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'LAWS DELAYS' AS ABUSE OF PROCESS; FRESH PERSPECTIVES AND CRITICAL ANALYSIS

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Editor's Note ... ...

The subject of 'laws delays' in Sri Lanka is of hackneyed usage yet the problem remains of utmost importance in regard to the efficacy of the country's legal process.

The Review brings some fresh perspectives to bear on the vexed problem of the delay of justice in the context of the criminal justice system. In the first instance, the 2004 Report of a Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts is published in this Issue to stimulate discussion in regard to the areas of concern examined by the Committee.

While the Report proceeds in the main along the hoary path of citation of inadequate resources and human resource personnel in courts and state institutions such as the Police Department, the Attorney General's Department and the Government Analysts' Department as reason for delayed justice, there is also an acknowledgment that the problem is larger than a mere question of resources. The Report advocates greater protection of victims and witnesses, stricter magisterial supervision in investigations to be prescribed by statute and recommends that defence lawyers be allowed access to all statements recorded during the course of police investigations.

In regard to the judicial handling of the caseload, the Committee suggests that the names of judges who are appointed to the Court of Appeal are gazzetted and that they be required to conclude all partly heard cases in which the prosecution has concluded its case. Importantly, it is pointed out that the breakdown in the continuity of trial is a key factor warranting urgent attention. Consequently, the ensuring of cases before the High Courts to be heard on a day-to-day basis is recommended as a matter of priority.

Its proposals in regard to the relevant change to be made in the law so as to permit extension of the time limit for keeping the suspect in police custody for investigations (from the current twenty four hours to seventy two hours), are however more controversial, given the possibility of abuse that such an extension may give rise to. The Committee's recommendation that such an extension of custody should be subject to magisterial supervision within twenty four hours may be critiqued as an inadequate safeguard. Magistrates have often not diligently performed their duties of ensuring that the suspects are not subjected to abuse, as has been remarked upon by the Supreme Court on many occasions in the context of the determination of fundamental rights violations.

Currently, the proviso to Section 2 of the Criminal Procedure (Special Provisions) Amendment Act No. 15/2005 (authorizes a police officer not below the rank of an Assistant Superintendent of Police to file in the Magistrates Court, a certificate before

the expiration of 24 hours after an arrest of a person, if it is necessary to keep such persons in police custody for an additional period of 24 hours (not to exceed an aggregate of 48 hours), except in a situation where the arrest of a suspect in a child abuse case is concerned, which latter situation is provided for differently in law. This amendment (originally intended to be in operation for two years, which period lapsed on the 31st of May 2007) has now been extended by Parliament for a further term of two years.

The insidious manner in which the strict requirement of twenty four hours police custody is being progressively relaxed is well evidenced. The impact of such relaxation of procedural safeguards, (in the absence of stipulation of rigorous measures to prevent custodial abuse) has alarming implications in the context of the pervasive climate of human rights violations in Sri Lanka, particularly but not limited to times of conflict. As studies of torture victims have well demonstrated, abuse on the part of law enforcement officers is not limited to periods of active war but is evidenced during other times as well. It is imperative therefore that the relaxation of procedural safeguards in this regard is accompanied by carefully thought out preventive measures that preserve the rights of the person in custody.

Other proposals of the Committee such as its recommendation that the 'right to silence' of an accused should not be adhered to in an 'overly rigid' manner and the proposed amendment of Section 25 of the Evidence Ordinance enabling confessions made 'voluntarily' to a police officer of gazzetted rank to be admitted in evidence against the accused are also problematic and should be subjected to extensive scrutiny. It is for this reason that the Review publishes the Report of the Committee. Despite its recommendations being made some three years previously, there has not been public discussion of the contents of the Report.

Two supplementary discussion papers have been written on invitation of the Review in respect of the topic under discussion. The first paper, **'Laws Delays': Some Perspectives'** by ***Frank de Silva*** offers interesting views for debate. The author's acknowledgement that delays in the legal process amounts to a form of judicial corruption based on the right to justice being seriously subverted deserves commendation. The assertion that " ....'laws delays' is more than a problem of workload. The problem in 'laws delays' is structural and systemic" is pertinent in this regard.

Responding to this paper, ***Basil Fernando*** engages in further reflections on the issues raised in the discussions. While appreciating the value of the assertion that 'laws delays' are structural, he differs from the viewpoint that mediation is an appropriate remedy to address the problem of 'laws delays' and crime control. He calls for

extensive examination of the structural and systemic problems affecting the criminal justice system and the encouragement of an open debate in this regard.

Thus;

> Such frank discussions have not yet taken place in the public sphere though they form the common core of private discussions in Sri Lanka with enormous frustration being expressed by people from all walks of life.

The concluding paper in this Issue contains a stringent critique of the **Malimath Committee on Reforms of the Indian Criminal Justice System** in India for the purpose of comparative discussions on these matters.

Kishali Pinto-Jayawardena

THE ERADICATION OF LAWS DELAYS IN SRI LANKA

COMMITTEE APPOINTED TO RECOMMEND AMENDMENTS TO THE PRACTICE AND PROCEDURE IN INVESTIGATIONS AND COURTS – 02 APRIL 2004

EXECUTIVE SUMMARY:

The Committee was appointed by the Minister of Justice, Law Reform and National Integration to recommend amendments to the practice and procedure in investigations and courts with a special focus on curbing crime and eradicating procedural delays existent in the administration of criminal justice in Sri Lanka

The Final Report is based on recommendations discussed over a four-month period from November 2003 to March 2004. During the course of twelve meetings, the Committee examined the workings of the criminal justice system and identified specific areas of concern that require amendment or improvement. This often involved the recognition of a need to introduce corresponding amendments to existing legislation. However, just as significant was the confirmation that laws delays are inextricably linked to the lack of adequate resources.

The deliberations addressed a broad range of subjects including the workings of the main branches of law enforcement such as the Police, the Government Analyst's Department, the Attorney General's Department and the Judiciary. In this regard senior officers of these institutions were invited to voice their views before the Committee in an attempt to formulate an integrated approach to the administration of justice.

It is the Committee's hope that the recommendations herein contained will form the basis of a Programme of Reform under the aegis of the Ministry of Justice, Law Reform and National Integration, with due priority being given to its immediate implementation.

Introduction

Inadequacies in the practice and procedure in the administration of criminal justice have been identified as one of the main factors contributing to delays in the dispensation of criminal justice in the country.

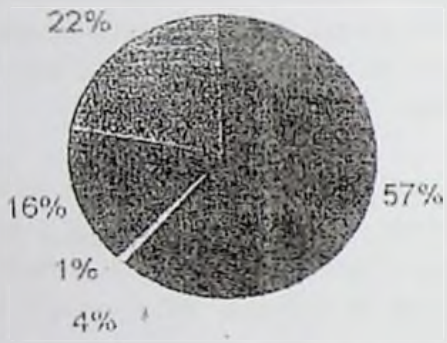
The rapid escalation of crime, increasingly committed in an organised manner with violence, impunity and considerable sophistication, thereby resulting in the loss of public confidence in the criminal justice system, has highlighted the need to review the existing criminal justice framework in Sri Lanka.

It is in this context that the Committee was given the mandate to identify the reasons for laws delays and to propose remedial action that can be taken to overcome the inadequacies in the practice and procedure of courts, so as to establish a credible and effective system with a focus on curbing crime and maintaining public confidence.

It is noteworthy that the present conviction rate in the country stands at a mere 4% *(see graph)*. This trend is inextricably linked to laws delays and highlights the urgent need to rethink procedural mechanisms to assist the efficacious dispensation of justice.

In accordance with its terms of reference, the Committee through this Interim Report hopes to *identify* provisional problems that are seen as obstructing the expeditious and effective dispensation of justice and thereby *recommend* reforms deemed necessary to overcome the procedural and other deficiencies existent in the present criminal justice system.

Disposal of Grave Crimes committed between 1983-2002



The recommendations contained in this Report also seek to make the practice and procedure of Courts and related crime prevention agencies more adaptive and future oriented and capable to cope with the changing behaviour of offenders and the changing opportunities for crime provided by technological and social change.

The recommendations herein proposed by the Committee are categorised as follows:

1) Recommendations relating to the administration, management and distribution of resources within the Court structure and related State institutions.
2) Recommendations warranting immediate implementation within the existing framework of the law.
3) Recommendations requiring the implementation of minor or non-controversial amendments to the existing legislation.
4) Long-term goals warranting the introduction of new legal provisions.

Recommendations relating to the administration, management and distribution of resources within the Court structure and related State institutions:

1.0 The Police Force:

The significant role played by the Police Force in the administration of criminal justice makes it an integral component of any strategy aimed at curbing crime. Therefore it is important that the Police Force be geared to perform at its maximum potential. The Police reforms proposed herein are intended to achieve progressive changes in Policing practice and provide a framework for improving standards, reliability, consistency and responsiveness within the Police Force.

In this regard Senior DIG Chandra Fernando was invited by the Committee to discuss and help identify the several problems, which appear to mitigate against the capacity of the Police Force to provide an efficient service with regard to the implementation of criminal justice.

This discussion highlighted the need for a reform programme aimed at improving the performance of the Police Force making it more flexible through diversity and workforce modernization, increasing its capacity, providing better conditions, training and development and investing in communications, IT, forensics and best practice.

1.1 Accordingly the Committee identifies the following areas of concern, which may be effectively addressed through the distribution of adequate resources, namely:

a) Lack of human resources: It is noted that 42.6% of all recorded crimes are committed within the Western Province, which although containing almost one third of the total number of Police Stations in the island (100 Police Stations out of an all island figure of 346 Police Stations are situated within the Western Province), is manned by a mere 14% of its total strength. Compounding matters further, the deployment of personnel for special assignments such as Parliamentary duty, VIP Security etc, is observed to be amount to a considerable percentage of the aforementioned limited human resources available within the Western Province.

In light of the imbalance, the Committee is of the opinion that the strength of the Police Force should be significantly increased, especially in the Western Province with particular reference to Police personnel engaged in investigations and crime prevention etc.

b) Lack of logistics and infrastructure: The lack of housing and transport facilities.

It is the Committee's view that logistical inadequacies significantly impede the mobility of Police personnel, a majority of who live outside the city of Colombo. Therein it is recommended that immediate measures be taken to provide adequate housing and transport facilities to personnel

c) Lack of material resources: The lack of technological support and equipment in the context of modern investigative techniques.

The Committee believes that the drive for better performance goes hand in hand with the need to provide new resources, tools and technology to the Police. However, the primitive nature of investigative techniques presently used by the Police i.e. outdated fingerprinting technology and the lack of rudimentary investigative equipment such as Polygraph machines (lie detectors) in Sri Lanka, highlight the urgent need to invest in equipment relating to IT and forensics.

Therein the Committee strongly recommends that scientific and technological support for criminal investigations be significantly improved in order to facilitate a meaningful effort in curbing crime.

d) Personal and psychological problems: The Committee observes an overall lack of motivation within the Police Force, which is seen to stem from stagnation in service with limited prospects of promotion and the imbalance of ranks within the Force.

The Committee also notes the failure on the part of the administrative hierarchy within the Police Force to adequately acknowledge and appreciate the investigative skills of its officers, especially in the context of granting promotions *(Also refer point 1.2 (c))*. Accordingly the members propose that steps be taken to grant adequate recognition to officers engaged in the area of criminal investigations and crime prevention.

e) The lack of training: The lack of effective training, commitment and leadership within the Police Force wields a significantly negative impact on the quality of investigations carried out by the Police.

In this regard the Committee recommends that a Panel of officials engaged in training Police personnel be appointed to scrutinise and rethink the effectiveness of existing training programmes and methodology, at both recruitment and promotional levels. It is further recommended that such Panel be invited to submit its observations with a view to maximizing the potential and performance of the Police Force with special reference to criminal investigations.

f) Inadequacy of scientific support services: The dearth of Crime Scene Officers ("CSO") to assist in the conduct of investigations.

