

the other Lanka



The *other* Lanka

— a collection of writings from 2005



Asian Human Rights Commission

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Foreword

In recent years the Asian Human Rights Commission (AHRC) and its sister organisation the Asian Legal Resource Centre (ALRC) have published considerable material on Sri Lanka's legal and justice systems as well as its human rights abuses. Most recently, the AHRC published *An X-ray of the Sri Lankan Policing System and Torture of the Poor* in September 2005, which documents 65 cases of police torture. Other books include *The right to speak loudly: Essays on human rights*, published in March 2004 and *An Exceptional Collapse of the Rule of Law: Told through stories by families of the disappeared in Sri Lanka*, covering the stories of over forty families whose loved ones were forcibly disappeared, published in October 2004. Two editions of article 2, a bimonthly journal of the ALRC, have also focused on torture and other human rights issues in Sri Lanka. Besides this, many articles written by the AHRC on human rights issues in the country have been published in Sri Lanka and abroad.

The AHRC frequently issues statements on current human rights issues in various countries. During 2005, numerous statements were issued concerning Sri Lanka. Most of these were reproduced in Sri Lankan newspapers and other publications. The Daily Mirror for instance, has published these statements on a regular basis in its Saturday issue. This book is a collection of these published statements as well as some that were published in 2004. It also includes articles by Sri Lankan journalist Kishali Pinto-Jayawardena, from her column in the Sunday Times and articles by Basil Fernando, executive director of the AHRC and ALRC.

The theme connecting the varied articles in this collection is the collapse of the Sri Lankan justice system. The system has come to a point where it is unable to benefit those seeking justice, but rather serves those committing crimes. This is linked to Sri Lanka's failure to modernise its policing system, to address delays in courts and to ensure accountability in public institutions. Inevitably then, conditions for widespread corruption exist in all areas of life.

Rather than halting this collapse, Sri Lanka's ruling elite in recent years have taken steps to undermine all measures initiated previously to limit the rule of law breakdown. The most significant of these steps has been the failure to respect the 17th Amendment to the Constitution. This amendment, while limited and incomplete, was a collective response to the unlimited power given by the 1978 Constitution to the executive president. The amendment

introduced several commissions to supervise the functioning of key public institutions, including powers over appointments and disciplinary control of employees. Commission members are to be selected by the Constitutional Council, which itself is appointed through the participation of all parties, to prevent the government from making political appointments. Due to the failure of the President and government to ensure appointments are made to the Constitutional Council itself, none of the commissions under the amendment are functioning at present. This abandonment of the 17th Amendment removes independent supervision of the key public institutions and returns absolute power to the executive president.

Sri Lanka is no exception to the rule that power corrupts, and absolute power corrupts absolutely. Even the Auditor General is now being attacked for carrying out his duties, on the premise that his audit reports of public institutions may create the wrong impression of these institutions. Earlier this year, two Supreme Court judges resigned from the three-member Judicial Service Commission as a matter of conscience. Despite strong local and international demand for the judges to voice these matters of conscience, silence prevails. It is clear the judges fear the repercussions of speaking out.

This fear of repercussions is a very real one that prevails in all aspects of life. Through statements and articles published in 2005, this book documents the expectation that every attempt to assert independence or to reveal what is perceived as wrong, may lead to serious threats on life, employment and property. These statements and articles reveal the other Lanka. Many persons living outside Sri Lanka see ethnic conflict as the only problem facing the country. For people living in Sri Lanka however, there is another reality: the reality of authoritarianism, which affects everyone and everything. The AHRC has always held that the ethnicity issue is itself a product of the breakdown of governance in the country, especially after the introduction of authoritarian rule through the 1978 constitution. It is this other Lanka that needs study and understanding if the present catastrophic situation is to be resolved.

As mentioned above, most of the material in this book has previously been published in the Daily Mirror and Sunday Times. For this reason, the text has largely been left as it appears in the original, with only minor editorial changes made to ensure consistency in style and spelling.

For the most recent information regarding the situation in Sri Lanka, please see www.ahrchk.net / www.srilankahr.net

List of Acronyms

ADB	Asian Development Bank
AG.....	Attorney General
AHRC.....	Asian Human Rights Commission
ALRC.....	Asian Legal Resource Centre
ASP.....	Assistant Superintendent of Police
BASL.....	Bar Association of Sri Lanka
CAT.....	Convention against Torture
CCP.....	Code of Criminal Procedure
DIG.....	Deputy Inspector General
DMO.....	Deputy Medical Officer
EC.....	Elections Commissioner
ESCR.....	UN Economic Social and Cultural Committee
GMOA.....	Government Medical Officers' Association
HRC.....	Human Rights Commission
ICCPR.....	International Covenant on Civil and Political Rights
IGP.....	Inspector General of Police
JVP.....	Janatha Vimukthi Peramuna (People's Liberation Front)
MC.....	Magistrate's Court
NGO.....	Non-governmental organisation
NPC.....	National Police Commissioner
OIC.....	Officer in Charge
OPCAT.....	Optional Protocol to the Convention against Torture
PAT.....	People Against Torture
PTPU.....	Prosecution of Torture Perpetrators Unit
RCT.....	The Danish Rehabilitation and Research Centre for Victims of Torture
SPO.....	Special Presiding Officers
SUI.....	Special Investigation Unit
UNP.....	United National Party
UN.....	United Nations

Chapter I

Right to due process

Lankan journalist wins rights case before UNHRC

The UN Human Rights Committee has found the State of Sri Lanka to have violated the provisions of the International Covenant on Civil and Political Rights (ICCPR) in the cases brought before it by prominent journalist Victor Ivan and a Tamil citizen, Nallararatnam Singarasa, who was accused of supporting the LTTE.

Accordingly, the Human Rights Committee ruled that Sri Lanka violated the right to freedom of expression of Mr. Ivan and the right to a fair trial of Mr. Singarasa, who is currently serving a 35-year jail term on charges under the Prevention of Terrorism Act (PTA). In its decisions released on the Internet last week, the Committee stated that the Sri Lankan government should provide “effective and appropriate” remedies including compensation to the victims as well as take measures to prevent similar violations in the future.

Basil Fernando, Executive Director of the Asian Human Rights Commission (AHRC) and a veteran rights campaigner said that the two cases were momentous as they showed that local remedies to redress human rights violations were inadequate. Therefore, there is an urgent need for the law in Sri Lanka to be changed in keeping with the standards imposed by international law and thereby enabling the people of Sri Lanka to actually benefit from the international treaties the government has signed.

Victor Ivan, a well-known journalist and editor of the newspaper “Ravaya”, submitted his case to the Human Rights Committee for intervention in December 1999. He complained that he had been indicted several times for allegedly having defamed ministers and high-ranking officials of the police and other departments in articles and reports published in his newspaper since 1993. Those charges were “indiscriminately and arbitrarily” made by the attorney general and designed to harass him, Mr. Ivan said. Three indictments

filed against Victor Ivan between 1996 and 1997 are still pending for adjudication in court, with the government failing to justify this procedural delay.

After nearly five years of communication and examination, the Human Rights Committee concluded that it was of the opinion that the proceedings in court in Mr. Ivan's cases have been unreasonably prolonged and are therefore in violation of the ICCPR.

The Committee considers that to keep pending the indictments for the criminal offence of defamation for a period of several years after the entry into force of the Optional Protocol by the state party left Mr. Ivan in a situation of uncertainty and intimidation. This was despite the journalist's efforts to have the proceedings terminated, and thus had a chilling effect which unduly restricted the exercise of his right to freedom of expression, the Rights Committee said.

According to Mr. Fernando of the AHRC, the criminal action against Victor Ivan was instituted by the attorney general without proper consideration and evidence. "Unfortunately, there are many similar cases being reported in which it is alleged that indictments filed by the police are based on fabrications," Mr. Fernando said. "These matters need to be reviewed seriously and those officers who have made such grave errors should be made accountable," he said.

In the case of Mr. Singarasa, the UN Human Rights Committee concluded that he was denied a fair trial, as he was found guilty of charges under the PTA based on an alleged confession that was obtained by two police officers without the presence of an external interpreter. The government had also violated the ICCPR by placing the burden of proving the confession was made under duress, on the victim, the committee said.

According to the Committee, Mr. Singarasa's right to review his case without delay was also infringed because the government failed to explain as to why there was a four-year delay between his conviction and the final dismissal of his appeal by the Supreme Court.

"The state party is under an obligation to provide Mr. Singarasa with an effective and appropriate remedy, including release or retrial and compensation," the Committee said. "The state party is under an obligation to avoid similar violations in the future and should ensure that the impugned sections of the PTA are made compatible with the provisions of the covenant," it noted.

The Human Rights Committee is the UN body of independent experts that monitors implementation of the ICCPR by its state parties. Sri Lanka is state party to the ICCPR and the Optional Protocol to the covenant, which enables individual complaints of human rights violations to be brought before the Committee.

Daily Mirror: September 6, 2004

<http://www.dailymirror.lk/inside/justice/040904.asp>

Mr. Lawyer, are you upholding or undermining justice?

The Asian Legal Resources Centre (ALRC) has expressed serious concern over the manifold forms of denial of the right of proper legal representation for criminal suspects at the Magistrate's Courts in Sri Lanka in contravention to the rights guaranteed under Article 14 (3) of the International Covenant on Civil and Political Rights (ICCPR).

When these allegations are of serious crimes, such denial can result in vitiating the magisterial court defence, and this could later have dire consequences on the trial before the High Court, the Centre said after Wednesday's ugly scenes where lawyers allegedly hooted in a courtroom, when a top lawyer appeared for the suspect in the case involving the killing of a High Court Judge. The ALRC also says it has gathered considerable information that police officers, attached to various stations, refer cases to preferred lawyers and obtain commissions of up to 50 per cent of the legal fees charged by such lawyers from their clients.

ALRC further says that in a letter written by the Wattala branch of the Bar Association to the OIC, Wattala police station sometime earlier, lawyers had complained that some officers of the Wattala station were referring suspects to specified lawyers for legal representation in court. This letter which was also copied to high-ranking police officers and to the Bar Association of Sri Lanka, had received wide publicity. Following the publication of this letter, it was revealed that this practice is not confined to Wattala, but takes place in numerous other locations throughout the country.

The reason for such references to specified lawyers is that there are arrangements with such lawyers to obtain commissions, which can sometimes even exceed 50 per cent of the fee charged. As the cases are postponed for several days the commissions will also be received for each of those days. After some

time, considerable daily income can be obtained through cases thus referred, ALRC says.

Other than the corruption involved, such commission taking also gives rise to many other questions regarding investigations, prosecutions and fair trial at the Magistrate's courts by the police. As even initial inquiries, production of suspects before courts and non-summary inquiries regarding more serious crimes are also handled by the police, this practice of collusion between the police and some lawyers can affect criminal inquiries in a serious manner.

The ALRC says, when the suspects are produced in court the police act as the investigators and the prosecutors. The suspect seeks lawyers for the purpose of defence. When police officers obtain commissions from defence lawyers they are very much compromised in the conduct of further inquiries and also the conduct of defence. Often, on the other hand, the lawyers too are compromised in the proper conduct of the defence.

In many instances the result is a plea tendered by the suspects on the advice of their lawyers who have to please the police who sent them the cases. This would amount to the suspects not getting fair legal advice on the actual nature of their cases. It also hinders them putting up a proper defence in court. Thus, irrespective of the guilt or otherwise of the suspects the limited option open to them would be to tender a guilty plea. If any suspect were to abandon this procedure, for example, by insisting that the lawyers fight for his innocence, then the lawyer would be compromised and likely discourage such attempts. If the suspect seeks another lawyer for the purpose of his defence then he might antagonize his former lawyer as well as the police. In such circumstances he may even be implicated in other cases.

If the court is under pressure to deal with an excessive workload and therefore is not quite willing to put up with persons pleading not guilty and who insist on trial—as may often happen—then such an atmosphere will contribute to the sort of collusion between the police and some selected lawyers as mentioned above. As a result, the public's perception of the legal process can be adversely affected and the concept of fair trial compromised. Settlement making could become the general atmosphere of courts. Finally, such collusion can have an extremely demoralizing effect on all stakeholders involved, with the self-respect of the profession in Magistrate's courts degenerating significantly.

These practices need to be scrutinized by the Bar Association of Sri Lanka (BASL) as well as the police. However, there had been much criticism published in newspapers and journals about the degeneration of the BASL in recent times, says the ALRC. The Association's first Secretary who later became its President, Desmond Fernando was quoted as follows: "We have experienced how arbitrarily issues concerning the Judiciary have been dealt with. We have experienced how some members of the Bar including those in the official Bar have been dealt with. We have experienced how damning allegations have been made against the members of the Judiciary. In all these instances the BASL had maintained a deafening silence and had continued unperturbed, engaging solely in welfare work obviously mixing up its priorities. Many members of the Bar have taken up these issues from time to time in the Bar council with no response." (*Daily Mirror*, January 21).

As a result of this deterioration, says the ALRC, complaints made by litigants against alleged malpractices of lawyers are not dealt with in a prompt and professional manner. For instance, the case of Dingiri Banda—a torture victim—illustrates how such complaints can even be fully ignored. Dingiri Banda had complained that his lawyer in a fundamental rights application had arrived at a settlement with the respondents, when his instructions were not to settle at all. Despite many reminders this matter has still not been investigated. And due to the lack of proper procedure to conduct inquiries into professional misconduct the dissatisfied litigants have no avenue to pursue their complaints.

Thus ALRC urges the Government of Sri Lanka to take appropriate action to ensure compliance with Article 14 (3) of the ICCPR, relating to fair trial.

Daily Mirror: January 22, 2005

<http://www.dailymirror.lk/inside/justice/220105.asp>

Chicken feces and contempt of court; where are the lines drawn?

In “The Comedians”, (1965, Viking), a darkly satirical story about Haiti during “Papa Doc” Duvalier’s time, Graham Greene writes about the theft of a coffin by Duvalier’s thugs, the Tonton Macoutes, (the term appropriately enough, translates into bogey-men), known for the sunglasses that they wear all the time as well as for their chilling propensity to kill and maim.

The coffin contains the body of a dead man, a former Minister who was unwise enough to anger Duvalier. Upon witnessing this bizarre incident where the coffin is snatched away from under the eyes of the widow and her son who was accompanying the body for the burial, the story’s main character questions his man-about-the-house as to why a body needs to be stolen. The latter replies that this is because Duvalier keeps all the men who he has killed in his palace to work from him, using Voodoo. “So nobody will attack him at night with the zombies there to protect him...they are better than guards, better than the Tonton Macoutes”, he explains.

Greene is describing no fictional belief here though the story itself is a novel. These indeed, were the popular notions that prevailed during that time when the ordinary people believed that to go against “Papa Doc” was to give up the ghost not only in terms of earthly living but in its spiritual manifestation as well. The belief exemplifies the nature of the absurdity that is brought into being during times of extreme abnormality. It is the phenomenon of the insecure which employs such strategies to protect itself where the ordinary rules of functioning are deliberately displaced, making it essential to quell revolt, which would have been otherwise manifested. Its application can extend to institutions as well as to human beings.

While it is not my intention to draw immediate parallels between Papa Doc Duvalier's use of voodoo and mind tricks with the primary issue being discussed in this column, the thread of surreal absurdity that runs through both cannot be denied. What we have, relevant to the current context is an extraordinary event emanating from an incident at the Marawila Magistrate's Court on December 6, 2004.

Writing about this event, the Hong Kong based Asian Human Rights Commission (AHRC) describes it thus; "Over twenty remand prisoners had come to attend to their individual cases. As is customary, they were brought by the remand prison bus and placed in the court's holding cell. Once the prisoners were placed in the cell, some sat down, as is usual when waiting for their cases to be called.

It was not long before they noticed a foul smell and those who were seated rose up to examine their clothes. What they found was chicken shit all over the backs of their shirts and clothes and looking further about they found chicken feces all over the floor of the cell. Not surprisingly, there was a bit of unrest in the cell and the prisoners told the guards what they had found. However, the remand prison guards were unwilling to do anything as it meant opening the holding cell, which is usually only done to get each prisoner separately when their names are called by the court.

After a while, the information about the incident reached the Magistrate who ordered the prisoners to be taken to the Remand Prison bus and in the meantime the cell itself was to be cleaned. After this was done the remand prisoners, wearing the same clothes because they did not have anything to change into, were returned to the cell.

Then the court resumed and the cases were called as usual. When the prisoners came to answer the charges against them, they were shocked when the Magistrate began to order jail sentences on each of the prisoners for contempt of court relating to the chicken feces incident. The prison sentences ordered for contempt of court varied from about six months to one year and no reasons were given either for the court order or for the variation of the sentences. The prisoners were not even told that they had been charged with contempt of court but when their cases were called the prison sentences were announced. The Magistrate prepared written minutes in the same case filed under which they were charged, stating that they had been subjected to these sentences for contempt of court."

The AHRC asks some pertinent questions including as to why the court did not follow due process before sentencing, why varying sentences were imposed on the prisoners and why no inquiry has been yet held as to how the chicken feces came to be in the cell in the first place? The organisation notes that, in fact, it is not the prisoners who should have been charged but rather, those who used the remand cell in this manner which could only have been done either by some court employees or with their knowledge.

It points out that this incident of sentencing the prisoners needs to be fully investigated and states that the use of contempt of court proceedings in this manner ridicules not only the law on contempt of court but also courts as a whole.

These questions are part of a wider debate. In this particular case, powers given by the Code of Criminal Procedure (CCP), (read with the Penal Code) in respect of proceedings where offences affect the administration of justice and where court sittings have been interrupted or insulted, appear to have been utilised. The factual assessment of the disturbance (i.e. the natural indignation of the remand prisoners in finding chicken feces all over their clothes and body, obviously manifesting in some manner of uproar inside the remand cell as opposed to the perturbation of the judicial officer in being apprised of the situation) is relatively simple. However, the question is whether contempt powers should have been exercised in the summary manner in which they are alleged to have been but which question this column is constrained from examining beyond a point due to the fact that the appeal is currently pending before the High Court. In the meantime, the remandees are currently serving out their sentences for contempt.

Differentiated from the precise nature of the pending appeal are certain general principles that are important. Firstly, the fairness of the procedure. In a draft Contempt of Courts prepared by civil society organisations some one and a half years back, the point was made that contempt proceedings whether in the Supreme Court or in any other subordinate court cannot constitute an exception to the fair trial principle, necessitating all the required elements of a proper charge, right to counsel, a reasoned order and so on. Infringement of this principle involves a violation of Article 13(3) of the Constitution as this amounts to the denial of a fair trial.

Secondly, there is the question of remand prisoners as necessarily distinguishable from convicted prisoners. Though the Sri Lankan Constitution does not

expressly provide for the rights of detained persons, this is an implicit right that is, in any event, specifically articulated in Article 10 of the International Covenant on Civil and Political Rights (ICCPR) which we are subject to in international law. ICCPR Article 10(1) mandates all persons deprived of their liberty to be treated with humanity and with respect for their inherent dignity and also recognises the separateness that ought to be accorded to remand prisoners by stating that they shall be kept separated and subjected to separate treatment as appropriate to their status. International jurisprudence in relation to these principles has been unequivocal in upholding their substance.

Generally, there persists the need for reform of the laws of contempt and the procedures relating thereto as well as appropriate training for judicial officers therein in Sri Lanka. In the long term, where contempt of court powers are used arbitrarily or unwisely, the primary result will be the loss of public respect for the administration of justice itself, which further erosion this country may not be able to stand.

By Kishali Pinto-Jayawardena
Sunday Times: Focus on Rights, February 13, 2005

Raped J. R. waiting for 12 Years

“Promptitude of punishment is the most certain deterrent to crime” pointed out Cesare Beccaria in 1764 in his book, *Essays on Crimes and Punishments*. He also made the observation that crimes are more effectively prevented by the certainty of, rather than the severity of punishment. However what certainty of punishment can there be when a criminal case takes between 7-15 years before a final judgment is arrived at?

The question of delays in adjudication has been perhaps the most talked about subject regarding the defects of the justice systems in Sri Lanka for many decades. However, there has been little attempt to link this with issues such as the increase of crime, social insecurity and loss of faith in the judicial process as a whole. There seems to be a reluctance to make these linkages.

Causal link

If in fact, these issues are seen as intrinsically intertwined, then any attempt to find a serious solution to crime and social insecurity and to establish confidence in the justice process, would require the undoing of such delays. Instead, when this linkage is forgotten and these problems are discussed in isolation, it results in hyped-up emotional responses that in turn could be mobilized for ulterior purposes. However, none of those social outbursts are capable of producing real solutions until the issue of delay in adjudication is seriously addressed.

There is also a general feeling among most decision-makers in the area of adjudication, that delays will remain an unalterable fact in the judicial process in Sri Lanka. However, this fatalistic acceptance of the situation only means that there is little belief in finding solutions to the increase of crime, social insecurity and other associated problems with the rule of law arising from the delay in justice. The result is a willingness to accept rather crude solutions to social problems via extra-judicial killings, torture and mob violence.

Case studies

In a discussion seeking real solutions, the causal link between the legal delays and the collapse of the rule of law with all its manifestations, should be reasserted. In fact, this should be the starting point of such a discussion.

Cited below are four cases randomly chosen pertaining to four young victims. These cases are not the worst from the point of view of delays. Instead they are randomly selected to show what transpires in an average criminal case in terms of delays and the consequent impact on the victims.

Case 1: J. R. was allegedly raped at the age of 16 on August 12, 2001. No immediate investigation was carried out. Instead investigation only came about much later, after the intervention of certain human rights groups. A case bearing No. 32151 in the Magistrate's Court, Nuvara Eliya, was filed and evidence was recorded. In October 2002 the case was committed to the High Court for trial and the file was sent to the Attorney General's (AG) department. However, to date the victim has heard nothing further about her case. The victim made several complaints regarding this matter to the AG and also the Human Rights Commission of Sri Lanka.

However, to her knowledge, no case has yet been filed in the High Court. Generally, after indictment is filed in the High Court, it takes between 3-5 years before final judgment. Then there can be an appeal, which itself may take another 3-5 years. Thus, J.R. may have to wait up to 12 years from the date of her alleged rape, for a conclusion of her case before court.

When a young victim such as J.R. is forced to go through this type of prolonged ordeal for justice, she also encounters many other associated problems. During this long waiting period, she may be subjected to further threats or violence at the hands of her perpetrators.

As a result, as well as due to the social stigma attached to a person claiming rape, the victim is often forced to leave her home and seek shelter elsewhere. Furthermore, another woman seeing the suffering of J.R. caused by the delay in the justice system, might think twice before complaining about a similar crime perpetrated on her.

Case 2: Y.S. was a mere 13-years-old at the time of her alleged rape on September 2, 2002. After the police conducted an initial investigation a case was filed in the Magistrate's Court of Kandy (Case No. 25248). This case is

still pending before the Magistrate's Court. It is not possible to predict when the Magistrate's Court Non-Summary proceeding will conclude. However, once it has ended it will be sent to the AG's department for the filing of indictments.

And going by earlier cases, Y.S. can expect to wait at least three years before the indictment is prepared and sent to the High Court, where the trial is likely to take a further 3-5 years for judgment. If the case is appealed, which is most likely, one may expect a further delay of 3-5 years before a final judgment. During this period the victim is also likely to experience similar problems as mentioned in J.R.'s case.

Case 3: K.A. was allegedly raped on July 2, 2003. Her case bears the number B 40152 at the Magistrate's Court. Having a 'B' number for a case means that the Non-Summary Inquiry has not yet begun. Going by earlier cases, a Non-Summary Inquiry often takes 2-3 years to be completed. And in the meanwhile the victim will most likely face the same prolonged wait and adverse experiences as aforementioned.

Case 4: I S was 17 when she was allegedly raped on April 7, 2002. The case bears No. B 37112 at the Kandy Magistrate's Court. Again, bearing a 'B' number means that not even Non-Summary proceedings have begun. Thus, she can expect to wait a decade or more before receiving any form of justice for the violation of her rights.

Fair trial

Delays create extreme difficulties for the realisation of fair trial. In Sri Lanka, for example, the official figure of the number of successful convictions in criminal cases is four per cent. And many of those convicted have pleaded guilty to the charges against them.

Long delays in adjudication affect fair trial in the following ways:

Over the years witnesses who initially come forward to give evidence withdraw for various reasons. Often they have to attend court many times for several years and thus their lives are seriously disrupted. Whether the trial takes place or not witnesses who come to court often have to wait the whole day. Thus, the witnesses experience a heavy sense of frustration and futility.

Others — who become aware of the travails, they are likely to suffer if they come forward as witnesses — often withdraw at the very beginning even if

they have vital evidence regarding a case. Their sense of civic obligation to the community on the one hand and their awareness of the many inconveniences they have to suffer during civic duty on the other, come into conflict.

It is difficult for people to remember every detail of an event that they experienced many years earlier. When witnesses are cross-examined about something they may have seen or heard 5-6 years ago, they are likely to make many mistakes when giving evidence. A clever cross-examiner may be able to exploit this situation and have the witness appear unable to recall the truth. If this is to be avoided then the court must hear evidence while the event is still fresh in the minds of witnesses.

Pressure

Another problem associated with judicial delays is the pressure brought upon persons not to give evidence or to change such evidence. When some members of their own communities bring heavy pressure over a long period of time, it is quite likely that many will succumb to fear. It is also possible that witnesses' fear may be realised and they come to harm. By having trials within the shortest period of time such pressure is much reduced and the providing of witness protection is made much easier. Thus, achieving effective witness protection requires that cases be heard within the shortest possible time.

When the right to a speedy trial is denied, many other rights are also automatically denied. Aggrieved persons may not wish to lodge complaints about crimes committed against them, knowing very well that justice if any will only be done years later. They may instead choose to suffer in silence and try to get on with their lives as best they can.

Hence legal delays inevitably favour perpetrators of crimes, not the victims. And the worse affected are innocent persons who are accused of crimes, for they will have to wait years for a declaration of innocence by the judicial process.

Conclusion

Therefore, until the problem of delays is addressed in a serious manner and solutions are found, the talk about the re-establishment of the rule of law in Sri Lanka will remain 'mere bluff'.

By Basil Fernando

Daily Mirror: March 5, 2005

<http://www.dailymirror.lk/inside/justice/050305.asp>

Vital lessons from Ambepitiya's trial

Ordinary citizens also have an equal right to such speedy justice

High Court Judge, Sarath Ambipitiya, was assassinated on November 21 last year. Within seven months of his killing, the criminal investigations as well as the trial into his assassination were completed, with a three member Trial at Bar finding the suspects guilty and sentencing them to death. According to reports the trial took 25 days for completion. Perhaps this, one of the speediest trials conducted into a serious crime in Sri Lanka, offers several valuable lessons to be learned, according to a statement issued by the Asian Human Rights Commission.

