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LAW AND SOCIAL POLICY IN POST-INDEPENDENCE SRI LANKA

LAW & SOCIETY TRUST

Editor's note .....

In her article on '**Law and Social Policy in Post Independence Sri Lanka**' Professor Savitri Goonesekere looks at how the law could play a dynamic and creative role in the lives of people. She looks at how social policy can provide a base for legal reform and calls for the greater use of international standards in the framing of social policy and legislation.

'**Ends and Means: Human Rights Approaches to Armed Groups**' is a summary of a study initiated by the International Council on Human Rights Policy, a human rights group based in Geneva. In several parts of the world armed groups are responsible for grave violations of human rights and humanitarian law. The study looks at some possible ways of engaging with armed groups in an attempt to reduce the number and intensity of human rights abuses.

In his article on '**50 Years of the UDHR: Search for a New Universality**' Adilur Rahman Khan looks at the traditional paradigm of human rights and its inability to hold accountable the international financial institutions and corporate institutions.

Irfan Husain's article on '**Electoral fraud in South Asia: cause and effect**' has a relevance for the entire South Asian region. He contends that the only way to ensure even a basic level of fairness during an election is to have a neutral caretaker government.

Mr. 'X' v Hospital 'Z' is a judgement of the Indian Supreme Court that looks at the rights of persons infected with HIV/AIDS. How does one balance the privacy rights of persons who are HIV positive with the public interest of preventing a spread of the infection.

Constitution which in itself was inspired by the Constitution of Ireland. This Constitution therefore reflects the perception of the Universal Declaration of Human Rights (1948) and western jurisprudence. It recognises civil rights such as the right not to be deprived of life, freedom of speech, and freedom from torture as legally enforceable rights. However, socio economic rights such as the right to education, and health are perceived as social policies that a government should work towards realising, rather than rights which citizens can claim from their government. Education for instance is dealt with in a distinct chapter in the constitution which defines the 'Directive Principles (or guidelines) of State Policy' which cannot be enforced as fundamental rights. Curiously Health is not included at all in the Chapter on Directive Principles of State Policy even though there are guidelines on policy formulation to ensure the full development of children and youth, the protection of the environment, and realisation of equity without discrimination, in particular on the ground of sex, ethnicity, caste or religion.

The Directive Principles of State Policy have occasionally been integrated by the Sri Lanka Supreme Court into the concept of a legally enforceable right. An example is the decision of Justice Wanasundere in Seneviratna v UGC (1978) where the Directive Principle in regard to eradication of literacy and providing access to education was used to support the idea that the recognition of a right to university admission of students from disadvantaged districts on a quota did not violate the right of other students to equal treatment and allocation of university places on merit. However, the Supreme Court of India has gone much further and used the comparable Directive Principles of State Policy to create a range of new rights not referred to as enforceable fundamental rights. A right to education has thus been recognised. More recently a fundamental right to protection from sexual harassment was recognised in the Vishaka Case on an interpretation of the fundamental right to life and gender equality, integrating international treaty standards in the Women's Convention and Recommendation 19 and the Beijing Platform for Action.

The jurisprudence being developed in the Indian Supreme Court is important for Sri Lanka and South Asia, since it provides insights into the manner in which policy perspectives recognised in international standards can be integrated into domestic law. This process is important because international treaties in India and Sri Lanka as well as some other countries do not become locally enforceable as law unless they are integrated into local law by courts or legislatures.

I would like in this lecture to focus on selected areas of our post-independence experience in linking social policies to law reform through the legislative process.

Post-Independence Social Policies Law Reforms

If a Sri Lankan was to glance through the official legislative enactments of the island that were compiled in 1956, it is apparent that our law makers have been very active. Our laws have been classified and arranged in 481 Chapters. An unofficial Compilation of 1980 adopts a similar scheme, and has arranged the statutes in 636 Chapters. A brief review of some of this legislation, affords some insights into our successes and failures in utilising the law to create social and economic changes, and a democratic society committed to the norms of international law and our Constitution.

Creating rights without legislation

Sri Lanka is a country in South Asia has received international and regional recognition for the high quality of its social indicators. Fifty years after independence, our male and female literacy, and life expectancy compare well with those of developed countries. Women's life expectancy is higher than that for males, through in South Asian countries it is lower or as in India, equal to that of males. Our infant and maternal mortality rates have been steadily lowered to levels that are better than in most developing countries of the world. Our school drop out rates for girls are lower than for boys. These creative changes have been the product of certain policies introduced in the years just prior to independence and continued in the post independence period. Yet our legislative enactments contain only an Education Ordinance of 1939, and a series of statutes regulating the institutions responsible for University education. We seem to have provided a right to access to free health and education by policies that have **not** been articulated in the laws of the land.

There is no constitutional or statutory right to access to education except in so far as a child or youth denied admission to a state school or university may challenge the denial as an arbitrary act of the state that is discriminatory and violates a person's fundamental right under the constitution to equality before the law. Several Supreme Court decisions on denial of school admissions have given relief to the child or young person on the basis that there has been discrimination and a denial of equal opportunity. An adult citizen's right of access to a professional or continuing education programme run by the state will also be determined in the same manner. However, fundamental rights are traditionally exercised against the state and in relation to executive and administrative acts of the state. A jurisprudence has yet to develop that will enable a Sri Lankan child, youth or adult to challenge denial of access to a private school or educational institution on the ground of arbitrariness or

discrimination. This is a serious limitation in a context where the state is pulling back from the educational sector, though the process of economic transformation. While resources for State education have been declining in the post-independence period, there is increasing reliance on the private sector to fill the gap and provide alternative avenues of access to education. Yet, since Sri Lanka's Constitution does not recognise a fundamental right of access to education, and the Education Act remains unreformed through five decades, the social policies on education that provided equality of access do not provide equity of access to quality education either in the private or public sector. The right of access, based on a political reality is being constantly challenged in the period of economic transformation. Our situation clearly demonstration the inadequacy of recognising rights that are not enforceable and regulated by law.

The late C.W.W. Kannangara's policies on free education were meant to make education at primary, secondary and tertiary level the 'inheritance of the poor' rather than the 'patrimony of the rich'. This was the 'pearl of great price' which he gave to Sri Lanka (Hansard 1944 Sessional Paper 24 of 1943). Yet later unregulated policies that created regional disparities, resulted in an expansion of poor quality State schools for students in the Arts stream. The 'affirmative' action policies of a later era to give quotas in university admission for disadvantaged schools has been perpetuated for five decades without recognising that a quota system is a temporary measure that must be combined with a strengthening of resources so that parity in academic standards can be achieved over a specific time frame. There is a wealth of research to indicate that socio-economic disparities including gender disparities in employment have become entrenched rather than diminished through the state education system. (Jayaweera 1998).

We have not revised compulsory education regulations until very recently in 1998 and these are not being implemented. Sri Lanka which should have eliminated child labour continues to face the problem of exploitation of young children particularly girls in domestic service and the informal sector. Employment legislation that has placed restraints on child labour has not been reinforced by a corresponding regulatory system in the law on education. The privatisation of education has resulted in a mushrooming of pre-schools, tutories and private educational institutions now established as Board of Investment or BOI projects. This intrusion into the overpowering monopoly of the state can lead to a creative pluralism that can give equity of access to quality education. However, the absence of any regulatory mechanisms to ensure standards and quality control through an effective education law will only help to entrench disparities. The very affluent will have access to the

best English medium schools and universities. The majority will have to settle for a poor quality education in an overburdened state system, discontentedly becoming a prey to the poor quality and unregulated private classes organised by staff and even students from within the state system. We may very soon reach the stage described by Professor Swarna Jayaweera in her analysis of educational trends in post-independence Sri Lanka. She describes a **pre-independence** era in which 'the dual language based school systems with a fee levying, urban based prestigious English schools for the emerging elite, and free, educationally impoverished vernacular schools in the local languages for the 'masses', (created) a level of privilege that was deeply resented by the disadvantaged majority' (Jayaweera 1998). These words are hauntingly apt for the current unregulated scene on education at primary, secondary and tertiary levels.

The decline in the quality of education through ad hoc policy planning and without a proper legal framework has also taken a toll in the area of curriculum and teaching methodology. It is true that Sri Lanka's child and youth population of today are the product of an environment of ethnic and political conflict that has spanned many decades. Yet the school and the university system has contributed very little to imparting the life skills and value systems for peaceful conflict resolution. The high suicide statistics and the violence and the ragging that takes place in many state schools and universities in this country speak eloquently of an education system that has failed to impact on the children and young people of today as well as the adults of an immediately previous generation.