The Committee strongly believes that forensic science has the potential to enhance the efficiency of the Police. The advent of DNA and related technology including the development of new methodology has today introduced the possibility for improving the strategic use of forensic science in the realm of criminal investigations.

However, while the limited financial resources available to import such technology is acknowledged, the Committee nevertheless highlights the importance of developing a

clear knowledge base on how forensic science might be used to better support the delivery of justice.

In this regard it is proposed that immediate steps be taken to appoint CSOs from an appropriate rank of Police Officers for every Police District. It is observed that this would also help partially address the lacuna created by the dearth of scientific officers in the Government Analyst's Department *(Refer Point 2.0)*.

1.2 The Committee makes the following additional recommendations pertaining to the Police in the context of advancing best practice:

a) Compulsory attendance: The Committee recognises the need to introduce administrative measures requiring Police Officers to attend Court on a compulsory basis, in view of the frequency with which Police Officers obtain leave and abstain from Court sighting inappropriate grounds, which has been observed to result in unnecessary disruption of Court proceedings in the recent past.

In this regard the Committee recommends that the Ministry of Justice advise the Judicial Service Commission ("JSC") and the Judges Institute to educate Judicial Officers on the necessity to take prompt and appropriate action against Police Officers who default on appearances on inappropriate grounds.

b) Profiling of suspects: The Committee proposes the establishment of a database containing the profiles of criminal suspects on a Divisional or Area basis. This database should be linked to a central repository and the data contained therein should be made accessible to all Police Stations. The Committee believes that the establishment of such a database will be of significant assistance to the Police in identifying suspects.

c) Recognition of performance: It is recommended that in addition to the existing scheme of rewards, the Police Commission consider the implementation of an additional rewards scheme for Police Officers, in recognition of the outstanding performance of their duties with regard to criminal investigations on specific commendation by the presiding Judge or the Attorney General. It is further proposed that the Police Rewards Fund be utilised for this purpose.

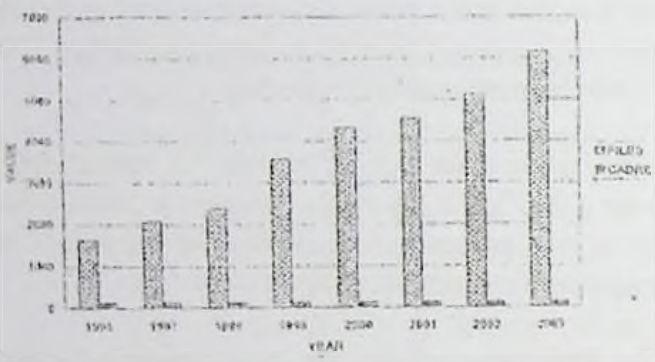
2.0 The Government Analyst's Department:

The Committee recognises that the effective and efficient administration of criminal justice can only be effected through the support and partnership of related agencies such as the Attorney General's Department *(Refer Point 3.0)* and the Government Analyst's Department ("GA' Dept"). In this regard representatives of the Police Force have sighted the lack of prompt assistance from the GA's Dept as contributing to existent procedural delays, a position confirmed by several Judicial Officers of the Committee.

Senior Government Analyst Dr. W.D.G.S. Gunatilleke, who was invited by the Committee to discuss this issue, informed the members of the Committee that at present, 41.8 % of vacancies in the GA's Dept remain unfilled. Dr. Gunatilleke added that some of these vacancies are not at the level of recruitment thereby further compounding the difficulties involved in recruiting new cadre.

In light of the present dearth of personnel, the Committee proposes a review of the present scheme of recruitment and promotion and recommends that immediate steps be taken to recruit adequate officers to the GA's Dept.

3.0 The Attorney General's Department:



Number of criminal files received by the Attorney General's Department from 1996-2002

3.1 Lack of cadre: At present the Attorney General's Department ("AG's Dept") comprises 123 officers out of which over 60 officers are assigned to the Criminal Division. The last cadre increase at the AG's Dept was in 1996 during which year the number of files received by the Department stood at 1639. However, as at 2003, the number of advice files received by the Department, in addition to those involving Court appearances amounted to over 6000 files *(see above graph).*

The failure to introduce an increase of cadre to correspond with the growing number of files received by the AG's Dept in the recent past has seriously impeded its expeditious dispensation of legal advice. Therefore the Committee strongly recommends that additional cadre be recruited to the AG's Dept with immediate effect, with particular reference to the Criminal Division.

3.2 Specialised training: Having regard to the evolving nature of crime and the increased level of sophistication involved in the commission of modern commercial and electronic crime, the Committee recommends that officers of the AG's Dept be provided with adequate local and foreign exposure and training in the aforementioned areas of specialised crime.

4.0 The publication of a revised Criminal Procedure Code Act. No. 15 of 1979 (CPC):

The Committee requests that the Ministry of Justice compile and publish a fully revised text of the CPC incorporating all amendments introduced to the main enactment.

5.0 Lack of resources in Courts:

The stark lack of resources in Courts and the respective Court Registries is observed to be a significant contributor to the problem of laws delays. For example it is seen that a majority of Magistrate's Courts lack photocopy machines needed to prepare briefs and Court proceedings. This deficiency has resulted in delaying the preparation of over 2000 briefs.

Therefore the Committee strongly recommends that immediate steps be taken to equip all Courts with basic resources such as photocopy machines without further delay.

6.0 Creation of additional Courts:

The Committee expresses its concern over the Courts being inundated with workloads, which often reach unmanageable proportions especially in High Courts and Magistrate's Courts. For example the High Court situated in Kandy is required to service the entire Central Province, thereby making intervening trial dates approximately one year.

The Committee believes that this situation needs to be addressed with immediate effect and thereby recommends the establishment of additional High Courts and Magistrate's Courts within existing provinces.

For example:

- Central Province – High Courts be established in Nuwara Eliya and Dambulla
- Sabaragmuwa Province – A High Court be established in Embilipitiya
- North-Central Province – A High Court be established in Polonnaruwa

Recommendations warranting immediate implementation within the existing framework of the law:

The appointment of High Court Commissioners:

The Committee recommends that the JSC be requested to consider the appointment of High Court Commissioners as a solution to the growing backlog of cases pending before the High Courts at present.

Accordingly the Committee proposes that in addition to the sitting High Court judges, the JSC be advised to recommend that Her Excellency the President* appoint High Court

* Ed. Note: Report submitted during the time of former President Chandrika Kumaratunge

Commissioners from both the official and unofficial bar for designated periods of service in Courts with a backlog of 150 or more cases.

7.0 Legal advice in investigations:

Having regard to the significant number of advice files pending for the advice of the Attorney General at present, the Committee recommends that a Senior State Counsel (SSC) or a State Counsel (SC) of sufficient seniority be appointed to provide prompt advice and assistance to the Police in the conduct of investigations on a regional basis. Furthermore the Committee recommends that one such officer be stationed in each Judicial Zone to act in an advisory capacity and to coordinate related matters with the Police.

8.0 The judicial management of caseload – the appointment of recorders:

Having regard to the growing workload of Courts, it is the opinion of the Committee that the appointment of Court recorders would considerably reduce the time spent by Judicial Officers on pre-trial and post-trial matters.

Accordingly the Committee recommends that recorders be appointed in particularly heavy Courts in consultation with the Chief Justice, in terms of Section 5 (C) (1) of the Judicature Act, as amended by Act No. 16 of 1985 x 16 of 1989.....*

10.0 Admission in terms of Section 420 of the Criminal Procedure Code:

The Committee expresses its concerns over the failure of Judicial Officers to pay adequate attention to Section 420 (1) of the Criminal Procedure Code Act. No. 15 of 1979 ("CPC"), as amended by Act No. 11 of 1988, which provides for the elimination of unnecessary evidence.

The Committee recommends that the JSC be requested to draw the attention of Judges to this particular legal provision and to advise and encourage Judicial Officers to utilise such provisions in criminal trials.

11.0 Service of summons:

The Committee recommends that in all cases, which are punishable with only a fine, the summons should be served by Registered Post. In the event of an accused not be present upon summons being served by Registered Post, the relevant Magistrate shall be entitled to issue a warrant upon proof of such service.

* Ed. Note: pages missing in the copy of the Report made available to the Law and Society Trust

Recommendations requiring the implementation of minor or non-controversial amendments to the existing legislation:

12.0 The contributory role of Non-Summary Inquiries to Laws Delays:

The Committee is of the unanimous view that Non-Summary Inquiries ("NSI") should be dispensed with, having regard to several concerns voiced by representatives of the Police and the Judiciary including members of the Official and Unofficial Bar. A long drawn NSI is often seen to negatively impact on the case, resulting in the de-motivation of witnesses due to the inconvenience involved in making regular attendance for the purpose of such inquiry.

However, while the total abolition of NSI is not advocated the Committee acknowledges the need to limit its application in cases in which the Attorney General could forward direct indictment. Accordingly the Committee proposes the following amendments to the present CPC and related statutory provisions:

a) The Judicature Act. No. 2 of 1978 together with Section 145 of the CPC should be amended in order to afford the Attorney General discretion to file direct indictment in appropriate cases at any time. (In particular having regard to the general trend where indictments are filed in almost 95% of all cases committed by the Magistrate).

b) Magistrates should be encouraged to institute legal proceedings in homicide cases immediately after the conclusion of the inquest and proceed with the NSI while investigations are pending.

While there is adequate provision in the present law to adopt this course of action, most Magistrates fail to follow this procedure, thereby contributing to the delay. Therefore the Committee recommends that the JSC be requested to advise Judicial Officers in this regard.

c) Magistrates should be authorised to record statements on oath of any person acquainted with the facts relating to the incident, which may be subsequently read at the commencement of the NSI and in the presence of the accused. The accused would then be entitled to cross examine the witness.

This procedure would enable the production of depositions in the subsequent trial under Section 33 of the Evidence Ordinance and thereby prevent the prosecution being placed at a disadvantage in the event of the subsequent death of such witness.

d) Judicial Medical Officers ("JMO") should be required to provide the Post-Mortem Report and all Medico-Legal Reports within one month of the incident, except in instances when permission has been granted by the relevant Magistrate.

e) The proviso to Section 148 (1) of the CPC should be amended prohibiting the recording of oral evidence of all public officers (including Police Officers) unless directed to do so by the Attorney General. Instead legal provision must be made to

enable the acceptance of official affidavits provided by such witnesses, when so required.

13.0 Investigations:

13.1 Role of a Magistrate: The Committee deems it necessary that Magistrates be required to play a greater role in investigations. In this regard the Committee recommends the incorporation of a statutory obligation in Section 124 of the CPC whereby Magistrates will be required to play a greater supervisory role over the conduct of criminal investigations.

13.2 The taking of blood samples: It is proposed that Section 123 of the CPC be amended to empower a Magistrate to order the taking of blood samples of suspects for purposes of conducting DNA and other scientific tests.

13.3 Access to statements: The Committee recommends that Trial Judges be afforded the discretion to permit witnesses to refresh their memory at any stage of proceedings on an application made for this purpose by such witness or the prosecution. The Judge shall grant such permission after having regard to the complexity of the transaction, the nature of the incident and the intervening period of time.

It is further recommended that in all High Court cases, defence lawyers be permitted, upon application to the Officer-in-Charge ("OIC") of the relevant Police Station, to be granted access (in the form of certified photocopies) to all statements recorded in the course of the investigations including the statements made by unlisted witnesses together with all notes of investigations. It is noted that this would significantly enhance the purity of the investigations carried out by the Police.

13.4 Amendment to Section 110(5) of the CPC: The Committee recommends an amendment to the CPC by way of an addition to Section 110(5) to facilitate a co-ordinated criminal investigation by the OIC of the relevant Police Station. It is suggested that the OIC be required to co-ordinate and carry out the investigation with the assistance of the GA/Fingerprint analyst/JMO etc, where their services are deemed necessary.