Firstly, cases can be completed speedily

The common lamentation in Sri Lanka, shared by citizens, bureaucrats, judges, prosecutors and defense lawyers and politicians alike is that the trial process in Sri Lanka is beset with extraordinary delays. It has even been said that without more courts, more judges, more prosecutors and more funds these delays cannot be cured. However, the Ambepitiya case demonstrates that this is not always true. This particular case was completed within seven months. It would be a slur on the judiciary if it were to be said that this case was considered as a special one and therefore special procedures were followed.

Everyone is equal before the law, legally speaking, therefore the killing of a judge is of no more importance than the killing of even the most humble of citizens in the country. Besides, more prominent persons have been assassinated previously. A Prime Minister, a President and several cabinet ministers are among those who have been assassinated. However, on those occasions the trials were not so swift. Thus, it should be a matter for celebration that for once a trial has been conducted speedily demonstrating that this is now a

possibility in Sri Lanka. One would hope that the principle of equality before the law would be more vigorously pursued by trying to repeat the performance in other cases, the AHRC says.

Second, the hearings were conducted on a day-to-day basis

In its entirety the trial took 25 days. The case was heard on a day-to-day basis as cases were heard when jury trials were conducted. However, common procedure in High Court trials today is that partial evidence is taken on one day and then the case is postponed for several months depending on the court's calendar. Thus, a case may be heard over 25 separate days with at least three months lapsing between each day of trial. This would mean that six years might pass before the court could reach a conclusion.

Thus a lesson that the Ambepitiya case has taught us is that if criminal trials are heard from beginning to end in one session, meaning back-to-back daily hearings, it is possible to overcome the present impasse and to ensure speedy trial. Usually the spacing of dates is blamed on the court's work overload or lawyers finding excuses to have distant dates set. The Ambepitiya trial, however, showed that such excuses are unjustified and that when a case is pursued with determination it is possible to overcome all other difficulties. In the case of judge Ambepitiya, three judges were involved as it was a Trial-at-Bar. If this could be done in his case, then surely this could be emulated in other trials where only one judge is present, the AHRC says.

Third, the security of witnesses was ensured

Another marked feature of the Ambepitiya case is that none of the witnesses was subjected to any severe injury. Nor did any witness withdraw due to personal safety or fear. It was reported that there were threats to some witnesses in the case. However, the fact that this trial was conducted speedily helped to ensure that the time period witnesses might be exposed to threat was significantly shortened. Given that the accused were alleged to be persons with underworld connections, with a lot of money to spend and a lot of power to wield, serious damage could have been done to the witnesses if the trial took the normal course as in other cases.

Thus, a lesson taught from this trial is that ensuring witness protection requires trials be conducted speedily. Not so long ago a Solicitor General noted that one of the reasons for the low rate of success in prosecutions was due to

witnesses withdrawing their evidence or changing their positions due to fear of repercussion. However, if the cases are heard speedily this fear factor may become less of an issue in future trials. The possibility of corruption was also limited due to the speediness of the trial.

Fourth, the use of forensic evidence was crucial

In Ambepitiya's case the reliance on forensic evidence such as DNA and other evidence was crucial. Given the principle of equality before the law, there is no reason now to deny any person the use of such evidence in the conduct of trials. A lack of resources or facilities cannot be used as an excuse. Preferential use of forensic facilities will seriously violate the very principles on which the justice system is based.

Fifth, the use of special units for investigations played a significant role

The investigation in this case was conducted by special units of the Criminal Investigation Department. It may be interesting to speculate as to what might have happened if the investigations were conducted under the normal policing channels such as the local police stations. There were reports in the early stages of the investigation that there was interference from some senior police officers regarding the investigation into this case. That is a factor that is always present when investigations are conducted through various police stations where the Officer-in-Charge is the chief investigator. This system, which was introduced during colonial times, is now obsolete. Investigations into serious crimes is best done by specialised units rather than through the normal channels of a police station, which is also much more open to undesirable practices and local pressures.

Evident from the Ambepitiya case is the greater effectiveness and likelihood of justice when a trial is conducted speedily, when delays are avoided, when witnesses are properly protected, when forensic evidence is used and when specialised units rather than local police are employed to investigate the case. Ordinary citizens of Sri Lanka, like high profile judges, have an equal right to this type of trial and it is the responsibility of the government of Sri Lanka to ensure that this right is met.

Daily Mirror: July 16, 2005

http://www.dailymirror.lk/arch/a_index.html

IGP shows double standards in speeding up trials

According to the latest media reports, IGP Chandra Fernando has said that the police will apply to the Attorney General's department to have a Trial-at-Bar to speed up the sensational Royal Park murder trial and that this will "send a clear message" to all that crime will be punished.

The Asian Human Rights Commission in a statement has queried by what criteria the IGP decided which cases are to be speeded up and where clear messages were to be sent? And was the urgency of a trial determined by the particular person who has been killed? Was the killing of a judge or a foreigner sufficient ground upon which to decide that the crime was heinous and speedy justice was needed? Surely the factors that deserve consideration included the positions of the alleged perpetrators and the circumstances of the crime, rather than the personalities involved, AHRC said.

There are no more heinous crimes than those crimes allegedly committed by law enforcement officers, whose duty it should be to protect, not undermine, the rights of the people. One glaring example of such a crime was the killing of Gerald Perera, a torture victim who was shot a few days before he was to give evidence in court about his ordeal at the hands of local police. Allegedly Mr. Perera was disposed of to prevent him from giving this evidence. After thorough investigations, the culprits were remanded, however, little attempt has been made by the police or by the AG's department to expedite this trial. Almost every week a killing is reported from one Sri Lankan police station or another. Only last week it was reported that a 52-year-old man was allegedly tortured to death at the Peliyagoda police station over the theft of a cordless phone. Meanwhile, it was also reported that personnel connected with the Kadawatha police station allegedly abducted a young man and dumped the body—which had over 30 external physical injuries—in a well. A man at Opanayaka was shot to death by the police, resulting in what newspapers

described as a mini battle between the police and large numbers of villagers who brought the casket of the dead man to the police station in angry protest. Were the daily, weekly, and monthly killings at police stations tallied, they would make a long list by the end of a year.

Has the IGP thought of “sending a clear message” to any of his own policemen on such killing and torture? Or instead were they sent a message that they will be protected? Are only some gestures made so that public anger is appeased and a false impression created in the international community? What moral authority did the IGP think he was exhibiting by calling for a speedy trial in the murder case of a young foreigner, while his police personnel were left to their own devices? That the trial of a murder victim should be speeded up because of social standing or nationality denies the principle of equality before the law and ignores the disproportionate effects of different crimes on the entire system of law enforcement.

Every time Sri Lankan policemen allegedly killed or tortured someone, mountains must be moved, through the UN and other international agencies, to get even the slightest action. Even where some special units do their jobs well and arrest the perpetrators, senior officers do what they can to protect the culprits. And most commonly, that support came through inordinate delays which inevitably gave time for victims and witnesses to be cajoled and threatened into pulling out of the trial. And sometimes, they ended up like Gerald Perera.

The AHRC said that when law enforcement officers are the accused, the police have a greater obligation than usual to protect the victims and witnesses, as the perpetrators have an extraordinary capacity to commit further harm. It is especially in these cases that speedier trials are needed.

The AHRC therefore has urged the IGP to ensure a speedy trial in the case of the killing of torture victim, Gerald Perera, and in all cases of killings at police stations.

Then a clear message will really be sent to the law enforcement officers who are destabilising the rule of law in Sri Lanka. This step would benefit the country far more than cheap populist gestures on high-profile cases, the AHRC said.

Daily Mirror: July 30, 2005

<http://www.dailymirror.lk/inside/justice/300705.asp>

Chapter II

Social and ethical responsibilities of professionals

AHRC tells Desmond: Work on vital reforms now

The Asian Human Rights Commission (AHRC) has welcomed the election of well-known lawyer Mr. Desmond Fernando as the President of the Bar Association of Sri Lanka. In a statement AHRC says it has come at a crucial time when the rule of law in the country has suffered an exceptional collapse, the independence of the judiciary has been questioned both internally and externally, and the quality of the legal profession itself has been undermined due to various factors.

In seeking the candidacy for the Bar Association presidency, Mr. Fernando had earlier expressed his reasons for contesting as follows: “the prestige and the standing of the legal profession has never been so low in the history as it is today. . . . The legal profession plays a pivotal role in the administration of justice, and it is the legal profession that must analyse what has gone wrong. It is the legal profession that must then take the initiative to put things right. This must be done at once. And in doing so, we must be innovative, fearless, challenging and effective...” AHRC says it hopes the new president will vigorously pursue these aims that are already long overdue.

AHRC also urges the Bar Association under its new leadership to address the following problems urgently:

Integrity

The integrity of the profession vis-à-vis all other institutions be reasserted, in particular, the police and the judiciary. Regarding the police, there are widespread allegations, particularly in the Magistrate’s Courts, that police officers attempt to dominate lawyers and that often work is assigned by the police to some selected lawyers from whom commissions are obtained. Although such issues have been raised by a BASL branch association recently, and also published in newspapers, no significant remedial action has been taken to date.

Dealing decisively with this issue and taking up the demand that the Bar Association has put forward in the past for proper representation by lawyers of the suspects' choice at the police stations should be reasserted. The dignity of the Bar is very much at risk if the public perceive that lawyers can be bullied by the police. The BASL can seek the cooperation of the IGP and the National Police Commission in resolving this issue.

That as the President himself has observed there has been, on occasions, a diminishment of the recognition of the legal profession by the judiciary. There are so many complaints that members of the legal profession make in private, but are unwilling to air in the public, due to the fear of repercussions to themselves or their professional practice. An essential element of the legal profession is to be able to practice without fear. This position needs to be re-established if the citizens of Sri Lanka are to get the best professional services from their lawyers, which is an essential element of equality before law in practice, AHRC says.

Legal aid

The plight of the poor in particular needs to be looked into urgently. Although there is legal aid of a sort in Sri Lanka, this does not in any way compare with the developed legal aid systems now existing in many parts of the world, including in Asia.

A proper system is required for making application for legal aid. The service of qualified lawyers for cases that are undertaken, is required so that no disparity is created between the rich and the more powerful sectors of society against the poor, for whom often, legal aid offers only the services of much less experienced lawyers.

This should also be accompanied by speedy inquiries into the allegations by clients of improper conduct by lawyers. It was quite recently that one such person who was assigned a lawyer from the legal aid commission of the Bar Association complained that his lawyer acted against his written instructions in a fundamental rights case.

Sri Lanka is a party to the protocol of the International Covenant on Civil and Political Rights (ICCPR) and has also ratified several other covenants and conventions including the Convention against Torture (CAT). However, respect for treaty obligations arising therein is often lacking. The legal profession

itself is not properly educated on Sri Lanka's international obligations and backward attitudes still exist within the profession of these matters.

Thus, a vigorous defence of these legal principles has not yet adequately developed in Sri Lanka, AHRC says.

The result is that the citizens of Sri Lanka do not get the necessary legal backing, to benefit from the rights available to them in terms of these international obligations. Hence the BASL can play an enormous role in improving the quality of the legal service to the citizens and thereby help improve the protection of human rights in Sri Lanka. For this purpose the BASL should in particular try to improve the quality of its human rights units in consultation with the international organisations of lawyers and others involved in the promotion of human rights.

Rule of Law

The re-establishment of the rule of law in Sri Lanka will remain a distant dream until one particular problem is adequately resolved. That is, the problem relating to the delays in adjudication in criminal matters, civil matters and in the sphere of public law. The delay in adjudication in criminal matters is perhaps the root cause for the increase in crime. The old legal adage, that the promptitude of punishment is the best deterrence, has received little attention in Sri Lanka. The time from the commission of a crime to the completion of investigations, the non-summary inquiries at the Magistrate's Courts, the filing of indictments by the Attorney General's department, the time taken to complete the trial in a High Court, and the time taken for appeals, will often take between seven and ten years, or even more. During this time serious criminals will remain at large except for short periods where bail is denied. They have the capacity to intimidate witnesses and even to kill them. Fear prevents witnesses readily cooperating with the criminal process. It is no surprise that the current conviction rate is as low as only four per cent.

There is no artificial solution to this problem as, for example, increasing pressure on courts to quickly dispose of cases. What needs to be done is to realise the need for increasing the number of courts, judges, prosecuting officers and more qualified investigators.

The BASL, representing the lawyers of the country, can play a significant role in shaping local and international opinion for resolving this problem, AHRC says.

Finally, one area in particular in Sri Lankan law that needs immediate formulation and improvement, is that of contempt of court law. The problems in this area are quite well known to the legal profession in Sri Lanka and also to the international organisations.

The BASL should take speedy steps to activate the relevant actors in this area. In particular, it should inform the public about all matters involving the rule of law within the country and educate people about their rights.

Daily Mirror: February 19, 2005

<http://www.dailymirror.lk/inside/justice/190205.asp>

Forensic science to restore rule of law

The Asian Human Rights Commission recently held a consultation in Hong Kong with a group of forensic and legal professionals from many countries from Asia including India, Sri Lanka, Bangladesh, China, the Philippines and South Korea, to discuss the interplay between forensic science and human rights. The participants examined how improved institutions and procedures for forensic investigations are essential to safeguarding the rule of law within the region and to give effective redress to victims of human rights violations.

The participants agreed that the extent to which forensic science is used in criminal investigations has a direct bearing on the scale of human rights violations throughout Asia, particularly torture. Torture is the most common method of criminal investigation for police in Asia. Even in those countries that have ratified the UN Convention against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR), which also absolutely prohibit torture, it is still widespread. However, in the few territories of Asia where forensic science is a key part of criminal investigation, such as South Korea and Hong Kong, torture is now rarely used, and usually detected and punished. To deny the use of forensic science in criminal investigations in itself amounts to a serious human rights violation, as it permits the continuation of flawed and violent methods of policing and attendant abuses. If the perpetrator of a crime or a gross abuse of human rights is not detected for want of proper forensic analysis—either inadvertently or deliberately—the victim is bereft of an avenue through which to pursue a remedy. Where effective remedies are not forthcoming, crime and rights abuses are further encouraged. Thus, any state that is serious about preventing crime and protecting human rights is obliged to improve the quality of criminal investigations, which means using forensic science expertise extensively.

The participants stressed that the role of forensic experts in criminal investigations throughout Asia is usually limited because of vast powers held by the police. In most countries, the police control all areas of criminal investigation: in a few, the public prosecutor shares some power. In many, the law has not described the role of forensic professionals in detail and in most, their presence in criminal investigations is not obligatory. The result is that the police or prosecutors see little need for forensic expertise. And unless systemic changes are made to expand the role of forensic professionals and delimit the power of the police over criminal investigations, this situation is unlikely to change.

The shortage of forensic professionals in most parts of Asia is another serious concern. Even in a more developed country like Thailand, for instance, there are only five forensic pathologists. Nowhere are there enough qualified persons available to afford proper services to the public. As a consequence, many suspicious deaths are not properly investigated. Murders and extra-judicial killings may go undetected, or they may be deliberately concealed in the absence of the required expertise and staff. Therefore, increasing the number of forensic experts remains a vital challenge that must be faced by the region.

Obstacles to the wider use of forensic science in criminal investigations must be understood as obstacles to the protection of human rights, and taken up by governments and the public in these terms. Participants at the discussion also noted that in territories where forensic science had become an integral part of criminal investigation, this was largely due to the presence of persons who have dared to speak out. Where for reasons of repression or otherwise people do not talk openly, bad criminal investigations and human rights abuses tend to persist.

Furthermore, forensic specialists should themselves play a far more active role in influencing public opinion towards change. They must talk to people more directly and make them aware of the benefits when independent forensic science facilities are available. They must use the media and other channels for far-reaching communication, both as educators and reformers. As they are in a better position than others to inform the state and the public on the manner in which criminal investigations can be improved through the use of forensic science they should take advantage of this position to speak with authority and influence.

Human rights defenders have a responsibility to mediate and expand contact between forensic experts and the public.

To do this they must learn more about the obstacles to forensic science becoming an integral part of criminal investigations, and what this means for their own work. Where human rights groups limit talk to generalities and avoid going into the details of how to apply theories and instruments of human rights, they are unlikely to effect any significant changes in the complex relations that permit continued abuses in most parts of Asia. For its part, the AHRC intends to pursue and deepen the discussion on the relationship between forensic science and human rights, and is committed to take it to a larger audience throughout this region.

Daily Mirror: May 28, 2005

<http://www.dailymirror.lk/inside/justice/280505.asp>

AHRC accuses GMOA of obstructing justice

The Asian Human Rights Commission yesterday slammed efforts by a Sri Lankan medical officers' body to allegedly protect its members by obstructing justice.

The Government Medical Officers' Association (GMOA) was attempting to block a police inquiry into alleged criminal negligence at the Negombo base hospital, the Hong Kong-based regional human rights group said in a statement. Citing a news article published in the *Daily Mirror* newspaper on Wednesday, the AHRC said that the GMOA had threatened trade union action if the police investigated its members. The police were not competent to assess whether or not medical negligence had occurred, a GMOA spokesman was reported to have said.

“Any person or organisation...attempting to interfere in a police investigation of an alleged crime is obstructing the course of justice,” the AHRC said.

“This effort by the GMOA to deny the proper administration of justice in Sri Lanka is therefore as illegal as it is reprehensible,” it said.

Pointing to the threat of strike action, the AHRC said that it was a “totally unacceptable” violation of both the law and medical ethics, which may compromise public health and safety.

The AHRC also attacked the GMOA's suggestion that it may take action against newspaper reporters who raised the case, calling it “a despicable attempt to muzzle persons who have acted impartially and in the public interest”.

It said that the GMOA was in effect undermining freedom of opinion and expression in Sri Lanka. However, the AHRC expressed confidence that the

Sri Lankan police would not be intimidated or compromised in their investigation.

It urged police to look into reports that there may have been attempts to forge documents and distort evidence.

It added that if the investigations were properly conducted then the rights of the accused would be adequately protected.

Forty-eight year old Sitthy Naseera reportedly had her leg mistakenly amputated at the Negombo Base Hospital on March 1, 2005.

She was kept at the hospital for a month while staff allegedly attempted to cover up the mistake.

The Sri Lankan police have begun investigating the case under section 329 of the Penal Code, which carries a maximum sentence of two years imprisonment and a fine of 1,000 rupees. No officers of the hospital have as yet been arrested or charged over the incident.

Daily Mirror: May 28, 2005

<http://www.dailymirror.lk/inside/justice/280505.asp>

International observers to attend torture trial in Lanka

The Asian Legal Resource Centre (ALRC) said that it has decided to send two international observers for a Sri Lankan torture trial hearing set for later this month. The observers, Chong Yiu Kwong, a lecturer in law and human rights activist in Hong Kong, and Bijo Francis, an Indian human rights lawyer, will attend the hearing before the Kalutara High Court against former Sub Inspector Silva, of the Welipenna police.

“Court observance is an old practice, particularly in important cases relating to alleged gross human rights violations,” said Basil Fernando, Executive Director of the ALRC. “Court observers representing reputed organisations have attended courts in numerous cases world over and have submitted their reports and observations. One of the purposes of court observance is to express serious concern about a case, bring it to international attention, as well as to express solidarity with the alleged victim,” he said.

The accused in this case is charged under the Convention Against Torture Act (No. 22 of 1994) and if found guilty will face a mandatory jail term of seven years and a fine of 10,000 rupees. He is currently interdicted pending trial. The Attorney General indicted the accused under the Anti-Torture Act after the police Special Investigation Unit (SIU) investigated the complaint of torture made by the complainant who alleged that he was arrested on February 3, last year and detained for three days during which time he had been repeatedly assaulted with a cricket post and also spat into the mouth by a person suffering from tuberculosis.

According to the ALRC the tuberculosis patient is a prosecution witness listed in the indictment in the case. He has allegedly stated to the SIU that under duress he spat into the mouth of the torture victim and licked his lips as

instructed by the police officer for the purpose of transmitting the disease to the torture victim and his family.

Last month the Asian Human Rights Commission (AHRC) had brought to the attention of the Attorney General certain events that occurred when this case was taken up at the High Court on June 26.

In two faxes sent to the AG, the organisation said that the defense counsel appearing for the accused police officer had made some statements against the torture victim, which were not true. That is, that the complainant in the case was disqualified from giving evidence in a court of law, should not be believed and thus that the case should be dismissed.

In support of his application the defense counsel had said that the complainant has two previous convictions—before the Elpitiya Magistrate’s Court where the complainant had been convicted for seven years imprisonment, which had been suspended. He also had a conviction at the Homagama Magistrate’s Court where he had been sentenced to 20 months rigorous imprisonment. He also said that the Homagama MC case had been heard in absentia and an open warrant was pending against the complainant.

The defense counsel had gone on to say that the complainant had filed affidavits in a fundamental rights application in which he had stated that he had no previous convictions. This, it was submitted, amounted to submitting fraudulent documents to the Supreme Court and on those grounds urged the court to disbelieve the complainant even before he gave evidence.

Subsequently the lawyers assisting the complainant had searched the records and discovered that the information provided to the Kalutara High Court by the defense counsel had been false. That is, the MC Elpitiya had no records of the case. Documents available elsewhere showed that there had been four accused in the case and only one pleaded guilty. Three of the accused including the complainant had come to a settlement and the case had ended. Only the accused who pleaded guilty to the charge was sentenced to 20 months suspended for seven years.

In the Homagama MC case it was found that there had been four accused including the complainant. On March 14, 1998 the case had been fixed for inquiry under S.192 of the Criminal Procedure Code as some of the accused—including the complainant—were said to be absconding. And though the

case was fixed for an inquiry, no inquiry took place. Thus, there had been neither an inquiry, nor conviction, nor a sentence in the case against the torture victim.

Therefore the AHRC has stated that the allegation made to the High Court to the effect that the torture victim had submitted a false affidavit to the Supreme Court was untrue.

Under these circumstances the AHRC has requested the Attorney General to urgently consider the implications of submitting false information to the High Court regarding convictions, which do not exist. It is also necessary to inquire into the document—submitted allegedly from the Elpitiya MC, as well as to take appropriate action to prevent harassment to the torture victim and witnesses by urging the court to reconsider the bail conditions of the accused.

Daily Mirror: July 9, 2005

<http://www.dailymirror.lk/inside/justice/090705.asp>

Better to be a scavenger rather than a lawyer?

A daily newspaper, this Saturday, recorded the robust complaint of a senior lawyer from Matara who was of the opinion, (as put before a recent meeting of the Bar Association), that it would have been far better to have become a scavenger rather than a lawyer. His reasoning was primarily grounded in the belief that, at least in the case of scavengers, they will protect a fellow worker if the former comes under threat whereas in the case of lawyers, there is no one to protect them when they are humiliated by judges.

This kind of masterful albeit colourful statement may, of course, vastly overrate the collective capacity of scavengers to bond together when a member of their tribe is in danger. However, there is no doubt that a grievance of this nature, stemming as it does from the complainant's anger at being judicially prevented from making submissions on behalf of his client, is eminently justifiable in its substance.

The Bar Association is reportedly pressing for the drafting of a code of conduct for Sri Lankan judges. Whether such a code will have the desired effect or be confined to the paper that it is written on remains to be seen. Some civil society organisations have already pointed out particular concerns in this regard. The first concern is in reference to the relationship between judges themselves as peers and as equals, where the higher and the subordinate judiciary is concerned.

Particularly relevant will be the modes of disciplinary control, promotions, transfers, and the like of judges of the subordinate courts. Complaints of arbitrariness and unfairness by the Judicial Service Commission which is the primary authority in relation to lower court judges, with cases still apparently (and eternally?) pending in court, have characterised processes of legal

administration even more than ever in recent times. Consequently, this is a vital concern that still remains to be addressed.

The second issue relates to the relationship between judges and lawyers from the official as well as the unofficial bar. This incorporates treatment of junior lawyers, out-station lawyers, and all other lawyers who may not belong to an elite; the right of audience as regards all lawyers; courtesy between the judiciary and lawyers; and preventing direct or indirect intimidation of lawyers of any category. This concern is all the more important given numerous documented instances where lawyers have been treated with extreme discourtesy at the very highest judicial levels.

Thirdly, the relationship between the judiciary and litigants should also come under scrutiny. Courtesy by the Bench to not only the Bar, but also to litigants who appear before them is of equal importance. The numerous travails of the judicial process in Sri Lanka including its ubiquitous laws delays and complicity between lawyers and judges in postponements of cases are now of common knowledge. And the perception (if not the reality) of corrupt registry processes, as disclosed in recent research studies together with widespread consumer dissatisfaction with litigation processes has resulted in public respect for the legal system plummeting to hitherto unprecedented depths in this country.

Underscoring all this however, is the hugely important question of the political integrity of judges. There is no doubt that ignoring this question while focussing on codes of conduct for judges will have all the proverbial elements of the ostrich and the famed hiding of his head in the sand.

It is in this respect that Sri Lanka has lost much in recent years, the explicit detailing of which needs no elaboration here. The very fact of two impeachment motions against the incumbent in the office of the Chief Justice being lodged and then abandoned for various reasons including the sudden dissolution of Parliament leaving numerous complaints of official misconduct hanging in the air on both occasions, is sufficient for this purpose. Inevitably, the negative impact that this has had both in regard to the accused who ought to have been afforded a basic right to a fair hearing (instead of being tried by the media) as well as badly damaged public perceptions in regard to the institution of the judiciary, has been enormous.

Bringing about an apolitical mechanism of determining judicial misconduct of judges of the higher courts rather than a parliamentary process which hinges on political factors, has been predominant for quite some time. The historical responsibility of the political lines of authority on both sides of the divide in failing to put into place such a mechanism is now extremely clear.

Both the Peoples Alliance and the United National Party have shown themselves to be governed by expedient thinking where the independence of the institution of the judiciary is concerned. Such expediency by the leadership of these parties in relation to protection of party political interests has, of course, been manifested in significantly varying degrees. Minority parties following in their sway is just another aspect of this reality.

Even now, the manifestos of the two main Presidential contenders do not appear to have dealt with the outstanding issue of the independence of the institution of the judiciary. Of course, in a context, where the two contenders have singularly failed to deal with even the broader and general questions of institutional independence as sought to be protected by the 17th Amendment, this is nothing to be marvelled at.

Meanwhile, the abdication by the Bar, of its traditional responsibilities in relation to protection of the independence of the Bench particularly during these years is equally well documented. The manner in which the past leadership of the Bar not only ignored but also positively supported executive interference in the internal workings of the judiciary in this country comes to mind in this regard.

Is it surprising therefore that after allowing such processes of deterioration to continue unchecked for so long, lawyers are now in a situation where they are compelled to declare that scavenging is a more estimable pursuit than lawyering? It needs to be said that protection of the integrity and reputation of the Bar (applied collectively to lawyers as well as to the institution of the Bar) is inextricably linked to the protection of standards of the integrity and independence of the Bench from the highest to the lowest levels. Where one deteriorates, it is inevitable that the other will follow. This is the reality that we are increasingly being compelled to face in this country.

