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SRI LANKA

Background and Overview of the Criminal Justice Sector and Its (Non) Functioning and The Policing System

ASIAN HUMAN RIGHTS COMMISSION

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1. Introduction/ overview to the country's criminal justice sector

1.1. Brief history of the establishment of the criminal justice system and its evolution

The establishment of a criminal justice system in its modern sense took place under the colonial administration of Sri Lanka by the British. Sri Lanka has undergone about 450 years of colonial rule and the last of the colonial powers to occupy Sri Lanka was Britain. The Portuguese occupied the maritime areas of Sri Lanka from around 1505 to about 1658. The Dutch occupied the same areas up to 1796. The British took over the maritime areas from the Dutch in 1796 and began their rule. In 1815, the British captured the entire island of Sri Lanka and from then until 1948 Sri Lanka was a part of the British colonial empire. Independence was declared on 4 February 1948.

One of the major contributions of the British was the establishment of a system for the administration of justice. The Supreme Court was established in 1802. The policing system of Sri Lanka was established in 1806, when the British-occupied parts of Sri Lanka were governed by Thomas Maitland. The system of prosecutions under the Attorney General's Department was established much later.

Prior to this, the Dutch had established a kind of policing system, and that started from 1866. However, with the British takeover, the system which was introduced was in line with British law, and therefore it was completely new. Prior to the colonial takeovers, there wasn't a formal system of policing in Sri Lanka.

The overall administration of the country from around the 8th century AD gradually came to be under a caste system. The overarching principles of the caste system that became established in Sri Lanka, which was due to the occupation of Sri Lanka by several Indian rulers, were basically the same as those in the Indian caste system. Within a caste system, there is a system of governing crime and punishment in a way that is in keeping with the hierarchical system of ordering society in terms of caste. The rules applied relatively - that is, in terms of which caste a person was said to belong to. Under these principles, punishments differed in severity and lower-caste persons would be dealt more severe forms of punishment for the same crime, with lighter sentences higher up the hierarchy.

The king himself was not subject to any kind of law; he was, in fact, the source of law. The group that was in the king's closest circle were called Radalayas and the king assigned them power over areas of Sri Lanka. The understanding of crime and punishment under this basically feudal system was very different to the ideas of crime and punishment introduced under the British system, which became the criminal justice system of Sri Lanka thereafter.

This study will explore the nature of crimes and punishments under the feudal system, which was based on the caste system, and thereafter will outline the basic system that was introduced by the British.

Thereafter, the study will explore the evolution of this system after independence, particularly in terms of certain constitutional reforms that took place in Sri Lanka in 1972 and 1978, and also in the context of the control of insurgencies which took place in 1971 and thereafter from 1987 to 1991 after a southern insurgency by a group known as Janatha Vimukthi Peramuna (JVP). The Tamil militancy developed from the late 1970s and there was an intense period of internal conflict up to 2009. During these periods, Sri Lanka came to be ruled under emergency regulations and anti- terrorism laws.

The idea of crime and punishment changed significantly under these emergency and anti-terrorism laws. On the one hand, the definition of crimes changed and expanded; on the other, the notion of extrajudicial punishments came to be embedded as being necessary to anti-terrorism. All these aspects will be explored in detail in this study.

1.2. Brief overview of the political history and development to the present day

Sri Lanka has a long history. The more organized forms of governance in Sri Lanka began to develop around the 1st century BC with the establishment of a monarchy that ruled over certain parts of Sri Lanka. This period is known as the Anuradhapura period. The monarchy that began to function in Sri Lanka underwent a very significant transformation due to the influence of Asoka's ideals of governance, which were then spreading in India.

Asokan ideas have been explored in great detail by Indian historians such as Romila Tharpar, giving us a detailed understanding of Asoka's philosophy of governance. Asoka realized, after being a warrior who enlarged the kingdom of the Mauryas, that ruling countries requires a certain development of rules based on moral principles. He tried to do this by bringing in Buddhist ideas, which had spread in his kingdom, and forging an idea of governance that combined moral authority with political authority. Asoka sent his son to Sri Lanka to meet with the Sri Lankan king. The Sri Lankan king received him warmly and accepted Asokan ideas, and the political system in the country was thereafter developed within the framework of Asokan ideals.

This period lasted until about the 5th century AD in Sri Lanka, followed by a period of decline. Meanwhile, in India there had been drastic changes and the Asokan ideals of governance were no longer in practice. In Sri Lanka, there was a drastic change around the 8th century, when there were several invasions from India and the occupation of Sri Lanka by Indian rulers, who introduced their own system of administration, a major feature being the introduction of the Indian caste system.

