
The Duty of States to undertake Adequate & Effective
Prosecution as Part of the Obligation to Protect the Right to
Life

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(Transcript)

I will be looking at the responsibility of the State and what the judiciary can do, and I will share a few experiences with you. I have been to a number of countries as a UN Special rapporteur and in my work as a rapporteur I have had to address the whole question of impunity. I have often heard judges say that it is the investigators that have not done their work properly, and the investigators say that it is the judges that don't proceed with the cases, and the police say that they have to resort to extrajudicial killings because the judges will give bail when they shouldn't and not give when they should. So there is the vicious circle of throwing the blame from one to the other. But I would agree with many of the speakers that the blame lies with each section of the Criminal Legal System (CLS).

We just heard about a case in which a medical report was not provided for seven years. I would say that is horrendous, but what was the judge involved in the case doing for seven years? This is also very much connected to case management, because judges have to manage their own cases, including making sure that e.g. police reports or medical reports are provided in time.

I also believe that in many countries we have a criminal legal system that is like a maze and people who are familiar with it know the loop holes and cut work that system. Those not familiar with that system stay behind, whether they are complainants or accused, they are the ones who are at the receiving end of a system full of flaws.

I will give you some examples:

In Brazil, in the State of Para, a large number of people had been killed by the police and death squads which were connected with the police. To my amazement I saw in the files that a number of policemen had taken the plea that they were insane. I said to myself, how come all these policemen became insane when they were on active duty just before they killed somebody? There was this accusation against them because they found that in the State of Para there was only one psychiatrist and the queue was so long that it would take at least two years before the psychiatrist would examine them. And I discovered that in Brazil there is a time bar – a limitation that if a case does not go to trial for 20 years it has to be dropped. And to my utter amazement I found that in a number of instances the investigation had taken 20 years and the case was therefore dropped. At random we picked up the files to see who the accused were, and invariably they were either a Minister's son, or a police officer or a governor's crony, but never an ordinary person.

Now although I do look at the question of impunity in my mandate, I am mindful of the fact and do not push it so far that people begin to get the impression that we are denying due process. Because judges have to be extremely balanced, they have to give every accused due process and I will not go by the figures of how many were convicted or acquitted. I think an acquittal by the judiciary, if it is done justly, is only promoting the ends of justice. But the point I am trying to make is that the CLS has to be certain, relatively effective and more efficient, and efficiency also includes the period of time that a trial can take. It is all very well to say that you don't get witnesses and in my own experience witnesses do indeed disappear. But if the trial is conducted within six months you are more likely to have witnesses than if it is conducted three years after the occurrence.

There are not only flaws in India, but there are systematic flaws in many countries. Take the example of Pakistan. There is no concept of an independent Public Prosecutor, i.e. there is no one person in charge of all the prosecutors. There is the Advocate General who represents the Province, the Attorney General who represents the Federal Government, and then there are this host of lawyers, most of whom are briefless lawyers who are actually appointed by the State. I am not de-valuing my colleagues because when I started practice I also went for State cases and I think it is a very good way to start practice, but we were given bail cases to start with. I am sure if I hung around there, by now I would be doing appeals in the Supreme Court as well learning very little in the Advocate General's office. I know from my experience as a criminal lawyer in my country that corruption is rife amongst Public Prosecutors.

Once, I was shocked when the counsel for the State in a case I was working on called me in the High Court and asked what was there in for me? When I asked why, he said because I seemed to be so emotionally attached to this case. It was a case of a woman who had been given the death penalty.

He said I wouldn't have to say anything but I would have to take him out for dinner. I responded, whatever you say does not matter to my case because I know your competence by now. I am more afraid of the lawyer for the complainant.

But having said that there is no chain of command amongst Public Prosecutors – in other countries, particularly in Latin America where they are beginning to change their CLS, the Public Prosecutors actually come from services. There is a proper exam for Public Prosecutors, rather than just any lawyer being picked to defend and to prosecute on behalf of the State. These Public Prosecutors have their unions and their associations, that forward a certain number of names to the government from which the government or the President are bound to select the chief Public Prosecutor both for the State and for the federation. I found that this change is making a difference in those countries in Latin America where before the rate of crime was very high and the CLS completely abysmal.

I have also noticed that now there are various Witness Protection Programmes (WPP) emerging and here I must say that I unhappily feel that our countries cannot have WPP. We are not the United States. Since I have studied the financial implications, I know that the amount of money spent on the WPP is huge. WPP also has limitations, especially in India and Pakistan, where we don't have friendly neighbours which would enable us to relocate people across the border. WPP – as well as e.g. extradition and absconders – would be far

more effective if there was a regional approach to a CJS. Wherever there is regional discourse and discord and the intelligence are not talking to each other, the rate of crime is higher. There is a kind of helplessness amongst those who are investigating and as a result they divert their attention to small time criminals because they believe that the big criminal is not in their reach. Therefore I think it would be important to build those skills and to give the Public Prosecutor and the investigating agencies all those facilities. This is a political issue that governments have to face. Peace in the region is absolutely important for the security of the people and to reduce the crime rate in all its countries.