This dual interplay of rights and responsibilities on the part of the Bar as well as the Bench is also reflected in international standards, most particularly the United Nations Basic Principles on the Role of Lawyers and the 1983 Montreal

Universal Declaration on the Independence of Justice. This responsibility remains even more imperative in developing countries and with regard to the “poor and marginalised” sections of society. The legal profession in Sri Lanka has, of course, singularly failed in this regard. Is it any wonder therefore that a crisis of confidence is evident to this extent in regard to both the Bench and the Bar?

It is, of course, not to be thought that the current initiative by the Bar Association in getting a code of conduct drafted for judges will address all these issues. It is to be hoped however, that this initiative would stimulate a wider discussion in the public forum on the nature of judicial administration, (if not the legal system in the country), rather than be confined to a simple question of how judges treat lawyers. Focussing exclusively on the latter would only result in the biggest joke of the era.

By Kishali Pinto-Jayawardena

Sunday Times: Focus in Rights, November 6, 2005

Devaluation of the rupee and the deterioration of the rule of law

The devaluation of the rupee is a concern for everyone today. However, few seem to think of this as a rectifiable situation.

The fatalistic acceptance of the pitiable flight of the rupee confines people's protests to the unbearable costs of living, rather than pressurising authorities to try and rescue their currency. Behind such fatalism, is the unexpressed conviction that there is no authority in existence in the country that is seriously concerned with making a difference on this issue, or any other serious matter facing the people.

This feeling of having no authority to rely on, is the result of a long chain of events. And this has gone on for several decades relating to the deterioration of rule of law. For many reasons, those who held authority in various fields of activity thought it acceptable to undermine the rule of law.

The cumulative effect of such actions was that those authorities lost a concept of reality in all fields of activity, be they economic, social, political or cultural. To me, the flight of the rupee is a product of this general experience of the inability to keep in touch with reality, and of the willingness of authorities to accept the degeneration of rule of law.

In modern society it is the rule of law that holds the community together. Law is expected to regulate most areas of life. This includes the regulatory framework of the economy and finance. While legislature makes laws regarding these aspects, legally authorised agencies enforce such laws by constant investigation and by taking corrective action. The purpose of such investigation and corrective action is to keep the society informed of the actual problems

affecting each area of life, so that relevant authorities and society at large will be kept informed of potential dangers.

Thus, without the operation of rule of law the relevant authorities and society in general fall into a state of ignorance, apathy, inaction and helplessness. In the face of adversity, such a situation can degenerate into utter chaos and even into violence.

To overcome such situations it is necessary to address the overall situation of rule of law and to take meaningful action to restore it. This can happen only if sections of the population of the endangered society find the link between the danger that it is faced with and the absence of rule of law. A clear understanding of the history of the collapse of rule of law will help future reformers in their quest for imperative and appropriate corrective measures.

Such measures would include the improvement of the investigative mechanisms into all areas of social activity, together with the capacity to take effective action on the basis of such information. Resistance to such change will continue to occur amongst corrupt elements that stand to benefit from the status quo, while the remainder of society continues to face hardship and catastrophe.

However, support can be expected from many whose livelihoods and ways of life have suffered as a consequence of absence of the rule of law. Anyone who appreciates and understands the importance of the stability of a country's currency, must acknowledge that this is only possible in the context of the existence of rule of law. The authorities need to take corrective action in addressing this matter and break the general apathy that exists in many pockets of society today.

By Basil Fernando

Daily Mirror: November 15, 2005

<http://www.dailymirror.lk/inside/justice/131104.asp>

AHRC indicts BASL President

The Asian Human Rights Commission (AHRC) has strongly condemned the stand taken by the Bar Association of Sri Lanka to advise lawyers not to appear for those persons accused of the murder of Colombo High Court judge, Sarath Ambepitiya.

According to several newspapers, BASL President, Ikram Mohamed is reported to have said that although every suspect has the right to retain a lawyer under Supreme Court regulations, since the murder of Mr. Ambepitiya was an attack on the judiciary, lawyers must take a personal stand on the case. He was quoted as saying, “We cannot ask a lawyer not to appear, but they have a personal duty and every lawyer should take up a personal stand.”

According to AHRC, this position is both irresponsible and unprofessional. It amounts to a call to deny the basic right of citizens to a fair trial. Thus the Commission strongly condemns any statement that denies, either explicitly or by inference, the right to fair trial of any person. The right of representation does not derive from Supreme Court regulations, but from universal norms. Therefore, it is a strange position for an organisation representing the lawyers of Sri Lanka to propose that citizens should be denied this right.

It is the same as if a medical association proposed denying treatment to a patient or group of patients on the grounds of a perceived slight against their profession. Such a stand is nothing short of barbaric. To deny fair trial to the accused will in fact be an insult to a courageous man who held the scales of justice at some of the most difficult times in Sri Lankan history.

What kind of response does this killing deserve? Certainly not the denial of due process to the accused, says the AHRC. Rather, what should be done is to ask basic questions about what led to the murder, and to address these matters seriously. For the BASL, these should relate first to the lapse in security around this judge in particular and the judiciary in general. Although the shooting

resulted from a security failure, to date nobody has been held accountable for this shortcoming, and the Bar Association has been silent on the matter. Secondly, questions should be asked about the criminal-police nexus, which has made committing murder easy in Sri Lanka. What measures should be contemplated to break this nexus, and particularly to end the involvement of the police in drug trafficking? Answers to these questions require thoughtful examination of jurisprudence developed in other countries.

Thirdly, the lack of witness protection in Sri Lanka is a key issue. Witnesses commonly reverse their statements after receiving threats or favours, sometimes both, from the accused. This is the main reason for unsuccessful prosecutions in Sri Lanka. Many countries have developed laws and schemes for effective witness protection, regionally most recently in Thailand. However, there are no provisions for the security of witnesses in Sri Lanka, says AHRC.

AHRC stresses that these are issues any lawyers' organisation seriously concerned with the integrity of its profession would be interested to address. It is well known that lawyers in Sri Lanka are themselves often intimidated from challenging the criminal elements within the police. When they cross the line, both criminals and police act in close collaboration to silence them. As a result, lawyers may refuse to take cases out of fear of the consequences for themselves personally. When Tony Fernando brought his fundamental rights case to the Supreme Court even very senior lawyers refused to appear for him. There are also serious allegations that some lawyers are themselves conspiring to be a part of the criminal-police nexus.

The killing of Judge Ambepitiya was made possible not from the strength of the criminals but from the weakness of the institutions in Sri Lanka that are supposed to maintain the rule of law. Until this systemic impotence is counteracted it would not be possible to have an independent legal profession or to ensure security for judges, lawyers, investigators and complainants. The AHRC therefore urges the Bar Association of Sri Lanka to look into these matters rather than make counter-productive suggestions that criminal suspects do not deserve legal representation. Instead, the benefits of jurisprudence developed in many other countries should be brought to Sri Lanka and public opinion motivated to find lasting solutions to the problems besetting the judiciary here.

Daily Mirror: December 19, 2005

<http://www.dailymirror.lk/inside/justice/041204.asp>

Chapter III

Right to justice and effective remedies

Evictions of tsunami affected landowners

In the past, forced evictions of landowners in Sri Lanka have been peculiarly discriminatory. Constitutionally of course, there is no right to property guaranteed, though the Supreme Court has, through judicial interpretation, recognised a right to due process when persons are deprived of their properties. This has included the right to be informed and to be heard when land is to be acquired.

A corresponding duty has been imposed on the State when acquiring property ostensibly for an urgent public purpose; to give due notification of the exact purpose as well as the urgency of the proposed acquisition.

This is, of course, in strict legal theory. Practically, the right to due process in respect of land acquisition and consequent evictions of landowners from their property has been realised only in respect of those fortunate enough to go before court and to obtain a fair hearing from judges sympathetic to their plight. The effect of those decisions have not trickled down to administrative and government officers in a manner as to benefit the marginalised and underprivileged who are unable for many reasons, including financial, to invoke the jurisdiction of the courts in their favour.

The attitude of the Government in relation to acquisition of land, whether for development purposes or otherwise has thus been very cavalier. The bypassing of norms that demand fairness and accountability is well evidenced, none more so perhaps than in relation to the Southern Expressway (the first major expressway project in Sri Lanka) as seen both in the increasing number of applications in court as well as by the fact that an internal report of one of the major lenders for the project, the Asian Development Bank (ADB) has found non-compliance with its own rules and guidelines in the implementation of

the project. The fact that the ADB could not have been stricter down the line in relation to the said implementation is, of course, lamentable.

This attitude of pervasive non-accountability is bound to govern the response of the Government to tsunami affected landowners, particularly as the legal rights of many of these people to the land on which they had been living prior to the tsunami are not well secured. The current position of the Government in regard to eviction of householders from their lands situated within the so-called buffer zones in the South and the North-East appears not to be as severe as it appeared to be at the start. This is due to the mass protests evidenced from tsunami affected persons from all the affected provinces as well as the displeasure evidenced by international humanitarian agencies who have pointed to the trauma that the internally displaced persons would suffer as a result.

However, the extent to which this caution will prevail is uncertain given also reports of tourism master plans being prepared for parts of the tsunami affected North-East as well as the South that would inevitably result in mass scale evictions.

All actions of the State, it must be understood, are governed in this regard not only by domestic norms that specify accountability but also by applicable principles of international law. Sri Lanka is bound by provisions of the International Covenant on Civil and Political Rights (ICCPR) which imposes certain restrictions on the Sri Lankan state in this regard despite the fact that the right to property is not a constitutionally protected right domestically.

Two decisions by the UNHRC are relevant in this regard (see *Adam v Czech Republic* (Comm. 586/1994, para. 6.2) and *Des Fours v Czech Republic* (Comm. 747/1997, para. 7). In these cases, it was ruled that the right to property is capable of judicial supervision and control. The UNHRC recognised that while the right to property is not protected as such under the ICCPR, such rights may be considered where they raise issues under other provisions of the Covenant. Consequently, Article 14 protects the right to a fair hearing and due process in the determination of property rights under domestic law, and corresponding protection from arbitrary interference.

In one instance, the Committee in examining the right to a home in terms of the International Covenant on Civil and Political Rights took the view that

forcible eviction of inhabitants from so-called informal settlements in certain parts of Kenya without prior consultation with the populations concerned and/or without adequate prior notification has been viewed as arbitrarily interfering with the Covenant rights of the victims of such evictions, especially their rights under Article 17 of the Covenant (See *Concluding Observations of the HRC in relation to Kenya, CCPR/CO/83/KEN, 29 April, 2005, HUMAN RIGHTS COMMITTEE, Eighty-third session*).

The European Court of Human Rights, (ECHR) in considering parallel rights in terms of the European Convention on Human Rights, has found that, although the deprivation of the property of a landowner may have been provided for under law and be in the public interest, the failure of a State Party to ensure a fair hearing can result in a finding that it acted unlawfully or arbitrarily in violation of the provisions comparable to Article 14 (See *Hentrich v France* (18 E.H.R.R. 440), para. 56).

Regional tribunals have also found that in seeking to protect their right to a home against potential threats, people are entitled to receive relevant and timely information. The State Party is under a positive duty to provide this and failure to do so can violate the individual's right to respect the home.

The requirement of consultation, information and adequate procedural fairness as an inherent aspect of the right reflects the approach of other international bodies such as the UN Economic, Social and Cultural Rights Committee (ESCR), which has stated in relation to forced evictions that it is crucial that appropriate procedural protections are in place prior to any evictions from the home.

These include (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all those affected persons prior to eviction and (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected. In this respect the ESCR Committee has specified that the right under Article 17 to be protected against "arbitrary or unlawful interference" with one's home complements this protection against forced eviction (See ESCR Committee General Comment 7, paras. 8 and 15).

These decisions and jurisprudence illustrate that the State needs to observe a particularly high standard of vigilance in ensuring procedural fairness when dealing with property rights of tsunami affected and/or development affected persons in Sri Lanka. What the State does may be taken to the international legal arena as a consequence of obligations that the State itself has incurred in international law (ie; by ratifying the ICCPR as well as its Optional Protocol permitting individual communications).

Public participation must be ensured from the beginning of the procedures for evictions and due account is to be taken of the outcome of the public participation in reaching the final decision, which must also be made public. Government officials may do well to observe the rules of caution specified by the domestic courts and the UNHRC in this regard.

By Kishali Pinto-Jayawardena
Sunday Times: Focus on Rights, July 24, 2005

Murderers among us, in Lanka

They may have disappeared and been killed some fifteen years ago, but to their families and loved ones the memories of them will live on.

“Even if I get millions of rupees, I will not forget all these dreadful memories. Until today I do not permit anyone to light fireworks and organise parties at our residence as we are still mourning the loss of our child,” says M. Maria Violet, whose son was forcibly taken away from home at gunpoint. Violet’s son was later killed. And her horrible experience is documented in a new book released on Tuesday. But the book is also testimony to the sufferings shared by tens of thousands of other Sri Lankans during the dark age of the country in the late 1980s.

The book, “*An exceptional collapse of the rule of law: Told through stories by families of the disappeared in Sri Lanka*”, details the ordeal of parents, spouses and relatives who witnessed the forced disappearance of their dear and near ones. There are 29 cases in which the victims included innocent students, workers and ordinary people of other professions.

They were among 30,000 people forcibly disappeared between 1988 and 1992 when perpetrators, some of them from the police and armed forces, had near-absolute impunity for their acts of violence and brutality. Some of murderers are still among us. Nearly 15 per cent of the victims were aged below nineteen.

People were abducted from homes, workplaces and on the streets, even openly and publicly. Many of them were murdered upon arrest, interrogation and torture. The perpetrators, unleashed and sanctioned by an authoritarian rule and constitutional dysfunction, acted gruesomely and casually on the excuse of an armed conflict between the then government led by the UNP, and the JVP.

In many cases, the victims were killed due to jealousy, personal feuds or in the elimination of political enemies or potential opponents in the reign of terror. After all these years, the perpetrators have yet to be brought to justice and attempts to find legal redress to innumerable cases of the disappeared have proved futile.

In the 222-page new book published by the Hong Kong-based Asian Legal Resource Centre (ALRC) and its sister organisation Asian Human Rights Commission (AHRC), together with Sri Lanka's Families of the Disappeared, families of the victims indicate the legal framework that made such atrocities possible is essentially unchanged.

“By telling their stories, these families are breaking the silence about the most fundamental aspects of Sri Lankan society. Many today want to keep silent about these events for various reasons. These families, however, cannot afford to remain silent,” said Basil Fernando, executive director of the AHRC and adds, “They are the voices of the huge number of people who have experienced the crisis that has enveloped the country in its most horrible form; a crisis shared by all, regardless of race, gender or ethnicity.”

The life of the entire family of a disappeared victim was affected since that fateful moment of abduction—savings were spent frantically dashing around the country trying to find their loved one, parents lost interest in their jobs, the education of the young ones at home was disrupted. The past, present and future of these families are tormented by those responsible for the disappearances.

“We, as Sri Lankan people, are now mentally suffering and will thus suffer for the rest of our lifetime because we have lost our son. My fervent prayer is that no other family faces the same plight which we are facing by losing our son,” says B. Carolis Silva, father of a 26-year-old victim.

“I have lost confidence in the procedures of law enforcement in Sri Lanka. Most of the law enforcement officials implement the law in accordance with the wishes and plans of various party leaders in our country...In short, democracy here in Sri Lanka has been restricted to a piece of paper. Thus, justice for me is to change the current system,” Mr. Silva says.

Daily Mirror: November 1, 2004

<http://www.dailymirror.lk/inside/justice/301004.asp>

Order with or without law: Re-establishment of the Rule of Law in Sri Lanka: True or fake?

The setting up of the 'People's Committee for the Establishment of the Rule of Law Again' by a group of concerned people is indeed a welcome move. However, at the inception of such well-intentioned work it is important to recognise that such a move has been long overdue and thus that there is a need to ensure that its eventual aim should not be the mere reinforcement of sentiments expressing regret and disappointment, but the ability to bring about real and lasting change.

While the proposal for the re-establishment of the rule of law admits that rule of law has been lost, phrases such as 'loss of the rule of law', 'collapse of the rule of law' and the like have ceased to hold much meaning. It would thus be useful to query about the extent of this loss. For, without an agreement on the extent of that which is lost, the proposal for its re-establishment may not be lucid or resolute enough.

At present for instance, amongst some articulate sections of Sri Lankan society, the extra-judicial disposal of those considered to be 'hardcore criminals' seems an article of faith. And police officers claiming to have shot such criminals are considered heroes. Even in the media we see some Buddhist monks accuse those who oppose such acts, as collaborators of criminals or lacking in patriotism.

Loss of faith

This call for the liberty to kill criminals is a clear manifestation of the loss of faith in the justice system. The tacit approval of extra-judicial killings as a solution to crime is a common phenomenon that develops in societies that have reached a high level of demoralisation. Therefore, any discussion on the

rule of the law must take into consideration this mindset, which considers the law as a hindrance to personal security. For, the development of such a mental framework allows society to overlook that which a stable society would consider gruesome, inhuman and uncivilised. Sri Lanka has reached that point. While the law is in the books, even state agencies such as the police, prosecution and judiciary initiate and follow policies in contradiction with the law. A question openly posed by representatives of such agencies is that if the people are in favour of a measure such as the extra-judicial killings of alleged criminals, is it possible or even necessary to oppose it?

The policy line thus expressed is that what 'people feel' is much more important than the law. When the legal establishment responsible for the enforcement of the law begins to believe that the law is superfluous and a luxury, and that the reality demands actions in direct contrast to the law, how does any discussion on the rule of law become relevant?

Whether or not any of the important laws in the country is considered enforceable by the legal establishments mentioned above should be queried. The answer does not lie in the righteous assertions that the representatives of these agencies are obligated to make if the questions are asked publicly, but in the actual enforcement principles and prevalent philosophy regarding these laws. In most instances it will be thought that the breach of these laws is necessary for the maintenance of so-called social stability and order.

Law and order

The term 'law and order' seems no longer a valid term in Sri Lanka. Rather, 'order' with or without law is the prevailing philosophy. In this case, if the law becomes an obstacle in achieving 'order', then the law must be discarded. This is not just a theoretical premise, but how practical policies are developed and pursued in the establishments that are supposed to uphold the law. It is common knowledge for instance, that there is a tacit agreement to ignore the law regarding corruption.

As for torture, the prevalent premise is that the police are unable to carry out criminal investigations without the use of torture. The Convention Against Torture Act No. 22 of 1994 then becomes a hindrance to criminal investigations. Some 'legal experts' thus argue against the enforcement of the Torture Act on two grounds: (a) the police cannot function without the use of torture and (b) the people want the police to function, even if torture is to be used. Similar arguments have legitimised extra-judicial killings of alleged criminals.

In such circumstances, can Sri Lanka be called a society governed by the rule of law? While abstract answers may claim that it can, in reality what can be done under the pretext of law is now left to the executive and supporting institutions. What is perceived to be the wish of the people is now more important than the creation and enforcement of legitimate laws. This being the case, senior police or prosecution officials now have the right to decide what is 'the wish of the people' and then carry out such wishes, regardless of the law. They also have the power to authorise the commission of crimes such as murder, torture and kidnapping.

Supremacy of law

However, any establishment of the rule of law SHOULD mean the acceptance of the supremacy of law above all other considerations. There cannot be selective acceptance of some laws and rejection of others, and nor can there be arbitrary decisions regarding who should select the law to be followed. Equality before the law is a primary tenet of societies governed by the rule of law. Without this supremacy and equality, law becomes irrelevant.

If demoralisation and disappointment has created 'a wish' to allow law enforcement agencies to ignore or violate the law, then the real arena for the fight of the re-establishment of the rule of law is public opinion itself. All efforts to re-establish the rule of law must convince the public that the critical examination of the problem is serious enough to allow for an effective remedy. Yet another exercise of mere commentary on certain aspects or obstacles regarding the collapse of the rule of law will do little to address the problem or change public opinion.

Hence, I sincerely hope that the newly advertised venture for the re-establishment of the rule of law creates the type of discourse in Sri Lanka that will be able to get past public cynicism about a law enforcement system that has so deeply disappointed the people. If it is able to do that, it will generate one of the most critical movements in the country that will have a lasting effect in rebuilding the fabric of the rule of law as against the arbitrary actions done in the name of 'people's wishes'.

By Basil Fernando

Daily Mirror: February 12, 2005

<http://www.dailymirror.lk/inside/justice/120205.asp>

Focusing on a rights related recovery process

The most recent protest to date in relation to the inequitable distribution of tsunami aid comes from Tangalle on the Southern coast where enraged villagers gathered in front of the Divisional Secretary's Office on Saturday morning to point to the spoilt supplies that they had been sent. One villager highlighted the predicament of many when he said that they do not receive the money allocation, which was handed out during the early months following the tsunami.

While this is so on one hand, on the other, we see numerous instances of aid being delivered to unscrupulous middlemen who either take the supplies for their own use or sell them for profit. These are the two extremes that are manifested in many areas in the South. In the process, the overriding grievances of the genuinely tsunami affected internally displaced persons in Sri Lanka in respect of land, housing and resettlement continue to be bypassed to date.

In the minimum, it is not even certain exactly how many permanent houses have been built for them or, if any have been built at all. Statements of government spokesmen, responding to critical domestic and international newspaper reports in regard to this question, have been ambiguous. Enforcement of the 100 meters ban on resettlement in the South has been capricious. In the North and East, the acute dissension between the Southern based political parties over the P-Toms agreement (given certain of its clauses that concede a problematic authority in the functioning of the aid mechanism to the LTTE on par with the Central Government), has led to uncertainty over its continuing implementation.

From a general perspective, while the Indian recovery effort has necessarily a different political dimension from the Sri Lankan context, it may be relevant for us to examine some common problems that affect both processes. Data emerging from the tsunami affected regions in both India and Sri Lanka suggest

that continuing problems faced by the enormous numbers of displaced persons in both countries are remarkably similar.

Over 200,000 homes have been fully or partially destroyed in India's mainland as a result of the tsunami and countless lives uprooted and shattered. Loss and damage to housing has been estimated at U.S. \$228 million. At least 647,556 persons have been displaced and moved into emergency shelters.

In both countries, adherence to the full implementation of the UN Guiding Principles on Internal Displacement (which apply not only to individuals displaced by armed conflict but also by natural disasters) has not been adequately manifested. These principles stipulate a number of standards, including the provision of internally displaced persons with an adequate standard of living. This would mean a minimal ensuring of safe access to essential food and potable water, basic shelter and housing, appropriate clothing and essential medical services and sanitation.

The Guiding Principles also mandate governments to provide aid on a non-discriminatory basis and to take "special efforts... to ensure the full participation of women in the planning and distribution of these basic supplies." They specify that "internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special conditions."

Importantly, the Principles impose the condition that displaced persons must be able to make free and informed individual decisions about where they are required to settle permanently. Affected persons should therefore receive accurate, timely information regarding this choice.

Measured from this standpoint, recovery efforts in the South Asian sub-continent have not been trouble free. Insofar as India is concerned, as the New York based Human Rights Watch has pointed out in a recent report 'After the Deluge: India's Reconstruction Following the 2004 Tsunami', several systemic and potentially enduring failures have plagued recovery efforts in the affected Indian states.

While HRW has applauded the Indian government's overall response to the tsunami, it has found that government recovery efforts did not adequately

take into account the needs of different vulnerable segments of the affected population, particularly women, children, the disabled, Dalits (so-called untouchables) and tribal groups.

The research highlighted severe defects in design and management of the temporary settlements and the shelters being provided to the displaced persons. Many displaced persons interviewed during the study had complained that the settlements, whether built by the government or NGOs, were uncomfortable, overcrowded and without adequate privacy. Some complained that there are not enough toilet facilities. Many of them left homeless by the tsunami had chosen to forego the offer of government shelter.

One fisherman, Kalamurthy, who lives in a tent in his old village in Southern India, told HRW researchers that he has refused to accept the temporary shelters. His statement is unequivocal; “I am a fisherman and I want to go back to my fishing business. I have to live near the sea. They are giving us temporary houses far away from the water. It is made of tin and asbestos, which is very hot. I will not go there.”

Other conclusions in the HRW report are also relevant for us. The report has pointed to the problems manifested in the recovery effort in protecting the livelihood of people without assets such as wage laborers or tenant farmers, inadequate transparency and consultation with community groups, which will be crucial to successful long-term relocation of displaced people and development of coastal land and problems in compensating people who had either lost title to their property or who lacked proper title because they resided on unused government land.

Meanwhile, the Indian government has stated that it will strictly implement the Coastal Zone Regulations, the principal legislation governing land use along India’s coasts, which mandate that there should be no new human habitation within 500 meters of the coast. The objective, like in the case of Sri Lanka, is to create a buffer zone along the coast to protect the environment. This has had a predictable negative impact on thousands of families in those areas now in danger of eviction and of not obtaining inadequate compensation, as they do not possess titles to their damaged properties. These persons are now in danger of being coerced to leave their properties. Alternately, they may not be provided with financial support for reconstruction.

All these are problems that have been evidenced in this country as well. Indian public interest litigation groups are now taking matters of resettlement, land and housing to court in efforts to obtain some justice for the victims. The sharing of experiences and the forging of common bonds among committed Indian and Sri Lankan lawyers and activists may afford one way to bring both governments to account for the implementation of a recovery plan that takes the rights of the displaced persons far more substantively to account than what is evidenced now. Unfortunately, the focus on a rights related recovery process appears to be yet distant in both countries.

By Kishali Pinto-Jayawardena

Sunday Times: Focus on Rights, July 3, 2005

Is Chaining of Prisoners to Hospital Beds Justified in all Instances?

The monumentally startling news report of a remand prisoner who was discovered casually relaxing at his home with his prison guard this week indicates the differential treatment of those who commit grave crimes but suffer no miseries by virtue of either their privileged backgrounds or their ability to bribe prison officials. The contrast between the inhumane treatment of poor and marginalised detainees, (taken in most often for the pettiest of crimes), as compared to others more fortunate, cannot be starker.

Such inhumane treatment encompasses, in many cases, the automatic chaining of such disadvantaged prisoners even when they are on their hospital beds after being committed into remand, despite being seriously injured and physically incapable of moving around.

The recent case of Rohitha Upali Liyanage, injured on July 28 this year when police officers attached to the Wategama Police Station beat him and his friend with iron rods, allegedly when Rohitha attempted to stop the officers from riding his motorcycle without his permission, is illustrative in this regard.

The beating resulted in Rohitha suffering a fractured leg and other injuries. He was taken to the Wategama hospital and chained to the bed, consequently being unable to attend court to sign his bail bond. It was only after pressure was brought to bear by local activists that some relief was provided for the victim. The supreme irony of an individual with a severe leg fracture being further chained to his hospital bed, ostensibly in order that he not flee the hospital, should not be allowed to pass unnoticed.