It is further proposed that the OIC of the relevant Police Station, having considered the complexity of the investigation and the nature of the case, be permitted if necessary, to seek the assistance of an expert who is a Public Servant or who is employed in a statutory authority.

In addition the Committee recommends the introduction of a statutory provision enabling the OIC/Magistrate conducting or in whose jurisdiction an offence is committed, to obtain where necessary, the services of a JMO/GA or any other expert provided that such expert is a public servant and employed in a statutory authority.

In any event the Magistrate should be empowered to seek the assistance of any other expert subject to the consent of such expert.

14.0 The marking of non-confessional statements:

14.1 The Committee proposes an amendment to Section 110 of the CPC to enable the production of non-confessional admissions contained in statements made by the accused as evidence, provided that such statements are made voluntarily and fall within the parameters of Section 24 of the Evidence Ordinance.

14.2 It is also proposed that at the conclusion of a NSI, a Magistrate may be empowered on his or her own motion or upon an application made by counsel to inquire from the accused as to whether he is prepared to admit in evidence certain facts. Such facts, if admitted may subsequently be led by the prosecution against the accused at the trial.

15.0 Tendering a plea in writing:

The Committee is of the view that in reference to offences, which are punishable with only a fine, the accused should be granted an opportunity to plead guilty in writing through an Attorney-at-Law. Such a plea in writing shall be in accordance to a form contained in a schedule to the CPC, which shall also include a list of offences in respect of which such a plea may be permitted. Accordingly the Committee recommends the introduction of a suitable amendment equivalent to Section 164 (5) of the Administration of Justice Law 1973.

However, such a provision shall apply subject to the Magistrate informing the accused that any answer made in consequence of such query may be used against him at the trial. Further the fact of the accused having made such a statement shall be considered by the trial Judge in determining the sentence. This provision shall apply notwithstanding Section 420 of the CPC, which provides that the accused shall be represented by counsel at the time such admission is made.

16.0 Magistrates to visit Police Stations:

The Committee recommends the incorporation of a mandatory legal provision requiring Magistrates to visit Police Stations at least once a month for the purpose of ensuring the detention and interrogation of suspects according to law. It is also suggested that provision be introduced to empower Magistrates to visit Police Stations at any time, in order to inspect and/or monitor the lawful detention and interrogation of suspects.

17.0 Amendment to the Firearms (Amendment) Act, No. 22 of 1996:

Upon a recommendation made by Senior Government Analyst Mr. W.D.G.S. Gunatilleke, the Committee proposes that the Firearms (Amendment) Act, No. 22 of 1996 (herein referred to as "FA Act"), be amended so as to extend the definition of 'Automatic Gun' to include both auto-find AND auto-loading weapons. The present definition merely provides for auto-firing guns.

On examination of this definition, a pistol would necessarily come within the ambit of an 'Automatic Gun'. However, a revolver, which does not repeatedly eject an empty cartridge,

would not fall within this definition. Therefore the Committee observes that with the growing sophistication of crime, organised criminals are in the habit of commonly using automatic weapons in the commission of serious offences. This highlights the necessity to bring both revolvers and pistols into the ambit of 'Automatic Gun'.

In these circumstances the Committee further recommends that the definition of the term 'Automatic Gun' in the FA Act, be redefined to include both pistols and revolvers with corresponding amendments to the statute.

In light of this suggestion, the Committee recommends that the definition of the term 'auto gun' in the FA Act be amended. At present the GA's Dept appears to take the view that an 'Automatic Gun' is a weapon, which is capable of repeated firing by a single pull of a trigger. This approach would not bring a pistol or revolver within the ambit of the 'Automatic Gun'. However, according to the definition provided in Section 2 of the FA Act, an 'Automatic Gun' means an gun which repeatedly ejects an empty cartridge shell and introduces a new cartridge on the firing of the gun.

Long-term goals warranting the introduction of new legal provisions:

18.0 Judicial handling of the caseload:

One objectionable procedural practice observed to be followed by several members of the Judiciary is the avoidance of hearing cases in anticipation of an imminent transfer. In light of this situation, the Committee recommends that the names of Court Judges who are appointed to the Court of Appeal be gazzetted and thereby required to conclude all partly heard cases in which the prosecution has concluded its case.

19.0 Investigations:

19.1 Time limitation for the conduct of investigations: The Committee deems the 24-hour time limitation specified for the holding in custody of a suspect pending the conduct of Police investigations in terms of Section 37 of the CPC, highly insufficient and impractical.

In this regard the Committee recommends that the time limitation be extended to a minimum period of 72-hours, especially in relation to cognizable offences, so as to afford the Police sufficient time with which to conduct a proper investigation.

However, notwithstanding the extension of time, the Police should be required to produce the suspect before a Magistrate within the first 24 hours from the time of arrest and upon an application made under the hand of the Assistant Superintendent of Police ("ASP"), be empowered to take back the suspect into custody for a total period not exceeding 72 hours form the time of arrest.

19.2 Defence of alibi: With regard to the defence of alibi, the Committee considers it appropriate to require an accused to give notice of an alibi prior to the commencement of the defence, as is the practice in several countries including the United Kingdom.

Accordingly it is proposed that the accused NOT be permitted to take up the defence of alibi if adequate notice has not been given. And that the accused be required to submit a list of his witnesses and set out the purpose for which such witness is to be called together with the list of documents, prior to the commencement of the defence case, especially in cases in which witnesses have not made a statement to the Police during the course of the investigation. However, this should not bar the defence, in exceptional situations, from calling a witness who has not been included in the list upon due notice being given to the prosecution.

Provided however, that in the interests of justice the Court may permit the calling of a witness or the production of a document not listed by the accused.

19.3 Legal Representation: The Committee recommends that an accused person should be afforded a statutory right to have access to a lawyer whilst in Police custody.

19.4 Proposed amendments to the Bail Act:

a) The Committee proposes that a Magistrate when granting bail, should first be satisfied of the whereabouts of the person and obtain the address and details of next of kin so as to ensure that the granting of bail will not result in the suspects subsequent absence from Court. Furthermore it is suggested that the Police be required to assist the Magistrate in ascertaining and verifying the whereabouts of the suspect.

b) The Committee observes that a number of magistrates blindly follow the provisions set out in Section 14 of the Bail Act, No 30 of 1997 ("Bail Act"), thereby remanding and unnecessarily extending the remand of persons accused of both bailable and non-bailable offences.

Therefore the Committee recommends that both the JSC and the Judges Institute be advised to educate the Magistrates in the proper application of the Bail Act with special reference to Sections 5, 7 and 14.

c) The Ministry of Justice is also advised to take legislative steps to amend the English text of the Bail Act to better reflect the contents of the Sinhala text.

20.0 Fingerprinting of suspects:

20.1 Legal provision for the recording of suspects: It is proposed that legal provision be introduced to enable the obtaining of fingerprints from arrested suspects in instances where the whereabouts of such suspects are unknown or where information supplied by them as regards their identity and whereabouts are suspect. (The Police refer to such cases as "A" Report cases).

These fingerprints may then be stored in a repository where they may be used in future criminal investigations for purposes of ascertaining the previous criminal record of suspects.

The Committee believes that this would help simplify investigations by effectively preventing a suspect from assuming a false identity.

While it is acknowledged that Sri Lanka presently lacks the resources to implement such a measure, the Committee considers it important to introduce the rudimentary legal infrastructure to facilitate an environment in which technology will play an increasingly critical role in tackling crime.

20.2 Rights of suspects: The Committee recommends the introduction of statutory safeguards as have been adopted in other countries, to protect the rights of suspects whose prints are stored in a repository. Accordingly the Committee proposes the enactment of Data Protection laws, *inter alia,* for the regulation of such a repository.

20.3 Category of offences: With regard to the category of offences for which the recording of fingerprints is to be made mandatory, the Committee recommends that the Police be permitted to fingerprint all persons who come into adverse contact with the law.

Also recommended is the mandatory recording of prints of all persons involved in offences requiring the remanding of suspects, including those involved in cognizable offences. In relation to non-cognizable offences, the Magistrate should be required to sanction the recording of fingerprints, where an application is made for this purpose by the Police (Such cases are more commonly referred to as "B" Report cases by the Police).

20.4 Notaries Ordinance: The Committee proposes an amendment to the Notaries Ordinance, No. 1 of 1907 to require a Notary to record the fingerprints of parties so as to prevent the forging of deeds and other such notarially executed documents.

It is the opinion of the Committee that such a requirement would be in the best interest of the Notary and would also serve to enhance the sanctity of the document. The relevant training in this area may be incorporated to the curriculum of the Practical Training Programme conducted for apprentice year students by the Bar Association of Sri Lanka.

21.0 Day-to-day trial:

The breakdown in the continuity of trials is observed to be a key factor warranting urgent attention in the context of eradicating procedural delays existent in the Court structure. In this regard the Committee recommends that cases before the High Courts be heard on a day-today basis, so as to maintain the continuity of the trial. Further it is proposed that the Attorney General be empowered to reserve a right to request a Magistrate to take up specific trials and NSIs in the Magistrate's Court without delay.

22.0 Victims and Witnesses:

22.1 Victims and Witnesses Protection Authority: The Committee voices its grave concern over the growing reluctance of witnesses to identify and testify against offenders due to threats and various other forms of duress against witnesses and their families. This is acknowledged as a

key contributor to the failure of cases involving organised crime, and highlights the need to implement special measures.....*

...on the day of passing judgment, the relevant Judicial Officer should be required to notify the victim on the right to be heard. This would effectively require sentencing to be scheduled for a later date.

- In the case of an appeal the victim should be informed of the status of the appeal and its outcome. Furthermore the registrar of the relevant Appeal Court should be required to inform the victim *AND* the original Judicial Officer of its order.

- Where the victim is deceased, his next of kin should be made entitled to the aforementioned right and be heard by the relevant Judicial Officer prior to the passing of sentence.

22.3 Compensation for victims: The Committee wishes to highlight the absence of a statutory provision in the CPC for the payment of adequate compensation for victims of crime. Having regard to this lacuna, the Committee recommends the introduction of a legal provision for the awarding of adequate compensation to victims at the conclusion of a trial.

The award of compensation should not bar any victim of crime from seeking a separate civil remedy. However, it is recommended that the compensation awarded by a criminal court be taken into consideration in the computation in a civil suit.

23.0 The Right to Silence:

The Committee's attention has been drawn to the concept relating to the accused's 'Right to Silence' in a criminal proceeding. While the right of the accused to remain silent remains undisputed, an overly rigid adherence to this concept is observed to hinder the effectual workings of the criminal justice system.

In this regard the Committee recommends that the present CPC be amended so as to provide statutory expression to the provisions contained in Section 213 of the Administration of Justice Law, No. 44 of 1973 ("AJL"). This would enable the trial judge to arrive at an appropriate finding where an accused fails to offer an explanation, when it is clearly within his power to do, so having regard to the circumstances of the case. In such an instance, an adverse inference may be drawn against the accused to enhance the case of the prosecution.

24.0 Proceeds of crime:

The Committee highlights the need to introduce adequate legislative provision to widen investigative powers to recover wealth accumulated through criminal activity and to consolidate and strengthen existing criminal confiscation powers.

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* Ed. Note: pages missing in the copy of the Report made available to the Law and Society Trust

In this regard the Committee strongly recommends that the Ministry of Justice take immediate steps to finalise necessary legislation for the recovery of criminal assets as provided for in the draft law on Proceeds of Crime.

25.0 Video recording of confessions:

The Committee recognises the need for a modern, prompt, efficient and effective criminal justice system, which meets the needs of the people whom it serves. In this regard the Committee proposes that authorities consider the possibility of video recording of confessions and Police interrogations. The defence may subsequently access such a recording and this would enable both parties to ensure that confessions are made free of coercion.

Such a provision would enable the admission of confessions, which are made voluntarily to a Police Officer of a gazzetted rank. However, this would require a corresponding amendment to be introduced to Section 25 of the Evidence Ordinance enabling such confessions to be admitted in evidence against the accused.