The scenario on health represents a mirror image of the experience with education, law and policy. The social policy of providing access to free health was introduced in 1950 several years after independence. The expansion of a widely distributed service network of state hospitals and facilities for health care contributed to the high quality of health indicators, particularly for Sri Lankan women and children. Equity of access to good health care and effective population control and family planning have been achieved through social policies and state facilities without a Constitutional provision or a law on health. Yet the serious under-resourcing of the health sector over the years since independence and the cut back on finances and service delivery have created the same crisis as in the education sector. Health remains unregulated by legislation and the few statutes that do exist cover areas like administration of local bodies in public health and regulatory measures on occupational health through statutes regulating Factory management and pesticide use.

These health policies have also not impacted on the serious problem of malnutrition or the quality of medical care available for prevention and treatment of illness. The new market economic policies and measures of economic transformation have encouraged privatisation of health care, with medical professionals from the state sector themselves offering their services in private institutions. The device of the BOI project has seen the setting up of private hospitals. There are measures to privatise medical education. Yet these institutions are outside the scope of any statutory regulatory measures imposed by Sri Lankan legislation. A private individual who is placed at risk or suffers loss because of poor health care or facilities must resort to expensive civil litigation to claim damages for professional negligence. Alternatively he must try to seek relief in the Supreme Court for violation of the right to equality - not an easy task unless there is some evidence of denial of equal access to health care and discrimination.

The proposed draft Constitution has attempted to recognise an enforceable fundamental right to life, and rights in relation to health care services including emergency medical treatment. The Directive Principles of State Policy refer to the State's obligation to realise an 'adequate standard of food security, housing and medical care, and the obligation to protect the environment in making laws and in governance.' Influenced by the U.N. Convention on the Rights of the child (1989) that Sri Lanka has ratified, the draft constitution also recognises enforceable special fundamental rights of children. Since a child becomes an adult at 18 years, these rights are available to all children under that age in addition to those general rights they can claim as citizens.

Among these rights are a child's right to a name, to be protected from maltreatment neglect and abuse or degradation, and a right to have an Attorney-at-Law assigned at state expense in criminal proceedings when a child comes into conflict with the law. A child has a right to parental care or to appropriate alternative care. This means that the State has an obligation to provide this care to any child who does not have a care giver and a family environment. Access to basic health care services, shelter and basic nutrition are stated as fundamental rights.

These social and economic rights recognised in the draft Constitution must be realised progressively by legislation and other measures within the scope of the available resources of the State. This introduces the traditional limitation of 'progressive realisation' rather than a concept of immediately claimable rights on the basis of parity with other rights such as those to life, personal security and protection from abuse. However, rather surprisingly the fundamental right to education is not

recognised in the draft Constitution or the new Directive Principles of State Policy. Only children between the ages of 5 and 14 years are considered to have a fundamental right of access to free education provided by the State. The new age limit is lower than the age of 15 for secondary education set as a norm in the Education Ordinance of 1939, and conforms with the existing limitation on use of child labour in our employment laws. There is also no reference to higher education in either the Chapter on fundamental rights or the Directive Principles of State Policy. The overarching concept of the state's obligation to make the 'best interests of the child a paramount concern is included in the chapter on fundamental 'special' rights of children.' Unless this concept is used as an interpretative guidelines to mandate legislation on education, the new draft Constitution can be considered to have marginalised the concept of education as a internationally recognised basic enforceable human right. There appears to be a backtracking on the obligations imposed by social policies of the state, in the first five decades after independence.

The National Education Commission and the Presidential Task Force on Health have developed a series of wide ranging proposals. It remains to be seen how these will be matched against the draft Constitution, and how they will be integrated into legislative reform. One can only hope that holistic statues on health and education will be introduced very early so as to give coherence to the policy initiatives and use effective regulatory measures to address some of the current problems faced in both the sectors of health and education.

Some successes and failures in Legislating to Implement Social Policy

Putting the law in place is only part of the challenge of using law to impact in society. Effective implementation and allocation of resources for law enforcement are critical if the law is not to remain a form of words that people ignore in their actions. An early British judge Berwick commented on the 'passive bearing' with which native Sri Lankan's respond to laws which they have no intention of accepting as norms of conduct. Yet the history of the country is replete with success stories. The vast majority of citizens do register their births and marriages, and license their radios and television sets.

Land Reform Laws and Ceiling on Housing Property laws disenfranchised owners of land and homes in excess of the ceiling specified by legislation, almost overnight. Tenant Cultivators from the remotest areas of rural Sri Lanka became aware very soon of their cultivator's share under the Paddy Lands Act, and neither intimidation or threats from the landlord could shake them from their resolve to claim their statutory

portions. State land continues to be allocated even today under an early Land Development statute, which still reflects the concept that the state is the owner of the land, which must not be fragmented encroached upon or alienated to those other than the allottee. This Ordinance's concept of land use focuses on 'preventing fragmentation, improvident alienation and joint ownership'. (Madduma Bandara 1998). This policy has been pursued strictly by successive generations of land officers in the administration, even though it has discouraged family members, and women in particular from engaging in agricultural production in state lands. The table of inheritance that applies when an allottee dies without nominating a single heir reflects a preference for the eldest male in any category of heirs - introducing a concept of primogeniture that is alien to both our customary laws and statutes on inheritance. These laws have been enforced so effectively that five decades after independence it has become impossible to ensure that a younger generation will go back to that land, producing the wealthy 'gentleman farmer' that the legislation of 1935 visualised. (Madduma Bandara 1998).

Similarly Citizenship laws and visa regulations that reflect discrimination and bias against women as spouses and mothers continue to be enforced to the letter. No Sri Lankan women may apply for a passport for her child without being told to produce evidence of the father's income, since it is he rather than she whom the law has deemed to be the 'blood relative by descent'. Sri Lankan law influenced by very early English Common law continues to reflect a strange biology that ignores the existence of an umbilical chord that links a woman to her child! A combination of political will, administrative commitment and a citizenry that is aware and willing to abide by regulatory controls has impacted to achieve successful implementation and law enforcement in these areas.

Yet in critical areas such as the criminal law, legal standards remain unenforced and do not confer rights. Sri Lanka's Penal Code strengthened the controls on child abuse and gender based violence by amending the law in 1995 on rape, sexual violence and forced prostitution, and creating new offences of incest and sexual harassment.

These laws reflect social policy approaches that are based on international standards relating to gender based violence and child abuse incorporated in Recommendation 19 of the Women's Convention, and the Convention on the Rights of the Child. There has been some effort to prosecute offenders under these laws, with women's groups, lawyers and child right activists anxious to monitor violations and bring offenders to justice. Nevertheless a range of factors, such as the lack of resources for forensic and police investigation, intimidation and interference with witnesses and victims, and the

fragile nature of victim support undermine effective law enforcement. Recent prosecutions in the Krishanthi Kumaraswamy and the Hokandara gang rape and murder cases are a tribute to those lawyers, law enforcement agencies and activists who sustained a combined effort to use the new law. Activists who are monitoring cases of sexual exploitation and physical abuse of children however, are concerned that the long delays in investigation and prosecution traumatise the children without resulting in successful prosecution. However, it is the constant vigilance of activist parents and families and their willingness to monitor and report criminal acts that will help the law enforcement agencies and also make them accountable to fulfil their responsibilities to the public. New breakthroughs in scientific research such as DNA testing will also contribute significantly to improving the forensic expertise required for effective law enforcement.

The Ragging Act which is a more recent piece of legislation on physical and sexual harassment in universities and educational institutions reflects a policy perspective that identifies this behaviour as socially unacceptable brutal conduct. It aims to create a culture of hostility to what has become an ugly and ritualistic right of passage in school and university campuses. The severe deterrent punsihments imposed on offenders are meant to be enforced with co-operation from the public, staff and students. Using these deterrent controls is critical to eliminating the practice and realising new standards of compassion and civility in inter-personal relations between seniors and freshmen and women.

At the beginning of this lecture I expressed the point of view that law must give the lead to society. It is on this basis that we have decided in this country to state in our Constitution and Social Disabilities Act that discrimination on the ground of ethnicity, religion and caste cannot be tolerated. Other countries have passed laws to outlaw dowry violence, female foeticide, infanticide, female genital mutilation and widow immolation. However, Sri Lankan legislation fifty years after independence still reflects norms and standards that have no relevance to the social mores of our society or our inter-personal relations.

Who is the alumnus of Ladies College who would accept that she has no right to pass her Sri Lankan citizenship to her own child? The early Christian Church, with pragmatic humanity recognised that the soul entered the body only at the stage of pregnancy when foetal movements were felt. Yet later social policy in nineteenth century Britain, formulated it is said by a medical profession that resented para professionals providing health services to women, resulted in the first legislative controls on termination of pregnancy. Many Christian countries with a heritage of

English Common law have introduced laws that allow for medically regulated termination of pregnancy when there is evidence of gross foetal abnormalities or a woman has suffered a sexual assault through rape, including gang rape and incest. Yet a proposal to change the law on the subject in Sri Lanka was defeated in Parliament in 1995 in a legislative assembly where many members made eloquent statements on the need to protect women from sexual and other forms of violence!