By around the 11th century, the caste system was well established and became the main form of social organization in Sri Lanka. This system was incompatible with the ideas introduced by Asoka, both in terms of the form of governance and in terms of ideas about crime and punishment, which underwent severe changes. This aspect will be explored in this study to throw light on some of the continuing social problems that militate against the development of a modern system of justice in Sri Lanka in spite of the changes later introduced by the British.

The third period of development involves the various Western foreign powers that occupied Sri Lanka – first the Portuguese, then the Dutch, and culminating in the takeover of the entire country by the British in 1815. From 1815 to 1948, Sri Lanka was a British colony. The basic changes that took place during this period and the impact of the Western occupations will also be discussed in this study.

The first period after independence in 1948 followed the governance model set up by the British, similar to the model introduced in India, Myanmar, Malaysia, Singapore, Hong Kong and even some African colonies. In essence, Sri Lanka accepted the separation of powers model of governance and the basic notions of liberal democracy.

A change had begun to take place by the beginning of the 1960s, when there was growing dissatisfaction among the elite about the British model, as a section of the elite felt that the model undermined their place as the upper class of the society, and they thought that a semi-authoritarian model was more suitable to Sri Lanka than the liberal democratic model.

The first attempt at this change was through a failed coup in 1962. It was by military and police leaders, and their aim was to get more influence in political affairs and change the political structure to one they considered more fit for Sri Lanka. The coup was exposed and failed, but the ideas behind the coup continued to be nourished by a group of elites. Subsequently, these ideas were introduced without a coup, through democratic means.

The next attempt to undermine the liberal democratic setup was in 1972, when the coalition government withdrew the judicial review powers of the Supreme Court of Sri Lanka. This was the first successful attack on the separation of powers concept in Sri Lanka. The next and more thorough attack was in 1978, when a government with more than 80% control of parliament introduced a new constitution giving extraordinary powers to a new institution, the Executive President. The Executive Presidential system undermined both the parliament and the judiciary, and the president virtually stood above the law. A great transformation took place in the entire structure of governance, and this naturally affected Sri Lanka's justice system too. This period lasted until January 2015, and within that long period a serious undermining of the democratic structure took place. This period is important in understanding the political rules creating the dysfunctional justice system in the country. This aspect will also be explored in the study. Finally, at the moment there are attempts at reforms, and the discussions on reforms and the limitations of those discussions will also be scrutinized in this study.

2. Police System

2.1. Is police conduct regulated by clear legislation and policy instruments?

Sri Lanka, as a former British colony, inherited a very rich legacy of law. All aspects of life and society, whether it be personal matters or property matters or even issues of rights, whether under the civil or criminal law, are all well defined by legislation and case law. This is a general characteristic of most of the British colonies: for example, India also has a very rich system of legislation and case law on all those matters. Regarding the police, there is a Police Ordinance and also police orders, which are supposed to regulate almost all aspects of the life and conduct of the police.

However, when we study the reports of various commissions appointed by the government to examine the policing system, we find in their observations and recommendations many very serious criticisms of the policing system in Sri Lanka. For example, one of the first commissions appointed was in 1946 – two years before independence – headed by a Supreme Court judge, Justice Soertsz, who wrote a lengthy report which is still available. In this report, the commissioners categorically stated that the model of policing in Sri Lanka is mostly military-style policing and that concepts of civilian policing had not been introduced into Sri Lanka to any adequate degree. The place of law, particularly criminal law, and the policing system in terms of the law, as well as various criticisms that were made by commissions appointed to study the policing system, will be explored in this study.

2.2. How does the history of the police system impact its functioning today?

Studying the impact of the history of policing on the present day institution needs to be in the context of the social and political history of Sri Lanka. On the positive side, the long years in which policing developed under the colonial administration have led to a policing system that has acquired many of the characteristics of a developed policing system, much more so than in some other Asian countries. In fact, it is perhaps more developed than the one in India, possibly because of the absence of a rigid caste system in Sri Lanka in the way it exists in India, as well as Sri Lanka being a much smaller place as compared to India.

The Sri Lankan police were able to assimilate some of the aspects of more Western-style policing systems. The basic ideas of the rule of law were introduced by the British to Sri Lanka. The basic ideas at the foundation of Western democratic institutions were also introduced to Sri Lanka, and were practiced during the long period of British colonial rule. That gave considerable time for local officers to assimilate at last some of the practices from the colonial model.