26.0 Dock statements:

The Committee is of the opinion that the law relating to Dock Statements warrants amendment as the present practice permits the accused to lie with impunity.

In this regard the Committee recommends that Courts be barred from attaching any evidential value to such a statement unless they are corroborated by other independent facts and material evidence.

27.0 The Photographing of suspects:

The Committee wishes to address the absence of legal provision enabling the Police to photograph suspects for purposes of investigation and identification. In this regard it is proposed that adequate statutory provision be introduced to regulate the photographing of suspects by the Police.

28.0 Mandatory reporting of a discovery of a corpse:

The Committee proposes the introduction of a legal obligation whereby a person would be required to provide information to Court upon a discovery of a body or any object used in the commission of an offence or any proceeds of crime, if such body, object or proceeds are discovered within the control of such person or upon such person having knowledge of the existence or whereabouts of such body or object. The failure to provide an explanation regarding such a discovery should invite an adverse inference to be drawn against such a person.

29.0 The Rehabilitation of drug addicts and the investigation of drug related offences:

The Committee highlights the necessity to implement a programme to treat and rehabilitate drug addicts. However, as this has been sufficiently addressed in the draft amendment to the Poisons, Opium and Dangerous Drugs Ordinance, the Committee recommends the introduction of amending provisions to facilitate a show of leniency towards a drug addict in an instance where such person assists with the Police investigation. (The re-enactment of Section 236 of the AJL is recommended in this regard).

30.1 It is the opinion of the Committee that the application of Conditional Pardon should be extended to cover the following instances:

a) *Where the person who is suspected of the commission of an offence extends his co-operation to the Police:*

Where the person accused or suspected of the commission of any offence provides information leading to a successful arrest, a sustainable prosecution and subsequent conviction in connection to any case, the Attorney General may at his discretion make an order for the suspension of the prosecution of the former offender.

b) *Where a criminal action is pending or proceeding against a person:*

The Attorney General may at his discretion apply to the Trial Court to consider imposing a mitigated sentence/punishment.

c) *Where a person is already convicted and serving sentence:*

The Attorney General may invite Her Excellency the President* to act under the Constitution and remit the present sentence in favour of a mitigated sentence.

30.2 The Committee recommends that in respect of a conditional pardon in terms of Section 256 (1) of the CPC, the requirement of remanding the person in question until the conclusion of the case be discontinued and that the issue of remand be left to the discretion of the Court.

30.3 Furthermore it is observed that the present law permits the granting of a Conditional Pardon only in respect of persons accused of offences which are 'exclusively' triable by the High Court, thereby effectively preventing the granting of Conditional Pardons in respect of offences such as organised robbery.

In view of the increasing number of such offences being committed today, the restriction placed on the granting of conditional pardons, is observed to be a very serious shortcoming in

* Ed. Note: Report submitted during the time of former President Chandrika Kumaratunge

the present criminal justice process. Accordingly the Committee recommends the deletion of the word 'exclusively' as contained in Section 256 (1) of the CPC.

31.0 Punitive powers of Magistrates:

The attention of the Committee has been drawn to the inadequacy of punitive powers wielded by Magistrates at present. Therefore the Committee recommends that punitive powers of Magistrates be increased to an imprisonment term of five years and a maximum fine of Rs. 100,000/-.

32.0 Law relating to Control-delivery:

32.1 Enabling legislation: The Committee highlights the need to introduce special legal provision relating to control-delivery and organised crime. In this regard it is recommended that enabling legislation be drafted to facilitate the control-delivery of drugs and arms, and to combat organised crime.

32.2 Legal protection for officers engaged in undercover operations: The Committee recommends the introduction of statutory safeguards to recognise and regulate undercover operations, which would afford special protection to law enforcement officers engaging in such operations.

32.3 Legislative definition: The Committee finds certain provisions contained in the Criminal Procedure Code to conflict with the concept of 'undercover'. For example Section 109 of the CPC requires that all evidence and the method of obtaining such evidence be reduced to writing. Therefore a relevant amendment to the present law is considered necessary with regard to the definitions of terms germane to such operations.

33.0 Special Court to hear cases of organised crime:

In light of the rapid escalation in the incidents of organised crime witnessed in the recent past, the Committee recommends the establishment of a special Court mandated to hear and try cases of organised crime notwithstanding territorial jurisdiction.

It is proposed that a separate Court be created in each Province to try persons indicted for the commission of specified offences (grave crime/PTA/serious drug offences etc) as may be specified in a Schedule and such offences which, in the opinion of the Attorney General, are deemed to generate public interest.

Conclusions

The Committee recognises that existent delays in the criminal justice process greatly frustrate the law enforcement effort, resulting in the development of a sense of injustice not merely within the victim of crime but also within the offender and citizen of the country alike. The end result is the overall loss of confidence in the criminal justice system of the country.

The recommendations set out above comprise short, medium and long-term measures that are collectively aimed at expediting and modernizing the criminal justice system with an overall focus on curbing crime and eradicating laws delays. It is hoped that these recommendations will rebalance the system in favour of victims, witnesses and communities and deliver justice for all by building greater confidence and credibility.

The Committee notes that the delivery of these outcomes is a joint enterprise involving a wide range of partners across the criminal justice system. It reinforces the need to forge effective links between all law enforcement agencies to form a unified force capable of eradicating the intractable delays existent in the administration of criminal justice in Sri Lanka.

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Mr. Ranjit Abeysuriya P.C.
Mr. V.K. Malalgoda - Senior State Counsel
Mr. Dappula de Livera - Senior State Counsel
Mr. U.R. de Silva - Attorney-at-Law
Mr. E.D.M. Hettiarachchi - SSP, Director/Crimes
Mr. N.S. Rajapakse - High Court Judge
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'Laws Delays': Some Perspectives

Frank de Silva[*]

Introduction

There is no doubt that abuse of the legal process resulting from 'laws delays' results in the denial of human rights. The 'right' involved in this context is the right to justice. Access to justice, (which amounts to a right to justice) is infringed if the process followed is seriously subverted in the deliverance of justice. People have an inherent right to justice as a basic human right. The right to justice is also a right that underlines each and every provision of our Constitution. Thus it is maintained that the sovereignty of the People includes the judicial power of the people. The judicial power of the People can be thwarted and this right denied by judicial action as well as by other action. Abuse of process and abuse of power means to deny or violate rights.[1]

Following from this argument, a commercialized process in delivering justice is, in essence, an abuse of process. A process for justice so faulted can hardly uphold rights. It brings in its wake a corruptive influence on the process, in denial or violation of rights. To that extent, abuse of process and power and their corruptive influence, is the violation of rights of the People. These aspects are often clouded over under the rubric of 'laws delays' in reviewing the workings of the law in courts. It is this aspect that will be discussed in the succeeding analysis.

'Laws Delays'

'Laws delays' is a term freely adopted to convey concerns in relation to the workings of the court system. Over the years, Committees of Inquiry have been appointed to look into this problem, designated as 'laws delays' and have made appropriate recommendations. The most recent Report is that submitted by a Committee under the Chairmanship of Justice Raja Fernando in 2006. The Committee was appointed by the Minister of Justice to 'identify ways to minimize delays in the administration of justice.' The purview of the Committee appeared to be limited to administration of justice in civil cases. The recommendations, classified under Pre-Trial Procedure etc. are of little relevance to criminal cases though the pertinence of alternate dispute resolution (which was confined in this report to civil cases) remains compelling to the present discussions as well.

Criminal cases

The purpose of this short analysis is to focus on the specific aspects of 'laws delays' in criminal cases. Delay in criminal court proceedings has a painful impact on the community. The process in the criminal courts is essentially one of attrition between the parties. The process has an abrasive effect on relationships within the community and contributes to disrupt harmony of such relationships. From the point of view of the community, the people involved are caught up in a harrowing process in

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[1] See '*Judicial Corruption in Sri Lanka*', Pinto-Jayawardena, Kishali and Weliamuna, JC in *Transparency International Global Report*, 2007

courts, the end result of which is devastating. In sum, 'laws delays' as they feature in the criminal process, have a destabilizing effect on the community. Inquiries into 'laws delays' however limit the examination of 'laws delays' merely to a managerial context; one of the workload and insufficient resources. Recommendations follow accordingly relating to additional resources to ease the work load. The community perspective of the problem from 'laws delays' is never the standpoint of these inquiries. Yet examination of protracted criminal proceedings in terms of time and expense is essential to a discussion of 'laws delays.' This has a distressing effect on the parties to the litigation and works to the detriment of the community at large.

Laws Delays and Corruption

The negative aspects of 'laws delays' are manifold. Delay is the stuff of corruption. Postponement, differing action, procrastination and putting off what has to be done are the means for subverting the process for corrupt ends. Practiced delay is in effect abuse of process. Delay is the means when intent is otherwise than honest. Abuse of power and position therefore is inherent in such deviance of process. Expeditious action and efficiency on the other hand is the converse of calculated delay. Action with expedition and efficiency limits the prospect for corrupt practice. There are a few examples of ready disposal of cases in courts which allowed no laws delays. These are but exceptions to the general rule of delay in court proceedings.

Abuse of process

When the term 'abuse of process' is subjected to rigorous examination of its exact meaning, it becomes clear that abuse of process through delaying action is in fact the predominant feature in governmental activity. 'Laws delays' do not stand alone. Government institutions, including courts, tend to develop these negative practices during the course of time. These practices are soon insinuated into the system and continue unchecked. In course of time, these deviant practices assume larger proportions; they figure thereafter very much as a fact of life, acquiesced to initially, and soon projected as inevitable. The problem then erupts as aberrations in the system, working into the vitals of the relevant organizations. Examples of this are many. In the medical field, such practices take the form of private practice; in the educational field, they emerge as the obnoxious resort to private tuition; these practices are ostensibly categorized as 'overtime' in the public service and as 'laws delays' in courts of law. Practices of NGO funded research in the universities are of the same order, apart from many other examples. The insidious aspect of these practices surfaces in the exploitation of official positions, in the abuse of process and in corrupt diversion (by those who engage in such practices), of official resources to further private interests.

Furtherance of private interests in any organization can only be at the expense of the vitality of the organization. Monetary incentives drive these deviant practices without which the practices cannot be sustained. However, in other instances, the thirst for recognition or for rewards in power and position may also be a driving influence and should be equally acknowledged as such. Yet these practices have the capacity to gain recognition in due course. Their adoption is then complete. The term 'laws delays' like all else gains official currency without demur, and is adopted freely with little reservation. The most recent examination of this problem under the Chairmanship of Justice Raja Fernando was

just one more of these reviews which avoided the embarrassment of referring to the darker side of the problem.

Manipulation of the Process

Manipulation of the process is a consistent feature in all these questionable practices referred above. The manipulation of the criminal process is a specific feature of deviance in the court process. Lethargy and inefficiency *per se* may cause delay but these deficiencies are capable of rectification. On the other hand, manipulation of the process results in delay becoming entrenched and systemic. Remedy is then difficult. These practices are subsumed into the court process through its roots and tissues, its files and the records. Incentive and inducement sustain or nourish the abnormality as it grows. Delay earlier justifies more delay later. Inducement is further induced. Incentives add to incentive. The process now lives on itself in parasitic symbiosis. A remedial process is thus all the more daunting.

Divergence of Interests in the Court Process

Divergent interests interplay in this context. Inducement and incentive for 'laws delays' are equally the result of public and private interests playing themselves out in the court proceedings. In theory, the public interest is upheld by the judges while lawyers pursue their private interests. Private lawyers cannot seriously be expected to uphold public interests detrimental to their financial interests. Laws delays are therefore, in the main, due to the private interests of private lawyers prevailing over the public interest to be upheld by judges. Private interests prevail only to the extent that they are permitted the space to drive their private interests, inducements and incentives. Public interests are willy-nilly weighed down by private interests to the extent they preponderate over the former. Evidence given in public at a Commission of Inquiry into the problem of law and order was, unreservedly, to the effect that 'no court house sits after 12-1pm on any day'. The Ministry of Justice responded that a circular has been issued to require judges to sit till 4.00 pm each day. Public interest, so ill disposed, can hardly assert itself over the private interest. Shortened hours serve the private interest. They may be acquiesced in by those upholding the public interest. Monetary incentives drive these interests. Delay is the result. Delay is remunerative.