One might also recall at this point, the notable chaining of ‘Tony’ Michael Fernando, a 42-year-old former teacher of English who was committed to one year hard labour in February 2003 for contempt of court.

Following his imprisonment in the Welikada Prison in Colombo upon the order of the Supreme Court, Fernando developed a serious asthmatic condition and was admitted to the Prison Hospital (and thereafter to the National Hospital) where, despite his deteriorating health condition, he was kept chained to his bed on the express orders of the prison authorities.

Later, the conditions of his detention were alleviated not so much due to intervention by locally based rights bodies including the Human Rights Commission of Sri Lanka or, for that matter, the many highly funded domestic NGOs ‘working’ on human rights concerns but only upon swift movement of a few individual as well as regional activists and international pressure including statements issued by then United Nations Rapporteur on the Independence of the Judiciary, Param Cumaraswamy. Fernando had to spend eight months in prison however.

Early this year, his petition against the conviction and sentencing for contempt of court was upheld by the Geneva based United Nations Human Rights Committee to which he had appealed under the right of individual appeal permitted by the Optional Protocol to the International Covenant on Civil and Political Rights which Sri Lanka had ratified.

Resoundingly, the Committee observed that his sentencing for alleged contempt violated the prohibition on arbitrary deprivation of liberty imposed by ICCPR Article 9, 1 in that the imposition of a draconian penalty without adequate explanation and without independent procedural safeguards fell within that prohibition. Primarily, no reasoned explanation was held to have been provided by the court or the State party as to why such the ‘severe and summary penalty’ of one year RI was warranted, in the exercise of a court’s power to maintain orderly proceedings.

The jurists did not however, rule on that aspect of Fernando’s petition regarding the alleged violation of his right to be free from torture in terms of ICCPR, Article 7 due to his being assaulted by prison guards and by the conditions of his detention, including specifically, the fact that he was kept chained to his hospital bed.

The Committee declined to consider this aspect of the petition due to pending cases in the domestic courts at the time that the petition was taken up in respect of these very allegations of his torture and ill treatment. This was understandable due to its strict observance of the rule regarding non-exhaustion of domestic remedies. However, if the jurists had in fact responded, the General Comment issued by the Committee itself on Article 7 of the ICCPR which is that “the prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim” would have been undoubtedly relevant to its finding.

Fernando was, after all, not a dangerous criminal with a propensity to violence but rather an innocuous individual who at the worst, had been culpable not of murder but of the relatively non-threatening offence of contempt, a sentence moreover which was decided to have been disproportionate by a tribunal of international jurists from a variety of enlightened jurisdictions and whose authority had been explicitly accepted by the Sri Lankan State. Was it necessary therefore, that he should have been chained to his bed like an animal during that period? The treatment meted out to him can only be said to vitiate the observance of the fundamental Buddhist tenets of proportionality and compassionate mercy so loudly proclaimed as informing if not influencing our legal system.

Recently, Sri Lanka’s Supreme Court ruled in the *Wewelage Rani Fernando* case (SC(FR) No 700/2002, SCM 26/07/2004, judgement of (Dr) Justice Shiranee Bandaranayake with Justices JAN de Silva and Nihal Jayasinghe agreeing), where the death of a father of three minor children (arrested for stealing a bunch of plantains) was directly due to assault by prison officials, that both the State and the prison officials had to pay compensation amounting to one million in equal shares.

The gruesome way that the deceased was treated at the Negombo prison, “....where a hapless prisoner was brutally tortured and left alone, tied to an iron door, to draw his least breath,” was a significant contributory factor in the award of high compensation.

The case law of other jurisdictions clearly mandates that handcuffing of prisoners can never be used for punitive purposes or for longer than is strictly necessary. This prohibition is also contained, implicitly or explicitly in the applicable domestic statutes, including the Prisons Ordinance as well as in international instruments including the Standard Minimum Rules for the

Treatment of Prisoners adopted by the United Nations Congress which was, in fact, referred to in the *Wewelage* case in a more general context.

The unnecessary use of handcuffs by the police has been ruled to be a violation of the right to personal liberty guaranteed by Article 21 of the Constitution of India in a number of Indian cases, including the seminal *Prem Shankar Shukla v. Delhi Administration* case (1980). Even though our constitution does not guarantee a right to life, (unlike Article 21 of the Indian Constitution), this has been implicitly recognised in such a manner as to imply a similar prohibition. Sri Lankan remand authorities need to re-evaluate their treatment of prisoners on the above grounds.

Theoretically, of course, the law should compel such a re-evaluation. Practically, the reality mocks at the law as well as all the high sounding pronouncements of justice that trip from the tongues of many. It is only in an overtly shameless culture that Sri Lanka can now proudly lay claim to, that such blatant injustice and hypocrisy is tolerated and even praised. For how much longer will we continue to bear this?

By Kishali Pinto-Jayawardena
Sunday Times: Focus on Rights, August 21, 2005

Chapter IV

Government duties and responsibilities

Human Rights: More show than substance?

Serious problems in relation to the rule of law sometimes amounting to its collapse altogether, have become a serious impediment to the realisation of human rights in many countries throughout the globe. The situation is not made any different by the mere fact that these States have ratified international treaties such as the International Covenant on Civil and Political Rights (ICCPR) since the rule of law itself has become an hindrance to securing people's rights.

The human rights framework articulated by the ICCPR presupposes a basic institutional framework within which violations of rights are addressed, so as to sustain a faith among the people that practical realisation of rights in fact exists. When such a basic faith in the institutional framework of rule of law is absent, human rights projects themselves are in serious peril. The ratification of the ICCPR and other gestures of the state to create the impression of compliance of its international obligations in such circumstance do not generate much enthusiasm about human rights but contrarily often create cynicism for the idea of human rights protection itself.

Thus, obligation of the state to respect, protect and fulfill human rights is intertwined with its obligation to maintain rule of law within an institutional framework that is credible and trustworthy. In this respect the function of three institutions in particular is of the utmost importance. Those are institutions relating to investigations into violations of guaranteed rights, the prosecution branch and the judiciary. Given the serious problems of rule of law prevailing in many parts of the globe, the workings of these institutions call for a closer study if human rights are not to be relegated to mere wishful thinking.

Investigations

The function of investigation belongs to the institution of policing. Studies

from various parts of the world highlight the types of problems that exist in policing institutions. Some of these problems may be related to historical reasons such as periods of repression in which the police function was often confused with the function of the military. Prolonged periods of civil conflict can have an impact on policing, as can the lack of political space to develop into an independent policing institution.

However, a more difficult situation arises when the commonly used mode of criminal investigation is torture. And this has a tremendous impact in building an overall resistance to the introduction of human rights standards, with the worst example being where policing systems build close links with criminal activity and corruption.

Contrarily, there are countries which have successfully developed policing systems that work within the framework of rule of law and are therefore able to protect human rights. The means by which policing systems with serious problems can be transformed into a law-abiding institution is therefore a vital need. And the Human Rights Protectorate has a serious stake in this matter.

Prosecution

The next most important institution that links rule of law and human rights is the prosecution branch. From the studies of many countries it appears that there are varied types of problems relating to the prosecution branch preventing it from performing an independent role in maintaining rule of law. In some instances the powers of the prosecutors are limited by law so that in many areas there are no laws enabling the prosecutors to intervene on matters that may affect the basic rights of the people.

In other instances the inadequacy of resources made available to the prosecuting branches makes it impossible for them to carry out their functions in a manner which will convince the public of their capacity to play a serious role in maintaining the rule of law. The worst instances are where the prosecuting branch is so politically controlled that its decision to prosecute is determined by direct or indirect political directives.

Sometimes the power-play between the institutions themselves can have a tremendously retarding capacity on the prosecution institution and this impedes upon its effective functioning. For instance, law enforcement agencies or security agencies under certain circumstances can have so much influence on the capacity

of the prosecuting branch to take appropriate actions purely on the basis of law. Whatever the circumstances the overall impact of such on the minds of the population is that there is no effective prosecution to be relied on to protect their basic rights. The impulse to pursue rights is thus suppressed under these circumstances.

Judiciary

The third important branch is the judiciary. Again, studies in many countries suggest various circumstances under which the judiciary cannot perform the type of functions required in order to maintain rule of law. In some circumstances the limitations are constitutional or based on law (e.g. when judicial review is not permitted or permitted only to a very limited extent).

On the other hand there are many instances when the procedural developments negatively impact upon the functioning of the independence of the judiciary. The work of the judiciary can also be hampered by limitations of resources preventing it from having sufficient numbers of judges, courts or other facilities, which are needed for the efficient functioning of the judicial system.

What is more troubling are situations in which there can be direct or indirect political control of the judiciary. Studies by the Rapporteur for the Independence of Judges and Lawyers have demonstrated many such forms of impediments to the independent functioning of the judiciary. Besides this the limitations in the investigations branch and the prosecution branch as aforementioned also impact upon the proper functioning of the judiciary.

There are other instances when the adjudication in cases can take an extraordinarily long time. Such delays militate against the principles of fair trial. The witnesses can suffer serious threats as well as other forms of violence during the intervening period and complainants may be forced into settlements and thus to abdicate their rights.

Negated

Thus, the obligations that a state undertakes by the ratification of the ICCPR may be negated by serious problems affecting the rule of law within a particular country. The situation is so serious in many countries that the attempt to introduce the human rights concept by way of education and other methods is often resisted by the local population. These people point to the basic absence

of legal safeguards as impediments to the realisation of rights propagated by the Human Rights Protectorate.

When the functioning of the basic institutions of the rule of law faces an acute crisis, there are instances when the people take the law into their own hands. For instance, a mob can catch an alleged thief and take him to the market place where he is then beaten to death. Similarly, such punishments can be given for murder, rape and even traffic offenses. An accidental killing on the road can for example lead, not only to assault or even murder of the driver, but even an attack on the police station nearby.

This same situation can even lead to the development of parallel justice systems. Sometimes when society loses faith in the prevalent legal system, public opinion may decide what is just punishment. Or else, religious or other codes maybe enacted regardless of whether those particular forms of adjudication and punishment offend the norms and standards accepted as universal within the human rights discourse. And it is not possible to counteract such development without at the same time trying to re-establish the confidence in the rule of law.

Where there are basic problems relating to the rule of law within the three institutions aforementioned, the introduction of subsidiary institutions such as national institutions under the Paris Principles cannot do much to alter the situation. Instead, the effectiveness of national institutions depends on the basically proper functioning of policing, prosecuting and judicial branches.

Therefore, if proper attention is not paid to this central issue much of the resources put into the promotion of national institutions may bear little result. In fact, it has been often argued around the world that national institutions can be used as propaganda tools to impress the international community without having much bearing on the actual realisation of rights. Instead, the actual promotion of rights of a state's citizens by national institutions such as human right commissions will entirely depend on the capacity of basic institutions of the rule of law being able to function in a creditworthy manner within a country context.

By Basil Fernando

Daily Mirror: August 9, 2004

<http://www.dailymirror.lk/inside/justice/040807.asp>

Will politicians be protectors or predators?

As Sri Lanka struggles to deal with the aftermath of the tsunami, the critical issue in the minds of everyone who wants to help, within the country and outside, is the function of the State as protector of its people, the Asian Human Rights Commission said in a statement. Questions such as, could the State have contributed to some form of an early warning system, what immediate action should have been taken by the State to minimise the damage and what action should be taken now in dealing with the aftermath of the catastrophe, as well as other similar questions are now being asked.

However, in Sri Lanka, the concept of the State protecting its citizens has become a cynical notion especially in recent decades. According to AHRC, the remark of the late president, J.R. Jayawardene that everyone must look after their own security, demonstrated rather aptly the attitude of the State towards the security concerns of its people. Each person for himself, and if you are in danger, you must only blame yourself: was the ideology propagated from the top and it gradually sunk into the psyche of the people, who as a result began to expect little from the State. Left alone to defend him or herself and to take responsibility for one's misfortunes was the beginning of a rather nightmarish situation for the individual. And the enormously high crime rate and apparent lawlessness prevalent around us—and which is often the most frequent topic in public discussion—maybe an important instance of such apathy on the part of the State.

The tsunami is now forcing the nation to rethink the concept of the state; questions such as what is the State for and what is the role of those who hold the position of elected representatives in the government and opposition, are being voiced and need urgently to be answered. Pure cynical condemnation of politicians can no longer be the sort of position that people can take, publicly or privately. They who run for the State and become elected

representatives have, above all, the radical duty of being the protectors of the people. Mere cynical dismissals of this duty on the basis that the protector has turned into the predator, will not be sufficient to deal with the post-tsunami devastation of Lanka.

The country is now in a very vulnerable position. At present, much of what can be done in the affected areas, such as the clearance of dead bodies, creating some kind of identification system of the dead by way of photographs or otherwise, providing the enormous amount of medical care that is necessary to deal with existing illnesses as well as the possible health risks that may arise, dealing with the issue of displaced persons, particularly those who have lost all their belongings, dealing with transport and communications infrastructure and other vital human utilities, will depend largely on foreign donations and aid. However, the chief organiser for providing solutions to these problems is the State and the State must face its responsibility.

The State is in no way ready to deal with this onerous task. This lack of readiness is not due mainly to the magnitude of the problem, the like of which has never been witnessed by the country, according to those involved in disaster management work. Rather, the fact is that Sri Lanka has not learned the necessary lessons from handling earlier disasters, albeit of a smaller magnitude. The idea of putting in place adequate warning systems to avert natural disasters, making speedy interventions and accepting firm responsibility for returning the situation back to the status quo, are not among the habits formed by the Sri Lankan bureaucracy and its political establishment. If the present relief effort is to be based on earlier practices, the outcome will indeed be a very bleak one.

As awareness is raised globally to assist Sri Lanka to come out of this colossal crisis, the question of how the State will take responsibility and give leadership to the relief effort becomes a vital one. The present catastrophe cannot be addressed by way of ad hoc activities; the State must face up to its task in a manner befitting its role as the protector of the people.

Sri Lanka is a signatory to the International Covenant on Economic, Social and Cultural Rights. This covenant obligates all state parties to protect the basic rights of their people to food, health, education and work, and in other matters relating to human well being. The maintenance of all basic elements that make human life possible and safe from peril is the duty of the State. In particular, the State must protect the poorer and most vulnerable sections of

society, such as the elderly, children and women. It is these obligations and their implications that the Sri Lankan State must respect, protect and fulfil. And it is the duty of all civil society organisations, while doing their utmost to help in the relief effort, to ensure that the State carries out its obligations as the protector of the people; especially to ensure that the poorest sections of society that have been hit the hardest by the tsunamis, will not be neglected.

Daily Mirror: March 19, 2005

<http://www.dailymirror.lk/inside/justice/010105.asp>

Condemning torture: Back it by action

In his address to the 61st Session of the UN Commission of Human Rights, Foreign Minister Lakshman Kadirgamar said that, “The Government of Sri Lanka, taking serious note of recent allegations regarding torture while in police custody, has introduced short and long-term preventive mechanisms to address the issue, in line with the recommendations of treaty bodies. The Government of Sri Lanka condemns torture without any reservation. The Human Rights Commission of Sri Lanka has also adopted a zero tolerance policy on torture. Under domestic legislation, torture is considered a serious crime, which carries a minimum mandatory sentence of seven years rigorous imprisonment. The Government looks forward to having a constructive dialogue with the Committee Against Torture when Sri Lanka’s second periodic report is taken up for consideration.”

In response, the Asian Human Rights Commission (AHRC) says that the Sri Lankan government’s acknowledgement of the allegations of custodial torture and the condemnation of torture without reservation is effectively a declaration of the official policy against torture. However, the AHRC notes that such a declaration must be considered within the context in which it is applied. That is, is such a declaration achievable or realistic when it must be applied and adopted by Sri Lanka’s law enforcement agencies, the Attorney General’s Department and the judiciary?

According to the AHRC, law enforcement agencies seem to be maintaining a dual policy in relation to torture. On the one hand there are public statements condemning torture without reservation, while on the other, there is a strongly stated belief that without torture the conduct of successful criminal investigations is not possible. The government of Sri Lanka, which has often declared before international bodies the policy of condemning torture unreservedly, nonetheless has not made a serious attempt to resolve this problem of dual policies existing within law enforcement agencies.

AHRC says that the government has not properly recognised the institutional practices relating to torture at police stations, nor has it given any specific guidelines regarding this to the police or other law enforcement agencies. Thus, when it comes to actual implementation, the government continues to apply a policy that is quite contrary to that which is declared to the public.

However, as the Sri Lankan government takes serious note of recent allegations regarding torture, it should, within the shortest time possible, establish principles that must be applied at all police stations, to avoid torture.

For this purpose, the government needs to conduct a serious study into the current conduct of police stations. To assist in the study and to ensure that it is done as promptly as possible, the government could rely on persons with experience within the policing establishment, from the many commissions which went into various types of investigations of police conduct relating to extra-judicial killings, from custodial torture victims themselves and from the many concerned persons and groups that have expressed opinions on the issue.

And to properly address the issue of custodial torture and find solutions towards its eradication, the government must be willing to take the matter seriously and provide the necessary financial allocations for the purpose of achieving this.

Duality

Duality also exists in the approach taken by the Attorney General's Department. While there have been many serious allegations of torture made against persons holding the positions of ASP or OIC, the department has shown little interest in prosecuting such officers. This is despite the fact that special units have investigated these allegations and have filed their reports to the AG's department. Of the cases that have been filed, the department has not shown sufficient interest in the protection of witnesses nor guaranteed speedy trials. While there are many cases that demonstrate this, the most glaring instance is that of the killing of Gerard Perera that happened only one week after the killing of Judge Ambepitiya. Judge Ambepitiya's case is already before the courts and the trial dates are also fixed. In the case of Gerard Perera, however, not even the Non-Summary Proceedings at the Magistrate's courts have yet begun.

One could predict, based on the practice of earlier cases, that it may take two to three years after the completion of the Magistrate's Courts inquiry, for the indictment to be filed and a further three to four years before the case is

heard. During that time the witnesses will be exposed to harassment by the alleged perpetrators. While the department argues that the delays are due to inadequate staffing numbers, it has simultaneously failed to try and raise the necessary resources to resolve such a problem.

The issue of delays also concerns the courts. There are those that were filed some five years back, but yet to be adjudicated. Therefore, it is the duty of the courts to hold their position of command by asserting themselves to deal with the issue of delays. Occasional complaints regarding delays are insufficient to adequately address the root causes of the problem. A strong stand against delays needs to be taken by the judiciary. Because resolving this problem would capture popular support among the people and would help to enhance the reputation and standing of the courts.

Preventive mechanisms

Thus, the Sri Lankan government's declaration of a policy of "condemnation of torture without reservation" must accompany short and long term preventative mechanisms to address the underlying issues of custodial torture. This is the challenge for the Sri Lankan government and one that it must overcome if torture is to be eradicated.

Much of what can be achieved in this area will also depend on the local media. At present few if any, newspapers in the country have taken a firm view on the issue of torture with even editorial policies having the same aura of dualism as previously noted. Therefore it maybe said the policy of condemning torture without reservation has not yet become an accepted media policy in Sri Lanka.

This dualistic approach by the media makes it unable to have a decisive influence on government policy in this area. In fact, the Foreign Minister's statement should also be an occasion for the media to examine its own conscience in this matter.

Therefore the AHRC urges all parties aforementioned as well as the public to respond to the positive statement made by the Foreign Minister on behalf of the Sri Lankan government so that the declared policy can become a reality by next year when the government will make another statement before the UN Commission on Human Rights.

Daily Mirror: April 2, 2005

<http://www.dailymirror.lk/inside/justice/020405.asp>

Squandering golden opportunities in regard to the elections commission and the National Police Commission

There is much to be red faced about in the categorical warning issued by the elections monitoring team of the European Commission that it would not be accepting future invitations to monitor Sri Lanka's elections unless its past recommendations in regard to reforming election laws and practices are implemented forthwith.

The warning mounts to none other than a veiled threat; that EU funding may well be reviewed if such compliance is not forthcoming. And while one may, in principle, deplore an external agency issuing such warnings, we have only ourselves to blame, quite categorically.

The EU recommendations are, after all, basic requirements of our own constitutional and legal structures. They include the establishing of the Elections Commission (EC), putting into place a Code of Conduct for candidates, effective addressing of complaints against the police and the security forces, enforcement of declaration of expenses for elections and allowing minority candidates sufficient media opportunities to explain their policies to the people.

Most heinous of all these omissions is, of course, the non-establishing of the EC mandated by the 17th Amendment, that supposed legislative panacea for all the manifold sins affecting Sri Lanka's body politic.

Astoundingly, remedying this lacunae do not feature at all in any of the campaigns of the two presidential candidates either. For example, neither of these worthies

has categorically stated that one of their first actions upon assuming office will be to ensure the speedy establishment of the EC and the effective functioning of the 17th Amendment. On the contrary, there is a deafening silence in regard to these matters.

Disagreement between the (thankfully fast retiring) incumbent in the Office of the President and the now retired members of the first Constitutional Council as to the name recommended by the Council for the Chairman of this Commission was the basic reason as to why it was never established. This is the very reason as to why the current presidential hopefuls should have addressed this question.

From another perspective, civil society has (excepting a few statements issued intermittently by polls monitoring bodies and a somewhat innovative recent advertisement by grassroots movements working on civil and political rights issues), not campaigned vigorously on this. The focus of the public on questions of institutional governance (as opposed to the nauseous debate as to whether “Mahinda or Ranil will come in”) is also negligible. Certainly therefore, we only get the politicians that we deserve.

Apart from the EC, the other new constitutional creature of the 17th Amendment, the National Police Commission (NPC) has been ‘cribbed, cabined and confined’ since its inception.

The European Commission has addressed the issue of police accountability understandably only insofar as the electoral context is concerned. However, the fate which has befallen the NPC may well be an illustrative example of why the EC cannot get off the ground and even if it does get off the ground, the formidable difficulties that it may face in trying to deal with its constitutional mandate.

The 17th Amendment mandated two primary powers of the NPC. Firstly, in respect of powers of appointment, promotion, transfer, disciplinary control and dismissal of all officers other than the Inspector General (see 17th Amendment, Article 155G(1)(a)). Secondly, in regard to instituting a public complaints procedure against police officers as well as the police service (see 17th Amendment, Article 155 G(2)).

In both these instances, the NPC has been deterred by adverse statements by government politicians that an independent commission for the police is not

needed. This belligerence has extended so far as to the tragic if not hilarious assertions by the Law and Order Minister that the IGP should be involved in the decision making processes of the NPC. Inflammatory remarks by the JVP at a point of time also added fuel to the fire.

On its own part, the NPC only belatedly realised the magnitude of the task that it was faced with. Its interventions on preventing politically motivated transfers of police officers prior to elections were to its credit. However, its early decision to delegate the disciplinary control of subordinate officers to the IGP meant that nothing changed in accountability structures within the police force.

Predictably, when the NPC woke up to a sense of its own responsibilities and decided to withdraw its hitherto delegated powers, going on thereafter to interdict police officers found culpable in rights violations, increased hostility became apparent between the current IGP and the NPC. Happily, the Supreme Court recently refused leave to proceed in a fundamental rights petition brought by some of these police officers.

In this scenario, the inability of the NPC to put the public complaints procedure into place is not surprising. What has befallen the EC and the NPC shows a significant failure of the 17th Amendment. However, at least as far as the Elections Commission is concerned, perhaps the EU elections monitoring team may succeed in achieving where domestic activism and media exposure has so singularly failed. Unfortunately, we cannot now afford the luxury of questioning as to whether such coercion would be by fair means or by foul.

By Kishali Pinto-Jayawardena
Sunday Times: Focus on Rights, October 30, 2005

Chapter V

Right to freedom from torture and mistreatment

Endemic torture and the collapse of policing

The Asian Legal Resource Centre (ALRC) released its second special report on torture by the police in Sri Lanka. Entitled 'Endemic torture and the collapse of policing in Sri Lanka', the 100-page report is published in the latest edition of *article 2*.

This is the second special report released by the ALRC on torture and policing in Sri Lanka. The first serious attempt at recording the routine use of torture by the police was released in August 2001 by ALRC. This had been widely received and publicised within the country and internationally. At that time, there was no public discussion on torture in Sri Lanka. However, the situation has since changed dramatically.

Torture by the police is now reported almost daily in the media. Public protests have been held against alleged torturers and heavy pressure has been placed upon defective state institutions. The judiciary too is under attack for its failure to deal effectively with the problem.

Internationally, the United Nations Special Rapporteur on torture, the Special Rapporteur on the independence of judges and lawyers, and Human Rights Committee, among others, have all commented on the prevailing practices of torture and have made recommendations for change. The government has thus come under global criticism.

Despite these intense efforts, torture by the police continues to be endemic in Sri Lanka. In fact, that it has now received such widespread attention and yet continues unabated speaks to an immense crisis of policing in the country. The police force in Sri Lanka as it now exists is in no position to protect the rule of law and citizens' rights; on the contrary, it is a profound threat to the security of both.

“What we are emphasising in this second report is that the gruesome torture still being practised in police stations across Sri Lanka indicates the almost total breakdown in policing in the country,” remarks Basil Fernando, Executive Director of ALRC. “To describe policing in Sri Lanka as being in crisis would be to understate the current situation; it is nearing collapse,” says Mr. Fernando.

Collapse

The ALRC report describes 31 recent cases of torture or killing by the police of 29 police stations in Sri Lanka, involving 46 victims, all of whom appear to have been innocent persons. Contents of this report indicate a collapse of disciplinary control and basic procedures in the Sri Lankan police force.

Among them, two recent stories are particularly disturbing. In one, an officer at Matale police station allegedly poured boiling water on his victim (case no. 28). In the other, an officer at Welipenna allegedly ordered a detainee believed to be suffering from tuberculosis to spit into the mouth of another detainee (case no. 29).

These officers are obviously psychologically unbalanced, and yet they are allowed to function as criminal investigators, exercising enormous power over the people they arrest. That such officers retain their posts even after their cases have been reported to the highest authorities, suggests a degree of tolerance of such behaviour that is difficult to comprehend.

Purpose

The contents of this report are not controversial. The Attorney General of Sri Lanka has himself publicly accepted that the lack of proper law enforcement in the country is due to institutional problems. He has admitted that his department is understaffed and the cause of delays. He has also pointed to the shortage of courts as a cause for delays.

In fact, no one would deny that these delays have become intolerable. There is also a consensus, even in the police force, that forensic and police training facilities are grossly inadequate, bordering on primitive. Likewise, there is general agreement that torture serves no legitimate purpose, and must be eliminated. Despite all this, there are at present few ideas on how to make the necessary changes. The purpose of this report is to argue that those responsible for bringing about changes, among them the National Police Commission, National Human Rights Commission and civil society organisations, must now put their energy into making a strategy for effective police reforms and elimination

of torture. This must include putting serious pressure on the government, and all political parties, to provide adequate resources for this task.

Under international law, torture is considered one of the most heinous of crimes. In some countries, perpetrators are punished with life imprisonment, and victims receive huge compensation payments. By these standards, both on paper and in terms of judicial precedent, the law in Sri Lanka falls far behind.