However, it must be noted that it was not the British police that was responsible for moulding the policing system in Sri Lanka; it was the Irish constabulary and the persons who were brought from that constabulary that provided the models for the policing systems of both India and Sri Lanka. Ireland at the time was a colony of the British and, therefore, the policing was done in a colonial style. That is one of the limitations of the system that was introduced to Sri Lanka.

Historically, also, the issue of a system introduced under colonialism poses some very basic questions in relation to policing. The idea of the justice system as a whole, in particular the policing system, being the protector of the rights of citizens, was problematic because, in a colony, one of the fundamental principles is that the citizens are not regarded as citizens. They are regarded as the subjects of the British monarch, and thus the very idea of self-determination, which goes into informing the nature of our rights, suffered a serious setback from the very beginning. Above all, a system of rights can only be built on the recognition

of the principles of liberty and equality. In a colony, the interpretation of the idea of liberty is very limited. Liberty is limited to the extent that the citizen has no right to challenge the government and its right to govern. That, of course, is an enormously serious limitation to the idea of the development of rights.

On the other hand, the colonial system as introduced by the British allowed for the liberties of a citizen within the criminal justice and civil law system. Thus, in terms of criminal justice, as well as in many civil law issues (such as property, marriage, the right to practice religion and the like), the idea of liberty was developed without creating any undue hindrances. Thus, from that point of view, there was a development of the idea of basic rights, which the policing system had to respect and protect. In this study, the colonial origins of the modern policing system - both the negative and the positive aspects of the system bequeathed to the Sri Lankan people - will be examined.

2.3. Have there been police reform programmes in place, and if so, with what impact and why?

Police reforms have been discussed over a long period, becoming particularly prominent during the time leading up to independence and continuing thereafter. For example, the policing system was known as the police 'force,' and this was changed after independence into a policing 'service'. This was a name change but, at least from the point of view of the authorities, this also meant a certain orientation of thought towards what the policing system should be. A number of commissions appointed by the government and their reports show rather intensive discussions about reforms.

However, in terms of actual reform, there has not been much in the way of practical endeavors and practical schemes for implementation. For example, although the Justice Soertz commission recommended that the policing system should be changed from the military style to a civilian style policing system, this change did not occur in Sri Lanka. Thus, the kind of transformation that took place in Britain after the introduction of the metropolitan policing system in London and other parts of Britain did not lead to counterpart developments in Sri Lanka.

Also, while there have been some attempts to develop a more sophisticated group of criminal investigators through the creation of the Criminal Investigation Division (CID), for the officers that are in the general policing system run through police stations throughout the country, criminal investigation training is poor. Thus, the use of torture and ill treatment has remained a key way of investigating crimes, not merely due to the inclination of police officers to that practice, but mostly due to the authorities neglecting to develop a more sophisticated and modern system that develops practical methodologies with a deep respect for the rights of the individual and the dignity of human beings. In this study, we will explore these historical aspects of the development of the policing system in Sri Lanka.

2.4. Recruitment and promotion procedures

The recruitment process under the colonial system gradually developed very strict procedures. The officers in the senior positions of the police supervised the recruitment process to ensure that selected persons had relatively acceptable educational standards, the capacity to use the languages necessary in particular areas, and also, character-wise, came from families without criminal backgrounds. The vetting process was an important part of police recruitment in the British colonial period.

In the first two to three decades after independence, similar procedures continued to be used.

However, very serious changes began to happen, including the institution of the constitutional changes in 1972 and, with a greater impact, in 1978. After 1978 in particular there has been a tendency to cultivate and develop persons in the policing system who are particularly loyal to the politicians in power. This process of absorbing the police into the political ideology of the ruling party is known in Sri Lanka as the

politicization of the police. The policing system underwent a very serious transformation in the period from 1978 to 2000, when there were some attempts made to control the situation. However, those attempts failed, and the system of recruitment is still under the thrall of those very serious and negative changes. The period after 2005 has seen large-scale recruitment – 1/3 of the existing force – and included some who did not even meet the basic requirements of literacy and elementary education. The overall emphasis was to take in people who were loyal to politicians. Though they were recruited into the lowest ranks of the police, over the years they have been absorbed into the police cadres and have risen into positions higher than reserve constables. Some have become sergeants, subinspectors and inspectors, and some have proceeded to even higher ranks. The problems in the recruitment process remain one of the major issues to deal with in terms of reforms in Sri Lanka. When, out of a police cadre of 86,000, around 26,000 are persons selected in this manner, there is clearly a serious problem in recruitment. There is a considerable body of literature on the subject of police recruitment and we will explore this theme as a very important part of this study.