How many of us are aware that our marriage legislation continues to recognise a phenomenon of 'death bed' marriages between persons before a Christian priest, though it is doubtful that the right has been exercised in a century. And of course Ladies College alumni who have married under Kandyan law will be surprised to know that they have no inheritance rights in their husbands' *mulgedera,* not even when they in the Ladies College tradition are devoted and caring daughters in law. Those alumni with entrepreneurial talents who are governed by traditional customary, Tamil law are probably unaware that they will not be able to obtain a bank loan or transfer their property without the seal of their spouse's written approval. These laws have no bearing whatsoever on our values or our interpersonal interaction. Yet they determine both our legal rights and obligations.

When I was invited by the Principal to deliver this inaugural lecture, she suggested a topic relating to the rights of children. I have touched on that theme, but my focus has been on the interplay between legal standard setting and social norms. This seemed to me relevant to the sense of community that has underpinned the dedicated contribution of the founders of this school and their successors and the traditions they established over a century. Ladies College has encouraged individual development but always fostered concern with social issues, co-operate living, tolerance, generosity and understanding across the divide of ethnicity and religion. This is the balance between individual and group interests that creative law making tries to achieve. This is not easy in an environment of self advancement, aggressive politics, and divisiveness which nurtures conflict of interests. Yet Sri Lankans more than at any other time in our history must recognise the need to protect our sense of self respect and identity, whilst having regard for others. As a first century Rabbi quoted by Harvard Law Professor Martha Minnow said:

'If I am not for myself, who will be for me?
If I am not for others, what am I?
And if not now, when?' (Minnow 1997)

Ladies College has linked us through a century and kept us connected in friendship and togetherness as members of a vibrant plural society. There are many who will criticise the record of governance, law making and enforcement in Sri Lanka and express cynicism regarding legal processes. I believe however that the law has an important role in ensuring good governance, accountability and conflict resolution in our country, and we must use it to connect with the universally valid standards of our time.

References

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ENDS AND MEANS:
HUMAN RIGHTS APPROACHES TO ARMED GROUPS

International Council on Human Rights Policy*

Summary of findings**

OVERVIEW

The majority of violent and deadly conflicts in the world take place within states. Armed groups that are not under government control are a key feature of these conflicts and are responsible for many, sometimes extreme abuses of human rights. These are of immediate concern to civilians affected by the fighting, but they also raise issues for national and international organisations that protect human rights, work for peace or provide humanitarian relief.

What can be done to influence armed groups to respect human rights? Do the same techniques apply, that are used to shame abusive governments? Can one - should one - enter into a dialogue on human rights with groups that have engaged in acts of terror and laid waste to their societies? Does engaging with armed groups imply recognition and therefore legitimacy? Will focusing on the abuses of armed groups undermine efforts to hold governments accountable or deflect attention from violations by government forces?

To these questions we adopted an essentially pragmatic approach. We asked national (and later international) organisations to describe the actions they had taken and the obstacles they had encountered. The aim was to provide a framework useful to organisations grappling practically with how to reduce abuses by armed groups. Internal conflicts are highly diverse as well as dangerous. The report therefore does not prescribe courses of action and it argues strongly that only the organisations concerned can decide whether or not, and how, to undertake such work. It lists actions that can be taken to influence armed groups' behaviour and suggests factors

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* The International Council on Human Rights Policy was established in Geneva in 1998 to conduct applied research into current human rights issues. Its research is designed to be of practical relevance to policy-makers, within international and regional organisations, in governments and intergovernmental agencies, and in voluntary organisations of all kinds. The Council is independent, international in its membership, and participatory in its approach. It is registered as a non-profit foundation under Swiss law.

** The Main Report could be obtained from the International Council <http;//www.international-council.org>

that should be considered when deciding which actions are likely to be effective. This framework does not offer answers but, rather, options - an approach to thinking about armed groups and the abuses they commit. Underlying the framework are three core ideas.

Understand the context

Our research and discussions suggest that understanding the context is the key to effective action. It is essential to look at the environment in which abuses take place and the character of the organisations that operate in it. In different circumstances, different factors will influence the success or failure of particular courses of action. Effective action requires above all else a dispassionate analysis.

Step back

Many people see armed groups as "good" or "bad". There is disagreement about whether political violence is ever legitimate, even when the motive is to end injustice. Such judgments are understandable but in general sanctifying or demonising armed groups does not help to improve respect for human rights. It is important to take an objective view. In the political conditions of internal conflict, this is extremely difficult - particularly for those who are close to victims. Foreign governments and intergovernmental organisations such as the UN also need to think clearly when they consider the same issues.

Acknowledge the diversity

As a category, armed groups take many forms and defy easy description. They share in common that they are not state forces, but this indicates little about their willingness to respect human rights. Armed groups range from small cells based in urban areas and living in safe houses to armies controlling large territories and fielding tens of thousands of combatants. A few have more resources at their disposal and exercise control over larger populations than some states. It is unwise to draw general conclusions about their character or their behaviour, in relation to human rights or other matters.

The framework

In thinking about context, we suggest three sets of questions can be asked, relating to the character of:

- the armed group,
- the state,
- civil society.

These are related sets that influence each other. The behaviour of armed groups is influenced by that of the governments they oppose (and vice versa); and the ability of civil society organisations to act effectively depends on the degree to which states and armed groups tolerate their actions.

In thinking about options for action, we suggest these can be divided broadly into:

- Punishment - criminal prosecutions and other legal sanctions;
- Shaming and persuasion - actions from public criticism to private dialogue that aim to shame or persuade armed groups to cease certain practices;
- Working with armed groups - actions that involve working directly with armed groups to assist them to better respect human rights and humanitarian norms.

These categories are not mutually exclusive and the dividing lines between them are not firm.

CONTEXT

We list below some characteristics that influence the capacity and willingness of armed groups to respect human rights and humanitarian norms. Each is named and key questions raised.

Aims and ideology

In what terms does an armed group present its struggle? What is it fighting for? In many cases, armed groups explicitly contest political power; they seek to replace a sitting government or establish a separate state. Such aims are compatible with contemporary notions of statehood and with the idea (widely accepted) that states seeking admission to the international community must commit themselves to human rights principles. Others have aims that do not take a conventional political form. Even in these cases, the group's ideology may contain notions that are consistent with the ideas of exercising restraint in warfare, perhaps based in religious or traditional values.

Leadership

The nature and style of an armed group's leadership strongly influence the degree to which it will respect human rights. Where the political leadership is to some degree accountable to its constituency (perhaps even through elections), abuse - at least of civilians under its control - is less likely. Abuses also occur within armed groups and accountable leaderships are probably less likely to initiate (or lose control of) purges leading to mistreatment of the group's members.

Openness

Closely related to leadership is the issue of openness. Who can join? Can members leave? Does the leadership tolerate dissent? Many armed groups are deeply authoritarian and require absolute adherence to the "party line" from combatants and also the civilian populations they control. Authoritarian tendencies within armed groups lead to abuses against members (such as those suspected of disloyalty) and inhibit the emergence of internal reformers whose criticism might help put an end to abusive practices.

Military command and control

The professional quality of an armed group's military leadership is important. Where lines of command are clear and military control is effective it is easier to ensure that combatants adhere to human rights and humanitarian norms. Though this applies to government forces too, armed groups face particular problems of control, for example when groups are small or clandestine or are led by leaders who are imprisoned or abroad. Strategies that focus on leaders who are not able to control their forces are unlikely to stop abuses effectively.

Foreign sponsors

Many armed groups have links to foreign governments, who support them politically or financially, or arm them. In some cases, foreign corporations directly or indirectly support armed groups, by trading with them or operating under an armed group's protection. Such outside sponsors can influence armed groups - and can equally insulate them from criticism.

Constituency

Who supports the armed group? Who does it claim to represent? Constituencies may be defined on ethnic, linguistic or religious lines or based on distinctions of class. The relationship of a group to its constituency will influence its willingness to respect human rights - notably the rights of people who are defined as 'enemies' or outsiders. Similarly, the degree to which an armed group is perceived to be legitimate by its constituency will influence its accountability and willingness to respect human rights. Does the group need to win genuine support, or can it survive by intimidation and repression - for example because it is financed and armed from abroad? In many cases genuine support does exist and constituencies can be key points of engagement (provided issues of safety can be managed).

Many armed groups have links with international constituencies of immigrant and refugee communities abroad. Such diasporas can plan an influential role by providing (or withholding) legitimacy, funds, and political support. From loyalty or because of distance, expatriate constituencies often have an imperfect understanding of the real behaviour of armed groups and can inhibit as well as promote efforts to reform abusive practices.

