

FORUM

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FACE TO FACE

Doing the Rights Thing

Former Sri Lankan Secretary of Justice, Dr Nihal Jayawickrama, on human rights inside and outside government

I never considered a profession other than law. I never thought that I had any other options. I grew up in a legal environment. Most of my mother's family and my father's family were lawyers. My father, who was a solicitor, died when I was quite young, and I spent the most formative years of my life in the home of my mother's brother who was a Judge of the Supreme Court and was later to become the first President of the Court of Appeal. There was a lot of consternation when my brother, who was seven years older than I, decided to do medicine.

I studied law at the University of Ceylon. My ambition was to be admitted to the Bar; that also was the end of the road as far as I was concerned. I practised for about eight years and enjoyed it immensely. Then, following a general election and the appointment of a new Prime Minister, I was invited first to be the Attorney-General and then to take charge of the Ministry of Justice which, at 32 years of age, was quite a challenge. My predecessors had all been senior judges. It was rather awkward at first because the heads of departments within the Ministry were all nearly twice my age. I think my contemporaries were the junior Crown Counsel in the Attorney-General's Chambers.

Elections are periodic, so I thought I would be back at the Bar within five years at the most. I was assured that I would have a free hand to embark on a programme of law reform, a subject on which I had fairly strong views at that time. Although Sri Lanka had been independent for about 22 years, no changes had been made in the courts' structure. Most of the procedural laws were Victorian. There was a lot to be done.

Changes

I was responsible for the fusion of the profession – something I now regret having done. I thought it would make a significant change and found it difficult to rationalise the distinction between barristers and solicitors. In practice, however, there was no fusion. The distribution of work continued as before, but one distinct result was a drop in quality standards and professional ethics.

There were also other problems and challenges. We decided to become a republic, which meant drafting a new constitution, abolishing appeals to the Privy Council and establishing a Court of Final Appeal. We had no problem establishing the Court of Final Appeal; it was quite a simple exercise. We were able to make a very smooth transition from the Privy Council.

There was also pressure to move from the use of English in the courts to the national languages. That is much more difficult than people here think. Of course, it is necessary that court proceedings should be conducted in a language the parties can understand. All of our work was in English, which the large majority did not understand. That was unacceptable. It is essential to devise a way in which court proceedings are conducted in a language which the parties understand, whether through simultaneous interpretation or other means.

Having said that, if your legal literature is in a language not your own, I think it is a mistake to attempt to change it, particularly if you have about 150 years of statutes and judgments in that language. If lawyers are comfortable using English, I think they should be allowed to do that.



We changed the language of the courts and the language of instruction in law schools. Sri Lanka now has a generation of lawyers who, because they studied only in the national languages, have no access to legal literature and, therefore, to the appellate courts. Many of them obtained their legal qualifications without consulting the law reports, perhaps relying only on lecturers' notes.

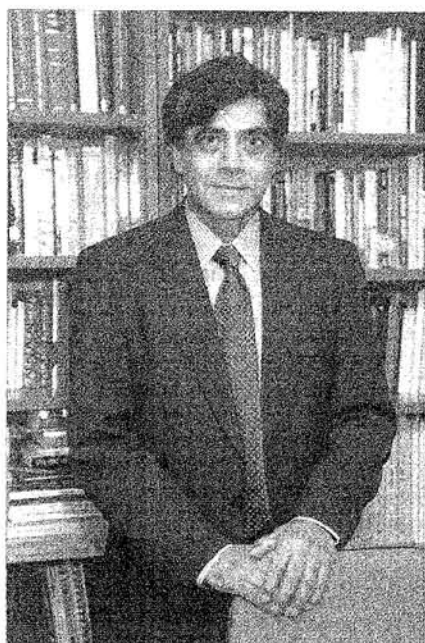
It is necessary to maintain a balance; to keep what you have and try to improve on it. Evidence can be given in any language. I don't know whether what a lawyer submits to a judge, particularly in the appellate courts, is of any interest to the parties. Usually the parties are not even present. You could still have interpretation if necessary.

Human Rights

I was also responsible for matters relating to human rights, which meant representing the Government at the United Nations General Assembly. I had earlier appeared in human rights cases against the Government, and was now seeing it from the other side. We didn't have any serious human rights problems then, although we did have a youth insurrection in 1971.

An extreme left wing movement, of at least 20,000 university students and graduates, decided to overthrow the Government. At least 18,000 of them ended up in custody. Two universities had to be converted into prisons. We had to make new laws to subject them to the judicial process, and at times I came into conflict with Amnesty International and the International Commission of Jurists, both of which I had been an active member of. At the end of that exercise, which took four years, about 200 remained in custody convicted of attempting to overthrow the Government.

I served as Secretary of Justice for seven years – two years longer than I had expected since the republican constitution extended the life of par-



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liament from five to seven years. When, in 1977, the Government lost the general election, I didn't really mind because I wanted to get back to the Bar. But it was not that easy. The Bar didn't take too kindly to one whom it regarded as having acted against its interests.

Some of the reform measures I attempted succeeded, some of them failed. One that failed was the regulation of lawyers, fees which was opposed by every section of the legal profession. If doctors' fees, for example, were self-regulated, I didn't see any reason why lawyers should be different. Some of the procedural changes which involved disclosure of written evidence and written submissions had a dramatic effect on the lifestyle of lawyers. The Bar was very unforgiving.

