

Chennai Judicial Exchange
on
Access to Justice
A Report



Hon'ble Madras High Court

Hosted by
Hon'ble Madras High Court

Facilitated by
The Commonwealth Human Rights Initiative (CHRI)



The International Centre for the Legal Protection of Human Rights (INTERIGHTS)

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Rapporteur: Mandeep Tiwana

Editor: Sara Hossain

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Introduction

This report summarises the discussions, key concerns raised, and recommendations made during a dialogue between judges, lawyers and jurists at the Chennai Judicial Exchange on Access to Justice held in Chennai, India from November 5-7, 2004.

The Exchange, hosted by the High Court of Madras, was held at the Tamil Nadu State Judicial Academy, Chennai from November 5-7, 2004. It was the third in the series of South Asia Judicial Colloquium series on Enforcing Human Rights and Access to Justice, facilitated by the Commonwealth Human Rights Initiative (CHRI), New Delhi and the International Centre for the Legal Protection of Human Rights (INTERIGHTS), London.¹

Participants included 34 judges in the cadre of District and Sessions Judge from the Tamil Nadu State Judicial Services; three serving judges from the Madras High Court (who formed the core group for the Exchange); the Chief Justice of the Uttaranchal High Court (who was formerly at the Madras High Court and initiated the process for the Exchange); the Vice-President of the International Commission of Jurists; a former Chief Justice of India; a former Judge of the Supreme Court of India; a former Judge of the Supreme Court of Sri Lanka; a former Judge of the Bombay High Court; and seven eminent experts, including academics, lawyers and civil society activists from across India. Representatives of the facilitating organisations (CHRI and INTERIGHTS) were also part of the Exchange.

Background of the Exchange

The primary focus of the Chennai Judicial Exchange was to create a space for judicial officers at the cutting edge of justice delivery - the District Courts - to deliberate on issues that inhibit access to justice, particularly for the poor, vulnerable and marginalised. The deliberations were premised on the *rights-based approach* to justice delivery, which considers rights as entitlements owed by the State, as opposed to concessions allowed by it. This report centres on practical initiatives discussed during the Exchange to improve access to justice for the poor and marginalised.

¹ The Chennai Exchange was preceded by the Maharashtra Judicial Exchange on Access to Justice held at Mumbai in November 2003 and the first South Asian Regional Judicial Colloquium on Access to Justice in New Delhi in November 2002. While the New Delhi and Mumbai Exchanges were designed for and primarily involved superior court judges, the Chennai Exchange focused on the district judiciary. Part of the reason for this was the feedback received from many quarters that the Exchange/ Colloquia process should focus on justice delivery at the cutting edge level.

Designed to be a dialogue amongst peers, the Exchange provided a platform for participating judges, jurists and civil society activists to share concerns regarding judicial protection of human rights and in particular discuss access to civil and criminal justice in the context of poverty and disadvantage. The agenda was developed after extensive consultations - both formal and informal - with superior and subordinate court judges, lawyers, social activists, academics and court users both within and outside Tamil Nadu. The concerns that emerged out of these discussions were crystallised into a questionnaire which was sent to one hundred judges stationed in district courts across the state. Their responses indicated the need for greater focus on constitutionalism; the protection and promotion of civil liberties; and enhanced sensitivity to the rights of women and Dalits to inform the judicial decision making process.

Key Concerns

At the very outset of the working sessions, participants were asked to share positive experiences in assuring access to justice and simultaneously identify obstacles that inhibit justice. These concerns shaped the core of the deliberations during the Exchange.

Positive experiences in assuring access to justice

- Assurance of a proper defence to poor and indigent accused by personally inquiring about their financial status at the outset of the trial
- Ensuring speedy trial by minimising the number of adjournments
- Reconciling the destruction of medical evidence with circumstantial evidence to secure conviction in rape cases
- Exercising due sensitivity for child victims by recording evidence in chambers rather than in court; spreading legal literacy through distribution of rights awareness material
- Resolving long standing disputes through the medium of alternative dispute resolution mechanisms; instituting cases through district legal aid authorities where medical malpractices have caused death; personally engaging with district authorities to ensure speedy release of old age pensions
- Ordering revenue authorities to get land records of poor people released
- Ensuring registration of criminal cases against perpetrators of police brutality

- ✓ Taking up the complaints of prisoners in jails
- ✓ Seeing that victims receive compensation for wrongful or negligent acts of the State

Principal concerns regarding obstacles to ensuring effective access to justice

- ✓ Non-observance of Supreme Court guidelines by law enforcement agencies
- ✓ Non-registration of complaints by the police especially where victims are poor or belong to marginalised groups; poor quality of investigation reports and delays in forwarding them to the court
- ✓ Incompetence and laxity on the part of public prosecutors in progressing cases
- ✓ Prohibitive cost of engaging competent counsel
- ✓ Non-appearance of witnesses in court
- ✓ Problem of witnesses turning hostile
- ✓ Lack of information/ legal awareness amongst court users about their rights and them being unable to follow procedural language
- ✓ The existence of archaic and regressive laws including personal laws and the irrelevance of law to problems of the poor

Session: 1

Judge as a Protector of Core Constitutional Values

This session included:

- ◆ Presentation on Judge's role in the Common Law System: Protecting Core Constitutional Values
- ◆ Panel Discussions on Protecting Core Constitutional Values



Prof S.P Sathe
Honorary Director
Institute of Advanced Legal
Studies (IALS), Pune

Let us begin by removing a popular myth that judges do not make the law, they merely find the law and apply it. Even at the district level, a judge's role is not mechanical. Trial courts can interpret a statute to further the objective of the law - judges who want to shun their responsibility tend to be legalistic.²

1. In many cases, strict construction or following the black letter of the law may pervert the course of justice. In recognition of this, the Common Law tradition that we follow in India lays great faith in judge-made law or the principle of stare decisis.³ The existence of this principle is necessitated by the fact that it may become crucial to interpret the existing law or statute in the light of its underlying objective. Since the spirit of the law is more important than its letter, the history of the development of Common Law has largely been that of judicial interpretation of law in favour of civil liberties, individual and now collective or group rights. The Supreme Court of India has time and again reiterated that legalistic interpretations which are against the original intention of the legislature are bad in law. Interpretations of law are to be carried out in accordance with the rights-affirming values of the Constitution, which are constantly being expanded with the evolving needs of people.

Because courts are accountable to the people of India in whose name the Constitution speaks - they must make maximum endeavour to render justice. It is not enough that their decisions are according to law - they must be just. Justness of decisions is determined by how facts are ascertained, and how laws are interpreted and applied.⁴

2. The Constitution reflects the ideals of the freedom struggle. At the time of its framing, the founders envisioned an India where everyone would be able to feel secure in the enjoyment of their rights; achieve their full potential; no person would be discriminated against; minorities would be protected; and

² Prof S.P Sathe, Honorary Director, Institute of Advanced Legal Studies, Pune

³ The Court has a constitutional obligation to forge new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed by the Constitution. Nilabati Behera 1993 SCC 746

⁴ Prof S.P Sathe, Honorary Director Institute of Advanced Legal Studies, Pune

people who were historically, economically and socially disadvantaged would be provided equal opportunities.⁵

3. The Supreme Court has on many occasions interpreted statutes and their accompanying rules in the light of the rights - affirming values of the Constitution. In the Kesavananda Bharati case⁶ when the sanctity of fundamental rights was imperilled, the Court intervened to hold that the powers of the Parliament to amend the Constitution were restricted by the 'inviolability' of its 'basic structure'. Though the basic structure "cannot be catalogued but can only be illustrated", the Preamble to the Constitution reflects its fibre.⁷ The ideals enunciated in the Preamble are given definitive shape in the chapters on Fundamental Rights and Directive Principles of State Policy. Together, they define the core of the Constitution and represent core constitutional values. The ideological underpinning of these values lies in creating a just, free and fair society, devoid of prejudice or bias.

*District Judges should not think that they have no power to enforce constitutional values or uphold human rights principles because they are not vested with writ jurisdiction under Articles 226 or 32 of the Constitution. Because most cases come to the district judiciary in the first instance, the role of judges at the cutting edge level is pivotal in the administration of justice.*⁸

4. Every case that comes before a trial court is unlike the one before. The facts, the situation, the surrounding circumstances are always different. That is why it is said that judicial powers are not supposed to be mechanically applied. Though the principle of law remains constant, the standard of application differs from case to case depending upon the circumstances. For example, a well to do person depriving people of their life's earnings out of greed should not be equated with a poor person stealing a piece of bread out of hunger though both actions may be criminal offences.