Laws delays induced by particular interests defy fair practices and plainly amounts to corruption of the process. Conflict of interest is a common feature of much of the phenomenon of 'laws delays.' Honourable lawyers who do not resort to this practice and judges who take harsh action against dilatory counsel are as rare as they are unpopular. There is then a structural dimension to the problem of 'laws delays', which any future Committee of Inquiry may take note of.

The Impact of Laws Delays on Crime Control

Reverting to the problem stemming from laws delays in criminal cases, it must be noted that delay hardly makes for effective law and order and for control of crime. 'Law' thus delayed has a negative effect on crime control and law and order. The criminal process, based on justice and punishment should be dispensed expeditiously. Delay tends to encourage an opposite result and inclines to a process both dilatory and desultory. Inevitably, this has a grievously negative impact on crime control.

The maintenance of law and order is negated by delay. Time, effort and expense wear down the parties to litigation (particularly the complainant and witnesses). Monetary inducement to delay, to that extent, wears down the parties and renders the process even more abrasive among the parties *inter se*. Acrimony in relationships is the one sure result of a court process. These elements do not make for good law and order. The process is therefore subverted in its endeavour to deal with crime. The unchecked development of these dilatory practices is invidious; their consequences are grave.

The Question of Expediency in the Legal Process

Expediency rather than due process finds its way within this milieu of a questionable criminal process. Expediency works itself into the judicial system in the space within 'laws delay', vitiating the integrity of the judicial process. Expediency manifests itself, for example, through disposal of cases 'otherwise', than through due process for conviction or acquittal. Statistically, conviction or acquittal through due process in cases amounts to a very low percentage. The disposal of cases through means otherwise than through due process, thus becomes the main means of concluding cases before court. Resort to 'otherwise disposing' of cases can be through the adoption of some expedient practices as reducing the charges, say, of theft to mischief etc. with the sole intent of concluding the case. Delay and expense over the long protracted period of attrition helps to impel that conclusion, of cases 'otherwise disposed'. Delay contrived long enough, months and years, to wear down the parties helps to bring them round to agreeing to their cases being otherwise disposed of. In other instances, this results in the victims taking the law into their own hands. Deviance in judicial process, in this manner, is then the grim reality. These devious practices hardly serve to inspire confidence of the community in the institutional process in respect of the dispensation of justice and the maintenance of law and order.

Conclusion

In regard to the less serious crimes, one remedy proposed has been the diversion of cases away from the formal courts. The remedy is not radical but only to the extent that it could alleviate some of the burdens. Diversion in some measure would avoid much of the harsh impact of court procedure in criminal cases on community relations. Mediation and conciliation between parties, (rather than adversarial adjudication with induced delay), appropriately, by the police, by the state prosecutors and also by courts may be a reasonable alternative. Relief to the ordinary litigant can be substantial.

These processes are surely not appropriate for the more serious cases but are eminently suitable for a range of minor cases. Minor cases possess the component of relatively less serious dispute which becomes more appropriate for resolution through mediation. In the more serious cases of crime, the offence is more against the State and the law which belongs in a different category altogether. In this regard, it must be emphasized that 'laws delays' is more than a problem of workload. The problem in 'laws delays' is structural and systemic. Solutions are therefore not easy. There is no doubt that a serious and concerted effort should be made by the judiciary, the legal profession, law enforcement officers and concerned members of civil society in regard to restructuring the legal/judicial process in order to address this vexed problem.

'Law's Delays': Some Further Perspectives....

Basil Fernando[*]

Introduction

The article, "*'Laws Delays': Some Perspectives*,' by retired Inspector General of Police, Frank de Silva is illuminating in many respects and deserves careful reading. Though one may join issue with him regarding his concluding comments concerning the relevance of mediation to the criminal process, the analysis contributes a great deal to the understanding of the problem.

The most important aspect of this analysis is the assertion by Mr. de Silva that delays are not just a matter of resources, but rather a matter arising out of structural causes; thus his comment that "it must be emphasized that laws delays is more than a problem of workload. The problem in 'laws delays' is structural and systemic." By saying this, Mr. Silva has gone far beyond the normal statements about laws delays which are attributed mainly to workload and limitations in resources.

Attributing delays to workload and limited resources is a factor that Supreme Court and Appeals Court judges often mention in their ceremonial speeches. Inadequate court houses, judges and financial resources of the courts and facilities are thus deemed to be the most important aspects affecting court delays. The Report of the Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts headed by former Solicitor General, (present Attorney General) C.R. de Silva on behalf of the Ministry of Justice in 2004 approached the problem of delay, mainly from the point of view of the limited resources of the courts, the limited number of prosecutors (attached to the Attorney General's Department) and the limited capacity of the policing system. However, in reality even the limitations caused by resource allocations are due to unresolved structural and systemic problems. For many reasons these systemic and structural problems are not even being discussed seriously, let alone being addressed.

Private Interests vs the Public Interest

Mr. de Silva mentions many systemic problems. Among these are various conflicts of interest, for example public and private interests, such as those of lawyers and courts. The short sitting times of courts, for example, most courts do not sit after 12:00 or 1:00 pm, is often a result of court adjournments due to lawyers seeking postponements. This is an issue that the Asian Human Rights Commission has also taken up many times and we have observed that speedy justice can only be ensured if the courts sit for the full duration of the official working hours. However, the reason for such postponements need not be conceived purely as private interests of the lawyers being pitted against the public interest as (theoretically) upheld by the judges. The conflict between private lawyers and the court is a problem that exists in all countries. In many jurisdictions, this is not accepted as a factor for the causing of delays, as proper guidelines have been developed and implemented by the courts for their proper functioning and no one is allowed to obstruct the judicial

[*] Executive Director, Asian Human Rights Commission

process. It is the function of courts to balance various interests and not to allow any party to undermine the administration of justice. It is the duty of the higher courts to give the necessary guidelines to all courts and to supervise their implementation.

This concept of command responsibility applies particularly to the Supreme Court. If courts fail to sit for the length of official working hours, this is a serious disciplinary issue and it is the Judicial Service Commission (headed by the Chief Justice and two superior court justices), which is empowered to deal with that issue. If those who command authority fail to carry out their obligations, that is a fundamental, structural and systemic issue. I am unaware of any inquiry or study examining the failure of the Judicial Service Commission to ensure that all courts sit during official working hours. The core issue of delays is time. If the time given for sittings of court is not utilized, is not an issue of resource limitations but one of discipline.

A further aspect relating to private interests is that it is not only the lawyers who obstruct the proper functioning by seeking dates etc. The Committee headed by former Solicitor General CR de Silva identified that one of the major causes of delays in criminal cases was the failure of the police to attend courts. The Committee proceeded to make recommendations in regard to the drafting of regulations and the education of judges to take firm action against police officers who refuse to attend court when duty requires them to do so. The relevant excerpt thus is, as follows;

> 1.2. a); 'Compulsory attendance: The Committee recognises the need to introduce administrative measures requiring Police Officers to attend Court on a compulsory basis, in view of the frequency with which Police Officers obtain leave and abstain from Court sittings, sighting inappropriate grounds, which has been observed to result in unnecessary disruption of Court proceedings in the recent past.'

This phenomenon of the police virtually defying the authority of courts was evidenced from 1971 when protection of 'security concerns' were perceived to override every other concern, including the obligations of police officers to attend legal proceedings. The result was that police officers who (for reasons of their own), did not wish to attend court made use of the perennial excuse of 'having to attend to serious matters.' Thus we see that the authority of the court system suffered greatly due to the acceptance of this practice. In recent times, ostensible concern for protection of national security has undermined concern for implementation of the rule of law. Among the most important structural questions that affect the court system is the undermining of the importance of the legal process and the independence of the institution of the judiciary. These are concerns that should receive the highest priority for attention.

'Laws Delays' as Judicial Corruption

Mr. Silva's article also makes many valuable points in regard to the element of corruption in the present phenomenon of 'laws delays.' Such frank criticism should receive foremost attention as this aspect affecting justice has not been discussed adequately. In all areas of criminal investigation and prosecution today, corruption plays a vital role. Often one of the very prominent reasons for torture is the fact that the police allow the actual criminals to escape and seek to put the blame for the crime on innocent people by creating a 'substitute accused' in place of those who have been allowed to escape. Many cases have come to public notice such as the case of Gerard Perera, who became a victim of

this process when the police were investigating a triple murder. In the course of looking for the perpetrator, the police ended up in arresting Mr. Perera and assaulted him to the extent that he suffered renal failure. Later on, while seeking justice before the High Court, he was assassinated. That is the extent to which the process now suffers from the infiltration of corruption into the system. No justice system can function if the basic structural issue of corruption is not pursued and resolved. If corruption supersedes the question of justice then there is no other solution to deal with that issue except by forsaking the justice system and resorting to extra legal means of combating injustice.

The Relevance of Mediation to Discussions on Crime Control

The possibility of mediation or settlement of criminal cases (rather than by taking these cases coming to court for trial) is however, that aspect of Mr. de Silva's analysis that I differ from. Advocating such a remedial measure begs the very question that he himself has very legitimately raised; thus, if corruption is so rampant then the encouragement of mediation and settlement can only contribute to greater corruption. It must be stressed that greater power being given to the police in the area of disputes must be discouraged in the absence of a substantive overhaul of the current policing system. In the present context, such power would only contribute to greater manipulation towards personal enrichment of corrupt police officers, rather than contribute towards the public interest. The recent family massacre at Delgoda and events thereafter starkly illustrate the dilemma of a community which has completely lost faith in the commonly accepted forms of law enforcement and dispute resolution. Indeed, what we see now is that the community fears the involvement of the police due to the fact that such involvement often leads to problems between parties *inter se,* being transformed into problems that are related to the deeper and more pervasive forms of corruption within society and the policing system itself.

A serious response to the questions raised by Mr. de Silva's article would be better framed by an extensive examination of the structural and systemic problems affecting the criminal justice system and by encouraging an open debate in this regard. Such frank discussions have not yet taken place in the public sphere though they form the common core of private discussions in Sri Lanka with enormous frustration being expressed by people from all walks of life.

The Relevance of the 'Malimath Committee' Deliberations to Sri Lanka

In India, the question of mediation, in the context of the criminal justice system, was discussed when the now infamous Malimath Committee report was introduced under the former BJP government. The crux of the Malimath Committee recommendations was to reduce criminal cases to civil disputes and pave the way for various types of mediations and settlements instead of criminal trials. This Committee went so far as to suggest that burden of proof in criminal trial should be on balance of probability rather than proof beyond reasonable doubt. The Committee members also called for the negation of basic principles of criminal law such as the presumption of innocence and the right to silence. The Committee's recommendations were shelved due to massive international and internal protests. However, there have been many attempts to bring these same recommendations through the 'back door' thereafter.

Treating crimes as purely private disputes is not uncommon. The practice of accepting blood money for 'private' crimes in the Saudi Arabian legal system was developed conceptually on this same

rationale. If the person who has suffered the loss due to the crime is paid by the accused, he/she may forgive the accused and thereafter the State has no right to deal with the issue. Consequently, the powerful become advantaged in such a system while the poor suffer punishment because they have no capacity to pay.

