point of view of providing social stability and wellbeing.

The theme pursued in this article relates to a wider problem that not only affects individual lawyers but also the legal profession as a whole in particular contexts. We refer to countries where the legal system is itself endangered, meaning that lawyers do not even have the possibility of practicing on the basis of universally recognized professional standards.

The article specifically refers to the context of Asian countries, many of which have legal systems that can expose lawyers to great danger when carrying out their normal work, often preventing them from providing effective services to their clients. The popular perception created by the dysfunctionality of endangered systems also affects the clients. Many would rather sacrifice their own right to justice in favour of ensuring their own personal safety. This means that they perceive that embarking on the path of seeking legal redress for the wrongs they have suffered would lead to greater suffering. As a Cambodian woman once said of her experience seeking justice after the rape of her daughter, trying to seek justice was like making a complaint

about one's dress being torn by someone and at the end having all one's clothes torn off – this was her experience of the process of trying to seek justice.

This issue of endangered systems of justice may be a problem that lawyers, and others, in developed countries find difficult to grasp. In their developed systems, which have developed over a period of centuries, certain norms, standards, and practices exist in theory and in practice. These guarantee the right of anyone who suffers a legal wrong to seek justice and access lawyers who could, without fear, provide the needed services to their clients. Being a lawyer with integrity within such a developed system is treated as a matter of honour, and the recognition of a shared set of ethical norms is assumed (and evident in practice). For that reason, the contrasting experience described in this article may be rather counterintuitive to those who have inherited such more developed systems.

Given the disparity of experiences and foundational assumptions, some explanation is needed about what is meant by 'an endangered legal system'. In essence, what is endangered in such systems is the ability of a judicial process to provide protection to individuals on an equal basis within the framework of a just system of laws. In a legal system as understood in developed countries, all the public institutions associated with the State, particularly those associated with the administration of justice, are bound by a normative framework, within which seekers of justice and the lawyers who represent them are protected. Derivations by individuals can be treated as aberrant cases, rather than indicative of the system itself being endangered, and can be fairly and transparently addressed by the system itself. This is not the case in situations where the legal system as a whole has reached a point of dysfunctionality.

A legal system can become endangered in the following ways (the observations in this regard are made on the basis of direct involvement with these systems over a long period of time):

1. A normative framework (as described above) has not been created in a particular country;
2. Such a framework existed but, after certain political developments, this was replaced or seriously undermined (example: Cambodia after the Pol Pot regime);
3. Great social upheavals have not only wiped out the previously-existing system but also almost every person who had some knowledge or memory of how the legal system functioned (examples: Cambodia and Myanmar);
4. Long periods of militarism have created a system that fortifies military control and, for that purpose, legal institutions have been reshaped (examples: Pakistan, Indonesia, and Myanmar);

5. Where Communist revolutions have displaced all liberal democratic ideas and norms, and have created systems based on completely opposite concepts to those in places where liberal democracy prevails (examples: China, North Korea, Vietnam, and Laos).
6. There is another category of systems where, while the state maintains electoral systems for electing governments, fundamental constitutional and other legal changes have altered the structure of the State to become an authoritarian one (examples: Sri Lanka, Bangladesh, and Singapore).
7. Yet another method of endangering a legal system is brought about by the failure to make the financial and other resource allocations needed to enable a functioning legal system, thereby creating a dysfunctional legal system. In this group of countries there are external appearances of a legal system, such as the judges wearing wigs and prosecutors claiming to be independent while in reality they are politically controlled; and policing systems that have uniforms and police ranks but do not have the means to carry out their functions with the proper training, command responsibility and facilities that are required for effective criminal investigations and other police functions.
 - i. One of the features of such a dysfunctional system is the long delays, such as an average of 17 years for finalizing an ordinary criminal case (as in India, Sri Lanka, Bangladesh, Nepal, and some other jurisdictions);
 - ii. A further devastating aspect is the widespread corruption at all levels of the legal system: police, prosecutors and even the judiciary. A further similarly destructive aspect is the politicization of the legal system, meaning that ruling political parties directly intervene without any respect for the principles of non-interference in the judicial process.

In these circumstances, what happens to the role of lawyers? As seen above, there are very complicated and complex factors that limit and act against anyone who wants to carry out their professional duties with the integrity that is expected of lawyers. First of all, a proper legal education that prepares them for playing such a role does not exist under these circumstances. Students of law do not have the experience of a functioning legal system within a normative framework, and therefore, even when they are given a general legal education, which may be in the right direction, the students have no way of experiencing or imagining what these principles mean in practice. However, the worst is when the education itself adjusts to the existing bad system; it does not even teach legal principles in a manner that would enable law students to envisage a legal career rooted in a foundational basis of integrity and honour.

