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**CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF
INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION
OF JUSTICE, IMPUNITY**

**Written statement* submitted by the Asian Legal Resource Centre (ALRC),
a non-governmental organization in general consultative status**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[29 January 2004]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

The Ramifications of the Report of the Committee on Reforms of the Criminal Justice System in India (Malimath Committee Report)

1. On 19 May 2003 at about 11am, officers from Bijpur police station arrested Tamal Sanyal (alias Ghanta), aged about 42 years, residing at Tentulta, Halisahar, West Bengal State, along with Lalan Basfore, Sunil Haldar and Kumar Mallick. The police later accused the men of consuming alcohol in a public place, but at the time of arrest they were given no reason. They did not produce the men before a magistrate. The local magistrate before whom the accused should have been produced never insisted on seeing them before remanding them to custody at Barrackpur. The local police exploited the situation and never cared to produce any of the arrested before the magistrate even days later. On May 25 there were some 250 prisoners in remand cells intended to house 50. Tamal Sanyal was suffocated to death there. His family received no compensation, and nor was there any inquiry into his death, even though it occurred while he was in police custody.

2. The law should begin operating at the moment of arrest or receipt of information regarding a crime. In Mr Tamal's case, he should have been brought before a magistrate within 24 hours of arrest, and ought to have been freed on bail. This did not happen, as the magistrate did not bother to meet him, resulting in his death. Unhappily, such malpractice is common in India; another case will serve to illustrate.

3. A sub-inspector of police arrested V L Joy, of Anthikkadu, Thrissur District, Kerala State on 20 May 2002. He did not explain to Mr Joy why he was being arrested. While in custody, the police tortured Mr Joy and forced him to drink urine. They refused to let his brother meet with him, and did not present him before the local magistrate for four days. Later they released him after making him sign some blank papers onto which they later wrote a confession and charged him with a petty offence for which the fine prescribed is Rs 100 (US\$ 2). Mr Joy filed a complaint before the local magistrate court and the magistrate, 'as per law', forwarded the complaint for enquiry to the same police who tortured him. The Asian Legal Resource Centre has this year submitted a separate written statement on the inadequacy of laws in India pertaining to torture. However, in this case Mr Joy successfully contested his case in court and he was acquitted.

4. If the Committee on Reforms of the Criminal Justice System in India (the Malimath Committee) has its way, however, victims of police abuses such as Mr Joy are far less likely to be acquitted, let alone have redress for the wrongs done to them. Rather, many more are likely to end up like Mr Tamal. In November of 2000, the Committee was set up to review and suggest modifications for proper implementation of criminal justice in India. In May 2003 it made 158 recommendations that show that despite its expression of noble sentiments, the Committee has in fact been intended as a means for the government to attack the very foundations of criminal justice, and give enormous powers to the police. Its report reveals that the Committee is far more concerned with increasing statistics of 'successful' convictions than with the delivery of justice. If its recommendations are implemented, they will result in a disastrous failure of human rights norms in India, a country already suffering from corrupt and inefficient officials and a failed criminal investigation system.

5. Persons arrested under the existing legal provisions are already sufficiently intimidated by the police that they do not want to contest their case in court, even when they are innocent. In Mr Joy's case he was afraid to meet with a lawyer as the torture had so terrified him that he preferred to pay the small fine and keep quiet, a common occurrence. After arrest, the detainee is tortured to extract a confession, which is later produced in court to obtain a summary verdict. Under the current system, however, where the accused is prepared to contest the confession it will usually fail the test of proof and result in acquittal. The Committee, however, has proposed a change in the burden of proof to a "clear and convincing" standard, on the grounds that "beyond reasonable doubt" is too high a standard for prosecutors to meet. In fact, this is a proposal to undo the presumption of innocence itself. Lower standards of proof and the presumption of innocence cannot coexist. Rather, lower standards of proof leave the police free to torture victims and obtain confessions that will be used as 'evidence', especially because the Malimath Committee recommends that a confession should be held binding upon the accused.

6. The shift in presumption of innocence would have had a dramatic effect in Mr Joy's case. Only after hours of counselling did he consent to take up the case and file a separate complaint for harassment and torture. The prosecutor knew nothing about the case as he had not been provided with the facts. When a copy of the charge was furnished, it was not supported with credible evidence. The prosecutor dropped the case, partly because of lack of evidence and partly because no interested parties bribed him to take it up.