Justice Desai talked about forensic expertise. I have thought a lot about how people in India, Pakistan, Bangladesh and Sri Lanka could leap frog into newer technology. There was a time when we were not even getting the kind of forensic expertise that was already available, but that has now changed. Now there is very sophisticated forensic equipment available, which is less expensive than the old style of equipment, including photographing and video-graphing. With video, however, we have to be very careful because it can be manipulated.

Talking amongst friends – when it comes to forensics I think overzealousness by judges is perhaps not ideal. I think that judges would like to do everything else except for what they are supposed to do. To give an example, in one of the countries I visited I met a judge who was in charge of finding ways to modernize technology. I suggested that this would be a matter for an expert because he might not have the necessary expertise, but he insisted that he had done fabulous work. One of the things he proposed as a remedy to witnesses disappearing was to have tele-conferences with the witnesses. I queried how he was going to ensure that the witness sitting in front of the camera did not have a man with a gun pointing towards his or her temple across the room. He said he would provide police protection. I pointed out that it is the police who are being accused of killing people so there would be no point sending another police for the protection of a witness so they can give testimony without fear.

I believe that these issues have to be addressed because if technology is taking all other aspects and institutions ahead, the judiciary and legal system must not remain behind. But it is up to the judges to pressurise the government to put together a team of experts, and to take an interest in that. But I do urge you not to become that team yourselves I believe that judges must never become controversial of putting a scheme together, since judges are not policy makers. Judges are people who have to ensure justice.

Now when it comes to how the State can address this I'll look at two aspects:

First, extra judicial killings: these usually involve a police officer, i.e. somebody within the system who is empowered, so I think judges have to make principles and define guidelines of what forms excessive use of force. Invariably, when a police officer kills someone it is alleged that he did so in the line of duty or as self-defence and because there was an encounter. Now your creativity comes into the fact where you look at what is excessive use of force. There are UN documents on what forms excessive use of force. I believe those documents can be enriched by you because I think they are coming down from top to the bottom. But when they are looked at by countries and by the judiciary like yourself (because I rate the Indian judiciary highly and I have great faith in it), your skills and your creativity can fill the gaps by adding the perspective of countries like ours which are underdeveloped and which have systems where e.g. perjury is not taken seriously.

Second, what can judges do?

How many of you have fined a policeman for perjury? How many have arrested people for perjury? The result is that lying is the norm and telling the truth is an exception. In Pakistan one has to swear by the holy Quran and the whole nation is lying on the holy Quran. So I suggested to one of our judges, wouldn't it be better not to get the Quran in the way? But this is what is happening in most parts of the world.

Then there are the common things judges have to look at - I have already mentioned forensics. But it is also important that judges insist that the forensic department be autonomous, rather than under the police. In most countries forensic departments operate under the police department. Maybe they don't in Sri Lanka, but they do in e.g. Nepal, Pakistan, Honduras and Brazil, even though they should fall under the justice department or the technology department. India is a country that goes by the rule of law, the oldest democracy, that you don't have influence on, but in other countries, e.g. in Pakistan, there is influence.

If you look at the medical evidence that comes before you – in Pakistan and Nepal it is stereotyped, particularly when you look at violence against women. E.g. whether it was one finger, or two fingers, whether the woman was a virgin or not, there is no detailed record of what has happened. There is no preserving of the crime scene in the required manner, nobody wears gloves, and the scene is not sealed. These are things that judges can insist upon by asking to see the reports. I have looked at some of the site plans in India and often they are not to scale. These are little things that people can get away with because we do believe that the accused must be given the benefit of doubt. We cannot change that principle and after September 11, I urge you please don't change that principle because the world is changing and more hangmen judges are coming, more and more judges who are more prosecutors than judges. We have our own traditions in India, Pakistan and Bangladesh and those principles are difficult to stick by, particularly in violence or terrorism. But these principles are what make up an independent judiciary.

I would also like to talk about fast tracking. Wherever there has been fast tracking there have been delays in ordinary courts, so you fast track one system but delay the other. Special courts have never brought down crime rates. They have only put the wrong focus and have given people the feeling that once they are stuck there they are bound to be convicted.

In many cases the police or an agent of the State have killed a number of people, but because it happened so quickly the person is not identified. But the crime is itself identified. In that case many of the courts tend to say that we cannot punish, so the case is dismissed. But it is exactly in those types of cases where the judiciary can help and can ask for an enquiry and at least that compensation be given to the victims. Even when nobody is punished because nobody can be identified, at least the fact is established that it was e.g. the police who killed people. Therefore it can be a deterrence, which helps to erode impunity, particularly of law enforcement officials and agents of the State.

It is also important for judges to insist on the government keeping data – the victims' data and the perpetrators' data, as these reveal patterns. I have seen landless peasants as patterns

of people that were killed by law enforcement agencies. I have seen children from poor slum areas as patterns of people that were killed by law enforcement agencies, or private individuals as part of social cleansing. We have seen women killed in the name of 'honour'. In Pakistan more than 300 women are killed every year but not a single person has so far been convicted for 'honour' killings. So these are patterns judges have to look at and monitor in order to be able to provide protection to the vulnerable. In Latin America, gays were killed and mutilated, their sex organs were cut off to show the discrimination against them. Judges had to be pointed out this pattern. Therefore data should be insisted upon and used by the judiciary and also by the lawyers who present the case. But more often than not this data is unavailable, and with your authority you can demand from the government that this data is made available.