When a system develops its own distorted ways, many lawyers who want to survive within such a system (as well as judges, prosecutors, and police investigators) learn to adjust to the system and even learn how to take advantage of the bad situation. What would be considered unethical and immoral concepts in a more developed legal system become quite normal practices, and those who dare to cross the line and do things correctly know that they will have to suffer very bad consequences. One horrendous result is the spread of corruption of various sorts within the legal profession itself. Some lawyers, concerned about justice and human rights, become endangered, while others in the same system not only fail to support them but even become part of the process to harass them.

Under the heavy pressure of bad practices that have been normalized, the enforcement of discipline within the legal profession becomes almost an impossible task. Powerful forces within the legal system itself come to resist every attempt to reestablish the liberal democratic normative framework of the rule of law and separation of powers, and block the introduction of rules and codes that are normally followed in more developed systems. Thus, powerful sections of the legal profession themselves become a major force that keeps the system dysfunctional so as to make a profit from the system that could not be made if a stronger and proper legal system were to prevail.

How serious is the problem?

I have found a metaphor to express what the AHRC has been saying about endangered legal systems and the role of the administration of justice within that context. This also illustrates the role of lawyers in such circumstances. I take the metaphor from what is being experienced in China on a large scale, in Hong Kong so far on a much smaller scale, and in many other countries, in terms of the spread of the novel coronavirus. The situation is such that the World Health Organization is treating this as a global emergency.

The spread of the virus also brings to mind some of the lessons from ‘The Plague’ by Albert Camus. In fact, he, too, uses it as a metaphor, as I am trying to do now.

When a legal system collapses, what the people experience is a situation akin to that of a plague or an epidemic. While people who are victims of legal wrongs - whether it is in terms of public law, or criminal law, or any other area - are the direct victims, society as a whole is also victimized. Everyone is afraid of catching the virus. As far as what we call ‘normal diseases’ are concerned, people have the assurance that the medical system that exists is able to deal with them. The assurance of having a functional medical

system helps them to cope up with individual problems. As far as the society is concerned, most persons would like to give some help to sick persons and to cooperate with the system by contributing to its development. ‘Normal illnesses’ do not make one person fear others.

That is also the case when there is a functional legal system based on just laws administered to a reasonable degree that satisfies the people. When problems occur, people have recourse to the system of justice. There are many people who will help them in that process. The criminal investigators will investigate a crime and try to resolve the mystery behind each crime. Prosecutors will help to prosecute crimes in terms of the law and judges will adjudicate according to the legal framework. Within that context, lawyers also play their role and have the reasonable possibility of assisting a person who has suffered a legal wrong. Besides this, the society is also engaged directly or indirectly in ensuring that justice has prevailed. In particular, the media faces the task of educating the public about the manner in which justice processes contribute to resolving problems. Thus, the sense of cooperation extends to all sectors to some degree in terms of ensuring the wellbeing of those who are victims of legal wrongs.

The opposite of this occurs when a deadly virus begins to spread throughout a locality. It is the same kind of situation that prevails when a collapsing legal system begins to effect the whole population.

People in places that are directly affected by crises like the novel coronavirus are preoccupied with taking extraordinary measures to attempt to curtail the spread of the disease. Entire cities with millions of residents can be closed down so that dwellers in the city have no access to the outside world. Governments will announce many precautions, like everyone wearing masks, to prevent the spread of the disease.

Doctors and health workers are also affected in many ways. As persons committed to assist the sick, they are likely to face anxiety as there is very little they can do to help when cures for a new disease is not available. The factors that motivate them will naturally be affected in such a situation of helplessness. Besides, they themselves face threats to their own health.

A collapsing legal system also has a similar impact. Judges, prosecutors, criminal investigators and others with functions to perform in providing redress are also thrown into a helpless situation. The lawyers in particular, who are naturally more aware of the situation than their clients, will also face anxieties when they are deeply aware that the justice that their clients seek is impossible to achieve in the given circumstances.

Above all, the impact of such a situation on the society as whole can be devastating. People can withdraw their cooperation and will attempt to find their own ways to resolve the kind of problems they confront

without having recourse to the legal system at all. Such alienation of the people itself gives rise to the spread of fear. Such spread of fear can give rise to violence and the exploitation of the situation by anti-social elements.

I have added this note in order to communicate the acute social dangers faced by several societies in less developed countries, particularly in many of the Asian countries, the legal systems of which AHRC has closely monitored and documented over a period of several decades.

What could developed countries do to address this problem in less developed countries?