Justice J.S. Verma
former Chief Justice of India
and
former Chairperson, National
Human Rights Commission

⁵"The transcendental goal of the Constitution was that of social revolution. Through this revolution would be fulfilled the basic needs of the common man [and woman], and it was hoped, this revolution would bring about fundamental changes in the structure of Indian society". Granville Austin - The Indian Constitution: Cornerstone of a Nation, Introduction, Pg vii, Oxford University Press, New Delhi 1966.

⁶ AIR 1973 SC 1461

⁷ The Preamble promises to secure to all citizens, social, economic and political justice; liberty of thought, expression, belief, faith and worship; equality of status and opportunity; and promotion of fraternity assuring the dignity of the individual and the unity and integrity of the nation.

⁸ Justice J.S. Verma, former Chief Justice of India and former Chairperson, National Human Rights Commission

5. While arriving at a decision, judges must be able to innovatively make use of the vast body of available jurisprudence and use their discretion to further the cause of justice. All that is required is to pursue the test set out in the Maneka Gandhi case⁹ - actions of the State must be right, just and fair, not arbitrary, fanciful or oppressive.
6. For instance, if in a case of rape, medical evidence has been destroyed but there is enough reason to believe the prosecutrix's testimony which is supported by surrounding circumstantial evidence, conviction rather than acquittal would uphold the test.



Ms Flavia Agnes
Advocate
Bombay High Court and
Co-founder Majlis,
a legal resource centre

Upholding of social justice and protection of human rights requires that we have socially committed judges, socially committed law enforcement agencies and socially committed lawyers.¹⁰

7. To fulfil the constitutional goal of putting in place a just and egalitarian society, it is imperative that judges be flexible, open minded, alive to existing social dilemmas and also to the type of prejudices and discrimination that prevail in society. This requires consistency within the judicial establishment that decisions will be informed by a commitment towards social justice and that the protection of the vulnerable or impoverished would be an overriding concern. The judiciary is often the last recourse of a widow who is being denied her rights over property; an aged person whose pension is not being released by the government; a farmer who has been dispossessed of his land by a powerful katta panchayat or a Dalit landless labourer who is being persecuted by a money lender. People - and especially those who belong to marginalised groups - must feel confident to approach the courts, secure in the knowledge that the spirit of the Constitution will prevail and justice will be done.

The need to know and abide by core constitutional values is a must for every citizen and more so for us - who are part of the justice delivery system - entrusted with the responsibility of implementing and preserving the rule of law.¹¹

⁹ 1978 SCC 248

¹⁰ Ms Flavia Agnes, Advocate, Bombay High Court and co-founder Majlis, a legal resource centre

¹¹ Justice J.S Verma, former Chief Justice of India and former Chairperson, National Human Rights Commission

Manifestation of Discrimination in Society and its Reflection in Judicial Decision - Making

This session included:

- ◆ Presentation on Recognising Judicial Bias
- ◆ Presentation on Experiencing Judicial Bias
- ◆ Discussion on Bias in Judicial Decision - Making

As human beings we all carry our social conditioning with us, which like spectacles, colour the way we look at things - as judges we have to be particularly careful not to let this happen.¹²

8. Being part of a social fabric that has an inherent bias towards the poor, women, Dalits and minorities - whether religious, linguistic or sexual - judges have to particularly guard against prejudice and see that it does not consciously or unconsciously affect their functions. The process requires having to rise above individual experiences and familial conditioning and sometimes even question deeply held personal beliefs.
9. The faith of disadvantaged and vulnerable people - who regard the judiciary as their most credible protection against discrimination - hinges on the guarantee of objective decision making and on the guarantee that existing social dynamics or class or caste or religious background of a judge will not have any bearing whatsoever on the final outcome of the case.¹³

How would you treat a poor man when he appears against a rich person? Very often the rich person has a better lawyer, while the poor person is without proper legal assistance. Few judges understand this difference and justice becomes a casualty.¹⁴

10. Poor people make up the overwhelming majority in our country. They face discrimination in every interaction with the State. Judges must be alive to this by not allowing prevailing social mores or superior legal counsel to silence the voices of the marginalised. Whether the matter involves the rights of landless labourers versus those of land owners; workers versus those of the management; indigenous people versus those of private corporations; slum dwellers versus construction companies; hawkers versus municipal



Justice Prabha Sridevan
Judge, Madras High Court



Justice H. Suresh
former Judge
Bombay High Court

¹² Justice Prabha Sridevan, Judge, Madras High Court

¹³ Principle 2 of the Basic Principles on the Independence of the Judiciary .U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985) lays down that judges must decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

¹⁴ Justice H. Suresh, former Judge, Bombay High Court

corporations; or environmentalists versus mega project promoters, the judiciary must seek to enforce the constitutional mandate of securing justice - social, economic and political - to all.



Prof B.B Pande
Faculty of Law
Delhi University

Bias - if ever it is to exist- must be for constitutionalism, protection of human rights and the interests of the poor and underprivileged.¹⁵

11. It is a well established rule that judicial decision-making must be informed by objectivity. However, this objectivity should be tempered by the constitutional premise that every person has a right to be treated equally and that individuals and groups who are historically and socially disadvantaged should be provided equal opportunities and secured their rights.
12. The onus of helping people realise their constitutional entitlements, including the rights to shelter, clothing, food, education, medical facilities, livelihood, and most of all human dignity lies on judges. In this, the judiciary must support the cause of the weak and the defenceless by ensuring proper enforcement of anti-discrimination laws which challenge bigotry and intolerance.



Mr Bojja Tharakam
Senior Advocate
Andhra Pradesh High Court

It is unfair to say that the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 is being misused. Every conceivable law in this country has been misused. We must look at the number of atrocities that take place against Dalits, the number of cases that are registered, the number of cases that are committed to trial and the number of cases in which a conviction is secured.¹⁶

13. Even after half a century of independence and the adoption of egalitarian values in the Constitution, Dalits still face many kinds of discrimination in our country. Though the Parliament has taken many steps to stop the discrimination, most notably through the enactment of the Protection of Civil Rights Act, 1955 and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, many Dalits remain insecure in the protection of their rights.¹⁷ A common refrain amongst those affected is that there exists a view that most cases registered under these acts are concocted

¹⁵ Prof B.B Pande, Faculty of Law, Delhi University

¹⁶ Mr Bojja Tharakam, Senior Advocate, Andhra Pradesh High Court.

¹⁷ The Ministry of Social Justice & Empowerment has expressed serious concern on the low rates of conviction in cases registered under Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 in its Seventh Report (2000), pg 8. Of the total number of cases registered under this Act in the year 2000 only 7.83% cases were disposed off during the year and out of these only 11.04% ended in conviction. Source: Seventh Report of the Ministry of Social Justice & Empowerment (2000) pg 64.

or false. Such a view, if held, is a manifestation of bias and violates the sanctity of the decision making process. Bias within the judicial system may often also be reflected through the reduction of charges against the accused on the grounds that the ingredients of an offence under the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 are not attracted, enabling them to wrongly obtain anticipatory bail or to get the charges against them quashed by the High Court. [However, this won't always be about bias, in some cases there may be good grounds.]

14. In trials under general laws too, there is a perception among many activists of stronger sentences being imposed when the accused is a Dalit. And conversely, of lesser penalties and even acquittal - being handed out when the victim is a Dalit and the accused happens to belong to a so called higher caste.¹⁸

*Women are often victims of prevailing patriarchal values being played out in court. It is a myth that Section 498-A of the IPC is being widely misused. It is the last recourse of a woman who has faced abuse and torture in her matrimonial home - she must find a ready and sympathetic hearing in court.*¹⁹

15. Violence against women remains rife across all communities. Despite significant law reform in this area, and other interventions, justice cannot be ensured without a change in mindset of those who make up the criminal justice system. Women are often wrongly accused of misusing penal provisions that address cruelty/ violence towards them - both mental and physical - and for making unwarranted demands for maintenance and matrimonial rights. In addition, there is also a knowledge deficit about women's rights. For instance, it took a long time to convince the police that an offence under Section 498-A of the Indian Penal Code, 1860 which penalises cruelty towards women is a stand alone offence and is not linked to dowry. Those who manage to get their cases registered are often looked upon as failing to conform to social norms, and in many cases, find themselves re-victimised when they come to the court. They are labelled as being 'fast' or 'unstable' and often aspersions are cast upon their character by opposing counsel. There is often pressure upon women complainants to

¹⁸ A telling example of judicial bias is the Bhanwari Devi rape case. In this case, the District and Sessions Judge, Jaipur while acquitting five men accused of rape, recorded that since the offenders were upper caste men and included a Brahmin, the rape could not have taken place because the prosecutrix was from a lower caste. This judgement was delivered on 15.11.95.