7. The Malimath Committee has an answer to this also. It suggests that the prosecution be brought under direct scrutiny of senior police officers, by way of an officer at the rank of Director General of Police being appointed as Director of Prosecution. This appointment would end the separation of the criminal investigation and prosecution functions, as both would be in the hands of the police. Civilian control of the system by way of an independent public prosecutor would be lost. As of now the prosecutor may decline to take up a charge when it is presented before the court. On implementation of the Committee's recommendations, the prosecutor will lose all independence and be no more than a mouthpiece of the police.

8. The Committee has also recommended that the accused should make a written representation narrating a defense of the case at the early stage in the trial. In Mr Joy's case, the trial was adjourned three times, since the prosecution could not present a charge sheet. Under these circumstances, what would be the justification for demanding that the accused present a written defense? What is more, the Committee has recommended that it be up to the magistrate to decide whether or not the statement should be admitted. Such provisions, if they are enacted into law, will allow corrupt and incompetent judicial officers, such as the magistrate in Mr Tamal's case, free reign to trample the basic principles of fair trial. They will in fact undo article 20(3) of the Constitution, which ensures that an accused not be compelled to act as a witness for the prosecution.

9. At the Wadakkanchery magistrate court, Thrissur District, Kerala state, it takes more than two months to get a certified copy of a court record. The reason for the delay is the absence of a photostat machine in the court, so any document to be copied must be taken to the district head quarters, which is 24 km away. As the head quarter receives such application from various courts, only during a specified week every month does it entertain applications from the Waddakanchery court. The Malimath Committee has proposed introducing an inquisitorial

system of justice. In this it has assumed that the adversarial system has failed. However, the unsatisfactory state of criminal justice in India has nothing to do with the adversarial system itself. Its failure is due to India's social structure and attitudes conditioned by entrenched habits of discrimination. These weigh heavily on the justice system, and have been severe obstacles to its development. Under these circumstances, it can be said that the adversarial system has never stood a real chance in India. To the extent it has been effective it has mitigated the operation of traditional prejudices. However, India continues to subsist under ancient primitive laws, instead of modern rules of justice. This particular recommendation appears to be an effort to abandon the more progressive aspects of law making for the purpose of getting easy convictions.

10. The inquisitorial system also requires a highly developed police force. If India were to develop such a police force, there would be no need for any change because the adversarial system itself would function well. It must also be noted that an inquisitorial system will be more expensive, as more personnel are required. More importantly, it would take a long time to create the mental habits needed to operate this new system. Therein, it would be better to seriously address the defects in the existing adversarial system.

11. Aside from all these nonsensical proposals, the Committee has neglected to comment on a number of important areas, including the use of torture by the police. India has not ratified the Convention against Torture and Other Cruel and Inhuman Treatment or Punishment, nor has it made torture an offence, despite strong recommendations to do so by the National Human Rights Commission. Meanwhile, the police continue to be responsible for endemic torture and extra-judicial killings. The Asian Legal Resource Centre has this year submitted a separate written statement on that topic to the Commission. Although the Malimath Committee has acknowledged this situation, it has failed to recommend anything. Under these circumstances its proposal that confessions be made admissible by amending section 25 of the Evidence Act is a dangerous incitement to further torture. The Committee is also silent about the extreme corruption prevalent among the police, and has ignored suggestions that an independent commission to monitor corruption be established.

12. If adopted, the Malimath Committee recommendations would result in an increase of police torture and extra-judicial killings, impunity and gross human rights violations in India. These are not forward-looking reforms, but rather a carefully concealed attempt to throw India back into the dark ages, under which it had subsisted for most of its history. The Asian Legal Resource Centre urges the Commission not to be deceived. The Commission, and in particular the Committee against Torture should:

- a) Pressure the Government of India not to adopt the Malimath Committee recommendations.
- b) Propose that the Government of India not set up wasteful committees devoid of any true intent, but instead use its resources to strengthen existing legal provisions and institutions.
- c) Suggest reforms that will ensure an independent and better prosecution system that will adequately protect the rights and interests of victims, and provide resources to this end.
- d) Recommend ways to ensure that the judiciary be appointed on the basis of merit, rather than political allegiance, and provide resources to this end.

- e) Encourage the Government of India to bring in legislation and other appropriate measures that will make the criminal investigation system publicly accountable, especially the police and public prosecutor.
- f) Assist in bringing state provided legal aid to a par with international standards, especially considering the appointment of legal aid counsels on their merits and not upon mere availability.
- g) Use its influence to ensure that the Government of India act on the thousands of overdue cases of under trial detainees within a specified time, and to see to it that justice be rendered through due process of law and not haphazard procedures.
- h) speak and act widely on this matter with deep ramifications for approximately one fifth of humanity, so as to stimulate public debate and opposition to the proposal.