Then, in the late 70s, an opportunity came my way to undertake, at Kings College London, a research project leading to a PhD in an area which was just emerging – the international law of human rights. Returning to academia was quite daunting, but I accepted it with gratitude because life was becoming very difficult for me in Sri Lanka. The new Government was being increasingly vindictive towards its opponents, and was about to appoint a special presidential commission to investigate the acts of the previous government.

I went to London, settled down, began my work, found a flat, and then came back home after three months – foolishly as it turned out.

I came back to bring my wife and daughter, who had stayed in Sri Lanka, to England. Three days after I arrived in Colombo, the Government impounded my passport saying I was required as a witness in their presidential commission of enquiry. The commission wanted to enquire into the conduct of the former prime minister. In Sri Lanka, at every general election since independence, the government has changed. The new Government decided to break the mould of Sri Lankan politics and find a way in which it could remain in office notwithstanding a general election. One way to do this was to immobilise the opposition by getting rid of its leader. Not by killing, of course; we hadn't degenerated to that stage.

The President was a lawyer and his brother was the President of the Bar. Together they devised a constitutional method to remove the leader of the opposition. If the commission reported there had been an abuse or misuse of power, then parliament would pass a law imposing civic disabilities for seven years. It meant no right to vote, stand for election, hold public office or address public meetings on political matters. Of course, if one held a seat in parliament it would mean forfeiting that seat.



Accused

No-one came to record a statement from me. After a month, I went before the commission and said that if I was required as a witness someone should take my evidence. They said they would let me know at the appropriate time. I waited another three months and then I asked them to release my passport. I told them I wasn't interested in my civic rights, I just wanted to continue my work in London. Then they said: 'You are now an accused.'

I was the first person to be brought before the presidential commission. I had about 45 charges served on me. Some were hilarious. For instance, 'you did attempt to introduce the concept of barefoot lawyers and thereby sought to undermine the legal profession'. At one stage, I did threaten to establish barefoot lawyers. That was when the Bar refused to participate in the legal aid programme. I tried to get them to co-operate but they wouldn't, so I said we would establish, to use typical Chinese language, a brigade of barefoot lawyers. If a person can appear for himself, why can't he appear through a friend? We could give them some basic legal training and let them appear in the rural areas and in the lower courts. Not in the appellate courts of course. It wasn't a very serious proposal; it was more *in terrorem*.

I had a seven month enquiry in 1979 from 9.30 am to 1.30 pm every day. I could do nothing except appear before the commission. Fortunately, three senior lawyers including the 'doyen' of the Bar, appeared for me without charging fees. By the time the enquiry was over, the commission was glad to let me go. Even before it reached its findings, it gave me back my passport. I returned to London with my family which now included another daughter. When I was there, I heard I had been found guilty and that parliament had passed a law imposing civic disabilities on me for seven years. A few months later the former prime minister and one of her ministers were subjected to the same enquiry and the same penalty.

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I don't feel bitter about what happened to me in Sri Lanka, that would be self destructive

pened to me in Sri Lanka; that would be self destructive. My family felt it more than I did. If you go through a difficult period in your life and you overcome it, that's it, you move on.

In London I worked with two people who were very active in the field of international human rights law. One was the President of the European Commission of Human Rights at that time and the other was Paul Sieghart whose pioneering book on the subject incorporated my research. My PhD thesis was on 'The Application of Human Rights Law to Sri Lanka Since Independence'. I was worried that I wouldn't have sufficient objectivity, but my thesis was accepted. By the time I finished it, in 1983, the situation in Sri Lanka had changed.

Hong Kong

I went back to Colombo and began practising at the Bar. I also accepted an appointment as the head of the legal division at the Marga Research Institute. Before leaving for Colombo, I had applied for various university appointments, although until then I had had no real interest in university teaching. About the middle of 1984, I had a letter from Hong Kong University offering me an appointment. My interest is essentially in constitutional and administrative law human rights law, and the Joint Declaration had just been signed. I knew that quite significant constitutional developments were about to take place. It was a new challenge. I accepted the position and arrived in Hong Kong on April Fool's Day, 1985.

I found that lecturing to a class of students was not really any different from addressing the bench because they always ask the awkward questions and you have to know the answers. Even small group teaching is interesting, except that you don't get much response from students here, they are very passive.

One thing that puzzled me when I arrived here was why Hong Kong didn't have a Bill of Rights. I assumed there would be a Bill of Rights because British colonies usually had them. In 1986, I was interviewed by the press and I said it was strange that we didn't have a Bill of Rights – we ought to have one. The journalist asked a number of people including some of my colleagues, and was told 'What a stupid question. Hong Kong cannot have a Bill of Rights. Hong Kong has not had one and never will.'

I did pursue it, however, and when the Hong Kong branch of the International Commission of Jurists asked me in December 1986 to talk to them on the protection of human rights in Hong Kong, I raised the question again. The Basic Law drafting committee was trying to draft one within the Basic Law, but they had taken the Chinese model and that would not serve our purposes. Michael Thomas, the Attorney-General at the time, responded immediately by convening a round table discussion. We finished work on the draft Bill of Rights on the eve of Michael Thomas's departure. Of course, he said it was purely an academic exercise; the Government would only respond if there was a public demand for it.

That led to involvement with JUSTICE which in turn led to involvement in the UN Human Rights Committee when the periodic Hong Kong report was being considered. Following Tiananmen, I assisted in taking one of the student leaders to the UN Human Rights Sub-Commission with a number of my colleagues from the University and securing the passage of the first resolution directed at China. I find this work very satisfying. In fact, without it, academic life tends to become quite boring. **HKL**