THE STATE

The actions of governments have an obvious impact on the behaviour of armed groups that oppose them, and also on independent actors who engage armed groups on human rights issues.

States engage in internal conflict in very different circumstances, and their political strength and legitimacy, economic strength and military capacity all influence both the character of armed groups and the government's willingness and capacity to protect human rights. When thinking about the way the character of the state affects efforts to ensure armed groups respect human rights, three factors, deserve special attention.

Legitimacy of the state

Legitimacy is a particularly important factor. A state (or government) that is not perceived to be legitimate by the majority or a significant minority of its people is not well-placed to defend principles of human rights, the rule of law or its own incumbency. Where it is an armed group that is seen as the legitimate authority (or

representative of the population or a segment thereof), then this affects how one engages with both the group and its constituency.

The relative legitimacy of the state (or government) has important consequences for international efforts at mediation or reform of the behaviour of armed groups. Where a government is perceived as legitimate, and secure in its international relationships, then this will affect the extent to which international actors will engage with an armed group opposing it.

State violence

Where state forces are themselves engaged in widespread violations of human rights, or state forces are not held accountable for abuses, armed groups are much more likely to treat sceptically demands for improvement in their own behaviour. The equation is not perfect, and some armed groups have shown remarkable restraint in the face of state repression. Nevertheless, outside monitors will have little credibility if they criticise armed groups but not the state where the latter has a poor human rights record.

State tolerance for independent action

In many cases, governments obstruct independent efforts to engage armed groups on human rights issues. Some welcome but manipulate criticism or armed groups to suit their political interests. Others misrepresent independent initiatives to discredit the organisations involved. In very few cases have the governments been prepared to encourage private dialogues or intervention by independent national or international organisations. Highly defensive responses by governments are understandable, given the issues at shake. Nevertheless, a general hostility to all forms of independent action is likely to undermine protection of human rights, and may close out opportunities to create conditions for peace. Government intolerance is so extreme in certain cases that independent initiatives become impossible because they endanger those involved.

CIVIL SOCIETY

Independent organisations that want to prevent human rights abuses by armed groups also need to understand their strengths and weaknesses, and the capacity of other organisations around them (and abroad) that might support or oppose them in work to influence armed groups.

Nature of civil society

Civil society organisations also operate in very diverse circumstances. Is the agency concerned surrounded by few or a rich mix of independent organisations? Are they large, professional and well-resourced or small and impoverished? Is the human rights community independent of government and armed groups, or compromised by close relations with one or the other? Are civil society organisations marginal in the society or are they deeply respected and popular? Are there international relations strong or weak? Is there a solid tradition of co-operation and trust within and between different sectors (religious, human rights, relief, etc.) or not? Taken together, these and other factors will greatly influence the ability of organisations to work effectively.

Safety

Safety is a key problem. Many armed groups attack or intimidate those who criticise their behaviour. Even where this risk is absent, national organisations face other constraints. NGOs fear that actions they take to reduce abuses by armed groups will be manipulated by the government, or that their independent role will be undermined. Where territory is changing hands and the conflict zone is fluid, it may be difficult to attribute responsibility for abuses and investigation may be dangerous. Making contact with leaders of armed groups will often involve risks and difficulties.

Role for "insiders"

Insiders - individuals or organisations that are nominally independent but close to an armed group - can use their influence within armed groups to promote reform. Our research showed that, in certain cases, insiders had exerted a very positive influence over time, which could not easily have been achieved by other means. In other cases, insiders have used their influence within civil society to undermine and destabilise independent organisations that do not align themselves with the armed group concerned.

International actors

International actors - whether NGOs or official organisations - will often draw mistaken conclusions about the character of an armed groups or its true constituency if they are not well-advised by national actors. Nevertheless, they enjoy distinct advantages. They are usually better placed to draw international attention to abuses, for example through the international media, and they may have easier access to the

leadership of armed groups that seek international legitimacy. International actors also face fewer physical risks than most national groups who cannot readily leave the country or expect outside diplomatic intervention if they are threatened or taken hostage.

Coordination

Different actors have different strengths and weaknesses and these are worth understanding in advance. This applies too in the division of roles. Human rights NGOs are accustomed to fact-finding, religious groups to initiating dialogues, humanitarian relief organisations to negotiating access, and so on. Our research revealed actors at all levels were frustrated by the lack of coordination between those trying, in different ways, to encourage armed groups to respect human rights.

One cannot expect harmony. The diversity of actors and the complexity and insecurity of most conflict situations make co-ordination difficult. Some actors must operate in certain ways (for example, discreetly) and all will be the wary of giving up any independence to act as they see fit in given circumstances. Nevertheless, where national actors do take co-ordinated approaches, and where international actors try to ensure their efforts are understood and supported by those in the country, the possibilities for influence are greater.

ACTION

In broad terms, an organisation that wishes to change the behaviour of an armed group can:

- shame or persuade an armed group to cease an abusive practice;
- work with the armed group to give it the means to do things differently; or
- aim to punish members of the group.

An armed group may commit abuses as a matter or policy or because it does not have the means to reform. In the first case, a group may consciously recruit child soldiers or murder suspected informants. To stop such practices the armed group must be persuaded to change the policy. Whether this is achieved by quiet dialogue and persuasion or by public denunciation is a matter of tactics.

In the second, leaders of a group may wish to stop abuses by their forces but have no system for training them. Where the desire for reform is genuine, direct engagement and assistance may be an effective and reasonable response.

Punishment for members of the armed group who commit serious human rights abuses involves criminal prosecution or other legal sanctions.

Punishment

Members of armed groups are subject to prosecution before national courts in their own country - often for mere membership of the group, or for crimes arising from human rights abuse. The deterrent effect of such prosecutions is difficult to gauge; certainly, national courts will enjoy little credibility with members of an armed group that has taken up arms against the state. For the most serious crimes (war crimes and crimes against humanity), members of armed groups are subject to international prosecutions before international courts or courts of other countries exercising universal jurisdiction.

Sanctions

Armed groups and their members might also be punished (and persuaded) by international sanctions. These may penalise those who trade or supply them with weapons or material, restrict their work abroad in other countries, prevent their leaders from travelling or require foreign states to seize their assets abroad. Sanctions can be imposed collectively (through the UN) or by states acting alone. The effectiveness of sanctions against armed groups needs more study, in particular to understand whether their impact on behaviour outweighs their negative consequences.

Fact-finding and denunciation

Many national and international actors have sought to influence armed groups by monitoring and reporting on the abuses they commit. This important activity is hampered by the difficulties of getting accurate information and assigning responsibility in situations where more than one party might be to blame. National organisations often face grave risks when they undertake such work. Nevertheless, without reliable reports of abuses many other initiatives will prove fruitless.

Use of media

The media are an important vehicle for drawing attention to abuses and the results of monitoring and fact-finding. The choice of strategy matters. The international media (western-dominated) may not influence groups that define their struggle in anti-western terms. National and local media may have more influence on an armed group's local constituency. Also, media reports tend to simplify issues, and this can backfire where the aim is to create space for dialogue.

Points of entry

Some human rights issues are more easily raised with armed groups than others. It may be easier to discuss the protection of children than use of certain weapons or the treatment of captured combatants. Similarly, armed groups may find it more difficult to shrug off public criticism of certain abuses than others. Our research showed many actors look for these entry points, and felt doing so was an effective way of beginning a broader dialogue.

Dialogue

There was wide support for dialogue. Even when armed groups had committed the most horrifying abuses, both national and international actors felt dialogue should always be an option. They considered it was unhelpful to demonise armed groups or treat them as beyond the pale.

Engaging constituencies

Where it is safe and feasible to do so, it is important to engage the armed group's constituency on human rights issues. This might begin as a general discussion on human rights and humanitarian norms, and later progress to discussion of specific abuses. A key point is that, wherever its constituency supports an abusive practice, the armed group faces less internal pressure to reform.

Assistance for reform

Both international and national actors have worked with armed groups to assist internal reform efforts. Activities can range from training combatants in the laws of war to assistance in demobilising. Much relief and development work undertaken with armed groups can be seen to have a human rights component, including work in

education, health care or empowerment of women. Providing assistance to armed groups raises quite distinct problems, compared with aid to governments. It will not be an option in many cases, for example where the armed group does not have stable control over territory and population. The government of the country is also likely to view foreign assistance of this kind with extreme suspicion.

Developing codes of conduct

Our research demonstrated the need for armed groups to adopt codes to regulate the conduct of their combatants and deal fairly with allegations of disloyalty and abuses of human rights and humanitarian law. "Legal" systems are needed to adjudicate disputes in areas that armed groups control and govern their relationships with civilians in those areas. Signing up to international agreements is important, but ways need to be found to implement the obligations they contain.