Although the Convention against Torture Act (No. 22 of 1994) prescribes a mandatory seven-year sentence, there is undue hesitation about applying the law. This must end. Judicial attitudes about torture can have a strong effect on the wider society. It follows that efforts by the Sri Lankan judiciary to bring domestic law into line with international developments in this area are long overdue.

Struggle for justice

As previously, this publication was the result of the hard work by many local organisations and concerned persons. For instance, the Centre for Rule of Law, Families of the Disappeared (Kalape Api), Human Rights and Development Centre (SETIK), Janasansadaya (People's Forum), and People against Torture (PAT). However, it is the willingness of the victims and their loved ones that has made all this work possible.

The government of Sri Lanka and even the Department of the Attorney General, have in the past claimed that victims of torture have been unwilling to come forward and fight for their rights. This has not been the experience of ALRC and its partners in Sri Lanka. As manifest by this and the previous report, victims are not only coming forward to reveal their stories; they are also enduring intense harassment—even risking life and limb—in their struggles for justice.

The sheer determination of these persons makes this report possible and gives rise to hope that change can be brought about to end the torture and attendant abuses persisting in Sri Lankan police stations. ALRC appreciates all those who, despite suffering so badly, have asserted their dignity by demanding that justice be done.

Daily Mirror: April 3, 2004

<http://www.dailymirror.lk/inside/justice/030404.asp>

Gerard's wife tells torturers - 'the fight is not over'

An interview with the widow of Gerard Mervin Perera

November 2004 was a black month in the annals of Sri Lankan human rights when police torture victim Gerard Mervin Perera was killed just a few days before the case against the alleged perpetrators was taken up before the High Court.

In 2002 Mr. Perera had been arrested by the Wattala police on mistaken identity and brutally tortured to such an extent that he suffered from renal failure that put him into a coma for two weeks. In his fundamental rights application, the Supreme Court awarded him a record compensation payment. Subsequently however, thanks to some quick and efficient work by the Criminal Investigation Department, the alleged perpetrators have now been apprehended to stand trial for the killing of Mr. Perera.

To mark three months since the shocking murder of Gerard Perera, JUSTICE brings you excerpts of an interview in which his widow, Pathma talks to Bijo Francis, an Indian lawyer and human rights officer.

Q: Why do you think your husband lost his life?

A: My husband was a brave man. He was fighting for justice and against the evils that are currently present in our society. He was fighting against the violations of his rights. And in this fight he lost his life.

However, those who think that this fight is over, are mistaken. I will continue from where my husband left off. I will see to it that whatever he wanted to establish through his struggle is achieved. In Sri Lanka, it is sometimes like those who stand up and say that something is wrong have to face bitter consequences.

Q: How does the murder of your husband make you feel? Do you ever feel that your husband should not have done what he did?

A: It is devastating to lose a husband. You know, I used to get ready everyday when it was time for my husband to return from his job; I would clean the house and bathe the children before their father arrived. Now I sometimes feel that I do not have to do these things anymore, as there is no one to wait for. But I know this is because of my emotions and because I have still not fully come to terms with his loss.

All this is personal though, and my husband did not undertake his struggle for his personal benefit. He was a brave man and could not help but fight against the injustice done to him. In fact, I feel that whatever he was doing was important for the people of Sri Lanka. I remember how my husband would come home and share his day's experiences with me. He would say he met Mr. Chitral or Fr. Ried (human rights activists). After his death, I got to know these people and received enormous support from them. These people are now my family too. My husband wanted to invite them for Christmas last year. Unfortunately, he could not live that long.

Q: What do you think about the police in your country?

A: Most police personnel in Sri Lanka work largely for their own interest and personal gain. They have little concern for the ordinary people. Take my own example—some time after arresting and torturing my husband, they came to know that he was not the man they were looking for. After he was released, when he protested against the violation of his rights, the police were only concerned about their promotions. When they realized that the case filed by my husband would affect their promotion and service, they did not mind disposing of him.

Some of them are beasts in uniform. It would be wrong to make such a generalisation if only one officer was involved in this incident. But in my husband's case several officers were involved. The police work in groups like hungry dogs who prey upon anything that crosses their path. This approach is not towards criminals alone. They behave in this way towards anyone, whether the person is a criminal or not.

In my husband's case a few simple questions would have avoided the entire tragedy, but they did not care. Even if those officers involved in my case are

punished, most of their colleagues will behave in the same way. I don't think they will change much.

Q: Do you think what happened to your husband is an exception?

A: The support my family received from the very moment of my husband's death until now, might be an exception. But arrest on mistaken identity, torture to make the person confess and killings are not exceptions in my country. You can read about them in the newspapers. Since my husband started interacting with human rights groups, we came to know that there are many people who face such situations. Still, a tiny part of me feels that my case is unique.

Q: Why is your case is unique?

A: In fighting torture cases, people in Sri Lanka run a great risk. However, if the majority of the people speak out against torture, the situation will change. When my husband started his fight, there was a lot of opposition. I know that it is hard for anyone to withstand this opposition, but my husband withstood it. He did not make compromises. That requires strong determination. Had I been in his position, I would not even think of fighting the case. Not because I do not want to, but because I am scared of these people. But now that I have undergone the worst, I have nothing else to fear. This attitude—holding strong to our beliefs and not betraying those who stood by us—is unique.

Q: Do you think that the human rights community in Sri Lanka did the right thing by taking up your husband's case, now that he is murdered?

A: The members of the human rights community, who stood with my family all through our time of need, are like our parents. They provided psychological, personal and financial support. I have the assurance that they will be there for my family. I lost my husband and my children lost their father. However, now I feel that I am the daughter in a bigger family. My children now have more grandparents, uncles, aunts, brothers and sisters.

Q: Would you say that your husband was killed because of human rights?

A: My husband believed in his rights and he fought for them. He might not be alive to see his fight bearing fruit, but I am sure that it will happen. Those who

feel that they were successful in their effort to muzzle the voice of protest are wrong. My husband fought and I will continue the fight.

Since my husband fought his case our children can live without disgrace. No one in this country should live with such disgrace. Our fight is to prove to the people of Sri Lanka that they need not live in disgrace. The reality that my husband is an innocent man is now known to the world because he stood up for his rights. Everyone should do this. This was possible because of the human rights community in this country and outside.

Q: Do you think fighting like this is worthwhile?

A: If there is a collective effort and a movement in the entire country then it is worthwhile. We are doing what we can. I would say everyone should and must do the same. When there are political differences people take to the road and our leaders lead them. Those who suffer human rights violations should also do this. Aren't we also people who can take to the streets? Can't we also protest against injustices we face?

Q: Do you think those responsible for your husband's torture and death would be punished ultimately?

A: Yes, I strongly believe that the perpetrators will be punished.

Q: Is there anything else you want to add?

A: There has been a great injustice done to us. The murder of my husband will make our family suffer for the rest of our lives. What we lost cannot be replaced. Please don't let it happen again, to other families. And my only request to the people in uniform in this country is, Please do not repeat to any other family what you have done to mine.

Yet another victim of police torture

The case of Don Wijerathna Munasinghe, who was arrested on April 10 this year and subsequently died of injuries allegedly received at the Maharagama Police Station, has received wide publicity in the media. The alleged reason for his arrest was that he did not stop his three-wheeler when instructed to do so by the traffic police. The following morning he was bailed out, with no serious charges laid against him. However, shortly after his release Mr. Munasinghe died of his injuries.

The police authorities have said that they are investigating this matter. However, so far, no one has been arrested or produced before a court for the crimes of torture or murder, the Asian Human Rights Commission (AHRC) said in a statement. There is no excuse for this delay. Since the alleged crime took place inside a police station, it can be presumed that the officer in charge and other officers attached to the police station are aware of what took place.

It is a primary duty of all citizens to report information about a crime. Failure to do so itself constitutes a crime. The policemen of the Maharagama Police Station, who did not participate in the alleged torture, are under legal obligation to reveal what they saw, heard or learnt about this crime. Therefore, if these law enforcement officers do not divulge such information, they should be charged for the offence of failing to provide information about a crime, the AHRC said.

It is worth noting that the torture of any person is accompanied by shouts and screams of the victim. Thus, it is impossible to believe that policemen—who may not have directly participated in the torture—would not have heard the crying and yelling of this innocent man. Torture would also leave marks and cuts to the body, as well as evidence of blood and other substances.

DNA evidence

The Deputy Solicitor General has only recently spoken about the importance of DNA evidence to prove crimes. There must be substantial evidence left at the Maharagama Police Station that could provide material for such DNA and other examinations. Will anyone pursue this matter before the evidence is destroyed? And the ASP of the area and other senior officers who claim to be conducting an inquiry should have collected such evidence before now, the AHRC said.

The alleged crime scene in this case is a police station. The examination of the crime scene is an essential part of any investigation of a crime. Hence has this crime scene been thoroughly examined? What evidence has been collected and produced before any court? It is the duty of an investigator to a crime to report the matter as soon as possible to the nearest magistrate's court, which has the duty to investigate this matter. Has such a report been produced?

Also a crime scene involving a case as serious as torture and murder requires that access to it be strictly forbidden until a thorough investigation is made and all evidence recorded. Was the Maharagama Police Station, and in particular the areas where the alleged torture leading to death took place, closed to everyone, including the alleged perpetrators, before the investigators conducted their inquiries?

If not, have not the police officers violated the basic rules relating to crime investigation and left room for the tampering of evidence?

Police books

What about the books that the police are supposed to maintain from the moment of arrest of a person, up to the moment of release? At the time of arrest the officers should have stated in their books the reason for the arrest. Thereafter, they should have explained to the person the reason for his arrest. The officers should have written in their books that they in fact, informed the person of the reason for his arrest. Then the officers should have recorded the manner in which he was taken to the station. At the police station they should have explained to him that they wanted to record his statement about the charges and, that if he wished, he was free to remain silent, the AHRC said.

Reactions of the arrested person to such information should have also been recorded in the police books. Thereafter, any ancillary events until the time of his release on bail should have been recorded. If he was kept in a police cell then there should have been an officer who could look into the cell at short intervals to ensure the safety of the prisoner. These observations should also have been recorded. If the prisoner was in any way unwell for whatever reason he should have been immediately sent for medical treatment. Such provisions are basic and elementary principles that police officers are supposed to observe and higher-ranking officers are supposed to impose, the AHRC said.

It is the responsibility of the Inspector General of Police, the Attorney General, the National Police Commission and the Human Rights Commission of Sri Lanka to ensure that these provisions were met and to treat this crime with the seriousness it deserves. The attitudes of these authorities should be measured by what they do rather than public statements they make.

Lawlessness

Foreign Minister, Lakshman Kadirgamar, in his speech of March 15 to the Commission on Human Rights in Geneva, stated that Sri Lanka condemns torture without reservation. Are these words merely said out of niceties for the international audience or are they said with conviction and the hope that they are implemented in actual practice?

The case of Mr. Munasinghe would suggest that it might in fact be the former. There are many cases reported on an almost daily basis regarding torture and killings at police stations in Sri Lanka. The authorities' response to this situation is often highly ineffective with only mild condemnation, if any at all, and little action taken to bring justice to those involved.

The AHRC said that it has repeatedly highlighted the appalling state of policing in Sri Lanka. It has submitted reports to the government and the Sub-Commission to the UN Human Rights Commission about the exceptional collapse of the rule of law in the country, especially the widespread lawlessness in the policing institution.

Yet despite these efforts and those of other local and international organisations in condemning the policing system, the government has failed to take adequate action. Why does the government continue to tolerate the lawlessness of the

law enforcement agencies? This is an issue that must considerably concern the country's legislators, opinion makers, human rights advocates and others.

Who will be the next person to become a victim of torture and perhaps murder by the police? Because, unless the IGP, the Attorney General and others act immediately, the likelihood of such a tragedy will inevitably occur soon, AHRC said.

Therefore, the AHRC has urged the government to act now to prevent the next act of torture and death. And the test of the government's care is the speediness in which all the perpetrators of Mr. Munasinghe's torture and murder are apprehended and brought before a magistrate, AHRC said.

Daily Mirror: April 23, 2005

<http://www.dailymirror.lk/inside/justice/230405.asp>

Police torture only the poor

To control and eliminate crime in Sri Lanka, effective steps must first be taken to eliminate crime in the chief law enforcement agency, the police, the Asian Human Rights Commission has said.

Highlighting this, AHRC quotes what a DIG asked a group of 100 Inspectors and the responses they gave.

From it comes the conclusion that the police never torture privileged people like politicians or wealthy individuals who are involved in multiple murders, huge rackets and other grave crimes.

Instead the police torture only the weak, the defenceless, voiceless, marginalized and poor people who need their protection most.

In an open letter to the Venerable Udagama Sri Buddharakkitha Mahanayake Thera of the Asgiriya Chapter and Chief Justice Sarath N. Silva, the AHRC states:

“The AHRC thought of writing this after seeing a news item on August 19, which reports of you on the occasion of the Chief Justice presenting a copy of a book. The central theme of the discussion at this meeting, as reported in the press, was the need to exercise criminal law more strictly so as to control the rapid increase of violence in the country.

You expressed your deep concern over the escalation of violence and killings in cold blood and that steps should be taken to punish the law breakers severely. You also wisely observed, at the rate crime was increasing in the country and the number of persons involved, one cannot imagine the number of persons who are not involved in committing criminal offences.

The AHRC believes that the public must be receiving this news with great

relief as finally important personalities are openly discussing an issue that is of vital importance to the community. We hope that you will consider our understanding of what we think is the single most important issue in resolving the crime rate problem in the country.

The AHRC has been closely observing the situation in Sri Lanka for several years and has been writing to government authorities and making statements on this issue on an almost weekly basis. We also have experience in other countries where similar problems regarding crime have existed but where they have been able to resolve this with a high degree of success. Our headquarters is in Hong Kong where the crime situation in the early 1970s was similar or worse than that in Sri Lanka now. However, to a great extent this problem was resolved and the manner in which it was done is well documented and even exists in websites maintained by the Hong Kong authorities.

The central problem of the elimination of crime is the ability to eliminate crime and criminal links within the policing system. Without facing this issue, whatever other gestures are made, such as allowing the alleged criminals to face extrajudicial executions or to receive the death sentence, is to basically avoid the issue. The determined attempt to intervene with the police by using the various aspects of the machinery of the state so that crime is not tolerated at police stations and the elimination of criminal links with the police are eliminated, will bear fruit far beyond anything that can be imagined at present. Thus, the matter that was discussed between you was in fact a matter that can be resolved within a short time and is not a problem that defies solution. However, whether there is sufficient courage amongst those who lead the moral opinion and the judicial intervention in the country is a matter that can be answered only by persons such as yourselves. So long as such courage is absent, crime will only increase. Filling the already overcrowded prisons will only create further expertise in crime in “universities for the tutoring of crime”, which is what the prisons are.

Sri Lankan police stations today are places where crime is tolerated and where almost every week at least one person dies. There is no leadership that is competent nor has the expertise to pursue crime in a sophisticated manner. This relays to the country that the police are incapable and unwilling to deal with crime.

The serious criminals in the country, who do not come from among the poor, but from among those who have accumulated wealth, know that it is easy to

bend the will of the police regarding any investigations into their affairs. Thus, the powerful elements that are controlling crime have a deep belief that the policing system is unable and unwilling to deal with them. What we say here is surely nothing new to any judicial officer or senior officer in the police, and for that matter, any member of the public as well. We quote below what a Deputy Inspector General of Police wrote recently in a Sunday paper:

“I had the privilege of addressing about 100 Inspectors on ‘Investigation techniques to minimise violation of human rights’ at a police training programme conducted by the United Nations Development Programme (UNDP) in early July this year.

When I asked these officers their opinion of human rights, especially the aspect of torture, their observations were that they had to resort to use of force to solve cases due to the following reasons:

Sense of shame and loss of face if they fail to solve the case by recovering the weapon of the offence or the fruits of the crime, where there were several eyewitnesses testifying against the suspect; lack of resources such as personnel, vehicles and equipment to pursue investigations; a period of custody of 24 hours being insufficient.

Pressure from superiors to solve cases with consequences of non-compliance or the failure to successfully complete investigations within the time limit would result in unfavourable reports to their personnel file or other strictures. This would also adversely affect their career prospects.

After listening to their response, I posed the question whether they had ever carried out acts that could be classified as torture, or whether they had heard of torture being perpetrated on members of the privileged classes such as politicians, the rich and persons of high standing in society, notwithstanding accusations or evidence to believe that such persons had been concerned in murder, sometimes multiple murders, fraud involving millions of rupees, rape and other such serious crime; whether force had been used on such persons to extort information or evidence relevant to the crime committed; whether force, or physical intimidation had been used to obtain information on the weapons used for the murders or to trace the stolen/defrauded loot. The answer was negative.

When I asked them whether I was incorrect in saying that in almost all the instances of torture in police custody, the victims were the poor, the destitute and the defenseless, they sheepishly admitted it was so.

The irony of the situation is that torture had been directed against the weakest sections of society—the sections that needed the highest protection from the state” (*D.I.G. J. Thangavelu – The Sunday Times, August 7, 2005*).

It is quite obvious that a policing system that is unable to investigate organised crime and is only capable of dealing with the poorer sections of society will be unable to find a resolution to the problem of crime. The example of Hong Kong demonstrates that in the 1970s an experiment was started where the key component was to first control the crime within the police before attempting to control society. An entirely new institution (the Independent Commission against Corruption) was created completely outside the police with wide powers and resources to conduct its work. The application of this principle of eliminating crime by establishing disciplinary control within the police resulted in overwhelming success in Hong Kong.

We therefore urge you, representing on the one hand high moral authority in the country, and on the other, the highest judicial authority, to reflect on the principle that to eliminate crime in the country, crime must first be eliminated from the chief law enforcement agency; which is Sri Lanka’s police force.”

Daily Mirror: August 26, 2005

<http://www.dailymirror.lk/inside/justice/270805.asp>

An X-ray of the policing system

The Asian Human Rights Commission has published a new book titled “*An X-ray of the Sri Lankan policing system and torture of the poor*”. The following is a short interview with AHRC Executive Director, Basil Fernando by Bruce Van Voorhis, editor of *Human Rights SOLIDARITY* on the contents and relevance of this publication.

Q. Can you give us an overview of this book, “*An X-ray of the policing system in Sri Lanka and torture of the poor*”, and why it should be important to readers, especially readers in Sri Lanka?

A. I can say that this book introduces a completely new approach to the study of contemporary constitutional and legal problems in the country. While the book focuses on analysing the Sri Lankan policing system, it is, in fact, the entire constitutional and legal systems that are being reviewed here. The book’s focus on torture with 65 recent cases that have been well researched places the analyses on actual practices of the police rather than on any historical model or some abstract concepts borrowed from some other jurisdiction. These cases also help to keep the discussion, not on some ideal policing system, but on a critical examination of the existing system. Thus, this analysis can help identify defects and develop solutions to actual problems that affect the system and the country.

As for the book’s relevance, I believe it will reveal in writing what all ordinary Sri Lankans know from their daily experiences, but rarely discuss, about the police and indeed, the whole legal system of the country. It will underline why reform of the police and the rest of the legal system is necessary if Sri Lankans are to enjoy human rights. Lastly, for non-Sri Lankan readers, I hope the book illuminates the deficiencies of a legal system that they too may suffer from, especially in Asia and other similar areas of the world, or explains to readers

who enjoy properly functioning legal systems why human rights abuses are so widespread in this part of the world.

Q. Please explain the contents of the book in more detail.

A. The book consists of 18 chapters and two annexes comprising 321 pages. The first six chapters consist of discussions on contemporary events through letters, articles, statements and interviews. It begins with a letter written to the Mahanayake Thero of Asgiriya and the Chief Justice of Sri Lanka about the issue of crime control. Next is a statement on the killing of Foreign Affairs Minister Laksman Kandirgamar, and reflects on security lapses.

The next chapter is based on interviews with four women who describe their experiences of facing the torture of one of their family members. This is followed by an article by a Deputy Inspector General of Police on equal access to justice, which gives insights into how torture takes place in police stations and ways to counteract it. The next two chapters are on the assassination of Gerald Perera and High Court Judge Sarath Ambepitiya in November last year.

Chapter 7 is about eighty pages long and gives the details of 65 recent cases of torture, including 13 cases of extra-judicial killings at police stations. All cases are about incidents that have taken place in 2004 and 2005, the most recent being a case that occurred in July this year. The actual incidents, the details of alleged perpetrators and the actions that have so far been taken by the state and other agencies are recorded in each case.

The chapters that follow consist of analyses of historical, philosophical, political and constitutional and other legal issues. The last chapters are devoted to the local movements that have tried to create public awareness of the problems of the justice system and which are working towards reforms.

Some questions and answers on Sri Lanka's human rights record that were raised at the European Commission on Human Rights are also contained in the book. The publication concludes with two annexes, the first of which includes several letters written to the former UN Special Rapporteur on torture, the Attorney General and IGP of Sri Lanka and a document submitted to the UN Committee against Torture by a Sri Lankan organisation. This last document contains answers by the organisation to a questionnaire initially submitted by

the Committee to the Sri Lankan government regarding the state party's third periodic report, which is expected to be discussed by the Committee shortly.

Q. How has the research been done?

A. The material in this book is based on several years of meticulous work that involved recording cases of torture that have taken place in Sri Lankan police stations. The documentation and publication of actual cases has been followed by interventions on each of these cases to local authorities as well as to UN agencies. In the course of these interventions, ongoing reflections about these experiences have led to a better understanding of the causes creating such institutional practices. This understanding extends not only to the country's policing system but also to the system of governance in the country. Moreover, in the course of analysing the political system and constitutional system, the articles in this book often challenge the existing assumptions on which much of the reflection on these issues have been dealt with in the past. Instead, this book attempts to introduce a new understanding about the country's constitutional system and the legal obstacles that stand in the way of developing functioning democratic institutions in the country that can truly protect people's human rights.

Daily Mirror: October 22, 2005

<http://www.dailymirror.lk/inside/justice/221005.asp>

Danish group tells UN Committee of torture in Lanka

The Danish Rehabilitation and Research Centre for Torture Victims (RCT) has submitted a written statement to the UN Committee against Torture regarding the prevalence of police torture in Sri Lanka, the lack of effective remedies and other issues.

The statement was submitted in advance of the Committee's hearings regarding Sri Lanka's compliance with the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), which was scheduled for November 10 and 11. At the hearing, the Committee was expected to study Sri Lanka's second periodic report submitted in accordance with article 19 of the Anti-Torture Convention.

In its statement, RCT raised concerns regarding the large number of police torture cases, many of which involved torture committed for the purpose of extracting confessions and as a result of the lack of proper investigation skills. According to RCT, unless the local police are properly trained and equipped to carry out their duties there is little hope of eradicating torture within the country. RCT also encouraged the Committee to raise this issue with the state party and recommend better training for police officers, better discipline within the ranks of the police and a higher level of accountability.

Witness protection

Another area of concern raised by RCT related to the severe lack of witness protection for torture victims who stand up for their rights and file cases against their perpetrators. Many of these victims have experienced serious threats to themselves and their families and have been urged to settle the cases outside the legal reach of the courts system. The statement mentioned the death of torture victim Gerald Perera in November 2004 as a shocking and

horrific example of the lack of protection for victims. The victims need to be protected from the police and not by the police, said the group.

Similarly, RCT expressed alarm at the absence of state efforts to enact legislation on the right of victims to rehabilitation. Torture victims in Sri Lanka have no inherent right to rehabilitation, which is in direct violation of the Convention Against Torture article 14, RCT said and urged the UN Committee to underline the importance of and the state's obligation to ensure the access to rehabilitation for all torture victims.

The statement also indicated the flaws within Sri Lanka's judicial system, which inevitably caused further suffering for torture victims. Of particular importance was that a suspect has no right to legal representation prior to appearance at the Magistrate Court and that the representation provided in the courts was often by lawyers who work closely with the police. The group further mentioned that threats and intimidation had been faced by few independent lawyers who represented torture victims and stressed the importance of protecting these lawyers. RCT urged the Committee to take up these issues and recommend that suspects only be produced before the Magistrate Court during working hours and that the suspect be provided adequate and impartial legal representation.

The statement urged that a suspect should be produced before a medical officer within 24 hours of his/her arrest to ensure that their condition is suitable for remand. Also that the Committee compel Sri Lanka to abolish the 30 day time limit imposed in its Constitution for the filing of Fundamental Rights Applications. Many victims have experienced severe mental and physical trauma and the injuries they have sustained make it difficult for them to make complaints within such a short time, said the group.

Unfortunate

RCT raised concern regarding the expiration of the mandate of the NPC on November 27. It observed that despite budgetary and other constraints, the NPC has slowly taken up cases of police torture and violence. Most recently the NPC recommended the interdiction of more than one hundred police officers due to allegations of torture. It is therefore extremely unfortunate and alarming that no efforts have been made to ensure the continuation of the mandate of the NPC, the statement said. Thus, there is a real risk that the NPC will cease to function after November 27, in direct violation of the

Constitution of Sri Lanka and will represent a deterioration of the human rights situation in the country especially as regards the fight against impunity in cases of torture. RCT thus urged the Committee to raise this matter with the state party as a matter of the utmost urgency.

RCT also acknowledged that the Human Rights Commission (HRC) as of recently has stepped up its efforts on the torture issue. RCT is encouraged by the fast track approach to torture cases taken by the HRC, the staff upgrade which has recently taken place and the increased number of cases referred to the Attorney General's office by the HRC. However, the HRC should keep up the pressure on the police and the Attorney General's Office. Finally, the mandate of the HRC will run out on March 26, 2006 and the HRC should take all appropriate steps to ensure the further existence of the HRC after this date.

Attack on HRC

RCT also expressed alarm at the recent attack on the premises of the HRC and of the fact that the attack may have been perpetrated by staff members of the HRC. An independent and impartial inquiry into the attacks should be conducted and possible suspects within the HRC should be suspended and be prosecuted.

This attack has further underlined the importance and effect of the continued efforts of the HRC in cases of human rights abuses.

Finally, the RCT stressed the importance of Sri Lanka ratifying the Optional Protocol to the Convention Against Torture (OPCAT) as the adoption of the OPCAT was an important milestone for the prevention of torture in places of detention. It will also be an important instrument in the ongoing fight to eradicate torture.

The Committee should urge the state party to without delay sign and ratify the OPCAT and to start the process of establishing a national preventive mechanism.

Daily Mirror: November 12, 2005

<http://www.dailymirror.lk/inside/justice/121105.asp>

19 Lankans get awards for justice for courageous litigants in the human rights field

The Asian Human Rights Commission together with the local network, People Against Torture (PAT)—a collection of about 20 grassroots level organisations—has been assisting torture victims in Sri Lanka since 2002. During this journey they have met with many courageous Sri Lanka citizens who despite the gross injustices meted out to them or their loved ones, have bravely come forward to complain, and withstand innumerable inconveniences, insults, dangers, and delays, to pursue the cause of justice.