¹⁹ Flavia Agnes, Advocate, Bombay High Court and co-founder Majlis, a legal resource centre.

compromise or conciliate in the interest of protecting the family because the integrity of the home is deemed to be more important than the dignity of the woman.

16. In cases of complaints of rape and sexual molestation, women often find themselves being objectified and treated with disdain.²⁰ Instead of being treated with consideration and sensitivity, they are sometimes blamed - even by the court - for having contributed to commission of the offence. This, coupled with the low rate of conviction in crimes against women, leaves a large majority of women unable to secure effective protection from the criminal justice system.



Dato' Param Cumaraswamy
Vice President
International Commission of
Jurists and
former U.N Special
Rapporteur on the
Independence of Judges and
Lawyers

Being free from personal prejudice or bias must necessarily include detachment from one's own inner prejudices. If in reality this is difficult to apply, the judge or magistrate should recuse herself or himself.²¹

²⁰ In addition to the trauma of rape itself, victims have to suffer further agony during legal proceedings as complaints are handled roughly; victims are more often than not humiliated by the police; and the experience of giving evidence in court is so distressing that it puts severe psychological stress on them. Delhi Domestic Working Women's Forum 1995 (1) SCC 14

²¹ Dato' Param Cumaraswamy, Vice President, International Commission of Jurists and former U.N Special Rapporteur on the Independence of Judges and Lawyers

Judge's Role: A Fair Trial and Due Process for the Accused

This session included:

- ◆ Presentation on Right to a Fair Trial: A Fundamental Human Right
- ◆ Presentation on Legal Aid: Pitfalls and Possibilities
- ◆ Presentation on Custodial Justice
- ◆ Case Studies on Rights of the Accused and Rights of Prisoners
- ◆ Discussion on Fair Trial and Custodial Justice

*The accused have certain rights which need to be nurtured and preserved by the judge who has to maintain a fine balance between the rights of the victim and assurance of fair treatment and due process to the accused.*²²



Justice V.S. Sirpurkar
Chief Justice
Uttarakhand High Court

17. While crime control, of course, is a significant aim, it is also a fundamental rule of justice that the accused must be given adequate opportunity to defend the charges against her/him. The rule of law mandates the observance of due process to the accused, no matter how heinous the offence. Assurance of a fair trial is the first imperative for the dispensation of justice.²³
18. Fair trial principles have been agreed upon and recognised by the international community of nations. They are a part of international customary law and are embedded in the Universal Declaration of Human Rights,²⁴ the International Covenant on Civil and Political Rights²⁵ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. They have also been expressly guaranteed by the

²² Justice V.S. Sirpurkar, Chief Justice, Uttarakhand High Court

²³ Police Commissioner Delhi AIR 1997 SC 95

²⁴ Article 11(1) of the Universal Declaration of Human Rights lays down that everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which s/he has had all the guarantees necessary for her/his defence.

²⁵ Article 14 (3) of the International Covenant on Civil and Political Rights lays down that in the determination of any criminal charge against her/him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which s/ he understands, of the nature and cause of the charges against her/him; (b) to have adequate time and facilities for the preparation of her/his defence and to communicate with counsel of her/his own choosing; (c) to be tried without undue delay; (d) to be tried in her/his presence, and to defend her/himself in person or through legal assistance of her/his own choosing; to be informed, if s/he does not have legal assistance of this right; and to have legal assistance assigned her/him, in any case where the interests of justice so require, and without payment by her/him in any such case if s/he does not have sufficient means to pay for it; (e) to examine, or have examined, the witnesses against her/him and to obtain the attendance and examination of witnesses on her/his behalf under the same conditions as witnesses against her/him (f) to have free assistance of an interpreter if s/he cannot understand or speak the language used in court; (g) not be compelled to testify against her/himself or to confess guilt.

Constitution²⁶ - in the chapter on Fundamental Rights - and are inherent in many of the provisions of the Code of Criminal Procedure, 1973.



Justice C.V Wigneswaran
former Judge
Supreme Court of Sri Lanka

The foundation of a fair and just system of criminal justice lies in the presumption of innocence and fair hearing.²⁷

19. The first and foremost principle is that a judge must begin with a premise that the person being charged is innocent. This may be difficult in high profile cases where the accused is often subject to a 'trial by media'. Judges therefore have to keep themselves aloof from all the media posturing, conjecture and rumours that abound in widely publicised cases. They must personally detach themselves from the nature of charges to prevent personal dislike or aversion vitiating the presumption of innocence. To ensure that justice is not only done but is also seen to be done, trials are conducted publicly unless there are compelling reasons for not doing so.²⁸ It is the right of citizens to be able to enter a courtroom anywhere in India and observe the proceedings therein. This right derives from the democratic privilege to observe the working of public institutions.
20. Procedural fairness also requires that the accused be given sufficient opportunity of being heard. This can only be done if the accused are formally informed about the nature of charges and given an adequate opportunity to defend themselves in a language they understand. Unfortunately, many court users particularly those belonging to economically and socially weaker sections are effectively denied access to information about their case, because the paper work and proceedings are conducted in English. Even if they are conducted in the official language of the state, it may be alien to the accused. A fair hearing is only possible when the complainant and the accused are able to follow the proceedings and progress of the case. It is therefore incumbent on the judge to arrange for an interpreter²⁹ in cases where it is so warranted, and also to see that the defence lawyer is defending the accused properly and not misleading her/him in anyway.

²⁶ Article 20 of the Constitution lays down that (1) no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence (2) no person shall be prosecuted and punished for the same offence more than once (3) no person accused of any offence shall be compelled to be a witness against her/himself.

²⁷ Justice C.V Wigneswaran, former Judge, Supreme Court of Sri Lanka

²⁸ Based on the discretion of a judge being exercised under Section 327 (1) of the Code of Criminal Procedure (CrPC) or under Section 327 (2) CrPC which requires inquiry into and trial of rape cases to be conducted in camera.

²⁹ This right was upheld by the European Court of Human Rights in *Cuscani v U.K* Application No 32771/96

Some judges say that it is my policy not to grant bail in certain types of cases - this is an escapist policy. Individual circumstances of each case should be taken into account by the presiding judge before determining whether there are enough grounds to grant bail or not. All that is required is that the judge should be honest to the facts and to the law.³⁰

21. Another area of crucial importance is that of bail and remand. Mechanical committing of accused persons to police or judicial custody remains one of the biggest obstacles to the realisation of the right to life and personal liberty. Even if a person is finally acquitted, s/he has to grapple with the social stigma attached with having had to spend time in custody. Magisterial and trial courts must be fully convinced of the necessity to remand a person before denying bail. Even if bail is granted, the poor are especially vulnerable to de-facto denial of bail if the amount fixed is beyond their means; or if they are asked to produce financially sound persons to act as sureties for them; or if they are asked to furnish property as security for the grant of bail.³¹ If at the time of production, it appears to the court that the accused cannot arrange for a lawyer then s/he must be provided with access to competent legal aid by the local legal services authority.

Assurance of proper legal aid to poor, indigent or vulnerable people is not a matter of charity - it is a matter of right.³²

22. The right to obtain legal aid has been upheld by the Supreme Court, which has consistently maintained that those without adequate means to put up a defence must be provided with a competent counsel at State expense³³ otherwise the trial and subsequent conviction would be bad in law.³⁴



Dr S. Muralidhar
Advocate, Supreme Court of
India and
Part-time Member
Law Commission of India

³⁰ Justice V.S Sirpurkar, Chief Justice, Uttaranchal High Court

³¹ The amount of bail should be fixed keeping in mind the paying capacity of the accused. Also if it can be ascertained that the accused have roots in the community that would deter them from fleeing, the need to have people stand as surety for them or to furnish a certain amount of money as bail bond can be dispensed with. Hussainara Khatoon AIR 1979 SC 1360 and Motiram (1979) 1 SCR 335.

³² Dr S. Muralidhar, Advocate, Supreme Court of India and Part-time Member, Law Commission of India

³³ Section 12 of The Legal Services Authorities Act, 1987 provides an exhaustive list of persons who are entitled to receive legal aid - Members of scheduled castes/tribes; victims of human trafficking or begar; women and children; persons with disability; victims of undeserved want arising out of mass disasters, ethnic violence, caste atrocities, floods, droughts, earthquakes or industrial disasters; industrial workmen; persons in custody in protective homes, juvenile homes or psychiatric hospitals/nursing homes; and those with income less than Rs 12,000 per annum if the case is before the Supreme Court or Rs 9,000 per annum if the case is before any other court (The National Legal Services Authority Rules, 1995 lay down that any citizen whose annual income from all sources does not exceed Rs 50,000 shall be entitled to legal aid).