> "I think that many more violations would have occurred, many more murders of people accuses as informants, many more executions of mayors, even more indiscriminate use of explosive devices and attacks on barracks and the like by the guerrillas would have occurred if pressure from the [human rights] organisations had not been exerted to respect international rules…".
>
> Former FMLN guerrilla, El Salvador.

DEFINITIONS

Armed group refers to groups that are armed, use force to achieve their objectives, and are not under state control. In general, we mean groups contesting political power, though it is difficult to distinguish clearly between groups with political as opposed to criminal objectives. We do not include paramilitary bodies that in fact the state controls, unless these have some real autonomy.

Human rights abuse refers to conduct or practices that clearly infringe standards of international law, whether international humanitarian law (the laws of war), international human rights law, or both. Briefly, it includes: arbitrary deprivation of the right to life, disregard for the protections owed to civilians caught in conflict,

interference with freedom of movement, interference with freedom of expression, assembly and association, torture and ill-treatment, abuses against children and women, and arbitrary deprivation of liberty and due process.

THE RESEARCH PROCESS

This summary describes the different actions that might be taken to encourage armed groups to respect human rights and identifies some of the obstacles to more effective action. It sets out the main findings of a research project, begun in April, 1999, which focused on the experience of national organisations in countries where armed groups operate.

In starting this work, we did not assume that abuses by armed groups are increasing or deserve more attention than abuses by governments, nor did we give close attention to international legal standards, the nature of modern conflict, or theories of state collapse. Our enquiries were above all pragmatic. We wanted first and foremost to identify problems that organisations face on the ground when they relate to armed groups. The aim was to describe the actions they had taken and what have been effective. Further discussions looked at the perspective of international actors. We began by recognising that the human rights tradition has generally considered governments to be the only proper focus of advocacy, but that many humanitarian and human rights organisations are now working increasingly to reduce abuses by armed groups.

The report does not prescribe courses of action and certainly does not suggest that organisations should undertake types of work that they themselves decide would be unwise or unsafe. It does not tell groups what to do or whether they should act at all. Further, it suggests an *approach* a way of thinking about armed groups that may be helpful to those who, in very difficult conditions, are trying to protect human rights.

To arrive at the report, the Council commissioned papers describing the experience gathered in ten countries: Colombia, El Salvador, Northern Ireland, the Philippines, South Africa, Somalia, Sri Lanka, Sudan, Turkey and Uganda. In September 1999 the authors discussed their findings with experts in international and national organisations who were familiar with the issues from their experience of other countries. A draft report was written and between December 1999 and March 2000

Over 600 individuals and organisations in over 60 countries were invited to comment on it. Those consulted included national and international NGOs, staff in intergovernmental organisations (such as the UN), academic and research institutes and government officials. In addition, members of the research team discussed the draft at meetings in Colombia, Egypt, the Philippines, Sri Lanka, Turkey and the United Kingdom. The final report integrated points raised during the consultation.

50 Years of UDHR:
Search for a New Universality

Adilur Rahman Khan*

After the dissolution of the Soviet Union and the demise of the cold war era, a new political scenario has emerged in the world politics, called 'globalisation'. The onslaught of this globalisation has further aggravated the divisions between the rich and the poor and North and South. On the one hand globalisation has opened all the opportunities available in the entire world to the richer, dominant countries of the North, known collectively as the G7 and OECD along with their multi-national and trans-national corporations. On the other hand it has brought miseries to the poorer and dominated countries of the South to whom its onslaught has become a form of neo-colonialism.

Uncontrolled capitalism and its global plundering have put the entire world, except for a few beneficiary countries, into a serious socio-political and economic crisis. CNN, Coca-Cola and Macdonald cultures have become predominant cultures in the world. In the name of 'intellectual property rights' most of the indigenous resources - starting from plant seeds to songs - are being patented in the North. The free market economy has made us open our borders for the North but close it for those in the South. The North desires that there should not be a barrier for Northern products entering the national economies and markets of the South to compete with our local products with their relatively lower prices. Ironically, manufacturers from the North searching for cheap raw material, frequently target the South as a good source.

Furthermore, the huge production capacity of the former can easily drive away locally produced items leading to the closure of more and more basic local industries, making millions jobless. There are barriers in the present globalised system for so-called 'export oriented products' entering the markets of the North. This area of the world applies various quotas and restrictions and tariff barriers on the South - meaning us. For example, the European Community (EC) will not buy any goods, which might or will compete with a similar product produced in the EC. The basic principles of the 'free market economy' do not apply to us in the South. The North does not recognise free movement of labour from South to North, however, it recognises the free movement of goods. The people of the world are becoming captive in the hands of a few multi-national and trans-national corporations and their unrestricted activities.

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There is no mechanism available for controlling or supervising their functions. The World Bank, IMF, MNCs, TNCs and all their subsidiary agencies are functioning like the East India Company of the time of the British Raj in India. No human rights mechanism under the present Universal Declaration of Human Rights (UDHR) can be made available to address this onslaught because of its old fashioned. limited guide lines which only cover the citizens of the nation states but are not designed to address the issues beyond.

The people of the Pacific Islands did not have any remedy against the French nuclear testing. People of the relatively smaller countries of South Asia do not know where to seek redress to protect their water and food from contamination brought on by the nuclear tests in Pakistan and India. The children of Iraq could not find any forum to tell their stories of hunger and illness caused by the northern blockade. No one knows how long the international political hypocrisy will continue to resist the birth of Palestine.

The world has been divided by the North into two blocks. These are the rich, colonial North and the poor, colonised South. The rich Northern block is the beneficiary of the present order and although having twenty percent of the world population, they have access to eighty percent of world resources. On the other hand, the poor Southern block is facing the pressure of neo-colonialism and although having eighty percent of the world population, it has access to only twenty percent of the world's resources. Moreover, "The poorest 20% of the world's population receives only 0.2% of global commercial credit, 1% of world trade and 2.7% of global foreign private investment" (M. Huq: Reflections on Human Development, Oxford University Press, New York 1995. p.142). This is total injustice and all the human rights mechanisms, including the UDHR, which only address the issues of human rights and disparity of nation states have become redundant at this present situation.

It is to be noted here that, when I speak about the North, I include the 'Northern people' and mechanisms in the South and when I speak about the South, I include the 'Southern people' living in the North. For example, General Suharto was the 'North' in the South and for many years the Irish people were the 'South people' in the North.

The World Bank, IMF and their related organisations and projects have failed to reduce human misery and poverty in the poorer South. This has put a big question in the minds of many about the original intention of these institutions, since almost half the countries of the world are facing serious debt crises. In many countries, the World

Bank and IMF act as 'super governments' and compel the respective state governments of nation states to act according to their will.

The xenophobia of the North has contributed to the emergence of neo-fascist organisations in Western Europe who are now fanning the flames of hatred against the minority Muslims and the prolonged inaction of powerful Western nations have allowed the Serbs to cause acts of genocide in Bosnia and Kosovo against people identified as being Muslim.

Ever since Samuel P. Huntington wrote on the 'Clash of Civilisation' (Foreign Affairs: Summer 1993) in 1993, many Northern countries, including the dominant powers, have taken this article as their handbook and guide of foreign policy. Muslims are now regarded as the 'communists of the Soviet era' and the present function of NATO is to prepare itself to strike against any future force which might rise in the name of Islam - which, according to them, is a potential threat to Israel and Northern civilisation. They have already reconfirmed their position by striking on the pharmaceutical factory in Sudan and by killing about a million innocent men, women and children in Iraq.

The North should understand and keep in mind that human history is the history of migration. The poor, deprived people always moved towards lands of resources. However, the 'fortresses' of the North are strong and designed to keep the massive poor population of the world out of these lands and from enjoying the resources. They fail to realise that these fortresses will become the targets of the poor, who will ultimately be drawn towards them and who will attempt to scale their walls by the sheer force of their determination and need, if not allowed to enter legally.

Total disregard of the 'Rio Declaration' of 1992, regarding the reduction of the gap between the rich and the poor by redistribution of resources from North to South and transfer of technology to the South have persuaded Northern 'xenophobic gurus' to look for a new enemy in order to pursue their beneficial economic position and 'jingoism' against the rest of the world by scaring them about their newly invented potential enemy - 'The Islamic Civilisation' (Huntington). After the demise of the Soviet Era and at the end of the cold war period, many people thought that the arms race would come to and end. However, the world watched with shock and distress as the war-hungry Northern powers and their stooges continued producing and developing machines of death and destruction and spending billions of dollars in the process to modernise them and make them more 'efficient'.

Therefore, to meet the need to confront their issues and the present situation of globalisation, a new declaration on the universality of human rights, drafted by all the independent countries and peoples' initiatives is needed to replace the present one - which was drafted by the five colonial powers of the North in 1948.