Therefore, to mark Universal Human Rights Day and also in recognition of the immense courage and resilience shown by these simple folk, the PAT network will be honouring 19 torture victims and their family members with the ‘Citizens Award for Justice’. The ceremony will be held on Friday, December 9, from 11:30am to 12:30pm, at the Public Library Auditorium Colombo 7.

The nominees for awards are:

A.M.Kusumawathi, a marriage broker from Darga Town, Beruwela: She complained that on 22.10.2002 she was brutally assaulted by a policeman of the Tourist police, Moragalla as a result of which her arm was fractured. The policeman has now been indicted by the AG before the Kalutara High Court, under the Anti-Torture Act. She has also instituted action for compensation in the District Court.

Ranjani Rupika, a housewife from Girikola Agalawatte: She complained that she was several months pregnant when she was assaulted by the Matugama police who visited her house in search of kasippu on 11.09.2001. She later lost her child due to the assault. This year, the Human Rights Commission (HRC)

recommended 50,000 rupees as compensation for violation of her rights, while the AG too has indicted the policemen before the High Court.

Ramani Perera, a housewife, of Hirana, Panadura: She is the wife of Tilan Perera who together with his brother Janaka alleged they were severely tortured at the Panadura police on 28.07.2002. The assault resulted in a broken nose for Janaka. Currently the HRC inquiry into the incident is pending.

K.P. Wimalasara, an ice cream seller from Kanathteewewa, Wariya-pola: He complained that on 20.06.2002 he was illegally arrested, detained and abused in foul language by the OIC, Wariyapola when he went to visit a friend in remand. This year, the HRC recommended 5000 rupees as compensation for the violation of his rights.

M. Premadasa, a casual labourer from Bombuwela: On 19.06.2002 his brother who was an inmate at the Magazine prison complained of being brutally assaulted and injured by a prison officer. His undeterred resilience for the cause of his brother resulted in the Borella police finally taking action against the officer. The HRC inquiry is currently pending.

The mother of fifteen year old, Saman Kumara, from Sinharaja Uduyanaya: On 28.07.2002, a student at the time, Saman was arrested by the Kiniyawela police and remanded for stealing tea leaves. He was charged in the Magistrates Court but after many years of hardship, was acquitted of all charges against him. But due to his constant persecution the boy was forced to forgo his education. The award is in recognition of his mother's heroic stand for justice despite the many obstacles placed in her path.

K.A.Samarasinghe, a carpenter of Kelin Kanda, Agalawatte: He complained that on 10.11.2001 he was arrested and brutally interrogated about a killing by the Badureliya police. As a result his leg was fractured and he became mentally traumatized. Currently the AG has indicted the suspected policemen before the Kalutara High Court.

Suresh Pradeep Kumara, a postman from Mahavila Panadura: He complained that on 17.12.2002 he together with friends were arrested and assaulted by the Panadura police. He complained to the IGP, NPC and HRC. Currently the HRC and police inquiries are pending. However he said that during the police inquiry he was threatened to withdraw his complaint. And though his friends withdrew in fear, he continues bravely and also complained against each such incident.

Sumudu Priyan-kara, a three wheel driver, from Kalutara: He alleged that he was arrested on 05.11.2002 by the Kalutara North police, illegally detained for four days during which he was brutally tortured. He later complained to the HRC, IGP and area-ASP. The HRC inquiry into the incident is currently pending.

Suraj Prasanna, quarry worker from Ovitigala, Matugama: On 08.01.2002 he was arrested by the Matugama police on suspicion for stealing from the temple till. He alleged that at the police station, he was assaulted and forced to worship a policeman while being hit on his back. As a result, he was hospitalised for three days. The HRC inquiry is pending.

The mother of seven year old Sujith Priyantha Wijekoon, student from Polpithigama: On 29.07.2003 he was accused of stealing from a cooperative store, locked up and harassed at the Polpithigama police station for a whole day. Later the Magistrate rejected the case against a seven year old and discharged the boy. The HRC inquiry and police investigations into the incident are currently pending.

Prasad Udayanga Perera (18), a student from Ratnapura: He was arrested and taken to the Wewelwatte Police post where he alleged he was assaulted and chained to a table. At the hospital he discovered his eardrums were ruptured for which he still received treatment. The HRC inquiry is completed and is due for recommendation.

M. Chandralatha, mother of ten year old Shiran Sasika, a student from Hinihuma: On 07.08.2002 the boy was arrested for stealing from the school canteen. At the police station he complained he was tortured by having his fingertips pricked with needles and his genitals slammed in a drawer. The FR case pertaining to the incident is currently pending. The AG has indicted the policemen before the Galle High Court while the HRC recently recommended 25 rupees as compensation.

Sunil Fernando, a trader of Keselwatte Panadura, complained he was assaulted with a knuckle-duster at the Panadura North Police station. The assault fractured his skull. He complained to the HRC, IGP and ASP-Panadura. The HRC inquiry into the incident is currently pending.

Ajith Navaratne Bandara, a mechanic from Keselwatte Panadura: He complained that he was falsely accused of possessing kasippu and arrested on

02.05.2002 by the Panadura North police who thereafter severely assaulted him. He then alleged he was presented to the Panadura DMO who signed the medical forms without examining him. Later, consequent to his complaint, the Medical Council passed stricture on the doctor. Currently, the HRC inquiry has concluded and fixed for recommendation.

Nandani Herath alleged she was arrested by the Wariapola police on 08.03.2002, detained for two days and tortured by having a pipe like object inserted into her vagina. This severely injured her and ruined her future prospects. Later, her brave stand against the police resulted in the interdiction of several policemen. They now stand trial before the Kurunegala High Court under the Anti-torture Act. Ms. Herath is now a human rights activist in Wariapola.

Elaris, grandfather of Lalith Rajapakse, who was rendered unconscious for fifteen days after allegedly being tortured by the Kandana police. The FR case filed on his behalf is pending before the Supreme Court as is the trial before the Negombo High Court. An award is recommended for the victim's grandfather Elaris, who pursued the cause of justice despite his advancing age and numerous threats not to proceed with the case.

Mother of Chamila Bandara, from Ankumbura: His torture at the hands of the Ankumbura police left both his arms paralysed. He had been arrested on 20.07.2003 suspected of stealing a few bananas. The FR case filed on his behalf is pending before the Supreme Court while the suspects were indicted before the Kandy High Court. He also appeared before the UN-Human Rights Committee in Geneva. His case enabled international attention to be focused on the problem of police torture in Sri Lanka.

D. Pushpakumara, student from Saliyawewa: He was arrested on 01.09.2003 and alleged that he was suspended from the ceiling and assaulted to confess stealing a chain. A few days later the police apprehended the real culprit but his family was constantly pressurised to withdraw their complaints. They courageously refused to do so. As a result, the responsible policeman currently stands indicted before the High Court.

Daily Mirror: December 03, 2005

<http://www.dailymirror.lk/inside/justice/031205.asp>

Chapter VI

Duties of state organs and justice mechanisms

Who committed the original sin of the judiciary?

The lamentations about the state of the judiciary in the country are many. Voices are heard from within the judiciary itself, from lawyers, from intellectuals and international organisations including UN agencies. A long list of faults is constantly being mentioned with many examples quoted. And this list is frequently being added to.

Some people seem to think that there was a golden age of judicial independence that has recently been lost. However there is a difference of opinion as to how recently this happened. While some would like to have it believed that the erosion to judicial independence was quite recent, others would generally say it began after Neville Samarakoon's period as Chief Justice.

Chief Justice Neville Samarakoon is regarded as almost a folk hero and his final battles with the Executive President J. R. Jayewardene are often portrayed in truly epic proportions. He is often seen as an Achilles like character. However, to what extent is this image really true?

The fact that the first Executive President was met with stiff resistance from the first Chief Justice under the new Constitution of 1978 is beyond dispute. That the Executive President and those surrounding him regarded this resistance with something akin to hatred is also well recorded. In fact, Lalith Athulathmudali, a well-known lawyer and prominent Cabinet Minister at the time succinctly summarised this ill feeling when he told a gathering of the Bar Association at a ceremony to felicitate its newly inducted President that "this should never happen again".

Perhaps the Executive President's wish that his former party colleague who he had appointed as Chief Justice would be his close collaborator had been shattered by the conflict that developed between the two. Perhaps in the very

scheme of the 1978 Constitution is the conception of absolute power, which requires collaboration and no resistance from the judiciary. However without any disrespect for the later resistance of Chief Justice Samarakoon to his former friend's designs, it may still be asked whether he was correct in accepting the post of Chief Justice under the 1978 Constitution.

At the time, it is true that even some liberal constitutional experts were putting a great deal of effort to demonstrate that the Constitution had its origins in the French Constitutional ideas. Today however, many of them would be too embarrassed to look back on the praises they heaped on the 1978 Constitution. When a colleague of Chief Justice Samarakoon in the Bar, Colvin R. de Silva, mentioned that the borrowings were not from the French—or for that matter any modern constitutional document—but from the legacies of the Emperor Jean Bedel Bokassa, his was a minority point of view. The legal eagles in the country were busy singing high praises and blowing bugles for the 1978 Constitution. Little did they know that the age of Bokassa was just beginning in Sri Lanka. The question that arises is, “Did Neville Samarakoon also share this illusion?”

Many questions can indeed be asked; did the then Chief Justice also believe that there was some sort of authoritarianism required in the country and that democracy had to be limited? This was quite a popular idea entertained by many legal intellectuals at the time. And did Neville Samarakoon rebel only when he realised that the authoritarianism had gone too far and that even his own position as the Chief Justice had been slighted by the new institution of the Executive Presidency?

It may be said that all human beings are mortal and have their limitations. The limitations that arose out of a poor understanding of the implications of the new Constitution were shared by many at the time. However, for a Chief Justice, can it be an excuse to say that he did not understand that the Constitution, under which he was the first Chief Justice, was fatally flawed?

Later when it came to the referendum in 1982 it is said that Neville Samarakoon was among the minority in the Supreme Court who voted against it. However, by then it was too late. A colossal mistake had been made constitutionally and there was very little chance of correcting the situation. In the Central African Republic after a long and severe struggle the people were able to overthrow Jean Bedel Bokassa's legacy. However, the 'Bokassan' scheme of things was to continue in Sri Lanka for a long time to come—and in fact still does—today.

No one would say that Neville Samarakoon knowingly agreed to this. But can ignorance of the consequences be an excuse for a Chief Justice particularly on matters of the Constitution? His regret about the situation naturally justifies understanding and even praise. But, it is not right that the original sin of agreeing to this Constitution will affect the nation for years to come until some way is found to circumvent the consequences of this fall.

History has shown that this was indeed a fall of great proportions, and the constitutional capacities of the people have not yet proven sufficient to reverse or indeed stall the momentum of the descent.

By Basil Fernando

Daily Mirror: August 23, 2004

<http://www.dailymirror.lk/inside/justice/040814.asp>

Hooting in court and legal absurdities

Writing about legal ethics in the American system (see Zitrin and Langford in *The Moral Compass of the American lawyer; Truth, Justice, Power and Greed*, Ballantine Books, 1999), the authors point out the essential contradictions between legally unethical and morally unethical actions on the part of legal professionals.

To quote an assessment by them that would apply verbatim to Sri Lanka; “Many consider the typical American lawyer to be either immoral or amoral while many others believe that our justice system no longer protects the interests of the average person. Polls show that public confidence in lawyers has never been lower.”

The book abounds with examples of instances where lawyers have faced competing ethical principles and most often than not, have succumbed to the lure of power and greed as opposed to truth and justice. If such a book was to be written about legal professionals in this country, I suspect that the writing would be as charged and as incisively angry, (if not more), given the almost but total breakdown of moral and compassionate standards by Sri Lankan lawyers.

This betrayal has been aggravated in recent years by seniors in the profession openly manipulating the prevalent state of insecurity in the judiciary, (vis-à-vis its independence from political interference), for their own benefit, power and greed. These instances need honest documentation and unsparing analysis at some saner point of time for the purpose of recording the darkness of an era which, hopefully Sri Lanka’s legal and judicial system would never have to endure again.

Currently, the controversy over a team of lawyers agreeing to represent the alleged killer of Justice Sarath Ambepitiya and the ensuing fracas in the Chief

Magistrate's Court where the lawyers, upon marking appearance for the main suspect, were hooted and booed by their colleagues at the bar table, is yet another manifestation of this same deterioration in legal ethics and standards in this country. Such an unsavoury incident was only a natural culmination of incautious statements made by the President of the Bar Association of Sri Lanka (BASL) not so long ago, virtually calling upon lawyers not to represent the accused.

From thereon, we had a veritable comedy of errors wherein the lawyers who ultimately agreed to appear for the suspect Mohamed Niyaz Naufer (whether for monetary largesse of an extraordinary kind or not, though it can hardly be maintained, even by the most naive among us, that their retention stemmed out of the kindness of their hearts) was able to obtain for themselves, a letter from the BASL giving them permission to appear on behalf of the suspects.

That permission could be given or that even notification need have been made of something as basic as a lawyer's right to appear for a suspect is, of course, a curiosity which could perhaps happen only in a system as internally subverted as ours. Though comparisons have been made, this question is very different to the situation in 1987-90, during the JVP youth insurrection, in response to the killing of lawyer Wijedasa Liyanarachchi, (who was among at least twenty lawyers killed for attending to their professional duties and in general during this period). The Bar en bloc and irrespective of its political differences, decided to boycott the ceremonial sitting of the Supreme Court in the new Courts Complex. Later, as the killers of Liyanarachchi were not brought to book, it was decided that no member should appear for any police officer until the matter was settled and the killers charged in court.

Returning to the matter in hand however, the letter of implicit or explicit permission issued to the lawyers concerned by BASL was apparently not sufficient to protect the retained lawyers from being jeered at in open court when the case was taken up. The public, as evidenced in letters written to the editor since then in a number of newspapers, has been rightly taken aback by the commotion in court, many letter writers pointing out the inherent injustice in lawyers behaving in this manner and getting away unpunished when ordinary persons are not allowed to talk loudly in court or for that matter, sit cross legged when sittings commence.

One recent practical instance should suffice to illustrate the absolute

contradictory manner in which the law operates to protect the dignity of court; that of an ordinary litigant, Tony Michael Fernando who was sentenced in early 2003 to one year rigorous imprisonment for contempt of court by a Supreme Court Bench comprising Chief Justice Sarath Nanda Silva and Justices Yapa and Edussiriya. The sentence was passed on him for talking loudly in court and persisting in his application.

Theoretically, contempt of court powers have been developed through the years not to punish hapless litigants who may lose themselves in an aberrant instance but rather to protect the administration of justice. A better example cannot be evidenced than where lawyers behave like ordinary ruffians in court and disturb the proceedings of court. Such repellent behaviour cannot be weakly explained away as a “natural phenomenon” upon the killing of a much respected judge, as was sought to be said to one daily newspaper this week by an office bearer of the Chief Magistrate’s Court Lawyers Association. Small wonder then that public distrust of the legal profession is growing by leaps and bounds when behaviour of this nature pass by unpunished and small aberrations are visited with such severe penalties.

V. R. Krishna Iyer, a former judge of the Indian Supreme Court renowned for his adroit manipulation of legal language, once termed the cornerstone of any legal system to be “the integral yoga of justicing and lawyering.” It would be apparent to all that this ‘integral yoga’ is malfunctioning very badly in this system of ours. At a time when the courts and lawyers might have stood strong against political arrogance from both sides of the political divide, what we have is weaknesses manifested at every turn and absurdities such as lawyers getting booed by their colleagues in court.

What we need now is a shift of focus from such absurdities to serious examination of every aspect of the legal system, the legislative and judicial processes, the working of the legal profession, the nature and functioning of law in all its aspects in relation to society and its relevance to contemporary needs. Sadly, given the unsavoury realities that predominate in the legal system now where lucre is the main aim of legal practice, such exhortations are necessarily limited to calls in the wind.

By Kishali Pinto-Jayawardena

Sunday Times: Focus on Rights, January 30, 2005

Are you condoning police killings, Mr. IGP?

Some of the views expressed by Police Chief, Chandra Fernando, at a discussion with Professor Carlo Fonseka over the SLBC last Monday, were alarming in their attempt to justify police shootings of civilians, the Asian Human Right Commission (AHRC) said. This comes at a time when there are reports of numerous civilian deaths after police arrest, the AHRC said.

Spelling out a Lee Kwan Yu doctrine of ‘discipline, development and democracy’, IGP Fernando has explained such killings as acts of self-defence, that is, the victim either tried to flee or harm the police officers who were then compelled to shoot and kill them. The defence of such acts—also termed as crossfire or encounter killings—by the highest police authority is tantamount to the encouragement of such behaviour, AHRC said.

‘Minimum force’

The earlier defence against police acts of violence was that they were using ‘minimum force’. However, this use of minimum force led to a spate of deaths in police custody and grave injuries such as skull fractures and kidney damage. Two of the latest cases in which ‘minimum force’ was supposed to have been used led to the death of Wijeratne Munasinghe, who was allegedly tortured at the Maharagama police station, and the alleged assault on a man and his five month pregnant wife, at the Embilipitiya police station, causing the woman to give birth prematurely.

Hundreds of cases of police violence have been submitted to the IGP and other Sri Lankan authorities. Everyday more cases are added, clearly indicating a breakdown of discipline within the police force. Under these circumstances, the IGP would do better to promote discipline within the department and ensure that the law is enforced according to established procedures, rather

than discussing political ideology, AHRC said.

According to AHRC, the guide for the police is the law that exists in the country, not ideology. This law is made by the people through their elected representatives in Parliament. The duty of the law enforcement agency is to enforce the law according to the procedures established. And the duty of the head of the police department is to ensure that the department enforces the law of the land, AHRC said.

Breakdown

To his credit, the IGP did admit during the radio discussion that the rule of law in Sri Lanka has broken down. However, this is not the first time the present IGP as well as his predecessors have so admitted. Merely admitting and repeating this is not enough. Instead, the leader of the law enforcement agency must undertake to end this collapse of the rule of law NOW. And to this end, the IGP needs to clearly spell out a programme of action proposed by his department on ways to reinforce the rule of law. The Sri Lankan public is unaware of any such plan proposed or published by the police department. AHRC said that when the IGP speaks about discipline as a component of development, he should above all be concerned about the discipline in the police force that he commands. It is publicly admitted that there is a near-complete collapse of discipline in the law enforcement agency, particularly in recent decades. As for the cause of this collapse, in passing the 17th Amendment to the Constitution almost unanimously, all political parties in the country attributed it to the politicisation of the police force. And the proposed solution was its de-politicisation under the strict supervision of the National Police Commission.

The 17th Amendment further provides for the establishment of a public complaints procedure ensuring prompt and thorough inquiries into acts of police misbehaviour, thereby reinforcing discipline within the police force. This constitutional provision has not been complied with however, and the old provisions of internal disciplinary inquiries are still in place, and hold no public confidence. Ironically, policemen who have been indicted in various High Courts are still serving within the police department, AHRC said.

Therefore AHRC said that if the IGP is genuinely advocating discipline, then he should understand that discipline is brought about through the strict enforcement of disciplinary procedures—anyone committing disciplinary

violations must be punished according to the law. When law enforcement agencies get away with such violations, what credibility do its officers have in their attempt to enforce discipline elsewhere?

Lessons from Hong Kong

The link between discipline and development is no other than the link between development and law. A lawless society cannot produce the discipline needed for the functioning of basic economic and social institutions, which deliver the required services for a vibrant economy. With a breakdown in law, corruption becomes widespread and inevitably affects the economy. Sri Lanka is a glaring example of this trend.

Discipline only becomes a part of civilian life when it prevails within state agencies. Lawless agencies create an obstacle to the establishment of discipline within society. This obstacle cannot be overcome in any way but through attempts to reinforce discipline within the state bureaucracies, particularly the police department. The transformation of law enforcement in Hong Kong since the 1970s is a clear indicator that any reinforcement of discipline must begin in the policing system itself. When proper discipline is enforced within the policing system, other government bureaucracies, the private sector and the population at large follow a similar course.

AHRC said the belief that errant law enforcement officers with the freedom to shoot at will can bring about a disciplined society, is misleading and irrational. The AHRC has in the past consistently communicated with the IGP about the exceptional collapse of the rule of law in the country and also underlined as its primary cause, the indiscipline amongst the police. Therefore, it once again urges the IGP to take up the task of restoring discipline within the police force through serious attempts at reforming disciplinary procedures.

This task requires courage, as there is bound to be great resistance from those within the institution who benefit from the present state of indiscipline. However, this is the price that anyone who talks of discipline in a serious manner should be willing to pay. Any form of encouragement for acts of violation, including torture and extra-judicial killings, can only make the situation worse.

Daily Mirror: May 7, 2005

<http://www.dailymirror.lk/inside/justice/070505.asp>

Are we heading towards the terror of the 80s?

The recent increase in death threats and intimidation of human rights activists and journalists in Sri Lanka is alarming, and gives rise to the concern that the situation may degenerate into something akin to the terror period in the late 1980s, the Asian Human Rights Commission (AHRC) warned in a statement.

The law enforcement authorities appear to have lost control, with extra-judicial killings and death threats being made openly, the AHRC said. Two prominent journalists have recently received death threats as have individuals from the Centre for Policy Alternatives. These threats, consisting of nasty letters, were common in Sri Lanka during the late 1980s and were followed by killings, even in broad daylight. The number of disappearances in the South itself during that time is estimated to be around 30,000.

At that time, certain persons were seen taking advantage of the prevailing lawlessness to settle personal grievances. Hence a large number of children were killed in the 1980s, merely for reasons of family rivalry and pettiness, but with some political pretext as a cover. It is quite likely that the current threatening letters will soon multiply around the country and be used as a cover for many crimes. And life throughout Sri Lanka is becoming extremely dangerous yet again, the AHRC said.

One of the groups most attacked today are the independent, non-governmental organisations (NGOs). These groups are being portrayed as traitors to the motherland, which is the latest justification for extra-judicial killings and other abuses. However, the existence of these independent groups is essential to the functioning of a democracy and to the defence and protection of vulnerable and marginalized groups in society, such as the poor, the AHRC said.

According to the Commission, there are two major causes for the present

instigation of violence. One is the arrival of foreign money for the projects relating to the tsunami. As is usual all over the world, part of this money is channelled through independent NGOs, to ensure that the money and services reach the recipients as promptly and effectively as possible. While their criticism of these independent groups is that the NGOs may swindle the money, they want control of the funds for political or even personal gain. It is for this reason that a tremendous struggle to wrestle the tsunami funds from these groups is occurring, the AHRC said.

Secondly, Sri Lanka is a country with a long history of caste discrimination and minimum consideration for the poor. Thus the fact that the poor are now becoming more vocal and making claims for themselves maybe greatly resented by the ruling elite. There have been many instances where affluent groups and individuals have attempted to grab the share of the poor, such as when 'three-posha' designed for malnourished pregnant women, was taken to feed pigs owned by the wealthy. There are also political groups who want to gain influence among the people and want to use the funds for their own work, the AHRC said.

The uncertain political situation is also a reason for the current instigation of violence and intimidation. The likelihood of elections in the not so distant future is an opportunity to create greater chaos that could be mobilized for various political purposes.

Ultimately however, the root cause for the persistence of this violence and its possible degeneration is the ineffectiveness of the law enforcement agencies, which the AHRC has consistently pointed out.

In Sri Lanka as elsewhere, the connivance of the police either directly or by their passivity is what leads to the escalation of violence. Despite constant calls for improved law enforcement through better investigation and facilities, the situation continues to worsen.

Therefore, the AHRC urges the Sri Lankan government, the opposition parties and the public to intervene forcefully to get the law enforcement agencies to perform their basic tasks. A thorough investigation into police performance of law enforcement is essential.

To avoid this issue may mean not only a large-scale loss of life, but a return of society to a more primitive state.

Sri Lanka's prospect of being caught up in another brutal cycle of violence is now very real. If action is not taken immediately, there may hardly be time to reverse this process.

Finally the AHRC also urges the international community to take note of this situation and to encourage and assist Sri Lanka to address it.

Daily Mirror: May 21, 2005

<http://www.dailymirror.lk/inside/justice/210505.asp>

Kadirgamar killing and the police crisis

The Asian Human Rights Commission (AHRC) has expressed shock and condemned the killing of Foreign Minister, Lakshman Kadirgamar. According to the Commission, in direct and indirect terms the Government and many other sources have accused the LTTE of being responsible for the killing. The LTTE has denied this allegation. The AHRC also said though a ceasefire has been in force since 2002, there have been on-going killings, which particularly during the last year, have intensified in the North and East.

In more recent months these killings have spilled over into Colombo claiming many lives, including prominent figures such as journalist Dharmaretnam Sivaram, the Chief of the Military Intelligence Unit Mr. Muthaliff, and now Mr. Kadirgamar. An immediate and thorough investigation has been urged by all concerned so as to bring the perpetrators to justice.

The business community organised under J-Biz, the umbrella organisation of the National Chambers have criticised the authorities for the serious breakdown in law and order and said that the deteriorating security situation is now spilling over into Colombo. The AHRC however, said that it has been drawing attention to this fact for several years now, by way of reminders almost three times a week to the Sri Lankan authorities, the Inspector General of Police, the Attorney General, National Police Commission and the Human Rights Commission of Sri Lanka. Such letters have also been sent to the President and the Prime Minister.

In a newsletter addressed to the Members of the Sri Lankan Parliament, the AHRC has highlighted the deteriorating situation of the rule of law in the country and called for action to be taken to correct this situation. In a newsletter entitled “Command Responsibility,” addressed to top ranking police officers in the country, the same point has been made vigorously. Also, in a report submitted to the UN Sub Commission on Human Rights in 2004 entitled

“Exceptional Collapse of Rule of Law in Sri Lanka”, the situation of the country was highlighted in more detail. However, the AHRC said that no significant action has been taken to improve this situation.

The organisation also said that as a result of the degeneration of the rule of law, killings have become easy throughout the country not only for political reasons but also for almost any reason at all. Out of this situation has grown a strong lobby in the Sri Lankan media for the control of crime. However, instead of addressing the causes of escalating crime, which are basically due to serious defects in the policing system, the prosecution and the judiciary, this media lobby mostly cries out for extra-judicial punishments against those who are named as ‘criminals’.

As a consequence, the arrest and killing of ‘criminals’ under the pretext of trying to control ‘those fleeing arrest’ had become rampant, allegedly supported by some law enforcement officers at the top and as well as the tacit approval of some politicians. This however has resulted in the further breakdown of discipline within the policing system, thus depriving the country of an effective mechanism of criminal investigation without which there cannot be any successful elimination of crime.