³⁴ Hussainara Khatoon AIR 1979 SC 1377, Khatri AIR 1981 SC 928, Suk Das AIR 1986 SC 991, Hoskot AIR 1981 SC 1548

23. Mere provision of an empanelled lawyer from the legal services authority is not enough. S/he must be able to provide an adequate defence to the accused and must be given sufficient time and facility for preparing the defence. In practice, when the defence counsel appears ineffective, the judge may assist during the trial. However, this alone does not guarantee fairness of procedure. An incompetent or ineffective lawyer should be replaced. Such situations can be averted if the district judiciary takes a proactive interest in guaranteeing that well qualified lawyers with human rights leanings are consistently empanelled with the District Legal Services Authority; political appointees are discouraged; and performance is periodically reviewed to weed out those not inclined or capable enough to provide quality legal services to needy persons.
24. Denial of adequate legal representation besides resulting in injustice is also responsible for an individual's rights against torture and harassment in custody not being enforced.³⁵

*The judiciary has to function as a watchdog to see that not only the legislature enacts custodial laws as per constitutional and statutory rights but also to ensure that powers of the executive in respect of arrest, interrogation, pre and post trial custody are exercised as per rules too.*³⁶

25. Apart from securing due process and a fair trial to the accused, courts are also vested with the responsibility of overseeing the conduct of the police and prison authorities, to whose custody accused persons are committed. An essential element of custodial justice is that judges be particularly vigilant to prevent incursions on individual liberty through wrongful exercise of arrest powers.³⁷ After ascertaining that the cause and rationale for the arrest is justified, judges need to ensure that the accused is treated with dignity; not

³⁵ Sheela Barse 1983 (2) SCC 96

³⁶ Prof B.B Pande, Faculty of Law, Delhi University

³⁷ No arrest can be made because it is lawful for a police officer to do so. A police officer must be able to justify an arrest which should not be made without a reasonable satisfaction being reached after some investigation about the genuineness or bonafides of a complaint and a reasonable belief both as to the person's complicity in the offence and the need to effect an arrest. Joginder Kumar (1994) 4 SCC 260.

³⁸ Handcuffing is only permitted if there is a 'clear and present danger' that the person will escape and is so dangerous or violent that there is no other way s/he can be kept under control except by handcuffing. In any case once a person has been produced before the court, the police must take its permission before further handcuffing the accused person. Sunil Batra 1978 (4) SCC 494, Prem Shankar Shukla 1980 Cri LJ 930, Citizens for Democracy 1995 (3) SCC 743.

handcuffed;³⁸ and that the detaining authorities observe all procedural safeguards.³⁹ Complete adherence to procedural safeguards will only come about through consensus within the judiciary to take stringent action on failure to adhere with the law. Turning a blind eye towards instances of illegal detention, forced confessions and torture only lead to perpetuation of these crimes. Simple reprimand or sending of a report to a superior officer for custodial misconduct is not sufficient - indeed it amounts to acquiescence with the practice. Disciplinary action must be ensured against errant officers and if warranted, cases should be registered for breaking the law.

*District Judges and magistrates must carry out regular visits to prisons and police lock-ups to ensure people are not wrongly imprisoned or ill-treated.*⁴⁰

26. Apart from prisons and police lock-ups, custodial injustice is widely prevalent in juvenile homes, protective homes, Nari Niketans, beggar homes and psychiatric hospitals. District Judges in their capacity as Chair of the District Legal Aid Authority are responsible to oversee the operation of all state custodial institutions in the district and ensure the existence of humane living conditions. Judicial inspections and interactions with the inmates of these institutions assist in preventing and redressing abuses; preventing detention beyond the maximum statutory period; tackling corruption; and denial of basic facilities. For instance, a District and Sessions Judge was able to address the complaint of a jail inmate, convicted in five different cases, whose period of sentence was being calculated to run consecutively instead of concurrently.
27. Lawyers empanelled with legal aid authorities can be encouraged to file complaints on behalf of inmates for the district judiciary to take up. If structural or systemic reforms are needed, a report may be sent detailing allegations to the High Court, which can take up the issue in the form of a writ petition.

*Custodial Justice, summed up, means ensuring fair and humane investigation; exercising oversight of arrest powers; reinforcing the privilege of the accused against self-incrimination; liberal bail and personal bond release in deserving cases; preventing detention of juveniles in adult custodial institutions; and enforcing the right to legal aid.*⁴¹

³⁹ As laid down in D.K Basu AIR 1997 SC 610 and existing under the Code of Criminal Procedure, 1973.

⁴⁰ Justice V.S Sirpurkar, Chief Justice, Uttaranchal High Court

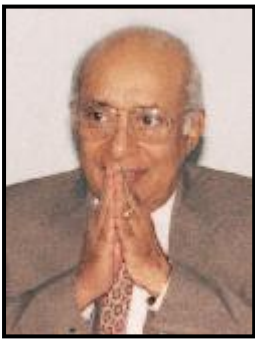
⁴¹ Prof B.B Pande, Faculty of Law, Delhi University

Session: 4

Judge's role in Ensuring a Fair Trial - Justice for Victims

This session included:

- ◆ Presentation Case Study on Inadequate Investigation
- ◆ Presentation on Court User's Experience of Ineffective Prosecution: Problems and Remedies
- ◆ Presentation on What the Judge Can Do to Protect Rights of Victims
- ◆ Discussion on Rights of Victims



Justice K.T. Thomas
former Judge
Supreme Court of India

At the trial court, judges must ensure that the prosecution and investigation are not lax. Their role is not limited merely to that of an umpire - they should actively participate in the proceedings.⁴²

28. On too many occasions, victims/survivors are reportedly left dissatisfied in their quest for justice. The rigmarole of judicial processes, coupled with the length of proceedings, may wear them out and contribute to loss of faith in the system. Overburdening of courts; poor prosecution; shoddy investigation; and the particular problem of witnesses turning hostile have contributed to the present sense of despondency amongst court users.
29. While reducing the quantum of case load and increasing the number of judicial officers are matters outside the purview of individual judges, strict oversight of the investigation and prosecution is an issue that requires exacting attention from judges.⁴³ A clear lead from within the judiciary to subject negligent investigation and careless prosecution to rigorous supervision at the trial court itself is fundamental to access justice. It was suggested that District and Sessions Judges should hold periodic meetings with their subordinates and exercise close supervision over magisterial courts in this regard.



Ms Navaz Kotwal
Coordinator
Gujarat Programme, CHRI

Victims expect and must get empathy from the courts. The process of getting justice on the ground is so long and cumbersome that it leads one to wonder whether dialogues such as these will really change things.⁴⁴

⁴² Justice K. T. Thomas, former Judge, Supreme Court of India

⁴³ It is the duty of judges to discover the truth and for that purpose ask questions, in any form and at any time, from any of the witnesses or parties to the case about any fact. This must be done without unduly trespassing upon the functions of the public prosecutor or the defence counsel, without hint of partisanship or appearing to frighten or bully witnesses. Ram Chander (1981) 3 SCC 191

Trial/ first courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder, recording evidence, overlooking the object of the trial i.e to get at the truth. Zahira Habibullah Shiekh (2004) 4 SCC 158

⁴⁴ Ms Navaz Kotwal, Coordinator, Gujarat Programme, Commonwealth Human Rights Initiative

30. The quest for justice involves a lengthy process of police investigation; filing of the charge-sheet; committing of the case to the appropriate court; recording of evidence; cross examination; and hearing of arguments before the final verdict is delivered. During this time, victims may be intimidated or pressured to withdraw their cases; subject to undue interference and harassment by the police; and made to wait long periods by court clerks to get orders and other information about their cases. This is particularly pronounced when the accused are rich and powerful or enjoy popular support. In the Melavalavu murder case⁴⁵ in which six Dalits were killed in broad daylight by caste Hindus, relatives of the deceased and even the lawyers assisting in the prosecution of the case were given death threats, prompting them to appeal to the President of India for protection.⁴⁶

*As judges, we must build consensus on what we as a body can do to discharge our duty and safeguard human rights of victims both within our states and outside them.*⁴⁷

31. Being at the cutting edge of justice delivery, trial court judges have to be especially sensitive to the victim's perspective. This can be done by taking practical steps such as making sure maintenance orders⁴⁸ are based on realistic assumption of living costs, ensuring compliance with basic legal safeguards such as holding in-camera trials in rape cases⁴⁹ or through effective use of available provisions in criminal law - for example, ensuring restitution for victims of crime through imposition of fines on offenders at the time of conviction.⁵⁰ Due process for the victim requires that the judge does not allow defence counsel - especially when comprising of high profile lawyers - to steamroll the judicial process in instances where the prosecution is weak by keeping a list of up to date case law for ready reference.