Electoral fraud in South Asia: cause and effect

Irfan Husain*

We in South Asia are all familiar with the sordid techniques used by unscrupulous politicians and their parties to rig elections. The impact of this electoral fraud on democracy can hardly be minimised: with depressing regularity, the result of the count in many constituencies across the subcontinent does not reflect the desire of the voters. Occasionally, the overall results of national elections are subverted through these malpractices. Even when elections produce a certain crude legitimacy despite scattered attempts at rigging, the defeated party refuses to accept the result, and loses no opportunity to bring down the government. Clearly, this constant cycle damages and destabilises democracy as a whole as people come to feel that their votes make no difference. While I am obviously basing my observations on Pakistan's experience, I believe they are valid for most of South Asia to varying degrees.

Although we have witnessed many such flawed electoral exercises, I think we need to step back a little and examine the causes of these practices, and not just their effects. Firstly, I think we subcontinentals are very poor losers, and our macho culture and outlook combine to transform every defeat into a loss of face. This is specially true for Pakistan where feudals make up the majority of candidates in rural areas. There is thus a strong motive to use money and muscle to prevail in elections.

The second problem we face is the tendency among the district bureaucracy to support candidates belonging to the ruling party. Whether the government sends out an official signal or not, the impulse in the field is to be more loyal than the king. A deputy commissioner or a superintendent of police often openly or covertly supports the ruling party's candidate in the hope of a career advancement, and for fear of reprisal should the party return to power. Also, the bureaucracy in Pakistan has been so politicised that the major parties have their favourite officers who are counted upon to help during elections.

An example from Pakistan's tarnished electoral history will illustrate this point. In the famous and still-disputed elections of 1977, Mumtaz Bhutto, a minister from the ruling Pakistan People's Party and a cousin of the prime minister, Zulfikar Ali Bhutto, was declared elected without being opposed in his rural constituency in Sindh. Probably the other parties felt it would be a waste of time and money to field a

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candidate against such a powerful feudal. The deputy commissioner of Larkhana, the Prime Minister's home town and constituency, had been hand-picked for the job and felt that Mr. Bhutto should be similarly elected without having to undergo the indignity of campaigning. He therefore, used all the considerable powers at this command to discourage other candidates from filing their papers with the election commission. However, the Jamaat-e-Islami candidate refused to comply. The deputy commissioner broke the deadlock by the simple expedient of having the candidate kidnapped and held until the last date for filing papers had passed.

This scandal was widely reported and set the tone for district administrators across the country. Whether true or not, the general perception was that the Larkhana incident could not have occurred without the secret blessings of the Prime Minister. In retrospect, it is easy to see why the elections of 1977 were so badly tainted, but at the time one could not understand why Mr. Bhutto needed to rig an election he would have won comfortably. Much later, it was reported that when the results started pouring in and he came to learn that major opposition heavy weights had been defeated in constituencies they had been widely expected to win, Mr. Bhutto became distraught and kept asking: "What are they doing to me?" He had obviously misjudged the calibre and sycophancy of the Pakistani bureaucrat. The perceived rigging of the 1977 elections triggered off a massive movement by the combined opposition parties that paved the way for eleven long years of military rule. It also led to Bhutto's execution.

In short, the course of the history of Pakistan was altered forever. But at the end of the day, a thorough study of the results indicated that in only 20 constituencies had ballot-stuffing made a difference to the results, and Mr. Bhutto would have won the election with a sizeable majority even without resorting to rigging. To this day I am not convinced that there was any master plan to fix the election: it was just a case of individual PPP candidates and the district bureaucracy getting carried away by the ease with which the Larkhana seat went to Mr. Bhutto. Had the Prime Minister taken action against the deputy commissioner, the domino effect that marred the entire election and ultimately derailed democracy in Pakistan might have been avoided. However, these are the ifs and buts of history, and we have to live with events as they actually occurred. As a footnote, let me add that the official in question went on to join the PPP and became a minister in Benazir Bhutto's first government.

The third reason candidates resort to illegal means to win an election is to protect the investment they have made in their campaign. Given the high costs of making a credible bid to reach the assemblies and the fact that this money can only be

recovered if a candidate makes it, there is a considerable financial motive to win at any cost. In Pakistan, at least, major parties award tickets to candidates who can finance their own election campaign. This policy automatically excludes middle-class candidates. The feudals and industrialists who make up the bulk of mainstream contestants spend large amounts of money to ensure their election. But given the huge constituencies for national elections, it is not possible to actually buy individual votes. But candidates do have to set up election offices, pay, and feed political workers who man them, entertain any locals who might drop by their electoral offices, hire *shamianas* and sound systems as well as a fleet of vehicles to transport their workers as well as voters on election day, and print posters to plaster all over their constituency. Clearly, these expenditures surpass the spending limits set by the Election Commission, but they are unavoidable if a candidate is to have any chance of winning.

In 1993, a close friend in Lahore was in real danger of being awarded a PPP ticket for Sheikhupura, a nearby rural constituency. A group of us sat down and tried to make a minimum budget for his campaign, and we ended up with a figure of around two million rupees which in those days translated to around $100,000. Fortunately, for him, Benazir Bhutto gave the ticket to somebody else and he was spared from making this investment. However, his luck ran out in 1996 when he was given a PPP ticket for a constituency in Lahore; given the strong anti-Benazir feelings prevailing then, he lost by a wide margin. Although urban constituencies are smaller and the requirements for transport proportionately less, he still ended up spending around a million rupees.

The point I am trying to make here is that given South Asia's generally poor infrastructure and low levels of income and literacy, candidates are forced to spend substantial amounts to mount a serious bid to win an election. To persuade voters to go to the polling station, transport has to be provided; to attract them to street corner meetings, cold drinks are often served; and to retain the services of volunteers, a stipend is often paid and food provided to them. All this costs a lot of money over the duration of a campaign.

Although these expenses are far above the unrealistically low limit set by the Election Commission in Pakistan, no MP has even been unseated for exceeding it. This is probably because the Chief Election Commissioner is fully aware that virtually every member of parliament would have to be prosecuted under the relevant law. And once candidates know that they won't be touched, there is every incentive for them to pump in more money into their campaign. In many cases they are financed by people

who hope to get a return on their investment after their man is in power. This is another cause for the corruption that has become endemic in our system.

But perhaps the biggest incentive to rig an election comes from the fate of politicians who are no longer in power: the full force of the state's instruments of repression are turned against them in the name of accountability. To escape the vindictiveness of their opponents, they are willing to resort to all kinds of fraud. However, in a trial of strength, those in power have a clear advantage because they have the civil administration behind them. Consequently, elections in South Asia often become a desperate struggle for survival.

One electoral factor that is perhaps unique to Pakistan in the subcontinent is the role of intelligence agencies. With huge unaudited budgets and virtually no accountability, they have come to play the role of king-makers. For instance, in the 1990 elections, the ISI received Rs. 140 million from a private bank and distributed a large proportion of this amount to the anti-PPP alliance formed by the agency to keep Benazir Bhutto out. These facts were revealed during court proceedings when Mr. Asghar Khan went to the Supreme Court to complain of this patent fraud, But although this is a matter of public record, nobody responsible has thus far been prosecuted. The politicians who benefited from this largesse are still strutting about, boasting of their democratic credentials, and the officials of the intelligence agency are presumably where they were, still dabbling in national politics.

Given these problems, it is difficult to see how and when elections will truly reflect the will of voters, at least in Pakistan.

For my mind, the only way out is to induct a genuinely neutral caretaker government to supervise elections. Even this will provide no guarantees of fair elections, but it should eliminate some of the flaws in the present system.

MR. 'X' v. HOSPITAL 'Z'

Supreme Court of India

Reported in (1998) 8 SCC 296 - AIR 1998 SC 3662

Edited for publication

(From the Judgment and order dated 3.7.98 of the National Consumer Disputes Redressal Commission at New Delhi in O.P. No. 88 of 1998)

Mr. 'X' .....**Appellant**
v.
Hospital 'Z' .....**Respondents**

THE 21ST DAY OF SEPTEMBER, 1998.

Present: **Hon'ble Mr. Justice S. Saghir Ahmed**
Hon'ble Mr. Justice B.N. Kirpal

Ms. Meenakshi Arora, Adv. For the appellant

S. SAGHIR AHMED J.

Facts

The infringement of a 'Suspended Right to marry' cannot be legally compensated by damages either in Tort or common law, is our answer to the problem raised in this appeal which is based on the peculiar facts of its own.

The appellant after obtained the Degree of MBBS in 1987 from Jawaharlal Institute of Post Graduate Medical Education and Research, Chandigarh, completed his internship and junior residence at the same college. In June, 1990 he joined the Nagaland State Medical and Health Service as Assistant Surgeon Grade - 1. Thereafter, the appellant joined the MD Pharmacology Course though he continued in the Nagaland State Service on the condition that he would resume his duties after completing the MD Course. In September, 1991 the appellant enrolled in the Diploma in Opthamalogy which he completed in April, 1993. In August, 1993 he resumed his duties in the Nagaland State Health service as Assistant Surgeon Grade - 1.