2.5. Is corruption a problem amongst the police, and with what consequences?

During colonial times, various methods were used to control police corruption. It was admitted that various levels of corruption existed during this time, similar to that found in India and other places, where corrupt practices were tolerated for various reasons. However, in the period after independence, particularly after the constitutional changes towards a more authoritarian system (as discussed above), corruption surfaced as serious problem. In essence, the control of corruption was abandoned. This was a way of encouraging officers in the entire civil service to be loyal to the political regime in power. Loyalty to the existing political regime became the only consideration; those who were loyal were promoted, and there was an open policy of discouraging the Commission against Bribery from pursuing inquiries and controlling corruption. In the recent decades, the police, in surveys conducted by organizations such as Transparency International, came at the top of institutional corruption watch lists. Last year, they came in second place to education, not because there was less corruption in policing, but because there was even more corruption in other areas.

The direct result of bending to authoritarianism was the deep spread of corruption. In the 2015 election, one of the opposition's major promises was to curb corruption. There have been some measures taken after the election to have commissions of inquiry, and the CID have been given more powers to investigate into corruption. Some of these efforts are ongoing. Meanwhile, one of the most recent developments is that the National Police Commission is undertaking certain measures to deal with corruption.

If the policing system is to be brought up to standards acceptable to a functional rule of law system, one of the major areas that requires change is the control of corruption. The dysfunctional elements that we are speaking about in this study could be traced to various measures that were taken to virtually encourage corruption, and the aim was to keep the policing system loyal to the ruling regime. This area will be explored in detail in this study.

2.6. Oversight mechanisms for the police

The most important oversight mechanism established over the police was the National Police Commission, a constitutional body brought about through the 17th Amendment to the Constitution, which was passed almost unanimously by the Parliament in 2001. Through this Amendment, certain measures were taken to introduce oversight mechanisms to control various aspects of public institutions. The public services, the electoral mechanisms and the policing system are examples of the institutions brought under the 17th Amendment's procedures.

However, the progress made in 2001 was soon defeated by a change of government. The new government wanted to deliberately destroy any kind of oversight over public institutions. Thus, the period between 2005 and 2015 was one in which all oversight mechanisms came to face serious problems, and the policing system was particularly affected.

One of the first reform attempts made after the January 2015 election was the revival of the idea of the 17th Amendment through a new Amendment, the 19th Amendment, through which the powers of these oversight mechanisms, including the National Police Commission, have been restored. Within the last two years, this Commission has been working towards changes, but it is too early to make any kind of serious observation into how far it will succeed as an oversight mechanism. In this study, we will explore the issue of oversight bodies in more detail.

3. Separation of Powers

3.1. Does the constitution provide explicitly for separation of powers amongst the executive, judiciary and legislative branches of government? Does the separation of powers exist in practice?

3.2. If not, what are the possible reasons for the lack of separation of powers? What are the ways in which the lack of separation of powers impacts on the functioning of the criminal justice institutions?

The original constitution, known as the Soulbury Constitution, adopted at the time of independence in 1948, was clearly structured on the basis of the acceptance of the doctrine of the separation of powers. The entire constitutional structure was based on equilibrium of power between the three branches of governance – the executive, legislature and judiciary. There was a body of case law from the higher courts in Sri Lanka discussing the principles and nature of the separation of powers. As Sri Lanka follows the common law model, the idea of judicial precedent is part of the law and, for this reason, what the judges decide is part of the law.

Therefore, it can be shown that the idea of the separation of powers was accepted in the Soulbury constitution and was strictly practiced up until 1972, when a new constitution was used to undermine these ideas.

The 1972 Constitution removed the judicial review powers of the Supreme Court. This was the first major blow to the operation of the separation of powers principle in Sri Lanka. During this time, the idea of the supremacy of the legislature was wrongly construed to mean that the legislature was superior to the executive and the judiciary. The government at the time, which considered itself a progressive government, considered the judges of the higher courts to be conservative and that judges could delay the implementation of laws that the government considered important and urgent. In any case, there were (and still are) serious delays inherent in the judicial system in Sri Lanka, and the government believed that any person who opposed them could bring cases before the courts solely for the purpose of causing delay to the implementation of laws. This whole misinterpretation of the phrase 'supremacy of Parliament' disturbed the manner in which the separation of powers was understood.