However, such systems create extremely terrible punishments as a necessary deterrent. Public beheadings in Saudi Arabia are commonly the manner in which crimes are dealt with within that system. A somewhat similar phenomenon is now taking place in many South Asian countries including Sri Lanka. A recent publication of a picture in an Indian television channel of a sub inspector in Bihar, seated on a motorbike dragging an alleged criminal along the road who was chained to the bike is one good illustration. He was trying to demonstrate to the people as to how justice is being done. A similar tendency has developed in allowing those identified by the police as hard core criminals to be extra judicially executed. In India, this phenomenon is known as encounter killings and in Sri Lanka, we see similar occurrences when criminals who are in the custody of the police allegedly try to harm policemen by trying to throw grenades or by other means consequent to which they are disposed of. Hundreds of such instances have been reported in recent times. In such a situation, the causing of forced disappearances of arrested persons, by their very custodians, is considered as a legitimate form of punishment.

We see today the manifestation of two strategies to deal with crime. One is the practice of mediation and settlement dealing with lesser crimes, while the other commonly evidenced phenomenon is extrajudicial punishment that is meted out in response to greater crimes. The result of both practices is to displace the due process of law and the notion of a reasoned process of criminal justice. What is lost along the way is a rational approach to deal with crime. In the past, such rational approaches were developed, not due to any sympathy directed towards criminals but due to the acknowledgement that the manner that a society deals with criminals has a profound impact on society itself. By defining certain acts as crimes, society recognises certain types of moral behaviour as a necessary pre-condition for its existence. While morality defines killings as being wrong, the law makes murder a serious crime. By means of criminalising certain activities, society was taught to avoid certain types of conduct as this conduct was deemed harmful to society. It is this acknowledgement that acts as a deterrent to crime and also holds the society together. When such a reasoning process is abandoned, the fabric of society itself is affected and societal collapse takes place. The demonstration of such a collapse is quite visible in Sri Lanka in crimes such as abductions for money and killing of families purely over land disputes as what happened in Delgoda.

When due process fails, the system of policing fails, as does the system of prosecutions and the judiciary. The crux of 'laws delays' is that it results in destroying the capacity of the society to maintain due process as the only possible mechanism of dealing with crime. Perhaps the surest mechanism to deal with structural and systemic problems of 'laws delays' is through the development of an effective corruption control agency with similar powers and organisational structure as the Independent Commission against Corruption in Hong Kong. This corruption control agency is structured completely outside all government departments including that of the police. The professionals attached to the department work solely for the department and have no affiliation at all to any other department. Besides investigations and prosecutions, the agency also conducts extensive education for the prevention of corruption. On the issue of corruption, there is no compromise and there is no mediation. It is a serious crime and it is dealt with in that way. As a part of the elimination

of corruption within society, corruption is also eliminated from the sphere of the administration of justice. Speed is an integral part of the efficiency of the administration of justice.

Contextual Problems Concerning Crime Prevention and 'Laws Delays'

Some time back, the Asian Human Rights Commission put forward a policy paper on crime prevention and policing in Sri Lanka[1] aspects of which are as follows,

Firstly, the police-criminal nexus is not only a reason for the increase in crime but also an encouragement to crime. The assassination of Colombo High Court judge, Sarath Ambepitiya disclosed the extremely close cooperation between some high ranking police officers and drug dealers; this is only a manifestation of a larger phenomenon that is wide-spread throughout the country. The criminal-police link has become deeply entrenched within the last thirty years. Today, this link has negatively affected the system of investigations into crime and in particular the administration of criminal justice. Above all, this nexus endangers the lives of investigators and witnesses. It also remains the source of an enormous extent of malpractice that defeats the purpose of fair trial such as tampering with statements made to the police and even the destruction of material evidence. As long as the people witness such a strong link between the police and criminal elements, they will not come forward to cooperate with the state agencies, even though they themselves may suffer a great deal due to crime. At present, people who become victims of crime once, suffer the second time the moment they begin to complain about the crime. Complaining about crimes can lead indeed to serious physical harm or assassination. Today, the lodging and pursuing of complaints against criminals has become a perilous activity for Sri Lankan citizens or for foreigners.

A second important general factor is the collapse of the rule of law which has been brought about with deliberate intent to institutionalize a new type of authoritarianism through which the executive has absolute power. Legal rules have been suspended in order to engage in extra judicial killings, torture and other forms of violence against persons and property. State sponsored violence has spread into all parts of the country and claimed tens of thousands of lives. The basic fabric of the rule of law operating through the police, the prosecution system (Attorney General's Department) and the judiciary has collapsed. There is no attempt to restore the legal fabric of Sri Lankan society and to revitalize the functioning of the system of the administration of justice.

In the first instance, the policing system (as it supposed to exist in terms of the law) does not exist in Sri Lanka. Instead, a parallel system has emerged in which extremely lawless elements in the police and criminal elements, mostly engaged in lucrative criminal activities such as drug dealing, illicit liquor and illegal forms of businesses, have combined to subvert the very foundation of a policing system functioning within the framework of the rule of law. Other institutions have been rendered powerless as a result of this extensive police-crime nexus. For example, the Department of the Attorney General, which is also the chief prosecuting department in Sri Lanka is at the mercy of the police in that, if the police fail to conduct criminal investigations, as they do most of the time, this department is powerless to do anything. The Attorney General's department then says, 'we cannot prosecute as we have no evidence.' In turn, the judicial system is powerless when the policing and

[1] see http://www.ahrchk.net/statements.mainfilephp/2007 statements as well as statements made in 2004 and 2006 for further discussions in this context.

prosecution systems are powerless. The police are able to subvert the entire process of justice by allowing the witness to be intimidated. Once the witnesses are intimidated, they do not attend court sittings or when they do attend, they deny previous statements. This they do in order to save their lives from criminal elements. Such witnesses are fully aware that the police cannot and will not protect them. Thus, the entire justice framework is in a state of serious crisis.

'Laws Delays' and the Legal Process

There is no doubt that the major defect of the justice system that contributes to the increase in crime is the delay in the administration of justice. With regard to crime, the investigations take too long and the reason often given is that there are insufficient qualified investigators and that the necessary equipment such as fingerprint examination facilities, communication facilities, transport facilities and education and training facilities are lacking. However, actual interest in crime prevention does not exist as a concrete objective for many police officers or for prosecutors. There is another group that suffers from a sense of futility which affects the administration of justice. Those are the lawyers. A large section of lawyers have given up the practice of criminal law. They have realised that to survive in that practice you need to evolve corrupt practices.

Meanwhile, the heavy workload in the courts creates long delays in adjudication. These delays result in the negation of the process of adjudication. People tend to settle their disputes in other ways than through the legal process such as by the assassination of opponents or severe intimidation, causing weaker parties to abandon their claims regardless of how legitimate such claims might be.

Conclusion - Inquiry into Short-Term and Long-Term Programmes to Control Crime

There are two major questions that need to be dealt with immediately if crime is to be controlled in Sri Lanka.

a. Substantively address the issue of the police and criminal nexus. Without this first step there is no real possibility of combating crime;

b. Introduce a comprehensive witness protection law and provide a witness protection authority that could, in fact, provide witnesses with effective protection so that they could participate in the judicial process without fear;

c. Take steps to reduce delays in adjudication so that the process of every single case will happen within a time period that can be rationally accepted.

The Malimath Committee on Reforms of the Indian Criminal Justice System: Its Contents and a Critique*

Introduction

In November 2000, the Government of India set up the Committee on Reforms of the Criminal Justice System, (known as the Malimath Committee as it was headed by Justice V.S. Malimath, Chief Justice of the Karnataka and Kerala High Courts and former member of the National Human Rights Commission of India (NHRC) purportedly to assess fairly and propose changes to the manner in which criminal trials are conducted in India.

By 2003 April however, the true objectives of the Committee had been revealed. A summary of its 158 recommendations shows that despite its noble sentiments, the Committee has in fact been intended as a means for the government to attack the very foundations of criminal justice in India and to give enormous powers to the police.

If the proposal to demolish the fundamental principles of criminal justice in India was initiated by the government itself, it would have been met with great resistance. The Reforms Committee, then, was a neat and carefully crafted vehicle to drive home the government's agenda. If its recommendations are implemented, it will be unnecessary for India to introduce new anti-terrorism laws or emergency legislation: their cumulative effect will far exceed the powers of such regulations.

To begin with, the Committee suggested that the Indian criminal justice system be guided by a "Quest for Truth". The Committee may believe that this is a reasonable proposition, and perhaps even an original one, but the "Quest for Truth" is nothing new to India. Ironically, however, every humbug and pious politician begins with the popular refrain *Satyam Sivam Sundaram*. Notwithstanding such sentiments, the inequalities and untruths that continue to consume India have few parallels in world history. This is because the "Quest for Truth" is de-linked from the search for justice, thus permitting cruel rampant inequality. Now, this old 'ideal' is being recalled to undo the system of criminal justice. The "Quest for Truth" also recalls the motto of the Chinese judicial system: "Finding Truth from Facts". Whereas the Committee pretended to introduce practices from continental European legal systems, in fact, it has borrowed the motto and practices of an authoritarian system that only now is developing new and less primitive judicial methods.

To achieve this "truth", the Reforms Committee has in fact launched an assault on the Constitution of India, without making specific mention of the same. Article 20(3) of the Constitution ensures that an accused not be compelled to act as a witness for the prosecution. The Committee however has effectively proposed that this article of the Constitution should be discarded through its recommendation that the accused present a statement of defence at the beginning of the trial. This is similar to the practice in China, although the right of the accused to remain silent is not recognised at all in the latter context. This clever proposal aims to reduce criminal trial to civil trial standards. In

* Published here are edited excerpts of the analysis on 'Crime and Justice in India" by Basil Fernando, Executive Director, Asian Human Rights Commission, first published by *Jananeethi*, India and the Asian Human Rights Commission in 2003.

India, where the poor lack access to competent lawyers, it will mean a growth in criminal convictions without adequate defence. The number of innocent persons languishing in jail due to ignorance and lack of resources will increase immeasurably.

The Committee has also proposed a change to the burden of proof, from "proof beyond reasonable doubt" to a "clear and convincing" standard of proof. The Committee has justified its decision on the grounds that "beyond reasonable doubt" is too high a standard for prosecutors to meet. In fact, this proposal is to undo the presumption of innocence itself. Lower standards of proof and the presumption of innocence cannot coexist. Once again, this is nothing other than a devious attack on one of the pillars of criminal justice.

Another remarkable suggestion of the committee is that an officer at the rank of Director General of Police be appointed as Director of Prosecution. This appointment would virtually end the separation of the criminal investigation and prosecution functions, as both would be in the hands of the police. Civilian control of the system by way of an independent public prosecutor would be lost. Such a model is typical not of more developed systems but rather more primitive ones.

On the other hand, the Reforms Committee refrained from making recommendations in a number of important areas, including the use of torture by the police. India has not ratified the UN Convention against Torture and nor has it made torture an offence, unlike several other Asian counties, despite strong recommendations by the National Human Rights Commission. Meanwhile, the police continues to be responsible for endemic torture and extrajudicial killing. Although the Committee has acknowledged this situation, it has failed to make a specific corresponding recommendation. Under these circumstances its proposal that confessions be made admissible by amending section 25 of the Evidence Ordinance is a dangerous incitement of further torture. That such a statement would have to be made to an officer not below the rank of Superintendent of Police, or recorded on tape, is no safeguard without legal provisions to prohibit statements taken by means of torture.

The Committee is also silent about the extreme corruption prevalent among the police. It has ignored suggestions that an independent commission to monitor corruption be established. Again, this means that its recommendations to strengthen the position of police investigation through a National Security Commission and State Security Commission are dangerous. Together with a proposed Apex Criminal Intelligence Bureau, such agencies could become a surveillance system threatening all independent organisations. Moreover, in the hands of a state inimical to the interests of some specific groups in society, they could prove lethal. The Gujarat massacre is not long passed, and the threat of such stage-managed violence yet looms large over millions in India.

What is needed now is not more freedom for the policing agencies to encourage and commit further atrocities. Independent bodies to monitor and control the police are the need of the hour.