⁴⁵ Crime No. 508/97 of Melur Police Station.

⁴⁶ People's Union for Civil Liberties (PUCL) Bulletin, August 2001. <http://www.pucl.org/reports/TamilNadu/2001/rathinam.htm>

⁴⁷ Justice J.S Verma, former Chief Justice of India and former Chairperson National Human Rights Commission

⁴⁸ Under Section 125 of the Code of Criminal Procedure, 1973

⁴⁹ Section 327(2) Code of Criminal Procedure, 1973. There have been representations from many quarters that in-camera trials may overawe victims and witnesses, especially when, their support group is denied entry to the court. The proviso to Section 327 (2) states that, on an application made by either of the parties, the presiding judge may allow any particular person, to have access to, or be or remain in, the room or building used by the court. This provision should be used to allow the victim's support group, access to the court room to enable victims and witnesses to depose truthfully - without being intimidated by the paraphernalia of the court or by a battery of defence lawyers.

⁵⁰ Section 357 of the Code of Criminal Procedure, 1973

32. India has a history of riot victims being denied justice through legal processes. Perpetrators of communal violence in Delhi 1984, Mumbai 1992-93 and Gujarat 2002 continue to evade justice because of inadequate or ineffective investigations and because of silencing of victims, activists and most importantly witnesses. This has shaken the faith of minorities in the criminal justice system. The onus of making sure that the sanctity of the legal process is not tampered with, both inside and outside the court, lies heavily on the judge conducting the trial. S/he must closely examine the veracity of the investigation report forwarded by the police and if necessary, in the interest of justice even alter or add to the charge, which can be done at time before the judgement is pronounced.⁵¹ Witness protection too, is an area that requires judicial notice as it is fundamental to the final outcome of the case.

*Witnesses come from far off places, not to be disrespected but to aid the courts. They should not have to come to court more than once - it tells upon the efficiency of the judge.*⁵²

33. The course of justice is frequently obstructed because witnesses fail to cooperate with the prosecution either out of fear or inducement, and sometimes both. Even when these factors are not in play, witnesses may become exhausted with the whole process on being made to wait long hours in court premises and summoned repeatedly. This, coupled with the shabby treatment meted out to them, especially if they are poor, seriously impairs the veracity of their testimony.⁵³
34. Trial judges need to be especially attuned to the fact that witnesses have to forgo all activities - economic and social- on the particular day they are summoned to court. Complete statements of witnesses should be recorded on that same day unless there are compelling reasons for not doing so. One suggestion might be that if the testimony of a witness is not vital to the outcome of the case, her/his statement could be accepted on affidavit.⁵⁴

⁵¹ Section 216 of the Code of Criminal Procedure, 1973

⁵² Justice K. T Thomas, former Judge, Supreme Court of India

⁵³ Witnesses have to visit the court at their own cost every time a case is deferred to another date and in adjourning a case without a valid reason, a court unwittingly becomes party to miscarriage of justice. Swaran Singh AIR 2000 SC 2017

⁵⁴ Under Section 296 of the Code of Criminal Procedure, 1973

35. Curbing the increasing tendency of witnesses turning hostile rests with trial court judges themselves.⁵⁵ An unscrupulous witness is emboldened to lie in court because perjury provisions under the Indian Penal Code, 1860 are rarely invoked. The equally compelling problem of witnesses being intimidated to retract their testimony in court is heightened by the absence of a recognised witness protection programme. Proactive judicial action in ascertaining whether victims, their families or witnesses, are being subjected to coercive pressure to withdraw their statements, and vigilance in ordering provision of adequate security cover in deserving cases can help reduce the incidence of perjury. The argument against such action that the police are already stretched beyond its limits should not be allowed to obscure the course of justice.

*In their supervisory capacity, judges must safeguard the interests of all those who come before the court - victims, witnesses, accused or outsiders.*⁵⁶



Justice A.K. Rajan
Judge
Madras High Court

⁵⁵ Under Section 340 of the Code of Criminal Procedure, 1973

⁵⁶ Justice A.K. Rajan, Judge, Madras High Court

Session: 5

Judicial Responses to the Rights of Vulnerable and Marginalised People

This session included:

- ◆ Presentation on Enforcement of Socio-Economic Rights under the Indian Constitution
- ◆ Film and Presentation on Ensuring Access to Justice: Using the Rights Based Approach to Judicial Decision- Making
- ◆ Discussion on Judicial Responses to Rights of Poor and Vulnerable People

Those who do not have large pecuniary resources at their command must be able to invoke the judiciary to assure for themselves equality of opportunity and access to resources.⁵⁷

36. Realisation of socialist values and assurance of maximum benefit to maximum people along-with the protection of individual freedom is a core value of Indian constitutional culture, which has been shaped by the Supreme Court through the unique development of Public Interest Litigation (PIL). The Apex Court has consistently come to the aid of the vulnerable and marginalised by enlarging the scope of the Right to life and personal liberty. It has held that Article 21 includes the right to legal aid;⁵⁸ the right to shelter;⁵⁹ the right to pollution free water and air;⁶⁰ the right to livelihood;⁶¹ timely medical treatment in a government hospital;⁶² the right to freedom from sexual harassment;⁶³ the right of prisoners against torture⁶⁴ and solitary confinement;⁶⁵ and significantly, the right to live with human dignity.⁶⁶

Although trial courts cannot issue writs - they can issue injunctions and other orders. Many of the great judgements of the Supreme Court - like the Ratlam Municipality's case - have had their genesis at the trial court level.⁶⁷

⁵⁷ Justice C.V Wigneswaran, former Judge, Supreme Court of Sri Lanka

⁵⁸ Hussainara Khatoon AIR 1979 SC 1377, Khatri AIR 1981 SC 928, Suk Das AIR 1986 SC 991, Hoskot AIR 1981 SC 1548

⁵⁹ Olga Tellis (1985) 3 SCC 545

⁶⁰ M.C Mehta AIR 1987 SC 1086, 1090; B.L Wadhwa AIR 1996 SC 1446; Vellore Citizen's Welfare Forum AIR 1996 SC 2715

⁶¹ Narendra Kumar JT (1994) 2 SC 94

⁶² Paschim Bengal Khet Mazdoor Society AIR 1996 SC 2426

⁶³ Vishakha AIR 1997 SC 3011

⁶⁴ Sunil Batra II (1980) 3 SCC 488

⁶⁵ Sunil Batra AIR 1978 SC 1675

⁶⁶ Francis Coralie Mullin AIR 1981 SC 746

⁶⁷ Prof S.P Sathe, Hon Director, Institute of Advanced Legal Studies, Pune

37. A large number of issues that form the subject matter of writs can and should be addressed by the district judiciary itself - through injunctions and other orders under the civil and criminal procedure codes - by treating acts violating fundamental rights as actionable torts - accompanied by the liability of violators to pay compensation. For instance, in the Municipal Council, Ratlam case,⁶⁸ the Magistrate took up the plea of residents under Section 133 of the Code of Criminal Procedure, 1973 and directed the municipality to draw up a plan to provide proper drainage facilities and ensure sanitary conditions for inhabitants. In the Santra case,⁶⁹ where a poor woman became pregnant, even after she had received a certificate confirming that she had been sterilized at a government hospital, the trial court held the medical authorities to be negligent and awarded her damages, which were upheld by the court of the District Judge and later by the High Court and the Supreme Court.
38. Because of the physical distance and the often prohibitive costs involved in approaching the superior courts, ordinary people must be able to seek and get justice at the district level.

Take for example, the Factories Act, 1948 or the Air (Prevention and Control of Pollution) Act, 1981 or the Environment (Protection) Act, 1986- all three have penal provisions which are not meant to be imposed by the High Court in the first instance. We have become too used to expecting the High Court to issue a writ and monitor the wrongdoer that we have forgotten that there is a whole set of statutes to be operationalised by the District Judiciary itself.⁷⁰

39. Progressive laws and landmark rights - affirming Supreme Court directives are meaningless, if actual implementation on the ground is lax. For this, courts at the cutting edge have to be both vigilant and proactive to ensure proper adherence to existing laws. District Judges in their capacity as Chairs of the District Legal Aid Authority must spur empanelled lawyers to visit factories and other places where commercial activities are undertaken to see whether employee guarantees under the Minimum Wages Act, 1948 Contract Labour (Regulation and Abolition) Act, 1970 or Bonded Labour System (Abolition) Act, 1976 are secured and if environmental and pollution control standards are being maintained.