The next attack on the separation of powers was much more drastic and complete: in 1978, the whole structure of the constitution was changed in favour of giving extraordinary powers to a new institution, the Executive Presidency. What it really meant was that all the powers of governance were placed in the hands of a single person. To achieve this, it was necessary to bring both the legislature and the judiciary under the control of the Executive President.

Though this constitution was initially accepted without protest from the courts, perhaps due to the overwhelming power that the government had in Parliament (over 80% of seats were held by the ruling party), a conflict soon developed between the Chief Justice and the Executive President. In fact, the conflict was provoked by the Executive President in order to get the message across that things had changed and that, under the new constitution, he controlled everything. This conflict continued for a few years and the Executive President even attempted to impeach the Chief Justice, starting parliamentary proceedings for that purpose. However, the official period for which the Chief Justice held office came to an end during this time, before the impeachment proceedings were completed.

This attempted impeachment had its impact on Chief Justices who came after this. The immediate successors attempted to work out some form of compromise in order to avoid any conflict between them and the Executive President. This itself left an impression on the population that the judiciary was not functioning in the same manner as it had earlier, and that it had become subordinate to the Executive President.

The situation became worse when a new government was appointed in 1994; the new Executive President appointed one of her close associates as the Chief Justice. The new Chief Justice openly collaborated with the Executive President, and virtually became a protector of the government rather than the rights of citizens.

A large number of new practices were adopted by the Chief Justice, who showed that he was able and willing to abuse his discretion in order to undermine the express provisions of the law. In fact, the approach was to use discretion instead of law. This overall approach gradually spread into the entire judiciary, the result being that the law and the place it held were undermined.

In order to further undermine the judiciary, the Executive Presidents adopted the practice of appointing people who were loyal to them to the higher judiciary – to the Supreme Court and the Court of Appeal – further violating respect for seniority and merit, as well as independence. This gradually developed into a situation in which the Executive President would illegally and arbitrarily dismiss Chief Justices who would even slightly deviate from their wishes.

In January 2015 there was a change of government, and it adopted the 19th Amendment to the Constitution as a step towards reestablishing the equilibrium of power between the three branches of government. While this has been seen as an important first step, it has not been perceived as an adequate measure for restoring the operation of the separation of powers principle into Sri Lankan governance.

There is now a discussion on adopting a completely new constitution and a committee has been appointed to consult on the views of the people on necessary constitutional changes. The committee, after such consultations, has issued their report. In their recommendations, the committee has clearly stated that the basic structure doctrine developed by the Indian Supreme Court by way of several famous judgments should be incorporated into the law of Sri Lanka and that the new constitution should be drafted on the basis of this doctrine. Discussions on the reestablishment of a liberal democratic form of governance in Sri Lanka are underway. There is a vast body of literature on the aspects explored under this section. This will be reviewed in the proposed study.

4. Judiciary

The separation of powers is a fundamental aspect of criminal justice institutions that function on the basis of the rule of law. The independence of the judiciary is central to a functioning criminal justice system, and in all matters of criminal justice the final arbiter is the judiciary. If that position does not exist, or it is seriously undermined, then the whole fabric of criminal justice is thereby disturbed. This process of disturbance is known in Sri Lanka as politicization. What politicization means is that, simply put, political decisions replace judicial decisions. Thus, the justifiability of any action relating to criminal justice doesn't depend on the law alone. Instead, the directives and wishes of the government or the politicians in power can interfere with the functioning of the system.

What the Sri Lankan experience demonstrates is the way in which, for example, the upper echelons of the police hierarchy – meaning the Inspector General of Police and their deputies, who, within the original structure had the power to control the whole system - lost their control and the politicians took over the system. This means the appointments, transfers and dismissals of officers was based more on political criteria than on the criteria developed by the institution itself on the basis of its institutional needs. Further, politicians began to interfere into decisions about whether certain complaints (i.e. information about crimes) should be investigated into. With the politicians themselves being, directly or indirectly, involved in crimes, pressure was brought on the policing system to stop investigations into many very serious and scandalous crimes. A large list of such uninvestigated crimes became part of the opposition's accusations against the government.

The same process also took place in Sri Lanka's prosecutorial department, known as the Attorney General's Department. The politicization of prosecutions meant that prosecuting officers had to develop a pro-government bias when they exercised their functions. This meant that the very essence of the prosecutor's function - their independence relating to all professional matters - was seriously undermined. At a later stage, the prosecutors' office was brought directly under the control of the presidential secretariat.