The ease with which killings are carried out has also been reflected in many deaths and serious injuries caused to arrested persons at police stations. Sometimes such assaults on citizens by the police have been for little or no reason. One such example was the recent case at Wattagama police where two brothers-in-law who were looking for their motorcycle, which was not in the place where they parked it, were allegedly attacked with iron rods by two policemen. And so severe was this attack that one man required immediate hospitalisation with three serious bone fractures on his leg, which is now fixed to an external fixator.

In another incident reported, two policemen attached to the Peliyagoda police station allegedly beat to death a 52-year-old man who was suspected of having stolen a cordless telephone. Thus, almost every week similar allegations are reported from police stations across the country but no serious action has been proposed by the authorities to remedy the situation.

The National Police Commission (NPC), which is the Constitutional body created for correcting this situation, particularly by being given the charge of controlling discipline, has complained that it does not receive cooperation from senior policemen and that the necessary resources for execution of the

Commission's mandate have not been given. However it may be said that the NPC has also done little to pressurise the authorities into giving it the necessary resources and the backing to execute its function.

In a modern state, the protection of citizens cannot be guaranteed without a competent, efficient and resourceful police service. The simple fact is that Sri Lanka does not have one. Where there is no policing capacity to protect the individual citizens, there cannot be the capacity to protect its more powerful politicians. In recent decades a lot of emphasis has been placed on the police engaging further in the protection of high-ranking politicians. One of the principal reasons for the deterioration of the investigating capacity of the police is this aspect of working, in effect, as bodyguards for politicians.

However, protection functions of the police lie essentially in its investigating capacity. Regarding the assassination of the Foreign Minister, it is said that the shooting was conducted from a nearby house to the minister's residence. Though the minister's residence has been extraordinarily guarded, apparently no investigation activity has been carried out in the neighborhood. The concept of investigations has been replaced with pure direct physical security.

While there is much shock about the senior minister's assassination and the circumstances surrounding it, there is hardly any alarm or concern in the media or elsewhere about what has happened to the Sri Lankan policing system. If there is one lesson to be learned from this assassination, it is that there is a need to significantly and thoroughly reform the policing system, the AHRC said. Failure to do so will only lead to greater insecurity in the country. The government, the opposition, the media and the public must address this single most important issue if repetition of recent events is to be avoided. Therefore the AHRC once again urged the international community, including those engaged in the peace process and those UN agencies, to bring this issue to the forefront. Finally quoting the statement made by Mr. Kadirgamar himself at the 63rd Session of the UN Human Rights Commission in Geneva in March this year, the AHRC said it hoped the government would implement what he promised, which in fact will address the concerns expressed in the statement: Mr. Kadirgamar had said, "the government of Sri Lanka, taking serious note of recent allegations regarding torture while in police custody, has introduced short and long-term preventive mechanisms to address the issue in line with recommendations of treaty bodies. The government of Sri Lanka condemns torture without any reservation".

Constitutional duties imposed upon the IGP and their bypassing

This week's statement by the Inspector General of Police, Chandra Fernando, (in a daily newspaper on Saturday) that the "Police department is severely hampered by interdictions of police officers as suspects in human rights violations before they are convicted," gives rise to a considerable amount of consternation if not incredulity.

It may be recalled that this is the same Inspector General who initially balked at proceeding against the assault on his own officers by the obnoxious offspring of the equally obnoxious Deputy Minister Mervyn Silva. Again, this is the same Inspector General who has consistently been attempting to block the efforts by the National Police Commission to fulfil its mandate in terms of the 17th Amendment to bring about an improvement in the functioning of the police service.

Why then has this honourable gentleman thought it fit to object to the interdiction of his errant officers once a prima facie case has been made out against them in regard to the committal of grievous wrongs? One of the more known cases remains the best illustration of the absurdity of his contention; namely the torture and killing of Gerald Perera, a wholly innocent (gainfully employed) man.

In finding the OIC of the Wattala police station and his subordinates culpable of the most gross torture of Perera (after they had mistaken him for a hard core criminal), the judges pointed generally to the fact that the duty imposed by Article 4(d) [of the Constitution] to respect, secure and advance fundamental rights, including freedom from torture, extends to all organs of government. The Head of the Police can claim no exemption. If he fails to give effective

directions designed to prevent violations of Article 11, and to ensure the proper investigation and initiation of disciplinary or criminal proceedings, his non-action may well justify the inference of acquiescence and condemnation (if not also of approval and authorisation).

Despite this specific judicial finding, most of the culpable officers (including the OIC) continued to hold office at the very moment that Perera was murdered in late 2004, days before he was due to give evidence at a High Court trial that had been instituted by the Attorney General against some of those very same police officers under the Torture Act. Within a year consequent to the killing, these police officers were again indicted in respect of the murder itself.

So, what exactly is the argument of the Inspector General of Police in this respect? Does he maintain that despite all the above, these police officers, for example, ought to remain in their posts until after the completion of that long period (given the inevitability of laws delays) ending in convictions? The public, who is at their mercy in the meantime, is entitled to ask this question from him.

From another perspective, has he, even in one case, initiated departmental inquiries against any police officer found culpable in respect of a rights violation? In hundreds of cases, the Court has directed that the IGP take disciplinary action, after due inquiry, against these officers. These judgements have all been ignored by him and indeed, by his successors. On judicial reasoning, this omission on his part may make him liable to the allegation that he is ignoring a constitutional duty imposed upon him.

His airy contention therefore, that those rare interdictions that do in fact take place, are 'hampering' the working of his department is highly inappropriate if not ludicrous. On the one hand, we have government bodies themselves acknowledging that Sri Lanka has a serious problem in regard to the prevalence of torture practices in the country, often practiced against the poor and the marginalised in the context of ordinary law and order, not in any emergency situation. In a recent interview with the London based REDRESS, for example, the Chairperson of Sri Lanka's Human Rights Commission has stated that torture practices have become endemic and are not confined to a few rogue policemen. The NHRC has acknowledged the significantly increased number of complaints received by its officers each day.

Apropos, the IGP needs to be reminded that in November this year, Sri Lanka will have to respond to questions of the Committee Against Torture (CAT Committee) to which it has presented its periodic report in respect of the measures domestically taken to give effect to the Convention against Torture. In its List of Issues published before the session, the CAT Committee has specifically asked the government to provide information as to what internal disciplinary processes exist within the police force and whether accused public officials remain at work during investigations of torture? (*See Issues 10 and 11*)

Perhaps the IGP's statement this week could be furnished to the Committee as good evidence of the obstructionist attitude prevalent on the part of the Head of Police in respect of his statutory if not constitutional duty to gradually return the police force to the old ideal of actually serving the citizens and not abusing them.

By Kishali Pinto-Jayawardena
Sunday Times: Focus on Rights, October 2, 2005

AHRC welcomes code of ethics for judges

The Asian Human Rights Commission (AHRC) has welcomed the resolution adopted by the Bar Association of Sri Lanka to introduce a code of conduct for judges. The Bar Association appointed a committee comprising a former chief justice and two former Supreme Court judges to draft this code of conduct.

This move by the Bar Association has answered a dire need in the country, said the AHRC. It deserves active support from all lawyers, intellectuals, and civil society organisations by way of public discussion and debate on the issues involved. The AHRC has for several years identified the situation in Sri Lanka as an exceptional collapse of the rule of law. Discussing the ethics that should inform and guide the judiciary can emerge as an important contribution towards alleviating this situation that if unattended, could sink the country into deplorable chaos.

An ethical code for judges should cover a large area of justice administration in the country. The AHRC identified a few areas as follows:

The judiciary itself—That is, concerning members of the higher judiciary as peers and as equals, the relationship between lower ranks and higher ranks of the judiciary, modes of disciplinary control, promotions, transfers, and the like;

The judiciary and lawyers, both in terms of the official as well as unofficial bar—This also involves the treatment of junior lawyers, out-station lawyers, and all other lawyers who may not belong to an elite class. There is also the right to an audience of legal representation and courtesy between lawyers and the judiciary, as well as the prevention of direct or indirect intimidation of lawyers in any category.

This concern is all the more important given numerous documented instances where lawyers have been treated with appalling discourtesy—even at the highest judicial levels.

The judiciary and litigants—The judicial process in the country is tediously drawn out. Often the ordinary citizen does not get the respect he or she deserves from the system. Courts often begin work at times convenient to the judges, while the litigants have to report early to court or sometimes even run the risk of being disallowed to enter courts thereafter.

Postponement after partial hearing of one witness drags cases on for a long time. Courtrooms are often uncomfortable, not very clean, and often lack even basic toilet facilities. All this creates an unpleasant and even intimidating atmosphere in court.

The judiciary and the police—since the assassination of Justice Ambepitiya, security considerations have brought the judiciary physically much closer to the police. Given the fact that in many cases the accusing fingers are pointed at the police, many conflict-of-interest considerations arise as to whether this close interaction might affect impartiality.

Even in the Magistrate Courts in recent decades, police officers have acquired a dominant role, thus affecting the capacity of lawyers to act without fear and intimidation when defending their clients. The judiciary's role in ensuring that citizens feel free to challenge the defects of law enforcement casts a heavy burden on Magistrates in maintaining decorum in court.

There are also other areas affecting the ethical conduct of judges, for example their dealings with the media. In the recent past, there have been grave accusations levelled against some members of the judiciary, but the public has not received satisfactory responses from the judiciary to these accusations. This affects public perception of the nature and quality of the judiciary.

These are but a few matters that may be pointed out at this initial stage of discussing an ethical code for the judiciary. The AHRC urged lawyers, judges themselves—including those retired professionals and intellectuals in all areas of life—and all concerned citizens and organisations to give a high priority to this discussion and to support the Bar Association in developing a code that could have great weight in improving the present state of affairs.

Daily Mirror: November 5, 2005

<http://www.dailymirror.lk/inside/justice/051105.asp>

AHRC challenges Solicitor General

In a letter to the Solicitor General of Sri Lanka, the Asian Human Rights Commission (AHRC) Head, Basil Fernando, has queried whether there can be improvement in the field of human rights without improvements in the administration of justice. The letter was in response to a speech made by the Solicitor General at a seminar to mark International Human Rights Day last week. He had been quoted in the media as saying that there had been ‘improvements in the field of human rights’ in Sri Lanka. In his letter Mr. Fernando said:

The only question I wish to raise with you is whether there can be improvements in the field of human rights without there being improvements in the administration of justice. As Solicitor General, whose field of competence belongs more to the field of the administration of justice, are you claiming that there is improvement in the administration of justice in Sri Lanka? I have not come across any person in recent decades making such a claim. On the contrary, I have met many people and seen and read much in the print and other media that tell of the degeneration of the administration of justice in the country.

For the purpose of this discussion, I wish to limit us to one issue, the delays in the administration of justice. This is the measure by which every litigant in the country will ascertain whether there is an improvement of the administration of justice, or, whether we are slipping towards a lawless society. I wish to provide you with a few examples from cases that have already been brought to the notice of relevant government agencies on many occasions:

The case of Rita—bearing No. 32151 of the Magistrate’s Court of Nuwara Eliya and which was committed to the High Court in 2002. The case concerns a fourteen year old girl, who alleged that she was raped. After recording evidence, the Magistrate was satisfied there is a *prima facie* case to be placed

before the High Court. To date however, the young victim has not received summons to appear before court for this case. Despite many attempts made on her behalf to find out what is happening with the case, no one seems to know what the situation is. So this young girl has to grow up waiting for her trial to take place at some undefined time in the future.

The case of Yamuna—bearing No. NS 25248 at the Magistrate’s Court of Kandy. The alleged rape took place on September 2, 2002. The non-summary inquiry into the case is still pending. Again, the case concerns a young girl and she too has to grow up, not only with the trauma of having been raped, but also with the uncertainty of when her trial in the court will end. Young people have a right to grow up without the constant burden of such problems and in the knowledge that justice has been done.

The case of Anushka—bearing No. B40152 of the Magistrate’s Court of Kandy. It concerns another case of the rape of a young girl, in fact gang rape, which is alleged to have taken place in July 2003. The non-summary inquiry has not even begun. This young girl also faces long years of uncertainty and shame before she will ever see justice done.

The case of Inoka—bearing No. B37112 at the Kandy Magistrate’s Court. The alleged rape of this young girl took place on April 7, 2002 and the non-summary inquiry has not even begun.

These are just a few cases. You are, of course, aware of many more. I need not remind you that rape is among the worst crimes, and the rape of such young girls offends the conscience of any society. However, when it comes to justice, these young persons have been utterly neglected.

No one from the state has cared to explain to them what is happening to their cases and how the state is ensuring their right to effective redress. In fact, the state has not even met its obligation to protect these persons. All four have had to live away from their homes due to the social reactions that follow such incidents. Their only recourse has been through the human rights groups that have provided them with alternative shelter and an attempt to help them to rebuild their lives.

Human rights are about state obligations to protect persons from violations. The state is to protect rights through its justice system, the police, which is supposed to investigate crimes, the prosecution, which brings these cases before the courts, and the judiciary, which finally adjudicates cases. Where this system

fails, human rights have very little meaning to the people in the country.

You also mentioned Sri Lanka's ratification of about 60 international conventions. However, ratification without implementation is only paper work. As you know, in all conventions there is a specific section—usually article 2 of each convention—which obligates the state party to take all necessary legislative, judicial and administrative measures to ensure that people enjoy the rights in question. Where there is failure, the ratifying nation violates one of its basic obligations.

On reviewing Sri Lanka's performance, UN treaty bodies have made many recommendations for specific improvements. For example, the Human Rights Committee made several recommendations in November 2003, however, none of the significant recommendations have been complied with. The Committee Against Torture (CAT) made a series of recommendations in November 2005, which are essentially the same recommendations as those made by the Human Rights Committee.

May I also remind you about another case concerning which the UN Human Rights Committee has stated that the Sri Lankan government has violated the rights of a young man as the result of undue delays in the administration of justice. This is the case of Lalith Rajapakse, Communication No. 1250/2004: Sri Lanka. On March 8, 2005, the UN Human Rights Committee stated that: "...the committee finds that the delay in the disposal of the Supreme Court case and the criminal case amounts to an unreasonable prolonged delay within the meaning of article 5, Para 2(b), of the Optional Protocol."

Even after this decision, the cases before the Supreme Court and the Negombo High Court are still pending. The next date in the Negombo High Court case has been fixed for May 4, 2006. The Human Rights Committee's finding concerning this case can also be applied to the large numbers of cases pending in Sri Lankan courts, which fall within an "unreasonable prolonged delay within the meaning of article 5, Para 2 (b), of the optional protocol."

So, where then are these improvements of rights taking place? Many people who have read the newspaper reports of your speech, would like an answer to that question.

Daily Mirror: December 17, 2005

<http://www.dailymirror.lk/inside/justice/171205.asp>

Chapter VII

Constitutional rights

The 1978 Constitution: Is its foundation flawed or false?

For more than 27 years, since the promulgation of the 1978 Constitution of Sri Lanka it has repeatedly been said that this Constitution is modelled on the French Constitution of 1958—known also as the Constitution originated by Charles de Gaulle. Constitutional pundits and politicians alike have harped on a ‘de Gaullian Constitution’ for so long that this misnomer has now become almost an article of faith. The reference is mostly to the institution of the Executive Presidency created by the 1978 Constitution, which is compared to the position of the French President under the 1958 Constitution.

The opening two lines in the French Constitution regarding the President of the Republic are as follows: ‘The President of the Republic shall see that the Constitution is observed. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State.’

It is thus amply clear that the primary function of the Presidency in the French Republic was to see that the constitution is observed. It is also his or her primary duty to ensure the proper functioning of the public authorities and continuity of the state. The French Constitution of 1958 is thus credited by observers with ushering in an era of stability.

That is, France has one of the richest constitutional histories in the world. Along with the United States, it was one of the first countries to put into practice the modern idea of a Constitution. But the 1787 American Constitution is still in effect today, while the French Constitution of 1791 did not last even a year. A good dozen regimes followed on the heels of one another thereafter, until the idea of the Republic triumphed and finally, in 1958, the Fifth Republic brought a stable regime to France (<http://www/france.diplomatie.fr/label>).

Chaos

How is it then that the 1978 Constitution did not bring about some form of stability to Sri Lanka? In fact, it may be said that the most chaotic period in Sri Lankan history was during the operation of the 1978 Constitution with horrendous bloodshed in the South, North and East. Also, national institutions have been at their weakest during this era. So how has the French constitutional model affected Sri Lanka? Or is it simply a bogus claim? And is it that, on some superficial aspects, the two Constitutions are similar but on a more substantial and fundamental level they are inherently different?

The answer perhaps lies in a further question as to whether the Sri Lankan President has the duty to see that the Constitution is observed. The basic duty of the French President, as mentioned in that Constitution, is to see that the Constitution is observed. This may be considered in the light of certain observations made by the National Police Commission Chairman, Ranjith Abeyseriya at a seminar held recently. He had observed that the Constitutional Council had been non-functional for more than one year and this had resulted in the failure to appoint High Court judges, which in turn affected the functioning of courts in dealing with the heavy backlog of cases.

The Chairman of the NPC had further said that the non-functioning of the Constitutional Council might affect the appointment of the IGP—when the present incumbent reached his retirement age in October this year—since a new IGP has to be nominated by the Constitutional Council. He was also quoted: “It is almost a year after the Constitutional Council had ceased functioning and irregularities are rampant in public administration. The appointment of a new Constitutional Council is vital for a sound administration.” So who is to solve the tremendous deadlock that had developed in the operation of public authorities as a consequence of the non-functional Constitutional Council? If it is the duty of the President to ensure the Constitution is observed, then the responsibility would be on the President to ensure that such a deadlock does not arise, and if it does, to resolve it immediately. To fail this sacred duty is to fail in the most primary function of the President—that is if the Constitution itself is based on the French model. However, to say that there is no such obligation on the President under the Sri Lankan Constitution to see the observance of constitutional provisions, is tantamount to saying that the 1978 Constitution is substantially and fundamentally different to the French model.

Who is the guarantor?

If the President of Sri Lanka was to say that there was no responsibility on the part of the President to ensure the proper functioning of the Constitution, then the question is, who is the guarantor of the observance of the Constitution? It cannot be the Parliament, which itself can be dissolved at the whim of the President. In any event, no action of the Parliament can be executed by itself. Executive power rests entirely with the President. Now, in this respect too Sri Lanka seems to have been under the disillusion that the relationship between Parliament and the Executive President is similar—in France and in Sri Lanka. However, this too is far from reality as one constitution expert, Oliver Duhamal noted:

“As defined by classic categories of constitutional law, France has a parliamentary system, since the government is answerable to the Parliament. In the eyes of public opinion, however, France has a presidential system, since the President is elected directly by the people. Specialists defined France’s system as a mongrel one, since it mixed traditional notions, until the jurist Maurice Duverger conferred more dignity on it by dubbing it ‘semi professional.’”

Constitutional Council

The third important difference between the two Constitutions is regarding the Constitutional Council itself. The French Conseil Constitutionnel is a powerful judicial body. Independent from both the executive and legislative branches, it had gradually carved out a role of a constitutional court. And among the world’s greatest judicial authorities on Constitutions are the Constitutional Court of Germany and the French Conseil Constitutionnel.

Sri Lanka’s Constitutional Council is at best an administrative body dealing basically with appointments to important posts. It is not a judicial body at all. Furthermore, its functioning can be disrupted by the President or due to other contingencies. Currently this Council is experiencing such a disruption. Sri Lanka does not have a judicial body similar to the Conseil Constitutionnel and this lacuna is one of the fundamental differences between the Sri Lankan Constitution and its French counterpart.

Public authorities

The French President has also to ensure the proper functioning of public

authorities. Once again it may be asked, who is to ensure the proper function of public authorities in Sri Lanka? Today almost the entirety of the public administration is in a state of collapse. Public administration relating to policing, regarding elections, public health and education, as in many other areas of life, is in a state of anarchy. Almost everyone including members of the ruling parties and Opposition agree on that point, so does public opinion and the media. The average citizen's daily complaint is the fact that public authorities function to his detriment and not for his benefit. And within the Constitution, there is no one to ensure the proper function of these public authorities.

If in all these fundamental aspects, the Sri Lankan Constitution differs from the French model then the question is, who created this big lie about the similarities with the French model. However, what is more important is as to why this lie is being perpetuated. Have not whole generations of lawyers and law students been miseducated about the paramount law of their country? Will the educational institutes carry on their educating based on this false notion, to yet other generations of students? And is not the entire civic education in the country based on such serious misinformation about one of the most vital areas of the nation, which is its Constitution? If there is an attempt to answer these questions the people may begin to see the whole constitutional debate in the country in a different light.

What is most important however, are the practical questions raised by the NPC Chairman about the present non-functioning of the Constitutional Council and the implication of such non-functioning.

Somebody must be held responsibility to stop such non-functioning. The country's institutions cannot function until this responsibility is attributed to some office. Perhaps this will be the most important constitutional question to be resolved if there is to be a constitutional form of government in the country.

By Basil Fernando

Daily Mirror: July 23, 2005

http://www.dailymirror.lk/arch/a_index.html

The presidency is a constitutional absurdity

Constitutional logic is based upon sound principles that determine the relationships between different parts of a constitution and their implications. These principles are rationally applied case by case.

For instance, there may be demands for a referendum to be held on a specific issue. These demands should be met with reference to general principles under the constitution regarding referendums, as well as contemporary concerns. A proposal for a referendum seeking for people to forgo their right to elect a government by allowing earlier elected representatives to continue for another term, must be looked at through the constitutional logic of the Gaullist Constitution of 1958—on which the Sri Lankan Constitution claims to be based. Such logic however, would regard the proposal as absurd, as it contradicts all constitutional principles of democracy. The constitutional logic of the US Constitution would say the same.

A constitutional pretext is giving a semblance of logic to a proposition that falls outside the structure of the constitution. This can be done by simply referring to any constitutional process, such as procuring the necessary majority in Parliament. For instance, a pretext could be made that any proposal accepted by way of a referendum is valid if passed with an absolute majority. That the proposal contradicts the basic tenets of the constitution can hence be completely disregarded. Under constitutional pretexts then, even the most absurd proposals may acquire legality. This is how presidents are able to acquire the powers of dictators under a constitution that declares the nation to be a democracy.

The constitution of a democracy, as mentioned above, has principles that determine the relationships between the people and the state. In the Gaullist Constitution these principles are stated under several headings e.g. On sovereignty (art. 2 to 4), The President of the Republic (art. 5 to 19) and The Government

(art. 20 to 23). The principles stated in each section are linked to those in other sections. The position of the President under the Gaullist Constitution is thus clearly defined and is linked to principles in other sections of the constitution. The position of the President of France is different to that of the Sri Lankan President under the 1978 Constitution. And according to Gaullist constitutional logic, the concept of the Executive President in the Sri Lankan Constitution could be described as a constitutional monstrosity.

A constitutional fancy is an idea of power and relationships based not on constitutional logic, but on imagination. The type of power attributed to the Sri Lankan President under the 1978 Constitution can only be fanciful. In reality such a presidency is a constitutional absurdity. This is because the Sri Lankan President has almost absolute power, which is the very thing a democratic constitution is designed to prevent.

In practical terms, this presidency can destroy every other constitutional body it relates to, such as the parliament, the government, and the judiciary. In fact, it does not even have a body to oversee the interpretation of the constitution, like the French Constitutional Council, which is a powerful body that ultimately determines all constitutional matters. The internal absurdities contained in the Sri Lankan Constitution make it impossible for the state to function.

Fundamentally flawed?

The question is, can there be constitutionalism when a constitution itself is fundamentally flawed? The answer seems a resounding NO. The Sri Lankan Constitution is one that is fundamentally flawed despite the pretensions that it is based on the Gaullist Constitution. The Sri Lankan Constitution helped the Executive President to escape from all constitutional controls and become a creature capable of using power arbitrarily. Thus, the purpose of this Constitution was not to create a constitutional government but to liberate the President from a constitutional form of government.

Under such circumstances the references to the Constitution in courts of law can only be on minor matters. Even the forms of references to courts can often be a pretext rather than of any substantive value. There have been many glaring examples of this since 1978. Perhaps most demonstrative of those was the 1982 referendum to allow the existing Parliament to continue for another term without an election. Such absurdity is possible only because

constitutionalism has hardly any meaning in the Sri Lankan context since the promulgation of the 1978 Constitution.

Looking back into the experience resulting from the implementation of the 1978 Constitution one may question the validity of the following assertion made by Dr. M.J.A. Cooray in a book published in 1982 entitled *The Judicial Role under the Constitutions of Ceylon/Sri Lanka*: “It is a truism that the modern administrative and judicial system of Sri Lanka has its origins in the institutions introduced by the British in Ceylon at the time it was ruled by them.”

At the time this comment was made the 1978 Constitution had been in existence only for six years and there was a prevalent assumption that despite some changes such as the executive presidency introduced by this Constitution, there was a continuity of tradition from the British times. However, now, after almost twenty-seven years of the practice of this Constitution it becomes starkly clear that a claim of any continuity with British practices is a farcical claim. Perhaps around 1982 much of the constitutional analysis consisted of purely looking into the text and comparing it with the text of the earlier two Constitutions and the practices under those Constitutions. However, looking into the political interpretations given to the 1978 Constitution, it becomes evident that what was envisaged was an authoritarian form of government in which the President had unfettered powers without any of the checks and balances developed within the British constitutional system and mostly followed during the periods of the two previous constitutions.

Dr. Cooray even thought that while the 1972 Constitution—which was said to be an autochthonous constitution—did not recognise the separation of powers, the 1978 Constitution recognised this separation. However, the flouting of the basic rules of the separation of powers has taken place under the 1978 Constitution where the Executive President has acted in sheer disregard for the Parliament as well as the judiciary. People who have had the experience of living during the administration of the earlier two Constitutions cannot imagine the extent to which the Executive President could act arbitrarily—as has subsequently been done under the 1978 Constitution.

Thus, what took place by way of the 1978 Constitution was to lose the continuity of the laws and practices of constitutionalism, which prevailed with varying degrees of modifications up to 1978. In a constitutional sense what took place was a rupture with the past and a return to sort of dictatorial

practices that is not possible within the concepts of constitutional government, which prevailed before it.

If these departures from the administrative and judicial system of Sri Lanka were justified under the pretext of adopting a French model of a Constitution, we have earlier shown that this claim is untenable.

By Basil Fernando

Daily Mirror: August 6, 2005

<http://www.dailymirror.lk/inside/justice/050806.asp>

Chapter VIII

Duties of constitutional bodies

Functions of the NPC: More than just a post box

The National Police Commission (NPC) has appointed several area coordinators, who have now assumed their duties. However, the interesting question is, what exactly are their functions? And have their activities made any difference to the manner in which inquiries have been conducted by the police department, prior to the establishment of the NPC?