- 1) Undertake or support efforts that help people understand how dysfunctional systems work, so that interventions can be made in a well-informed manner to resolve these problems. This can be illustrated by the following example: The mandate for the UN Transitional Authority for Cambodia (UNTAC) included working towards the improvement of human rights in Cambodia. In 1992, the first international conference on human rights in Cambodia took place under the auspices of the human rights component of UNTAC. One of the recommendations of this conference was to help to develop the judicial system. When UNTAC ended, three months after the elections in May 1993, the UN Centre for Human Rights established an office for the continuation of this work. As a senior staff member, I proposed that if any effective work was to be done to improve human rights in Cambodia, the manner in which the Cambodian court system worked needed to be studied in detail. The way to do that, it was proposed, was to get a small team of experts consisting of lawyers with considerable experience practicing in their jurisdiction, or retired judges, who would sit as observers in several courthouses and collect detailed information on the workings of the justice system. Then, these experts could lay out their findings and discuss the nature of the system they had observed. On that basis, a detailed set of recommendations would be made to guide the work of the UN Centre, and the data would also be shared with all the countries that were willing to assist in the process of aiding the Cambodian government and civil society in ways that would gradually improve the system. This proposal was accepted and became a part of the Centre's vision. Through the intervention of the US ambassador at the time, a contribution of US\$500,000 was made to the UN in Geneva to carry out this proposal. However, due to some bureaucratic delays, the proposal as it was envisaged was never put into effect. Even up to now, despite many reports made by the UN Centre, which was later became an office under the UN High Commissioner for Human Rights, and also reports regularly being made UN Secretaries General, Special Representatives from 1994

up to now, no detailed work has been recorded about the actual routine practices of the Cambodian justice system. For this reason, recommendations have been broadly of a very generalized nature, and, for that very reason, no significant contributions have been made for the improvement of the system. It can safely be said that, despite the long time that has passed from 1993 up to now, Cambodia does not have a competent and independent system of justice. To various degrees, similar problems exist in most other countries in Asia, as well as other developing countries across the world. Broad generalisations that have not been informed by the ground realities relating to the justice system reduce the impact of the work of very competent people with good intentions. A similar approach to what was proposed (with observers) is an essential component of any practical implementation of human rights.

- 2) Developing countries can also support civil society organisations that are gathering in-depth information of the work of local justice systems, which obstruct the work of implementing human rights. In particular, gathering detailed information regarding the functioning of public law and the criminal justice system can be the core of such monitoring and documentation work. Competent work in these areas can contribute to the local conversation in each country and towards better international efforts to assist in this process. As an example, there is AHRC's work on several countries, including Sri Lanka. A considerable body of information has been gathered, analysed and been made available through publications that are shared directly to relevant bodies as well as through the internet to all persons. This body of information shows, for example, how Sri Lankan public and criminal law systems obstruct the implementation of the rule of law and protection of human rights.
- 3) At the United Nations level, the High Commissioner's Office should be encouraged to make it a part of their mandate to find more effective ways to implement Article 2 of the ICCPR and Sustainable Development Goal 16 of the Agenda 2030. Article 2 of the ICCPR requires all signatories to the convention to ensure that legislative, judicial and administrative measures are undertaken by the relevant states to ensure the enjoyment of human rights by the people. The UN efforts have mostly been confined to insistence on legislative developments. However, when the operational system for the implementation of rights, particularly through the institutions of the police, prosecutors and judiciary, have a negative impact, even legislative measures remain merely achievements on paper. There is a need to find ways through which to assist and encourage

governments to implement judicial and administrative measures. To do this, the Office of the UN High Commissioner for Human Rights should find detailed observations on how the system works. This can be done by encouraging and supporting efforts by civil society organizations to undertake work in that direction. As for administrative measures, the High Commissioner's Office and treaty bodies should also inquire into the actual budgets that have been allocated for the proper functioning of the administration of justice. If such funding is not allocated, it is not possible to expect that any of the public institutions tasked with the implementation of the rule of law and human rights will be able to do any effective work.

- 4) UN treaty bodies and the Rapporteurs who make recommendations to governments should do so on the basis of their detailed observations on the serious defects of justice systems and advise on ways to address these matters.
- 5) The World Bank and United Nations Development Program, and other UN bodies, should assist governments and civil society on working in the direction proposed above.
- 6) At the Universal Periodic Review, the United Nations Human Rights Council should examine the nature of the justice systems of each country and how they function in practice, particularly in terms of the implementation of the rule of law and human rights. Again, very broad and generalized recommendations that does not manifest well-informed opinions about systemic problems have proved to have very little impact.
- 7) All poverty-alleviation programs should give a significant place to work relating to SDG 16 of Agenda2030, which requires improving access to justice and maintenance of public institutions that enable the poor to benefit in the assertion of their rights through their justice systems.
- 8) All Bar Associations and other bodies of lawyers that have an interest in supporting lawyers that face dangerous situations should also consider the ways of highlighting the problem of endangered legal systems, which disempower lawyers from carrying out their professional duties in the manner required of them. Bar Associations and other bodies of lawyers can help to create a global discourse on the matters raised in this paper.

- 9) All funding agencies engaged in the promotion of democracy, development, the rule of law and human rights should assist civil society organizations that undertake the work on the lines proposed above.

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