This also applied, though in a less obvious manner, to the judiciary. There was direct interference with the judiciary and the intimidation of judges became part of the routine complaints against the government.

This whole issue of how political changes that undermine the separation of powers interfere with and undermine the whole judicial process is at the heart of this study, which concentrates on how this makes the justice system dysfunctional. Political interference can virtually change the character of a justice system by

fundamentally shifting its task from being the protection of the rights of parties involved in adjudication to being a protector of the state.

5. Reform Programmes

5.1 Justice sector reform programmes

These issues are related to what has been stated on the history of democracy and rule of law in Sri Lanka after the period of independence, particularly after 1972 when there was thrust towards a semi-authoritarian system, replacing the essentially liberal democratic system in place at the time of independence in 1948.

The period of direct and very explicit authoritarian tendencies lasted from 1972 to January 2015. Therefore, talk about any kind of reforms for the better occurred outside this historical context. What we have is not reforms but deformities, in terms of the criminal justice system and the constitutional system. The most intense forms of undermining took place after 2005, and one of the circumstances that provided the ethos for undermining the rule of law and democracy was the heightening of the conflict between the militant Tamil groups, such as the LTTE, and the military. The conflict developed into the proportions of what is called a war. It is an extreme case of antiterrorism without limits. It must also be said that it was the kind of terrorism that also knew no limits to the undermining of all rules of decent engagement, including respect for the rights of civilians.

During this most unfortunate period, some of the greatest beneficiaries were those who aspired to form a more authoritarian form of government. They justified what they were doing by framing themselves as heroes fighting against terrorism. When people in society experience intensified forms of complete instability and insecurity, society – or at least a considerable part of it – begins to give consent to the State to do whatever it wishes in order to bring back some normalcy and stability. This is an aspect that needs to be understood in dealing with developing countries. The kind of situation that Sri Lanka experienced from 2005 to 2009, and which continued up to 2015, is being experienced in many parts of Asia today in even more intensified forms. Two of the clearest examples of this are Pakistan and Bangladesh. Even the developments taking place in the Philippines, where the President has authorized direct extrajudicial killings, forms of illegal arrest, detention and the like for those who are called drug dealers and those involved in any way with the drug business, are examples of how the instability that develops in society creates social and psychological conditions wherein society itself demands more vigorous actions of repression from the State, and there are people who will unscrupulously utilize this situation for their own ambitions for power.

The worst part of this phenomenon took place, ironically, at the end of the conflict with the LTTE, after the government claimed victory and the complete suppression of the LTTE. What was expected at this point was a liberalization and a withdrawal of the repressive measures put in place during the conflict. However, what happened was the opposite: the Ministry of Defence was developed into a virtual State within the State, with extremely repressive machinery, exercising surveillance on all those who were critical of the government – opposition parties, journalists, human rights organizations as well as, naturally, trade unions, peasants movements and student movements fighting for their most basic rights. During this period, intelligence services working under the Secretary to the Ministry of Defence and those they manipulated were responsible for abductions and death threats.

Thus, in the period before 2015, talking about any kind of reforms was to misunderstand the ethos and milieu within which the Sri Lankan population lived throughout all parts of Sri Lanka, whether they belonged to the majority or a minority.

Small inroads towards reform started with the change after the January 2015 elections and the parliamentary election victory for the same group in August 2015. However, they have not embarked on a well-thought-out reform program.

They have, however, embarked on several constitutional reforms, and the 19th Amendment is an example of this. Through this, oversight bodies were once again appointed in terms of the institutions (mentioned above) addressed by the former 17th Amendment and attempts were made to ensure that appointments, promotions, transfers, dismissals and disciplinary actions were controlled by certain commissions appointed by an independent constitutional council. The police come under this and, to some extent, so do the judiciary, with the Judicial Services Commission being granted greater autonomy and the withdrawal of controls exercised by former governments.

These constitutional reforms are part of attempts to return to the liberal democratic model, but that commitment has not yet been clearly stated. As mentioned above, there have been discussions on constitutional reforms, and even a committee appointed to consult on the people's views, and they have given their recommendations within the purview of liberal democracy. They advocate a basic structure doctrine, as developed by the Indian Supreme Court, to be brought into the constitution and the government, and a return to a completely democratic structure.