In conclusion, if these recommendations are implemented, the consequences will be that:

1. The judiciary and lawyers will be subordinated to the police. Judges hold an important place in society due to the high standards they uphold. Once they become mere arbiters of civil-style cases, they will also be viewed as nothing more than that. Judges—and the lawyers presenting cases—will lose respect, to the short-term benefit of the executive.

2. By applying civil law standards to criminal trials, the value of life and liberty will be reduced to same position as that of property. In India, where society has been built upon graded inequalities, the removal of the little recognition of human equality given by the law can only have very sad consequences. The vast number of Indians, and particularly more discriminated groups—such as women, tribal groups, low castes and Dalits— will lose the small gains they have made since independence.

3. Powerful groups will use the police as a tool without fear of challenge. Given the already naked use of power by some political groups associated with the ruling party, it is frightening to think of what could happen next.

4. Ultimately, degenerating criminal justice will in turn affect the basic democratic system enshrined in the Constitution. The electoral system will be weakened, as opposition groups will face new and unprecedented police powers. Again, those who represent minority interests will experience the gravest of problems.

Therefore, all democratic-minded persons should engage in whatever efforts possible to expose and resist the attack on criminal justice and democracy contained in the recommendations of the Committee on Reforms of the Criminal Justice System. These are not forward-looking reforms but a carefully concealed attempt to throw India back to the primitive Law of Manu. There must be full and open public debate on the Committee's findings.

Summary of the Recommendations of the Malimath Committee

Though the Committee on Reforms of Criminal Justice System was constituted by the Government vide its notification dated 24.11.2000, the Committee became functional only from 1.6.2001 when it was provided with the office and staff. The Report was finalised within 22 months.

Crimes are increasing rapidly and new types of crimes are proliferating. There is huge pendency of criminal cases in the Country. As per the figures for 2000 published by the National Crime Record Bureau, there were 49,21,710 criminal cases under the IPC pending at the end of the year 2000. During that year only 9,33,181 cases were disposed of. So far as criminal cases under the special local laws are concerned, 36,49,230 cases were pending at the end of 2000 out of which only 25,18,475 cases were disposed of during that year. In many Session's Courts innumerable serious cases are pending for trial for more than 15 years. The rate of conviction of cases under the IPC during the year 2000 is 41.8%. The rate of conviction of serious crimes is much lower. The rate of conviction in countries like USA, Australia, Singapore, France, Germany, Japan is more than 90%. Criminal Justice System is virtually collapsing under its own weight. As it is slow, inefficient, ineffective and costly people are losing confidence in the System. The System that is followed in India was inherited from the Colonial rulers more than 150 years back. Over the years the system has proved grossly inadequate to meet the new challenges. Realising the seriousness of the problem, the Government of India, Ministry of Home Affairs constituted the Committee to recommend measures to revamp the Criminal Justice System. It was called upon to examine the fundamental principles governing the system. The Committee has made many as 158 recommendations in its Report. A brief summary:

Quest for Truth

The Committee felt that the ultimate objective of the system is to render justice. Justice should ideally be founded on Truth. Hence the Committee has recommended that "Quest for Truth" shall be the guiding star of the entire Criminal Justice System. The duty of every one is to actively pursue it. For this the court shall be empowered to summon and examine any necessary person as a witness and to issue relevant directions to the Investigating Officers to assist the Court in its search for truth. The Committee has recommended conferment of inherent power on every criminal court which is presently restricted to the High Court. The Courts, the police and the prosecution have to play a dynamic and proactive role in search for truth.

Search for Truth and the Role of Accused

Without affecting the precious right of the accused under Article 20(3) of the Constitution (not to be compelled to be a witness against himself) the Committee has suggested empowering the Court to question the accused during trial with the object of ascertaining truth and to draw appropriate inferences including adverse inference if the accused refuses to answer.

Accused to file defence statement

To ensure fairness in trial it is recommended that the prosecution should serve a statement on the accused containing all relevant particulars about the alleged crime and on charge being framed, the accused shall be required to file a defence statement meeting the allegations against him. The accused who wants to claim the benefit of any general or special exception should plead the same, failing which he shall be precluded from claiming benefit of the same. Allegations which are admitted or not denied are not required to be proved.

Standard of Proof

It is a fundamental principle of criminal jurisprudence that the accused is presumed to be innocent and the burden of proving that the accused is guilty is on the prosecution. So far as standard of proof is concerned, it is governed by the judicial precedents that the standard in criminal cases shall be "proof beyond reasonable doubt". The Committee has come to the conclusion that this places a very unreasonable burden on the prosecution. In Continental countries the standard of proof is much lower namely "preponderance of probabilities". The Committee has recommended that standard of "proof beyond reasonable doubt" should be done away with and in its place a standard higher than 'preponderance of probabilities' and lower than 'proof beyond reasonable doubt' namely 'clear and convincing' standard of proof should be statutorily prescribed.

Focus on justice to victims

The Committee felt that the criminal justice system does not adequately focus on justice to victim. It is therefore recommended that the victim should be given the right to be impleded as party in criminal cases involving serious offences punishable with imprisonment for 7 years and above to enable him to participate in the trial. It is further recommended that a law should be enacted to provide reasonable

compensation to the victim. As the victims are often subjected to serious threats it is recommended that a law should be enacted to provide adequate protection to them.

Ensuring Better Investigations

So far as investigation is concerned it has made several recommendations to improve professionalism and efficiency of the Investigating Officers. Proper use of modern techniques provided by Forensic Science and involvement of forensic scientists from the inception of investigation is recommended.

Admissibility of statements & confession

The Committee has recommended amendment of Section 25 of the Evidence Act to provide recording of confession by an officer of the rank of Superintendent of Police or above with simultaneous audio/video recording and to render it admissible as evidence on the lines of Section 32 of POTA 2002.

All offences to be registered & investigated

The distinction between cognizable and non-cognizable offence shall be done away with, thereby requiring the police officer to register and investigate every crime that is reported to him.

The Committee has also endorsed the recommendation of the National Police Commission for a new Police Act. It has recommended setting up of an Apex Criminal Intelligence Bureau for collection, collation and dissemination of criminal intelligence.

No arrest for minor offences

The Committee has recommended that no arrest shall be made in cases where fine is the only or an alternate punishment. In cases where punishment is less than 7 years arrest can be made only under an order of the Court.

Advocating better prosecutions

To achieve independence, efficiency, better co-ordination and supervision, the Committee has recommended that an officer of the rank of Director General of Police should be appointed as Director of Prosecution by the Government in consultation with the Advocate General to function under the general guidance of the Advocate General.

Need for specialization

The Committee felt that specialization in criminal law will contribute to expedition and improvement in the quality of justice. Therefore it has recommended creation of permanent criminal benches in the Supreme Court and High Courts to be presided over by judges specialised in criminal work.

More cases for summary trial

To speed up the trial of cases involving less serious offences, it is recommended that all cases in which the punishment prescribed is 3 years or below should be tried summarily with power to the Magistrate to award punishment up to 3 years. It is further recommended that every Magistrate shall have the power to try summarily.

Witnesses Rights and Obligations

The Committee has recommended that witnesses should be treated with due dignity and courtesy and be provided with facilities for their seating, resting, toilet, drinking water etc. The rates of travelling and other allowances should be reviewed and arrangements should be made for prompt payment. As witnesses involved in serious cases are often subjected to threats, the Committee has recommended enactment of a law for giving protection to the witnesses.

As a large number of witnesses gives false evidence in the Court, the Committee has recommended a summary procedure for trial and enhancement in. It is further recommended that before the evidence of the witnesses is recorded the judge should caution the witness that it is his duty to tell the truth and if the Court finds that he is telling lie in the court is punishable.

Arrears eradication

The Committee has recommended an Arrears Eradication Scheme on the lines of the Fast Track Courts scheme to deal with arrears of cases pending for more than 2 years. For effective implementation of the scheme it is recommended that a retired judge of the High Court proficient in criminal work and known for quick disposal of cases should be incharge of this work.

Increase in fine

The Committee has recommended amendment of the Penal Law to increase the fine amount.

Sentence of Life Imprisonment

The Committee has recommended the sentence of imprisonment of life without commutation and stated that remission should be added as an alternative sentence.

Saving innocent children from prison

As it is wrong to inflict punishment on an innocent child by its remaining with the mother who is imprisoned, the Committee has recommended that when a pregnant woman or a woman who has a child below 7 years is sentenced to a term of imprisonment, that sentence should be carried by directing her to remain under house arrest. The Committee has also recommended community service for a specified time sentence in default of payment of fine.

Sentencing guidelines

As there is no uniformity and consistency in the matter of imposing sentence, the Committee has recommended creation of a statutory Committee to prescribe guidelines in the matter.

Settlement of cases

The Committee has recommended implementation of the recommendations of the Law Commission in regard to the settlement of cases without trial so that more number of cases can be settled.

Offences against women

The Committee has recommended modification of section 498-A to the effect that the offence should be made bailable and compoundable.

No death penalty for Rape

The Committee is not in favour of imposing death penalty for the offence of rape for in its opinion the rapists may kill the victim. Instead, the Committee has recommended sentence of imprisonment for life without commutation or remission which is higher than the punishment of imprisonment for life now prescribed by the statute.

Liberalising S. 125 of Cr. P.C.

The Committee has recommended that a woman who is living with the man like his wife for a reasonably long period also be entitled to the benefit of maintenance under S.125 of the Cr.PC.

Non-penile penetration to be a new offence

As several forms of non-penile penetration are not adequately punishable under present law the Committee recommended creation of a separate offence prescribing punishment on the lines of S.376 of the IPC.

Sensitising Magistrates

The Committee has recommended special training to Magistrates in regard to trial of cases of rape and other sexual offences to instil in them sensitivity to the feelings, image, dignity and reputation of the victims.

Organised crime, Terrorism & Federal Crime

The Committee recommended enactment of a federal law to deal effectively with organized crime and terrorism. It has recommended amendment of the domestic law to conform to UN Convention Transnational Organised crime. The Committee has recommended a federal law to deal with crimes of inter-State and/or International /Transnational ramification by including them in List I of the Seventh Schedule of the Constitution. The Committee has recommended that the Nodal Group recommended

by the Vohra Committee be given the status of a National Authority with legal frame-work with adequate powers including powers to freeze accounts of the suspects/accused etc and to attach their property.

Economic Crime

Several measures have been recommended to effectively deal with growing menace of economic crimes. With the emergence and complexity of giant industries and the capitalist modern economic system, economic crimes have risen in numbers, size and complexity. A strong, quick and fair disposal of cases of economic crimes with sufficient protection for the weaker parties will help reduce the rigors of the market economy. The peculiar problem as created by the proliferation of crimes involving finance and drugs with possible connections to organized crime terrorism can be dealt with only by new laws and new procedures. Apart from laws, equally important is to put in place specialized investigation and prosecution teams to handle complicated cases of fraud. Regulation and regulator's institutions need to be appropriately strengthened with clear demarcation of regulatory functions and non-regulatory activities. The Committee has recommended legislation on proceeds of crime on the lines of similar legislation in the UK and Ireland and also creation of Asset Recovery Agency at the federal level. The Committee has recommended establishment of a mechanism by name "Serious Fraud Office" by an Act of Parliament with adequate power to investigate and launch prosecution with utmost speed.

The Committee has recommended creation of Asset Recovery Agency to deal with forfeiture, confiscation etc. on behalf of courts and Govt. departments. The Committee has recommended that serving representatives or regulators should not be appointed on the Board of Directors of financial institutions to avoid conflict of interests.

Creation of Asset Recovery Agency

The Committee has recommended that violation of environmental laws which has serious economic and public health consequences should be dealt with effectively and expeditiously. The Committee has also recommended enactment of a law to protect informers, covering all kinds of major crimes.

Training

For the purpose of improving the quality of performance of all the functionaries of the Criminal Justice System, the Committee has recommended training should be adopted as an important strategy.

Vision for the future

The Committee has recommended that a provision should be made in the Constitution for appointment of Presidential Commission to periodically review the functioning of the Criminal Justice System. There is need for the Govt. to come out with a policy statement on criminal justice and in particular implementation of the Committee's recommendations.