⁶⁸ AIR 1980 SC 1622

⁶⁹ (2000) 5 SCC 182

⁷⁰ Dr S. Muralidhar, Advocate, Supreme Court of India and Part-time Member, Law Commission of India

40. The onus of balancing competing local interests lies foremost with the district judiciary as they are in the closest proximity and thereby best placed to comprehend the realities of a situation. Whether the issue involves prawn farms⁷¹ or leather tanneries,⁷² economic activities of a handful but powerful group of people must not be allowed to threaten the well-being and health of local communities. Conversely, because certain vulnerable groups such as slum dwellers,⁷³ adivasis⁷⁴ or migrant labour⁷⁵ are in a minority, their rights to livelihood and shelter must not be discounted or overlooked.

If the rule of law is to prevail and poor and powerless people are to be secured their life, liberty and property, trial courts have to be activated. District courts are forums most accessible to common people. Unless they are sensitive to social justice and human suffering, the ordinary person will not have faith in the rule of law.⁷⁶

⁷¹ Prawn farming in ecologically fragile coastal zones was ordered to be discontinued on a petition that some states were allowing big business houses to establish large scale prawn farms in violation of the Environment (Protection) Act, 1986 and other provisions of law. S Jagannath (1997) SCC 877

⁷² Tanneries discharging noxious effluents in the river Ganga were ordered to be shut down till the time they set up Primary Treatment Plants. M.C Mehta AIR 1988 SC 1037

⁷³ Eviction of a person from a pavement or slum without provision of an alternative site for resettlement will ultimately lead to deprivation of means of livelihood in violation of the Right to Life. Olga Tellis (1985) 3 SCC 545

⁷⁴ Fishing permits granted to tribals in lieu of their traditional fishing rights before the area was declared a protected forest have been held valid. Animal and Environmental Legal Defence Fund JT 1997 (3) SC 298

⁷⁵ The Inter- State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 must be properly implemented. Damodar Panda (1990) 4 SCC 11; Labourers working on Salal Hydro Project (1984) 3 SCC 538; and Bandua Mukti Morcha (1984) 3 SCC 161

⁷⁶ Prof S.P Sathe, Hon Director, Institute of Advanced Legal Studies, Pune

Ensuring Effective Enforcement of Rights

This session included:

- ◆ Presentation on Role of Human Rights Courts and Commissions in Building a Human Rights Culture
- ◆ Presentation on Judicial Accountability and the Role of the Judiciary as Protector of People's Rights
- ◆ Discussion on Effective Enforcement of Human Rights

The purpose of dialogues such as this is to embed human rights in the work of judges. Human rights values must inform judicial practice, process and decision making. Only then can they become a living reality in our courts rooms and in the lives of ordinary people - and especially vulnerable groups - who struggle to get access to justice.⁷⁷



Maja Daruwala
Director, CHRI

41. Being at the helm of the criminal justice system, it is crucial for judges to interpret existing statutes in harmony with human rights values. Human rights jurisprudence hinges on State responsibility to prevent rights violations, not only by State players but also by non-State players.
42. Trial courts being at the cutting edge of justice delivery must base decisions on fair and just process and not be constrained by overly legalistic and technical formulations of the law. There is abundant case law, both domestic and international, to support judges who wish to take a human rights approach from being limited by legal technicalities. The Constitution expressly recognises and supports human rights in the chapters on Fundamental Rights and Directive Principles of State Policy.⁷⁸ India is also committed to a human rights regime under its obligations in international law.⁷⁹
43. In addition, statutory institutions⁸⁰ - particularly the National and State Human Rights Commissions set up under The Protection of Human Rights

⁷⁷ Ms Maja Daruwala, Director, Commonwealth Human Rights Initiative

⁷⁸ Directive Principles of State Policy though not legally enforceable in Constitution must be read with Fundamental Rights and the two must be harmoniously construed. *Grih Kalyan Kendra Worker's Union* (1991) 1 SCC 611; *Literate Association* (1990) 2 SCC 396.

⁷⁹ Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into domestic provisions to enlarge the meaning and content thereof, to promote the object of constitutional guarantees. *Vishakha* (1997) 6 SCC 241

⁸⁰ Such as the Women's Commission, National Commission for Scheduled Castes and Tribes, Minorities Commission

Act, 1993⁸¹ - can help courts ensure greater access to justice. Human rights commissions, working in tandem with the courts, have on several occasions assured effective enforcement of rights.

*Courts have to realise the presence of human rights commissions, which play a complementary role to the judiciary, and the fact that these commissions can help in the better protection of human rights.*⁸²

44. For instance, the Supreme Court was able to constructively take the help of the National Human Rights Commission to monitor the situation when reports of starvation deaths came in from Orissa; and in conducting an inquiry into allegations of mass cremations of "unidentified persons" by the police in Punjab.⁸³ On both these occasions, the Commission was able to aid and the advise the Court on the basis of its independent investigations.
45. The National Human Rights Commission has also issued a number of guidelines⁸⁴ based on constitutional provisions, the country's obligations under international law, existing statutes, and general principles of law. Trial courts could operationalise the guidelines by insisting on mandatory observance by concerned authorities.



Justice F.M Ibrahim Kalifullah
Judge
Madras High Court

*As judges we must remember that regard for public welfare is the highest law.*⁸⁵

46. As trustees of the constitutional responsibility to protect human rights and uphold the rule of law, judges need to be particularly alive to the concerns of public well-being. This requires adoption of a pro-active approach. For instance, a District and Session Judge used the legal aid authority to inquire into a news report about an accident victim allegedly dying due to the negligence of medical authorities, and got a case registered on the basis of its findings. The judiciary must go beyond handing out punishments or

⁸¹ Section 2 (d) defines human rights as, "rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by the courts in India". International Covenants being the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966

⁸² Justice J.S Verma, former Chief Justice of India and former Chairperson, National Human Rights Commission

⁸³ Reference made by the Supreme Court of India on Writ Petition Nos. 447/95 and 497/95

⁸⁴ On custodial deaths/rapes; encounter deaths; regulation of lie detector tests; arrests; measures to improve police-public relations; human rights in prisons; women's rights; rights of children; ending manual scavenging; illegal trade in human organs; and on addressing cases of child sexual abuse by the media

⁸⁵ Justice F.M Ibrahim Kalifullah, Judge, Madras High Court

passing an order either way - it must guarantee protection for the future to affected persons or communities for the wrongs they have suffered and assure them proper restitution and reparation for their losses.

47. Regard for public welfare also means making people aware of their rights by holding public awareness programmes; and by publishing and distributing material to raise awareness about rights and about existing enforcement mechanisms - including those for alternate and specialised dispute resolution such as Lok Adalats and Consumer Courts.
48. It also requires those entrusted with responsibility to look both outwards - to stay in touch with ground realities and contemporary social trends - and inwards - to see whether public confidence and trust is being upheld.

Accountability and transparency are the very essence of democracy. Not one single public institution or for that matter even a private institution dealing with the public is exempt from accountability. Hence, the judicial arm of the government too, is accountable.⁸⁶

49. While the judiciary must be insulated from political and executive intrusions to maintain its guarantee of independence, it is a universally recognised principle of jurisprudence that judges are accountable for the impartial conduct of trials in an open court - unless there are compelling reasons for not doing so - expeditiously within a reasonable period of time.⁸⁷ To guarantee proper procedure and reduce any hint of arbitrariness, it is necessary to explain clearly, the rationale for deciding a case. Furnishing of a proper rationale to court users is fundamental to realisation of the legal maxim - justice should not only be done, it should also appear to be done.

⁸⁶ Dato' Param Cumaraswamy, Vice President, International Commission of Jurists and former United Nations Special Rapporteur on the Independence of Judges and Lawyers

⁸⁷ Article 14 (1) of the International Covenant on Civil and Political Rights, 1966 lays down that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Critiquing judicial decisions is essential to upholding of democratic values. How else can we ensure judicial accountability? The critique should not merely be limited to legal analysis but also include sociological analyses.⁸⁸

50. With the grounding of democracy, judicial determinations are scrutinised by legal scholars, social activists and by members of the public, whose confidence in the enforcement of rights derives its strength from the expectation that judges will exhibit higher standards of professional and personal conduct than those demanded of ordinary citizens or other public servants.