However, the government does not have the required majorities to pull through these reforms by way of legislation, and a section of the opposition – representing the old guard, responsible for the kinds of repression stated above – are strongly militating against the reforms mentioned. Thus, getting parliamentary consensus on the reform program remains one of the challenges in terms of the future development of governance in Sri Lanka.

However, even with the limited possibilities available, the present government has some liberty for improving oversight mechanisms, such as the National Police Commission, Judicial Services Commission, the Human Rights Commission and the like, and helping them to evolve their own reforms and development program.

It is the view of the Asian Human Rights Commission, which has closely observed the development of Sri Lanka, that one of the major obstacles for reforms is the loss of the memory of democratic institutions, of democratic norms and practices, over a period of several decades in which these things were seriously undermined.

On the issue of reforms as discussed by civil society agencies, it has been the view of the Asian Human Rights Commission that priority should be given to the reintroduction of an education program on basic notions of democracy and the rule of law for all government institutions – particularly into the justice system, meaning the police, prosecutions department, judiciary, prisons and related services.

One of the factors that is also related to this is that, at the time that basic democratic notions and the rule of law were introduced in the colonial context, it was done through an elite class that used English as their medium of communication. With the subsequent changes that have taken place, this elite group has virtually lost their influence in Sri Lanka and many of the younger generations belonging to these groups have left Sri Lanka and/or have very little interest in matters relating to Sri Lanka. What is important in that context is that English is no longer the medium of education and administration in Sri Lanka. The languages of importance are Sinhalese and Tamil. However, there is no substantive literature in these languages for the education of the state sectors involved, for civil society and for the younger generation going through legal education, political education and the like, which they can refer to in their own languages.

It is impossible to expect that there will be a sizable population in Sri Lanka who are able to read texts in English in the near future. Therefore, a reform program should emphasise the creation of a body of literature based on substantial texts from the international community on democracy, human rights and the rule of law in the Sinhala and Tamil languages, so that the basic notions around which the whole discourse on democracy and rule of law take place will be understood by a larger section of the population. The parliamentarians come from the population and their level of education in recent times has reached its lowest levels because of the repressive system discussed earlier. This state of affairs has virtually disheartened those with better education from being involved in public affairs. There were also enormous personal risks during repressive periods. There has also been an enormous withdrawal of those with greater integrity because people have seen that the opportunities for actual action towards a better future don't exist. Added to that has been the brain drain, where nearly everyone who is able to secure employment outside prefers to leave Sri Lanka rather than to stay within its borders.

All this imposes a very serious obligation on those interested in reforms to engage in a very substantive form of education, not the ordinary types of training in civil society education, but a more substantive education with texts being prepared and more educational facilities for the population at large.

Particular focus should be on the sectors whose work relates to the administration of justice, so that the quality of education on the basic concepts, notions and practices of democracy, rule of law and human rights can be better understood in these populations.

6. How the Criminal Justice System functions (or not) in practice

6.1 Arrest, detention and interrogation: in law and in practice 1.1. The right to be informed of the reasons for arrest

The legal provisions do exist and they are in the constitution itself. The rights against illegal arrest and detention provided in the constitution are inkeeping with the international norms when taken generally. However, the issue is not the availability of legal provisions, but of the practices that have developed outside them and the impunity for ignoring those legal provisions.

Some cases have come up on the right to be informed of the reasons for arrest, and the Supreme Court has held that this right has not been made available to those victims. However, a large section of the victims don't come to complain because of poverty, illiteracy and the lack of support available from the state and civil society in providing support for everyone to pursue their constitutional rights. Thus, it is an inbuilt practice in the policing system to arrest persons without any substantive evidence; arrest can be made purely on the basis of gossip or trivial suspicion with police officers having a free hand in to engage in the torture of these victims. The very fact of torture itself prevents any kind of information about arrest from being obtained. Furthermore, the basic goal is to secure arrest without having to give any reasons. It has been demonstrated by large-scale documentation of such arrests, including the documentation done by the Asian Human Rights Commission, that the arresting officers are often not clear as to why people are being arrested. It is a matter of testing and guesses, and an expectation that by way of torture they can get some information about crimes and be able to begin investigations thereafter. Thus, a deep study into these practices – for which a large amount of empirical data is available - shows that this right, while it exists in legislation, is not practiced except on rare occasions.