Relevant Responses to the Malimath Committee During its Deliberations

With a view to revamping its criminal justice system, which is on the verge of collapse, the Indian Ministry of Home Affairs had constituted the instant Committee on Reforms of the Criminal Justice System. The Committee prepared a questionnaire to elicit suggestions and recommendations from knowledgeable persons in response to which the following are a selection.

1. Adversarial System & Right of Silence

1.1 ***Do you think that the adversarial system as followed in our Country has contributed to satisfactory dispensation of criminal justice? If not what changes do you suggest?***

The unsatisfactory state of criminal justice in India has nothing to with the adversarial system. The reason for the unsatisfactory situation lies elsewhere. India's social structure and attitudes are conditioned by entrenched habits of discrimination. There are various forms of discrimination, among which one may mention caste discrimination, discrimination of indigenous (tribal) people, and minorities. Discrimination weighs heavily on the justice system. This has created severe obstacles on the development of India's justice system in general and the criminal justice system in particular. The investigative machinery regarding crimes is terribly crude, both in terms of attitudes as well as facilities. Further, the justice that one may get is also associated with poverty. The level of poverty in India is so appalling that the poor cannot afford justice. Beside this, the management of the criminal justice system is inefficient and obsolete. Poor human resources and technical resources affect every area of the system. The shortcomings of the Indian Criminal Justice System have been evidenced not because of the adversarial nature of the system but due to incompetent policing, prosecution and rampant corruption.

The adversarial system in India which is a consequence of British rule had brought changes in the pre-colonial justice systems. The new system could not incorporate the history and culture of the nation and to an extent, failed to prove itself. However, the effect of abandoning the adversarial system will be negative for the people who have been less powerful in society throughout Indian history. Under the pretext of abandoning the adversarial system what seems to be underway is an effort to in fact, abandon the more progressive aspects of the law, for the purpose of obtaining easier convictions.

Hong Kong has an adversarial system. There is no move to change it. Instead much has been done to improve it, by creating better police and a system of control of corruption by means of an independent investigative body.

1.2 ***Do you favour investigation of cases being done under the supervision of the Judge, as in the inquisitorial system in France?***

First it should be noted that many aspects of the inquisitorial system have come under heavy criticism in the European Court of Human Rights, and also from many French jurists. Now the tendency is to modify the inquisitorial system by incorporating many aspects of the adversarial system. It is naïve to think that the civil law system merely involves having an inquiring judge. That system has had its own historical development and one of its major advantages is its mechanism to guide police investigators to act legally. That system requires a very highly developed police force. If India could

develop such police, then there would be no need for any change because the adversarial system itself would function well with such an advanced policing system.

It must also be noted that civil law system would be more expensive. In the place of one judge required for a Court, there would have to be two—one inquiring judge and a trial judge—doubling the problem of finding good Magistrates in India. Rather than changing the system altogether, it is better to strengthen the present system, keeping in mind, the following points;

- Inquisitorial System (IS) itself is under criticism in the legal systems of its inception;
- IS requires a highly developed police structure;
- IS is more expensive as it involves two judges; one inquiring and other adjudicating/trial;

Therefore, it would be better to seriously address the defects of operation in the adversarial system in a comprehensive manner and improve its real operation. This would mean improving the policing system, prosecution system and judicial system—particularly in the lower courts and those excising criminal jurisdiction.

1.3 ***In the system presently followed, the accused enjoys the "right of silence", which often comes in the way of search for truth in criminal cases. Should this be changed requiring the accused to disclose his defence, once the prosecution case/charge leveled is made known to him?***

The rule against self incrimination is the corner stone of personal liberty and forms part of the basic structure of the Constitution of India. The duty of the prosecution is to prove guilt beyond reasonable doubt and not to gain upon the defence of the accused. The shift of burden of proof onto the accused will create an unfavourable result. Given lack of accessibility to competent lawyers, the situation can cast a shadow on personal liberty. The coveted principle of 'presumption of innocence' will be dethroned to the detriment of the marginalised. Demanding a defence beforehand will also reduce criminal trials to civil standards and blur the difference between the two. Given the fact that a person's life and liberty is at risk, reducing criminal trials to the same level as civil ones is immoral.

This suggestion implies a specific departure from the principles and practices of criminal law in the following manner;

- The presumption of innocence will be diluted.
- Availing efficient legal advice for all the accused is a mirage in Indian situation.
- Criminal trial will reduce to the standard of civil trial.

2. BURDEN OF PROOF

2.1 Do you favour proof on the basis of preponderance of probabilities as in civil cases, instead of proof beyond reasonable doubt?

To effect such a change goes against the very fundamentals of criminal trial, which deals with the life and liberty of individuals. Civil disputes deal mainly with property matters and criminal trials deal with the life and liberty of people. If a person is to be sentenced to death on the preponderance of probabilities, that is a mockery of justice. The same applies to imprisonment. Such a change to the

standard of proof would trivialise the process of criminal justice. A direct outcome would be the further degeneration of the police investigators and prosecutors. Importing preponderance of probabilities principles to criminal procedure will equate life and liberty with property and will lead to a miscarriage of justice.

2.2 If no presumption of innocence or guilt of the accused is drawn, do you think that such neutrality would affect unfairly or lead to failure of justice?

This would destroy the very fabric of the criminal justice system as the presumption of innocence of the accused was developed after a long struggle against barbaric practices that victimized individuals. The removal of this rule will result in the return of such barbaric practices of victimisation. The presumption of innocence is a foundation stone of Indian criminal justice system; any move to change the same will be retracting from civilized norms of justice.

2.3 In some laws, the burden of proof is placed on the defence by raising certain rebuttable presumptions against the accused. Do you think that similar presumptions should be raised in respect of other offences? If yes, please indicate such offences.

The practice of placing rebuttable presumptions should be limited as much as possible, especially in India (South Asia) where the police are yet to establish a presumption of fairness in regard to their official actions. Proving guilty by efficient investigation is the duty cast on police and prosecution which duty should not be shifted to the defence.

3. PLEA-BARGAINING/ SETTLEMENT WITHOUT TRIAL/ COMPOUNDING OF OFFENCES

3.1 Do you favour introduction of the concept of 'plea-bargaining' as is practised in the USA?

While the concept of plea bargaining itself need not be rejected, some preconditions should be detailed, such as representation by competent counsel. Given the social context of India, where many poor persons become the accused, they can be pressurised into bargaining even when they have had nothing to with the offence. In such circumstances the threat is that, "You may lose the case and if you fight you will be punished severely—so why not bargain for lesser punishment?" Thus, an accused without competent counsel can be exploited, even when the prosecution is aware that its case is a weak one. Plea-bargaining will lead to justice only if there is competent representation in court for the accused which is not the case in South Asian jurisdictions.

4. SENTENCES AND SENTENCING

4.1 The predominant global view, including international conventions, appears to favour the abolition of the death penalty. The Supreme Court of India has ruled that the death penalty is not unconstitutional, and may be imposed in rarest of rare cases. Do you favour the abolition of the death penalty? If so please indicate the reasons.

The abolition of the death penalty is undoubtedly favoured. Life imprisonment exists as an alternative and is quite enough punishment. Further, more and more cases are coming to light that indicate miscarriage of justice in a significant number of cases ending in death sentences. Discovery of a miscarriage of justice after execution is futile for the person concerned and his or her family. And further, the people who end up with death sentences are mostly the poor.

4.2 In the absence of a statutory definition for "imprisonment for life" the said expression has "imprisonment for life" to mean imprisonment till death, as is in vogue in several countries?

The legal definition should leave much discretion to the judges in determining imprisonment till death, subject to an absolute fixed minimum term. However, it is also necessary that in cases of serious crimes, the term of imprisonment should not be subjected to easy reductions. In the future, when offences such as crimes against humanity are likely to enter into national criminal codes, it will be necessary that a difference in punishment be maintained depending on the nature and the gravity of crimes. A set of guidelines can be developed to this end.

4.3 The punishments provided under Sec. 53 of Indian Penal Code (IPC) are death, imprisonment for life, imprisonment—rigorous or simple, forfeiture of property and fine. In many countries, there are other types of punishments, including rendering community service. What new forms of punishment do you suggest for various offences?

For less serious crimes, offenders who are not hardened criminals with demonstrably bad records, and young offenders, community service is a better form of punishment. Working for voluntary organisations dealing with humanitarian issues is even better. The State should develop creative rehabilitation programs which combine basic moral and ethical education plus skill training. Where offences are against specially protected groups such as women and "low castes", convicts should be ordered to go through special orientation courses, and where possible do community service related to the victims of this social group. This would reduce the prejudice levels and improve tolerance.

5. INSTITUTIONS

To illustrate how confidence can be built in institutions, Hong Kong is a good example. Hong Kong was in a state of rapid change in the sixties and seventies. The massive growth in population and the fast expansion of the manufacturing industry accelerated the pace of social and economic development. The Government, while maintaining social order and delivering the bare essentials in housing and other services, was unable to satisfy the insatiable needs of the exploding population. This provided a fertile environment for the unscrupulous. In order to earn a living and secure the services which they needed the public was forced to adopt the "backdoor route". "Tea money", "black money", "hell money" - whatever the phrase - became not only well-known to many Hong Kong people, but accepted with resignation as a necessary evil. At that time, the problem of corruption was very serious in the public sector. Vivid examples included ambulance attendants demanding tea money before picking up a sick person and firemen soliciting water money before they would turn on the hoses to put out a fire. Even hospital amahs asked for "tips" before they gave patients a bedpan or a glass of water. Offering bribes to the right officials was also necessary for the application of public housing, schooling and other public services.

Corruption was particularly serious in the Police Force. Corrupt police officers covered up vice, gambling and drug activities. Social law and order was under threat. Many in the community had fallen victims to corruption. And yet, they swallowed their anger. Corruption had no doubt become a major social problem in Hong Kong. But the Government seemed powerless to deal with it. The community patience was running thin and more and more people began to express their anger at the Government's lukewarm attitude towards tackling the problem. In the early seventies, a new and

potent force of public opinion emerged. People pressed incessantly for the Government to take decisive action to fight graft. Public resentment escalated to new heights when a corrupt expatriate police officer under investigation succeeded in fleeing Hong Kong. The case provided the straw that broke the camel's back...

The Independent Commission Against Corruption (ICAC) was established in February 1974. Since its inception, the Commission has been committed to fighting corruption with the three-pronged approach of investigation, prevention and education. With the support of the Government and the community, Hong Kong has now become one of the least corrupt places in the world.

6. TRIAL/COURTS/JUDGES

6.2 Do you think that the present level of equipment and experience of the Judges of the Criminal Courts is adequate and satisfactory? If not, suggest appropriate improvements.

What is required at the moment is the change of mentality. Judges must be able to use modern communication and administration methods. However, for that they must feel that the system they are leading is really working. Above all they need higher morale. It is a common principle that every profession needs improvement. How you bring it about is another matter.

6.3 In the present system, Judicial Magistrates First Class are recruited from amongst Lawyers having about four years of practice at the Bar, do you think that this experience is inadequate?

If proper managerial training can be provided, four years experience should be enough. But, how do you measure experience? There must be objective measurement by way of tests. Some serious tests can be developed to go into all areas of ability before recruitment.....

6.16 Witnesses are often subject to serious threats to life/ property by the accused or their supporters. What measures do you suggest to protect the witnesses?

The causes of such threats can be removed only by strong anticorruption measures as suggested above. Systematic threats and intimidation take place due to the weaknesses of the system. .....

6.20 Do you subscribe to the view that Judges should be accountable? If so, suggest measures?

Immunity of Judges for actions taken in official capacity and in good faith is a concomitant part of the independence of judiciary. At the same time a Judge who lives in the society open to the 'pulls and pressures of the cosmos' cannot be left unaccounted. To strike a via media is therefore the task. An independent and efficient body should be devised to monitor the judiciary.

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