The Bangalore Principles of Judicial Conduct 2002,⁸⁹ developed by eminent judges and jurists from across the world, call upon the judiciary at all levels to exhibit the following characteristics:

- ✦ independence - in both its individual and institutional aspects
- ✦ impartiality - not only in the decision itself but also in the process by which the decision is made
- ✦ integrity - as it is essential for the proper discharge of judicial office
- ✦ propriety - as propriety and its appearance are essential to the performance of all the activities of a judge
- ✦ equality - as ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office
- ✦ competence and diligence - as they are prerequisites to the due performance of judicial office

While the executive arm is often apprehensive of judicial independence, the judicial arm is often apprehensive of judicial accountability. Judicial accountability is not inimical to judicial independence. Judges no longer can oppose calls for greater accountability on grounds that it will impinge on their independence. Judicial accountability, without impinging on judicial independence will enhance judicial integrity for judicial impartiality.⁹⁰

⁸⁸ Prof S.P Sathe, Hon Director, Institute of Advanced Legal Studies, Pune

⁸⁹ The Bangalore Draft Code of Judicial Conduct, 2001, adopted by the Judicial Group on Strengthening Judicial Integrity as revised at the Roundtable Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002

⁹⁰ Dato' Param Kumaraswamy, Vice President, International Commission of Jurists and former United Nations Special Rapporteur on the Independence of Judges and Lawyers

Judicial Initiatives on Delivering Access to Justice in Tamil Nadu

The participants identified specific action point initiatives that could be taken by the judiciary within Tamil Nadu for furthering access to justice. These focused on substantive issues and approaches to interpreting the law in the prevailing socio-economic context, and took into account the dual role of judges as members of the judiciary and representatives of the State Legal Services Authority.

TO JUDGES:

Interpreting the Law

- ◆ In adjudicating cases, interpret the law, in conformity with human rights values and principles;
- ◆ Dispense justice with a human touch rather than carrying out strict and rigid interpretation of statutes;

Providing Legal Services

- ◆ Encourage empanelled lawyers under the Legal Service Authorities Act, 1987 to identify both practical and substantive obstacles to justice and bring them to the notice of the District Judiciary;
- ◆ Apply the existing powers of the District and Sessions Judge under the Legal Services Authorities Act, 1987 to hold public awareness camps, in conjunction with non-governmental organizations where appropriate, to inform people about their rights and available remedies; and

Developing a Human Rights Culture

- ◆ Take initiatives to hold discussions among cross sections of society, including for example civil servants, local administration and civil society on ways and means to bring about a human rights culture.

TO GOVERNMENT:

Required Procedural Reforms

- ◆ Consider enactment of a witness protection law to pave the way for a comprehensive witness protection programme;

- ✦ Consider amendment of the Protection of Human Rights Act, 1993 to make recommendations/ guidelines laid down by human rights commissions binding by law; this will pave the way for their enforcement by the courts;
- ✦ Consider enhancement of powers of District and Sessions Judges to assist them to bring to account erring police officials; and
- ✦ Consider separation of the police's law and order and investigation duties.

Agenda

Friday, November 5, 2004

Inaugural Session

- 18:45 Invocation
18:50 Lighting of the Lamp
19:00 Welcome Address
Ms. Maja Daruwala, Director
Commonwealth Human Rights Initiative (CHRI)
19:05 Need for Judicial Dialogue on Access to Justice
Hon' Justice F.M Ibrahim Kalifulla, Madras High Court
19:15 Presidential Address
Hon' Justice N.V Balasubramanian, Madras High Court and
President, Board of Governors, Tamil Nadu State Judicial Academy
19:25 Inaugural Address
Hon' Justice B. Subhasan Reddy, Chief Justice, Madras High Court
19:40 Key Note Address
Dato' Param Cumaraswamy, Vice President International Commission of
Jurists
20:10 Vote of Thanks
Thiru. M Jeyapaul, Director, Tamil Nadu State Judicial Academy
20:15 Dinner, hosted by the Madras High Court
Venue: Tamil Nadu State Judicial Academy

Saturday, November 6, 2004

Session 1: The Judge as a Protector of Core Constitutional Values

Moderator: Dato' Param Cumaraswamy
Vice President International Commission of Jurists

This session will focus on the judge's special position in the common law system where s/he has the discretion to liberally interpret and apply the law in its spirit, rather than being bound by its letter. This will be followed by a discussion on how core constitutional values can be upheld in the daily business of the court.

- 09:00-09:30 Group Exercise
09:30-09:50 Judge's role in the Common Law System:
Protecting Core Constitutional Values
Hon' Justice J.S Verma, former Chief Justice of India and
Former Chairperson, National Human Rights Commission (NHRC)
09:50-10:20 Discussion on Judge's Role in the Common Law System -Protecting Core
Constitutional Values
Panelists: Prof. S.P Sathe, Honorary Director, Institute of Advanced Legal Studies,
Pune and Ms Flavia Agnes, Senior Advocate, Bombay High Court
10:20-10:40 Coffee/Tea Break

Session 2: Manifestation of Discrimination in Society and its reflection in Judicial Decision making

Moderator: Hon' Justice Prabha Sridevan
Madras High Court

This session will focus on how vulnerable people often find themselves at the receiving end of injustices. The session will focus on discrimination, as it exists in our society- how it may creep into the judicial process- and how judges can address it.

- 10:40-11:00 **Recognising 'Judicial Bias'**
Hon' Justice H. Suresh, former Judge, Bombay High Court
- 11:00-11:20 **Experiencing judicial bias**
Mr. Bojja Tharakam, Senior Advocate, Andhra Pradesh High Court
- 11:20-12:00 **Discussion**

Session 3: Judge's role: A Fair Trial and Due Process for the Accused

Moderator: Hon' Justice V.S Sirpurkar
Chief Justice, Uttaranchal High Court

This session will focus on custodial justice- the role of the judges as protectors of accused persons. It will look at how judges can ensure due process to the accused through oversight of the police (by curbing police malpractice), legal aid authorities (ensuring quality defence to indigent accused) and the prisons department (inspections to see that prisoners are not being denied their rights)

- 12:00- 12:20 **Right to a Fair Trial: A Fundamental Human Right**
Hon' Justice C.V Wigneswaran, Former Judge, Supreme Court of Sri Lanka
- 12:20-12:40 **Legal Aid: Pitfalls and Possibilities**
Dr S. Muralidhar, Advocate, Supreme Court of India
- 12:40-13:00 **Discussion**
- 13:00-14:00 **Lunch**
- 14:00-14:20 **Custodial Justice**
Prof. B.B Pande, Professor of Law, Campus Law Centre, Delhi University
- 14.20-14.40 **Discussion**
- 14:40-15:30 **Group Discussions (Case Studies)**
- 15:30-16:15 **Group Presentations**
- 16:15-16:45 **Discussion**

Sunday, November 7, 2004

Session 4 : Judge's role in Ensuring a Fair Trial - Justice for Victims

Moderator: Hon' Justice A.K Rajan
Madras High Court

This session will focus on how judges can ensure justice to victims through better court processes. The session will look at bad practice in investigation and prosecution through the accounts of court users, followed by a discussion and consensus building on how judges can ensure accountability of the police and public prosecutors.

Panel Presentations - Experiences of Court Users

- 09:00-09:20 Inadequate investigation - Case Study
Ms. Navaz Kotwal, Coordinator, Gujarat Programme, CHRI
- 09:20-09:40 Ineffective prosecution - Problems and Remedies
Ms. Flavia Agnes, Senior Advocate, Bombay High Court
- 09:40-10:00 What the Judge can do
Hon' Justice K.T Thomas, former Judge, Supreme Court of India
- 10:00-10:45 Plenary Discussion
- 10:45-11:00 Coffee/Tea Break

Session 5: Judicial Responses to the Rights of Vulnerable and Marginalised People

Moderator: Hon' Justice C.V Wigneswaran
Former Judge, Supreme Court of Sri Lanka

This session focuses on socio-economic rights of poor and vulnerable people. It examines the role of the judiciary in ensuring that the poor and vulnerable are not denied their rights, and on social justice as a core value informing the decision making by judges. It emphasizes that rights are entitlements and not concessions.

- 11:00-11:20 The Enforcement of Socio-Economic Rights under the Indian Constitution
Prof. S.P Sathe, Honorary Director, Institute of Advanced Legal Studies, Pune
- 11:20-11:40 Ensuring Access to Justice for the Poor- using the rights based approach to Judicial Decision Making
Dr S. Muralidhar, Advocate, Supreme Court of India
- 11:40-12:25 Film/Group Discussion
- 12:25-13:00 Discussion
- 13:00-14:00 Lunch

Session 6: Ensuring Effective Enforcement of Rights

Moderator: Hon' Justice F.M Ibrahim Kalifulla
Madras High Court

This session will focus on the strict duty of the courts to protect peoples' rights, the problems of non-compliance with judgments, steps that can be taken in this respect. It will look at how courts can work effectively with other institutions in developing their work.