6.2. Right to be brought promptly before a judge and notification of arrest-detention to independent authority

The general legal principle of producing a person within 48 hours has been well-engrained into the Sri Lankan law. In the long period of colonial rule it was only 24 hours. Later, due to various problems related particularly to insurgencies, this was extended to 48 hours. In general, it can be said that persons are in most instances produced before a court within this period. However, there are many instances in which, through various pretexts, persons are not really arrested, but are kept in police stations without records being made. This is in order to keep them in detention for longer than they are allowed to be kept. However, it needs to be emphasized that there has been some improvement in that direction, particularly because of various interventions brought under the fundamental rights law and due to civil society organizations in particular, who make a great noise when such a rule is not observed.

However, when the police really want to keep detentions secret they do so, as the rule relating to reporting to an authority, such as reporting to the Human Rights Commission, goes without being observed. There is a Presidential Order to let the family of the arrested person know of the arrest, but that is also usually not followed. Further to that, the visits by lawyers to arrested persons are severely discouraged by various means. Thus, there is a large area for improvement in this regard.

6.3. Access to a lawyer and to inform members of the family upon arrest

This issue was partly dealt with above. There are no direct legal provisions for access to a lawyer but there are certain circulars, one of which is gazetted, which have been arrived at after negotiations with lawyers, formally granting the right of lawyers to visit police stations. However, getting access is extremely difficult and various means are adopted to discourage lawyers. One method is to try to develop a certain

group of lawyers who act in collaboration with the police, so that the police can manipulate the whole process.

The idea of allowing a lawyer to stay when statements are recorded has not been either part of the law or practice, and changing this has been resisted vehemently by the law enforcement authorities.

Further, a large section of the population is poor and they cannot afford legal fees for better quality legal services. The legal aid system is in extreme disarray and the fees prescribed through legal aid are quite paltry, and, as such, the legal aid system does not play a major role in providing services for the victims. On many kinds of applications, the legal fees are quite high and most people cannot afford such fees. Besides, there is the other problem of the general delay in the justice system, which means that people have to pay over a long period for lawyers, and that is not within the capacities of much of the population. All these factors affect the access to lawyers in Sri Lanka.

In fact, an area that should be studied in the context of developing countries is the quality of lawyering in terms of providing services for the protection of victims' rights. The concept of the protection of victims' rights has not been part of the overall lawyers' psychology in developing countries, and this is clearly the case in Sri Lanka.

The legal profession was considered to be for the privileged and the people recruited in the distant past were people from elite groups, who kept a very great distance from ordinary people, and who normally wanted to keep the status quo, part of which was to support the police in whatever the police may do. There are now more lawyers from poorer backgrounds, but they often don't have the morale or psychological strength to challenge authority and the police in particular, as the police are more able to interfere with the rights of the lawyers themselves. The whole area of the role of the lawyers and what has happened to the legal profession in these countries in the long period of their development, and the retarding factors from the past and the ways to overcome this to create a more liberally-minded, strong legal profession, need to be examined for sake of the victims of human rights abuses.

Not many studies are available in this area and perhaps the proposed study can throw some light on this issue.

6.4. Access to an independent medical examination upon arrest

There is no legal provision requiring a person to undergo a medical examination on arrest. However, there are legal provisions, as well as a fairly developed system for access to Judicial Medical Officers, for when a person reports torture or ill treatment, at which time a magistrate can order the person to be examined by a JMO. However, one major problem is that lawyers in most areas are reluctant to make such a request because they want to keep peaceful relations with the police, and they believe that their legal practice would be affected if they antagonize the police. There have also been cases of custodial deaths after magistrates have ignored the lawyers and victims' statements regarding their treatment by the police. This issue of access to medical examinations, as well as the actions of police, magistrates and lawyers, is important to study.

6.5. Right to writ of habeas corpus

Although habeas corpus is part of Sri Lankan law, in practice it has suffered a great setback, particularly during the long period wherein the security forces were engaged in fighting insurgencies. In the judiciary itself, there is the tendency to have an acquiescent mentality towards the security forces, rather than protecting those who were presumed to be inclined to terrorism. There is a good study on this issue based on around a thousand cases of habeas corpus filed before the courts, in which hardly any cases were found in favor of the victims. Flimsy excuses were found by judges to delay and later to dismiss these cases. A habeas corpus application will on average take five or more years before being dealt with by the courts. Problems of habeas corpus and problems of other writs should be highlighted in dealing with the restoration of democracy, rule of law and human rights in Sri Lanka.

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*The **Asian Human Rights Commission** (AHRC) works towards the radical rethinking and fundamental redesigning of justice institutions in order to protect and promote human rights in Asia. Established in 1984, the Hong Kong based organisation is a Laureate of the Right Livelihood Award, 2014.*

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