One Itokhu Yethomi who was ailing from a disease which was provisionally diagnosed as Aortic Anuerism was advised to go to the 'Z' Hospital at Madras and the appellant was directed by the Government of Nagaland to accompany the said patient to Madras for treatment. For the treatment of the above disease, Itokhu Yepthomi was posted for surgery on 31st May 1995 which, however, was cancelled due to a shortage of blood. On 1st June 1995 the appellant and one Yehozhe who was the driver of Itokhu Yepthomi were asked to donate blood for the latter. Their blood samples were taken and the result showed that the appellant's blood group was A positive. On the next date, namely, on 2nd June 1995, Itokhu Yepthomi was operated for Aortic Anuerism and remained in hospital till 10th June 1995 when he was discharged.

In August 1995 the appellant proposed marriage to one Ms. 'Y' which was accepted and the marriage was fixed for 12th December 1995. However, the marriage was called off after a blood test was conducted at the respondent's hospital in which the appellant was found to be HIV positive. The appellant went again to the respondent's hospital at Madras where several tests were conducted and he was found to be HIV positive. Since the marriage had been settled but was subsequently called off, several people including the members of the appellant's family and persons belonging to his community became aware of the appellant's HIV positive status. This resulted in severe criticism of the appellant and he was ostracised by the community. The appellant left Kohima (Nagaland) around 26th November 1995 and started working and residing at Madras.

The appellant then approached the National Consumer Disputes Redressal Commission for damages against the respondents, on the ground that the information which was required to be kept secret under medical ethics was disclosed illegally and, therefore, the respondents were liable to pay damages. The Commission dismissed the petition and the application for interim relief summarily by order dated 3rd July 1998 on the ground that the appellant may seek his remedy in a civil court.

The Argument of the Appellant

Learned counsel for the appellant has vehemently contended that the principle of "duty of care", as applicable to persons in the medical profession, includes the duty to maintain confidentiality and since this duty was violated by the respondents, they are liable in damages to the appellant.

The duty to maintain Confidentiality

The duty to maintain confidentiality has its origin in the Hippocratic Oath, which is an ethical code attributed to the ancient Greek physician Hippocrates, adopted as a guide of conduct by the medical profession throughout the ages and still used in the graduation ceremonies of many medical schools and colleges. Hippocrates lived and practiced as a physician between the third and first century BC. His manuscripts, the Hippocratic Collection [Corpus Hippocraticum], contained the Hippocratic Oath.

The Hippocratic Oath consists of two parts. The first, or covenant, is the solemn agreement concerning the relationship of apprentice to teacher and the obligations enjoined on the pupil. The second part constitutes the ethical code.

It is on the basis of the Hippocratic Oath that the International Code of Medical Ethics has also stated:

> "A physician shall preserve absolute confidentiality about all he knows about his patient even after his patient has died."

Here, in this country, there is the Indian Medical Council Act, which controls medical education and regulates professional conduct. Section 20A, which has been inserted by the Indian Medical Council (Amendment) Act 1964 states:

1. The Council may prescribe the standards of professional conduct and etiquette and a code of ethics for medical practitioners.

2. Regulations made by the Council under subsection (l) may specify which violations thereof shall constitute infamous conduct in any professional respect, that is to say, professional misconduct, and such provision shall have effect notwithstanding anything contained in any law for the time being in force.

At the same time, that is, by the same Amending Act, clause (m) was also introduced in Section 33 and this clause provides that:

> The Council may, with the previous sanction of the Central Government, make regulations generally to carry out the purposes of this Act, and, without prejudice to the generality of this power, such regulations may provide for -

(m) The standards of professional conduct and etiquette and code of ethics to be observed by medical practitioners."

It is under these provisions that the Code of Medical Ethics has been made by the Indian Medical Council which, *inter alia*, states:

> "Do not disclose the secrets of a patient that have been learnt in the exercise of your profession. Those may be disclosed only in a Court of Law under orders of the presiding judge."

It is true that in the doctor-patient relationship, the most important aspect is the doctor's duty to maintain secrecy. A doctor cannot disclose to a person any information regarding his patient which he has gathered in the course of treatment nor can the doctor disclose to anyone else the mode of treatment or the advice given by him to the patient.

It is contended that the doctor's duty to maintain secrecy has a co-relative right vested in the patient that whatever has come to the knowledge of the doctor would not be divulged and it is this right which is being enforced through these proceedings.

It is a basic principle of jurisprudence that every right has a co-relative duty and every duty has a co-relative right. But the rule is not absolute. It is subject to certain exceptions in the sense that a person may have a right but there may not be a co-relative duty. The instant case, as we shall presently see, falls within the exception.

A "RIGHT" is an interest recognised and protected by moral or legal rules. It is an interest the violation of which would be a legal wrong. Respect for such interest would be a legal duty. That is how Salmond has defined it. In order, therefore, that an interest becomes the subject of a legal right, it has to have not merely legal protection but also legal recognition. The elements of a "LEGAL RIGHT" are that the "right" is vested in a person and is available against a person who is under a corresponding obligation and duty to respect that right and has to act or forbear from acting in a manner so as to prevent the violation of the right. If, therefore, there is a legal right vested in a person, the latter can seek its protection against a person who is bound by a corresponding duty not to violate that right.

The Hippocratic Oath as such is not enforceable in a court of law as it has no statutory force. Medical information about a person is protected by the code of Professional Conduct made by the Medical Council of India under Section 33(m) read with Section

20A of the Act. The relevant provisions of the Code of Medical Ethics have already been reproduced above which contain an exception to the general rule of confidentiality, in as much as it provides that the information may be disclosed in a court of law under the orders of the presiding judge. This is also the law in England where it is provided that the exceptions to this rule permit disclosure with the consent, or in the best interests, of the patient, in compliance with a court order or other legally enforceable duty and, in very limited circumstances, where the public interest so requires. Circumstances in which the public interest would override the duty of confidentiality could, for example, be the investigation and prosecution of serious crimes or where there is an immediate or future (but not a past and remote) health risk to others.

The General Medical Council of Great Britain in its guidance on HIV infections and AIDS states:

> "Where diagnosis has been made by a specialist and the patient after appropriate counselling still refuses permission for the General Practitioner to be informed of the result, that request for privacy should be respected. The only exception would be when failure to disclose would put the health of the healthcare team at serious risk. All people receiving such information must consider themselves to be under the same obligations of confidentiality as the doctor principally responsible for the patient's care. Occasionally the doctor may wish to disclose a diagnosis to a third party other than a health-care professional. The Council thinks that the only grounds for this are when there is a serious and identifiable risk to a specific person, who, if not so informed would be exposed to infection.... A doctor may consider it a duty to ensure that any sexual partner is informed regardless of the patient's own wishes."

Thus, the Code of Medical Ethics also carves out an exception to the rule of confidentiality and permits the disclosure in the circumstances enumerated above under which the public interest would override the duty of confidentiality, particularly where there is an immediate or future health risk to others.

The argument of the learned counsel for the appellant, therefore, that the respondents were under a duty to maintain confidentiality on account of the Code of Medical Ethics formulated by the Indian Medical Council cannot be accepted as the proposed marriage carried with it the health risk to an identifiable person who had to be protected from being infected with the communicable disease from which the

appellant suffered. The right to confidentiality, if any, which vested in the appellant, was not enforceable in the present situation.

The Right to Privacy

Learned Counsel for the appellant then contended that the appellant's right to privacy had been infringed by the respondents by disclosing that the appellant was HIV positive and, therefore, they are liable in damages. Let us examine this contention.

The right to privacy has been culled out of the provisions of Article 21 and other provisions of the Constitution relating to Fundamental Rights read with the Directive Principles of State Policy. It was in this context that it was held by this Court in **Kharak Singh vs. State of Uttar Pradesh** AIR 1963 SC 1295 that police surveillance of a person by domicilliary visits would be violative of Article 21 of the Constitution. This decision was considered by Mathew, J. in his classic judgment in **Gobind vs. State of Madhya Pradesh & Anr.** (1975, 2 SCC 148), in which the origin of the "right to privacy" was traced and a number of American decisions, including **Munn vs. Illinois** (1877) 94 US 113: **Wolf vs. Colorado** (1949) 338 US and various articles were considered. It was laid down in that case:

> "Depending on the character and antecedents of the person subjected to surveillance and also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domicilliary visits would always be an unreasonable restriction upon the rights of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest."

Kharak Singh vs. State of Punjab and **Gobin vs. State of Madhya Pradesh** (supra) came to be considered again by this Court in **Malik Singh & Ors. vs. State of Punjab & Ors.** (1981) 1 SCC 420 and the view taken earlier on the right of privacy was reiterated.