- 14:00-14:20 Role of human rights courts and commissions in building a human rights culture
Hon' Justice J.S Verma, former Chief Justice of India and former Chairperson, National Human Rights Commission (NHRC)
- 14:20-14:35 Discussion
- 14:35-15:15 Group Discussion: The Judge's Role in Enforcing Rights
- 15:15-15:35 Judicial Accountability and role of the judiciary as protector of people's rights
Dato' Param Kumaraswamy, Vice President, International Commission of Jurists
- 15:35-15:50 Discussion

Concluding Session

- 15:50- 16:25 Setting goals for the future
- 16:25-16:30 Vote of thanks

Participants' List

TAMIL NADU COURTS

MADRAS HIGH COURT

Hon. Justice F.M. Ibrahim Kalifulla
Judge
Madras High Court

Hon. Justice Prabha Sridevan
Judge
Madras High Court

Hon. Justice A.K. Rajan
Judge
Madras High Court

SUBORDINATE COURTS

Mr. A.C. Arumugaperumal Adityan
Principal District Judge
Madurai

Mr. P. Murugesan
Principal Judge
City Civil Court, Chennai

Mr. A. Selvam
Principal District Judge
Ramanathapuram

Mr. S. Sivaprakasam
District Judge
Kanniyakumari at Nagercoil

Mr. P.R. Shivakumar
Principal District Judge
Dharmapuri at Krishnagiri

Ms. R. Mala
Principal District Judge
Vellore

Ms. Aruna Jegadeesan
Sessions Judge
Mahalir Neethimandram, Madurai

Mr. G.M. Akbar Ali
Principal District Judge
Chengalpattu

Mr. T. Mathivanan
Special Judge IX Additional Judge
City Civil Court, Chennai

Mr. A. Ratnavelu
Principal District Judge
Coimbatore

Mr. A. Arumugasamy
Additional District Judge
Presiding Officer,
Special Court under E.C. Act, Salem

Ms. K.B.K. Vasuki
Principal District Judge
Namakkal

Mr. P. Devadoss
I Additional Judge
City Civil Court, Chennai

Mr. R. Karuppaiah
Principal District Judge
Tirunelveli

Mr. A.S. Kannan
Chief Judge
Court of Small Causes, Chennai

Mr. F. Akbar
State Transport Appellate Tribunal
Chennai

Mr. M. Chinnapandi
Chief Judge
Pondicherry

Mr. N. Retnaraj
Principal District Judge
Perambalur

Mr. R. Mohandoss
Principal District Judge
Erode

Ms. S. Vimala
Judge
Mahalir Neethimandram, Chennai

Mr. T. Duraisamy
Principal District Judge
Virudhunagar at Srivilliputhur

Mr. P. Kalaiyaran
Principal District Judge
Dindigul

Mr. D. Krishnaraja
I Additional District Judge
Salem

Mr. A. Ahamadullah
I Additional District Judge
Madurai

Mr. A. Ayyappan
I Additional District Judge
Tirunelveli

Mr. M. Md. Zafarullah Khan
III Additional District Judge (PCR)
Madurai

Mr. B. Gokuldoss
II Additional District Judge
Pondicherry

Mr. P. Shanmugam
Principal District Judge
Uthagamandalam

Mr. S. Udayan
Additional District Judge (FTC-I)
Madurai

Mr. V. Balasundarakumar
Additional District Judge (FTC)
Virudhunagar

Mr. P.S. Avadi Thiagarajamoorthy
Additional District Judge (FTC)
Vellore

Mr. V.B. Chinnappa
Additional District Judge (FTC)
Ariyalur (Permbalur District)

Mr. P.G. Rajagopal
Additional District Judge (FTC)
Dindigul

Mr. M. Sekar
Additional District Judge (FTC)
Tiruppur (Coimbatore District)

SPEAKERS (in alphabetical order)

Ms. Flavia Agnes
Advocate
Bombay High Court

Dato' Param Cumaraswamy
Vice President
International Commission of Jurists

Ms. Navaz Kotwal
Coordinator, Gujarat Programme
CHRI

Dr. S. Muralidhar
Advocate
Supreme Court of India

Prof. B.B. Pande
Professor of Law
Delhi University

Prof. S.P. Sathe
Director
Institute of Advanced Legal Studies, Pune

Hon. Justice V.S. Sirpurkar
Chief Justice
Uttaranchal High Court

Hon. Justice H. Suresh
Former Judge
Bombay High Court

Mr. Bojja Tharakam
Senior Advocate
Andhra Pradesh High Court

Hon. Justice K.T. Thomas
Former Judge
Supreme Court of India

Hon. Justice J.S. Verma
Former Chief Justice of India

Hon. Justice C.V. Wigneswaran
Judge
Supreme Court of Sri Lanka

FACILITATING ORGANISATIONS

Ms. Maja Daruwala
Director
Commonwealth Human Rights Initiative
(CHRI)

Ms. Sara Hossain
Consultant
International Centre for the Legal Protection of
Human Rights, (INTERIGHTS)

SECRETARIAT

Ms. Manju Dhall
Programme Coordinator
CHRI

Mr. Mandeep Tiwana
Consultant, CHRI

Ms. Moni Shrestha
Programme Assistant
INTERIGHTS

Commonwealth Human Rights Initiative

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international non-governmental organisation, mandated to ensure the practical realisation of human rights in Commonwealth countries. Human rights advocacy and education are at the core of all of CHRI's activities, and the aim and end of all its publications.

The objectives of CHRI are to promote awareness of and adherence to the Harare Principles, Universal Declaration of Human Rights and other internationally recognised human rights instruments and domestic instruments supporting human rights in Commonwealth member states.

Through its reports and periodic investigations, CHRI draws attention to progress and setbacks to human rights in Commonwealth countries. In advocating for approaches and measures to prevent human rights abuses, CHRI addresses the Commonwealth Secretariat, member governments and civil society associations. By holding workshops and developing linkages, CHRI's approach throughout is to act as a catalyst for activity around its priority areas.

CHRI is headquartered in New Delhi and has offices in London and in Accra.

CHRI is currently working in the following areas:

- Right to Information
- Police Reforms
- Prison Reforms
- Constitutionalism
- Human Rights Advocacy
- Facilitation of Judicial Dialogue

CHRI presents a Biennial Report on Human Rights Issues to the Commonwealth Heads of Government Meeting (CHOGM).



CHRI

B-117, First Floor
Sarvodaya Enclave
New Delhi - 110017
INDIA

Tel.: +91-11-2652-8152, 2685-0523

Fax: +91-11-2686-4688

E-mail: chriall@nda.vsnl.net.in

Website: www.humanrightsinitiative.org

INTERIGHTS

INTERIGHTS, the International Centre for the Legal Protection of Human Rights, is an international human rights law centre, established in 1982 and based in London, England. Regionally, it works in Africa, Central and Eastern Europe and the former Soviet Union, and South Asia. Its thematic focus includes liberty, security and the rule of law; equality; and the enforcement of economic, social and cultural rights. Access to justice for the most disadvantaged is a common thread in all its programmes and the majority of INTERIGHTS' work is done in cooperation with local partners.

INTERIGHTS provides legal and strategic advice and assistance on international and comparative human rights law to legal practitioners, judges, non-governmental organisations and victims of human rights abuses. This includes both direct representation and the submission of amicus briefs and third party intervenor petitions in cases before national courts and international and regional courts and tribunals, including at the UN, in Europe, Africa, the Americas and South Asia. It also organises and conducts workshops and seminars for judges, lawyers and NGOs in the techniques of using international and comparative human rights law.

An important part of INTERIGHTS' work is to disseminate information on recent developments in international and comparative human rights law to judges and lawyers. It provides current information through the quarterly Bulletin, which carries summaries of international human rights cases, the Commonwealth Human Rights Law Digest, which contains summaries of national decisions, through the Case Law Database and through its website. It also publishes expert reports and papers on a periodic basis based on current issues of concern in the legal protection of human rights. INTERIGHTS' website can be accessed at www.interights.org.



INTERIGHTS

Lancaster House
33 Islington High Street
London N1 9LH, UK
Tel: +44 (0)20 7278 3230
Fax: +44 (0)20 7278 4334
Email: ir@interights.org
Website: www.interights.org