In another classic judgment rendered by Jeevan Reddy, J., in **R. Rajagopal vs. State of Tamil Nadu & Ors.** (1994) 6 SCC 632, the right to privacy vis-a-vis the right of the Press under Article 19 of the Constitution was considered and in the research-oriented judgment, it was laid down, *inter alia.*

> "The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone." A citizen has a right to safeguard the privacy of his home, his family, marriage, procreation, motherhood, childbearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. The position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy."

In an American decision, **Jane Roe vs. Henry Wade** 410 Us 113, the Supreme Court of United State said that:

> "Although the Constitution of the U.S.A. does not explicitly mention any right of privacy, the United State Supreme Court recognises that a right of personal privacy, or a guarantee of certain areas or a zone of privacy, does exist under the Constitution, and that the roots of that right may be found in the First Amendment, in the Fourth and Fifth Amendment, in the penumbras of the Bill of Rights, in the Ninth Amendment, and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.

Reference may, at this stage, be made to the European Convention on Human Rights which defines this right as follows:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

As one of the basic Human Rights, the right to privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or the protection of health or morals or the protection of rights and freedoms of others.

The right to privacy may, apart from contract, also arise out of a particular specific relationship, which may be commercial, matrimonial, or even political. As already discussed above, the doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore, doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the rights of privacy which may sometimes lead to the clash of one person's "right to be alone" with another person's right to be informed.

Disclosure of even true private facts has the tendency to disturb a person's tranquillity. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities, and as already held by this Court in its various decisions referred to above, the Right to Privacy is an essential component of the right to life envisaged by Article 21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or the protection of health or morals or the protection of rights and freedoms of others.

Having regard to the fact that the appellant was found to be HIV positive, its disclosure would not violate the rule of confidentiality or the appellant's right of privacy as Ms. 'Y' with whom the appellant was likely to be married was saved in time by such disclosure, or else, she too would have been infected with the dreadful disease if, the marriage had taken place and been consummated.

We may now examine the right based on confidentiality in the context of marriage.

Marriage is the sacred union, legally permissible, of two healthy bodies of opposite sexes. It has to be a mental, psychological and physical union. When two souls thus unite, a new soul comes into existence. That is how life goes on and on in this planet.

Mental and physical health is of prime importance in a marriage, as one of the objects of the marriage is the procreation of equally healthy children. That is why, in every system of matrimonial law, it has been provided that if a person was found to be suffering from any, including venereal disease, in a communicable form, it will be open to the other partner in the marriage to seek divorce. Reference, for instance, may be made to Section 13(i)(v) of the Hindu Marriage Act, 1955 which provides that:

"13. (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party

(I) .....

(V) Has been suffering from venereal disease in a communicable form."

So also Section 2 of the Dissolution of Muslim Marriages Act, 1939 sets out that if the husband is suffering from a virulent venereal disease, a woman married under Muslim Law to such person shall be entitled to obtain a decree for dissolution of her marriage.

Under the Parsi Marriage and Divorce Act, 1936, one of the grounds for divorce set out in Section 32 is that the Defendant has, since the marriage, infected the plaintiff with venereal disease.

Under the Indian Divorce Act, 1869, the grounds for dissolution of a marriage have been set out in section 10 which provides that a wife may petition for dissolution if her husband was guilty of incestuous adultery, bigamy with adultery or of rape, sodomy or bestiality.

Under Section 27 of the Special Marriage Act, the party to a marriage has been given the right to obtain a divorce if the other party to whom he or she was married was suffering from a venereal disease in a communicable form.

The emphasis, therefore, in practically all systems of marriage is on a healthy body with moral ethics. Once the law provides that "venereal disease" is a ground for divorce to either husband or wife, such a person who was suffering from the disease, even prior to the marriage cannot be said to have any right to marry so long as he is not fully cured of the disease. If the disease, with which he was suffering, would constitute a valid ground for divorce, was concealed by him and he entered into marital ties with a woman who did not know that the person with whom she was being married was suffering from a virulent venereal disease, that person must be prevented from entering into marital ties so as to prevent him from spoiling the health and consequently, the life of an innocent woman.

The contention of the learned counsel that every young man or, for the matter, a woman, has a right to marry cannot be accepted in the absolute terms in which it is being contended. Having regard to the age and the biological needs, a person may have a right to marry but this right is not without a duty. If that person is suffering from any communicable venereal disease or is impotent so that the marriage would be a complete failure or that his wife would seek divorce from him on that ground, that person is under a moral, as also a legal duty, to inform the woman with whom the marriage is proposed that he was not physically healthy and that he was suffering from a disease which was likely to be communicated to her. In this situation, the right to marry and duty to inform about his ailment are vested in the same person. It is a right in respect of which a corresponding duty cannot be claimed as against some other person. Such a right, for these reasons also would be an exception to the general rule that every "RIGHT" has a correlative "DUTY." Moreover, so long as the person is not cured of the communicable venereal disease or impotency, the RIGHT to marry cannot be enforced through a court of law and shall be treated to be a "SUSPENDED RIGHT".

There is yet another aspect of the matter.

Sections 269 and 270 of the Indian Penal Code provide that:

> "269. Negligent acts likely to spread infection of disease dangerous to life - whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a terms which may extend to six months, or with a fine, or with both.
>
> 270. Malignant act likely to spread infection of disease dangerous to life - whoever malignantly does an act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with a fine, or with both."

These two sections spell out two separate and distinct offences by providing that if a person, negligently or unlawfully, does an act which he knew was likely to spread, the infection of a disease, dangerous to life, to another person, then, the former would be guilty of an offence, punishable with imprisonment for the term indicated therein.

Therefore, if a person suffering from the dreadful disease "AIDS", knowingly marries a woman and thereby transmits infection to that woman, he would be guilty of offences indicated in Sections 269 and 270 of the Indian Penal Code.

The above statutory provisions thus impose a duty upon the appellant not to marry as the marriage would have the effect of spreading the infection of his own disease, which obviously is dangerous to life, to the woman whom he marries apart from being an offence.

Can the appellant, in the face of these statutory provisions, contend that the respondents, in this situation, should have maintained strict secrecy? We are afraid, the respondent's silence would have made them participant criminis.

Ms. 'Y', with whom the marriage of this appellant was settled, was saved in time by the disclosure of the vital information that the appellant was HIV positive. The disease, which is communicable, would have been positively communicated to her immediately on the consummating of marriage. As a human being Ms. 'Y' must also enjoy, as she, obviously, is entitled to, all the human rights available to any other human being. This is apart from, and, in addition to, the Fundamental Rights available to her under Article 21, which, as we have seen, guarantees the "Right to Life" to every citizen of this country. This right would positively include the right to be told that a person, with whom she was proposed to be married, was the victim of a deadly disease, which was sexually communicable. Since the "Right to Life" includes the right to lead a healthy life so as to enjoy all facilities, that the appellant was HIV positive, cannot be said to have, in any way, either violated the rule of confidentiality or the right of privacy. Moreover, where there is a clash of two Fundamental Rights, as in the instant case, namely, the appellant's right to privacy as part of the right to life and Ms. 'Y' s right to lead a healthy life which is her Fundamental Right under Article 21, the RIGHT which would advance the public morality or public interest, would alone be enforced through the process of Court, for the reason that moral considerations cannot be kept at bay and the judges are not expected to sit as mute structures of clay, in the hall, known as the court room, but have to be sensitive, "in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day." (See: Legal Duties: Allen).

"AIDS" is the product of undisciplined sexual impulse. This impulse, being a notorious human failing if not disciplined, can afflict and overtake anyone how high so ever or, for that matter, how low he may be in the social strata. The patients suffering from the dreadful disease "AIDS" deserve full sympathy. They are entitled

to all respect as human beings. Their society cannot, and should not be avoided, which otherwise, would have bad psychological impact upon them. They have to have their avocation. Government jobs or service cannot be denied to them as has been laid down in some American decisions. **(See: Social Board of Nassau Country, Florida vs. Airline (1987)** 107 S. Ot. 1123; **Chalk vs. USDC CD of Cal.** (9th Circuit 1988) 840 2 F, 2d 701: **Shuttleworth vs. Broward Cty.,** (SDA Fla. 1986) 639 F. supp. 654; **Ravtheon vs. Fair Employment and Housing Commission, Estate of Chadbourne** (1989) 261 Ca. Reporter 197). But, "sex" with them or possibility thereof has to be avoided as otherwise they would infect and communicate the dreadful disease to others. The Court cannot assist that person to achieve that object.

For the reasons stated above, the appeal is without merits and is, consequently, dismissed.

S. Saghir Ahmed
B.N. Kirpal
New Delhi,
Sept. 21, 1998.

Forthcoming

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