The following example illustrates how the NPC's coordinators conduct inquiries against police officers. A complaint was made with regards to torture, detention, and the fabrication of charges of one Prabath Neil Chaminda, by his father. This complaint to the NPC was made on February 21, 2004. The father had previously complained to the Inspector General of Police (IGP) as well as to the NPC, but had not received any indication as to whether anything had been done about the case. On February 26 the Coordination Officer, (Colombo) of the NPC wrote a letter requesting the IGP to investigate the matter and submit a report to the NPC. Ironically, the complainant himself had already made a complaint to the IGP as far back as December 2002.

What difference has this mode of conducting inquiries by the NPC made to the manner in which such inquiries were conducted before? In fact, it was the frustrations felt by the people at the neglect of their complaints by the IGP's office that created the outcry, which gave rise to the very creation of the NPC. However, even after the Commission has been appointed and the coordinators are in place, very little seems to have changed, as illustrated by the aforesaid incident.

This raises the question as to what instructions have been given by the NPC to their coordinators about conducting inquiries. Have any written instructions been given? If so, the public has a right to know what these instructions are. In the absence of knowledge of any such, it is not difficult to suggest some basic

instructions that should have been given to the NPC coordinators. The following are some suggestions:

The very first instruction that should be given to the coordinators is with regards to their independence. The Commission should share its own views about the manner in which the police conduct inquiries about themselves, as well as with regards to the extreme public distrust regarding such inquiries. If the same old procedures are to continue, the very appointment of the coordinators themselves is defeated.

The most elementary duty of anyone dealing with a complaint is to interview the victim as soon as possible and to form an opinion as to whether there is a *prima facie* case. The meeting with the victim is thus essential for any investigation. This is more so when the person is in remand as in the case cited above. In fact, this particular person has been in remand since December 1, 2002, and this long period of detention itself should have concerned the investigator.

The next duty of the investigator should be to visit the police station and look at all documentation relating to the incident. This would enable the investigator to better understand the problem. It is only after such preliminary work had been completed, can the coordinator decide upon a subsequent course of action regarding the case at hand.

If he submits a preliminary report to the Commission at the initial stage, it would be possible for the NPC itself to take some steps to intervene in the matter. This is particularly so when the victim is in police or prison custody. If the investigation points to the validity of the complaint, then steps can be taken to release the person pending further inquiries. And in alleged torture cases, steps can also be taken to help the victim obtain medical and other necessary assistance.

If after the preliminary inquiry it is felt that a more professional inquiry should be held for the purpose of taking criminal or disciplinary action, the case can be referred to the Prosecution of Torture Perpetrators Unit (PTPU), functioning under the Attorney General's (AG) Department.

This procedure established under the AG's department is much more reliable than referring the case to the IGP who will merely refer the case back to the Assistant Superintendents of Police in the area where the particular incident

allegedly took place. This practice on most occasions has proved that such inquiries are not conducted with fairness and openness, but rather, the complainants are bullied into some form of compromise. Besides, the inquiries by the AG's department can lead to criminal prosecutions.

An obvious further duty of the coordinators is to expedite the inquiries and let their findings be known to the persons who have made the complaints. In the case cited above, the complainant has heard nothing after the matter was referred to the IGP. All this requires that the complaining citizens be treated with the seriousness that is their due.

Merely to act as a post box for their complaints does not show much of a serious concern for the citizens who seek the assistance of a constitutionally established commission regarding the problems they face. This lack of seriousness itself is an encouragement for those officers who violate the rights of citizens.

The actions of the coordinators at the moment takes place without the NPC performing its constitutional duty of establishing a Public Complaint Procedure as required by Article 155G (2) of the Sri Lankan Constitution as amended by the 17th Amendment.

Particularly in these circumstances the Commission should feel more obliged to ensure that citizens' complaints are dealt with greater seriousness. Meanwhile, the Commission must expedite the establishment of the Public Complaint Procedure against police officers as required by the Constitution as soon as possible.

By Basil Fernando

Daily Mirror: May 1, 2004

<http://www.dailymirror.lk/inside/justice/040501.asp>

NPC to revoke delegation of authority to IGP

The Asian Human Rights Commission, in a special statement issued this week has welcomed the serious measures announced by the National Police Commission (NPC) of Sri Lanka to ensure disciplinary control of the police.

Accordingly, the National Police Commission (NPC) of Sri Lanka made the following welcome announcements:

- That disciplinary control of all police officers except the Inspector General of Police (IGP), including those of officers below the rank of Inspector of Police, would again fall under the domain of the NPC. This announcement effectively revokes the earlier delegation of authority to the IGP in matters of disciplinary control pertaining to officers below the rank of inspector.

This was announced on August 20 by Mr Ranjith Abeysuriya PC, Chairperson of the NPC, at a consultation held jointly by the Law Society & Trust, the Asian Human Rights Commission (AHRC) and the World Organisation against Torture (OMCT). Mr Abeysuriya also indicated that he would take steps to see that this control be reassumed as a matter of urgency.

During the consultation, Mr Abeysuriya explained that most of the NPC's work since its official inauguration in November 2002 has been devoted to matters relating to police promotions, particularly the filling of about 4000 vacancies in important posts which remained vacant due to inaction under the earlier system of administration. He explained that it was thought that resolving this problem of vacancies was a priority in order to get the system to function properly; however, the NPC is aware that dealing with public complaints is of a matter of paramount importance.

- That the public complaint procedure under Article 155 G (2) of the Constitution of Sri Lanka, introduced under the 17th Amendment, will be implemented as soon as possible. This announcement was also made at the same consultation, and Mr Abeysuriya graciously apologised for the delay in initiating this procedure, which the NPC has acknowledged as one of its primary tasks. The Chairperson mentioned that the NPC intends to adopt the draft procedure for complaints submitted by the AHRC, with appropriate adjustments.
- That dealing with police torture will be the top priority starting from this week. This was reported in a Sunday Newspaper, quoting the Chairperson of the NPC to the effect that, “Earlier this issue was handled by the IGP, but under the 17th Amendment this responsibility has fallen upon the Police Commission. So we are attending to it and giving police torture priority.”

It was further reported that new investigators are to be recruited shortly to probe the increasing rate of police torture in Sri Lanka. In 2003, 15 per cent of complaints received by the NPC related to police torture, while 40 per cent related to inaction on public complaints.

These are decisions of very great importance, no less than historic in their proportions, towards resolving the problems relating to policing in Sri Lanka. The 17th Amendment to the Constitution, which gave birth to the NPC, was a response to institutional malfunction and paralysis, and awareness of the need for change. Events of recent decades had caused the police to become politicised and militarised.

The measures that the Commission has undertaken to implement shortly can, if properly implemented, address this institutional paralysis and create new momentum to deal with such serious problems as lawlessness, increased crime, and incompetent policing.

Two years of experience has for the NPC and the public alike brought this realisation sharply to the foreground. To date, the experience of the NPC has been one of extreme frustration, as the Commission’s hopeful mandate has remained unfulfilled. The measures announced this week mark a critical stage in its attempts to fulfil its constitutional mandate.

All civil society organisations and human rights groups in particular, should now find ways to cooperate with the Commission at this very critical moment.

It is essential to keep attention on these issues, and build public opinion in support of its important new steps. Where public support is effectively mobilised in favour of these developments, protection and promotion of human rights will be enhanced.

Finally, the NPC must itself add a public education component into its work, and use the state radio and television media in particular to educate the public on the measures it has envisaged for the realisation of the above stated aims.

Daily Mirror: August 29, 2004

<http://www.dailymirror.lk/inside/justice/040828.asp>

Addressing the elections commission impasse once and for all

Reportedly, Dayananda Dissanayake, Sri Lanka's Commissioner of Elections has recently reiterated his pleas for the speedy establishment of the Elections Commission in terms of the 17th Amendment to the Constitution. He has also outlined his views in relation to the manner in which the powers of the Commission (in whose place the Commissioner is now reluctantly functioning, though hopefully not ad infinitum) should be increased.

This is indeed an extraordinary situation, where the country's chief elections officer's pleas (becoming increasingly plaintive as time goes on) is disregarded so blatantly by not only the Government but also, to all intents and purposes, the opposition parties as well. Though the impasse has arisen between the Kumaranatunge presidency and the Constitutional Council, one did not discern any noticeable enthusiasm on the part of the United National Front, while in government for that brief but reasonable period of time not so long ago, to remedy the situation either.

The disinclination of both the major parties to intervene in any substantial matter of governance unless it concerns their immediate political future cannot be more strongly condemned. This tendency, most strongly seen in fundamental concerns affecting the office of the Chief Justice in recent times, has resurfaced in the case of the Elections Commission.

Insofar as the latter is concerned, one possible solution is that Article 41B be amended to provide that where there is a deadlock between the President and the Constitutional Council regarding the recommendations of the appointees, the President may request the Council to reconsider its recommendations for reasons stated. If after reconsideration, the Council makes the same

recommendation, the person recommended will be deemed to have been duly appointed if the President fails to make the appointment within one month.

In addition, the 17th Amendment should be subjected to a thorough review in respect of other constitutional clauses. For instance, it is difficult to ascertain why different procedures have been stipulated for appointment in regard to the categories of officials specified in Article 41C. Appointment of the said officials should also be subject to the similar processes as the members of the bodies specified under Article 41B.

This process of review is specially important where the conducting of elections is concerned. Deficiencies abound in this sense. For example, Article 104 B(2) states that "...shall be the duty of all authorities of the state charged with the enforcement of such laws, to cooperate with the Commission to secure such enforcement." This should be amended to vest the duty of cooperation with all authorities of the state and not limited to only those specifically charged with the enforcement of such laws.

Again, Article 104B(4) of the 17th Amendment empowers the Elections Commission to prohibit the use of any movable or immovable property belonging to the State or any public corporation by any candidate, political party or independent group as well as for the purpose of promoting or preventing the election of the above.

This article does not regard the misuse of state property in its widest sense as including individuals in employment of the State nor could it be said to include incorporeal interests. It does not therefore reflect the general principle affirmed by the Supreme Court of Sri Lanka in numerous judgements during the 1990s, that state property cannot be used by politicians in a manner that violates the right of voters to ensure that their public funds are used for the benefit of all and not those of a particular political persuasion only, and should be amended accordingly. The article should also be amended in order that any person who contravenes or fails or neglects to comply with any direction or order issued by the Commissioner or indeed, any provision of the law relating to elections, guilty of an offence.

Similar prohibitions should apply to the powers of the Elections Commissioner vis-à-vis directions that he hands out to the print media, for example, regarding balanced reporting as there is no power of compulsion of these directives as

opposed to his more specific powers in the case of misuse of state resources by the electronic media.

While the special procedures detailed under the 17th Amendment and specific duties imposed on state media institutions under these provisions of the Sri Lankan election laws are eminently justifiable in terms of the particular rationale applying to the use of public funds, the private broadcast and telecast media should be put under a general duty of fairness in allocating broadcasting facilities during election time.

In consequence of this acknowledgement, the 17th Amendment should be further amended in order to include a new sub section which empowers the Elections Commission to determine fair allocation of broadcasting time for candidates and political parties in its discretion as far as the private broadcast and telecast media is concerned.

Ideally though perhaps controversially, the said new article should further give the Commission power to move the appropriate court to censure and/or impose a fine on such station and/or apply for a restraining order on such station restraining the continuance of such contravention in the event of noncompliance with its directions.

Meanwhile, another defect in the 17th Amendment, which may hamper the effective working of its provisions with regard to the Elections Commission once it becomes fully operative is the ambiguity that it perpetuates between the Commission itself (comprising of five members) and the Commissioner General of Elections who shall, subject to the direction and control of the Commission, implement the decisions of the Commission and exercise supervision over the officers of the Commission (Vide Article 104E(6)).

The Commissioner General is appointed by the Commission and subject to the approval of the Constitutional Council. His or her removal is however, problematic, as Article 104E(7) provides in one clause that it is subject to a prolonged parliamentary process while providing in another clause that he or she could be removed by the Commissioners on account of ill health or physical or mental infirmity. It is not difficult to see the nucleus of a potential conflict between the Commissioner General and the Commission in these provisions, at a time when both are fully operative in a manner that will be akin to tussles that we saw at one point between the Bribery and Corruption Commission and its Director General.

The immediate dilemma faced by the Commissioner of Elections has been so far met with unconcern by civil society in general, excepting the occasional symposium and intermittent lobbying. Indeed, given its fundamental importance to basic norms of electoral functioning, this is a consultative process that the National Human Rights Commission should spearhead.

Pertinently, the Election Commissioner's perturbation in this regard was shared recently by the outgoing members of the first Constitutional Council appointed under the 17th Amendment. While the basic deficiency in Article 41B has been put starkly in issue in reference to the stalemated Elections Commission, the possibility of similar conflicts occurring in respect of other appointments specified to be made under this constitutional article is not far fetched. If the option is to wait grimly till the term of one obdurate set of commissioners expire, what we have left of constitutional governance will not be fit even for the proverbial dustbin.

By Kishali Pinto-Jayawardena
Sunday Times: Focus on Rights, April 17, 2005

HRC Kandy coordinator must go, says AHRC

The Asian Human Rights Commission (AHRC) has expressed its shock and disappointment at the recent actions of Nimal Hapuarachchi, director of education and training of the National Human Rights Commission (HRC) in trying to subvert the national body's decision to transfer its Kandy area coordinator, Viranjan Sumanasekara.

The AHRC in a statement has criticised Mr. Hapuarachchi for organising a strike together with the HRC staff union against the transfer. The rights education director was also condemned for allegedly misleading the public by telling newspapers that the transfer was "unjust and unreasonable" and that the human rights of the area coordinator had been violated.

HRC chairperson, Radhika Coomaraswamy, made the decision to transfer the area coordinator after a one-man committee said he lacked the competency needed to make inquiries into human rights violations such as torture. The committee which had been appointed by the HRC after an earlier inquiry found that the area coordinator had dismissed a complaint of torture against some officers of the Ankumbura police without having conducted an inquiry. A subsequent inquiry found that the allegations had validity.

In 2003, Chamila Bandara, a 17-year-old boy from Kandy, gave testimony before the UN Human Rights Committee in Geneva that he had been tortured by the Ankumbura Police and as such had partially lost the use of his arm. When the state party attempted to verify this allegation from the Human Rights Commission in Sri Lanka, Mr. Sumanasekara denied that this was a case of torture. An investigation carried out by the police themselves into this affair found that there was clear evidence of torture. However, his report in the case caused a delegation from the government of Sri Lanka to give misleading information to the UN Human Rights Committee and as a result, Chamila

Bandara's case became an international incident, creating doubt about the impartiality, independence and professionalism of the HRC of Sri Lanka.

According to a statement made by the Chairperson of the HRC, the next step in the procedure would have been to hold a disciplinary inquiry. However, due to the long years of service of the Kandy coordinator, it had been decided instead to request him to come to Colombo for a six-month period of training. The HRC employees' union has decided to reject both the disciplinary inquiry, where the Kandy coordinator would have had a full opportunity to be heard, and the request for a six-month period of training.

Therefore AHRC poses the question as to whether Mr. Hapuarachchi's actions were compatible with his position. "What Mr. Hapuarachchi did is harmful to the victims of torture and other human rights violations," the Hong Kong-based regional human rights group noted and added, "We are compelled to say that by your action you have disqualified yourself from holding the position of director of human rights education. Such education on human rights carried out by persons like you will hold no credibility." It was further said that Mr. Hapuarachchi's open criticism against the decision of the HRC constitutes a manifest conflict of interest.

Mr. Hapuarachchi had also reportedly claimed that the area coordinator had been transferred out of Kandy because he had taken action through the Human Rights Commission against the activities of certain human rights organisations acting through some deceitful and unlawful non-governmental organisations. In response, the AHRC executive director, Basil Fernando, says that these comments are an attack on human rights defenders and violates the UN Declaration on Human Rights Defenders. "We intend to pursue this matter locally and internationally," adds Mr. Fernando.

The HRC chairperson, Radhika Coomaraswamy, and other commissioners have expressed deep regret that some members of the employees' union went on strike on Monday.

The AHRC backed the decision to transfer Mr. Sumanasekara, but noted that it had called for his dismissal on the ground of gross abuse of powers and being an obstacle to the protection of human rights for the people in Kandy. "However, the right of transfer and dismissal lies with the Human Rights Commission itself. The resistance shown in this instance is not a statement of human rights, but rather a breach of discipline," the AHRC said in a separate

statement.

AHRC also notes that much had gone wrong with the national rights body before the appointment of its new commissioners, who have sought to make reforms and regain public confidence. Some staff persons have resisted these changes. Some of these persons may be those who have enjoyed opportunities for corruption during inquiries into police abuses, which they now fear losing. This may explain the strong resistance to this transfer.

Therefore, the AHRC urges the Human Rights Commission of Sri Lanka to stand firm and remove bad elements in its staff to ensure that it is capable of carrying out its mandate to protect and promote human rights in accordance with the law. Earlier, the Human Rights Commission had maintained that it is dedicated to the upholding of the rule of law and fighting impunity of perpetrators.

The AHRC also noted that on many occasions it had recommended that government institutions, especially the police, take disciplinary action against incompetent, unprofessional behaviour. “The Human Rights Commission cannot subscribe to double standards. It must uphold the highest standards and insist on discipline and professionalism among the staff if it is to serve the public faithfully,” the AHRC said.

Daily Mirror: November 8, 2005

<http://www.dailymirror.lk/inside/justice/061104.asp>

Is this what the voters of the north/east deserved?

My acute sympathy for a long-suffering Elections Commissioner was perhaps at its lowest ebb following the November 17 Presidential elections. Make no mistake, this is not to excuse the lamentably (but predictably?) shortsighted decision by the UNP not to raise objections in relation to the impediments confronting voters in the North/East before the counting of votes commenced, reportedly because they were anyway confident of a victory. This is also (heaven forbid) not to pursue the argument that if the votes of these intimidated voters had been counted, the UNP would have won. Assuredly, the antagonism (at least on my part), that had been escalating immediately prior to the elections was directed quite equally at the two Presidential contenders in so far as their sublime bypassing of responsibilities of institutional governance was concerned. Now that one of the two contenders is in office, it remains to be seen as to whether he could in fact, check the degeneration of the institutional process that we have been subjected to in recent years.

However, this column is occupied in this instance, with a dereliction of duty on the part of the Commissioner of Elections, which cannot be excused by his passing the responsibility on to a political party. Regardless of who the winner and the loser has been in the recently concluded elections, what occurred in relation to the North/East poll has alarming repercussions for future elections in this country.

The simple truth is that the primary responsibility of intervention, at a point when it had become demonstrably clear that a free and fair poll was not taking place in the North/East, was the Commissioner's responsibility. His complaint that even if he had ordered a re-poll, that would have been of little use as there was nothing to have guaranteed that the LTTE would have permitted the people to vote a second time around is painfully simplistic in its reasoning. Essentially, this ignores the fact that the Commissioner has been

vested with the constitutional duty of conducting the franchise in a manner that secures the right to vote of all citizens to the fullest extent possible. At the very minimum, if a re-poll had been ordered, it would have put the LTTE into a difficult position of having to repeat their tactics with the attention of the international community being directed towards them.

It is opportune to refer to an instance where, in vastly less intimidating circumstances in relation to the conducting of Provincial Council polls, the Supreme Court laid down principles that had to be followed by the Commissioner at all times (See *Mediwake v Disanayake* [2001] 1 SriLR 177 (the Egodawela Case)).

The Commissioner himself is fond of quoting this judgement as indeed, he did in the days preceding the November polls to assure the voters of his swift action if intimidation occurred. Regrettably, his assurances lost their significance in the post polls period.

In this case, four registered voters of the Kandy District petitioned the court regarding various incidents alleged to have occurred on election day at 25 polling stations in the District during the run up to the Provincial polls in April 1999. These included the premature closure of one polling station, ballot stuffing, driving away polling agents and intimidation of several others. The petitioners alleged infringement of their rights under Articles 12(1) and 14(1) (a) of the Sri Lankan Constitution, relating respectively to the right to equality before the law and the right to freedom of expression.

As far as the respondents were concerned, the Commissioner of Elections and the Returning Officer for the Kandy District (through their counter affidavits), admitted that certain incidents had taken place at some polling stations but claimed to be unaware of most of the incidents. In the absence of specific answers from the respondents, the court had recourse to the journals of the Special Presiding Officers (SPOs) to determine as to what actually had happened.

Intricate procedures had been evolved by the Commissioner of Elections in reporting and ascertaining what had actually happened at the polling stations on elections day, which duties had devolved on the SPOs to report to the Commissioner. These included instances where it was not possible to conduct the poll due to any reason beyond the control of the Presiding Officer, if one or more polling agents are chased out during the poll, non-arrival of the

polling party at the polling station due to obstruction on the way, if any disturbance of peace at the polling station makes it impossible to take the poll and if any stuffing of ballot papers is forcibly done by unauthorised persons.

Examining these legal duties, the Court considered two questions in respect of each of these polling stations. First, did the incidents warrant the annulment of the poll under Section 46A of the Act? Secondly, was the Commissioner of Elections under a duty to order a re-poll? Both questions were answered in the positive with the Court rejecting a “narrow and mechanical interpretation” of the law as opposed to a purposive reading of the statutory provisions.

The judges proceeded on the basis that the incidents were not simply a matter of “ x ballots being stuffed or y polling agents being driven out.” On the contrary, the court found itself compelled to consider the effect of the incidents on the electors. Thus, it was pointed out that “ballot stuffing and driving out polling agents go hand in hand with violence or the threat of violence—which in turn, will have a deterrent effect on electors in the vicinity as well as those still in their homes...driving away polling agents is a classic symptom of graver and more widespread electoral malpractice ranging from the intimidation of electors and the seizure of polling cards to large scale impersonation.”

Importantly, the Commissioner was required to see whether the cumulative effect of a re-poll at all the 23 polling stations (at which serious irregularities were found to have been committed) was likely to have resulted in the preferences obtained by the candidates being affected. Proceeding from this reasoning, the judges held that even those irregularities which affect only the preferences and thereby the identification of the candidates elected, do affect the result. The Commissioner of Elections was thus left with no choice but to order a re-poll at those specified polling stations.

An interesting postscript to this was the judicial caution that even though a re-poll might have caused considerable delay in determining the overall result for the Kandy District, delay or inconvenience could not be used as an excuse for depriving voters—however small their number may be—of their vote. As in the case of the Provincial elections law, Section 46A of the Presidential Elections Act No 15 of 1981 (as amended, brought in by Special Provisions Act No 35 of 1988) outlines instances in regard to which a poll could be declared void, which are similar in content. The inability of the Commissioner to utilise this judgement in his aid is (looking at it charitably) an undoubtedly startling error of judgement.

A bolder decision by him would not have resulted in the LTTE intimidation being brushed under the carpet but would have put in issue the unreservedly totalitarian nature of its functioning. This was the very least that the people of the North and East deserved in their plight. Instead, what we had was a *fait accompli*, vigorously assisted by the very individual tasked with the responsibility of holding elections in the entire country. In retrospect (while I sympathise with his plea to release him with the appointment of an Elections Commission) this failure of constitutional responsibility remains undeniably disturbing.

By Kishali Pinto-Jayawardena
Sunday Times: Focus on Rights, November 27, 2005

Chapter IX

Right to liberty and equality

Killing freedom of expression

General discussions on the freedom of expression centre on violations such as censorship, self-censorship, attacks on journalists, attacks on publications and the like. But not much attention is usually paid to the suppression of freedom of expression through the legal process itself.

This is because in developed democracies, the legal system actually guarantees freedom of expression. Such legal systems also ensure avenues for persons or groups who feel that their rights relating to freedom of expression have been violated, to find redress. However, this is not the situation in other 'lesser' democracies. In such countries the legal system itself creates many obstacles to the freedom of expression. Furthermore, defects in the legal system, when manipulated unscrupulously, either by the executive or the judiciary, can obstruct this freedom and compel people into silence and submission. Let us examine a few such obstacles created by the legal system itself.

Paralysis

Curtailing the freedom of lawyers to carry out their functions can virtually paralyse the freedom of expression of almost the entire society. When the freedom of expression of any segment of society—including the Parliamentarians—is violated, it is the lawyers who will have to canvass the matter before courts. When the matters are vibrantly raised before courts the violators are put on notice that their violations are under legal scrutiny. Besides, lawyers raise these questions after professional research and after establishing the grounds for going before court. And thus, such pleadings also provide good material for the media to highlight these violations as raised by the lawyers within legal parameters.

Thus, the serious debate on all matters relating to freedom of expression in the courts takes place through the mediation of lawyers. If by direct or indirect means the lawyers are prevented from playing this role in the most effective

and sophisticated manner, as allowed within the parameters of their profession, freedom of expression can be silenced from within. And there are many modes by which such legal actions for the protection of freedom of expression can be curtailed by tampering with the rights of the lawyers.

The first, of course, is to limit the remedies available in law so that the capacity of lawyers to handle matters of violation of freedom of expression is limited. There are countries in which the role of the lawyer is confined to some limited criminal or civil matters such as property or commercial law and the room for public law does not exist at all. There are other countries where this role does exist but only to a limited extent. This is the case of most former colonies. Even though there may be constitutional expansion for legal canvassing for freedom of expression through bills of rights or other provisions introduced through the Constitution, the actual capacity that exists for such canvassing is limited, and is often also circumscribed by procedural limitations and habits in courts that were established through long years of practice.

Intimidation

However, what is even worse are the deliberate attempts to intimidate lawyers by various means, to not exercise their profession with the complete vigour as required by their training. Such intimidation can take many forms. On the pretext of dealing with the workload of courts an impression may be created that professional lawyering is some form of obstruction to the speedy administration of justice. Within this psychological ethos the lawyers are internally and externally pressurised to limit their interventions and give up some of their basic professional freedoms in exchange for the pseudo efficiency of the courts.

If this pressure continues for long enough, as has happened in several countries, many lawyers may become discouraged or demoralised. And over the years a younger generation of lawyers may emerge, not even having the opportunity of seeing a vigorously functioning legal profession in their countries. The other side of this process is that opportunism may be resorted to by some sections of the legal profession itself, that will exploit the situation to unscrupulously subvert the basic practices of the profession and cause a further degeneration of it.

Chilling effect

Further to this, another mode of silencing lawyers is to use, in an unscrupulous manner, legal actions against lawyers, to bar them from further practice—permanently or for some time. While rules against unprofessional practice are essential to the proper functioning of any profession, such regulations need to be imposed only according to the best traditions of the profession. If the rules are used against lawyers on flimsy grounds in an arbitrary manner, this will have a chilling effect on the profession as a whole.

When a lawyer begins to feel that his dignity as a professional is losing respect and that he himself will only get into serious problems if he does not toe the expected line, he may avoid performing his duties in a proper manner and instead accept a lesser role. For example, if the rules against lawyers are issued with such easy manner it may become a common joke among the lawyers that “you may be the next target of an issue of rule”. In this manner the whole profession is affected psychologically, becomes demoralised, cynical and begins to die a slow death. What remains thereafter as a profession is only the paraphernalia of a profession and the external façade but not the profession as it should be.

This same effect can also be brought about by the easy use of contempt of court proceedings. Such proceedings can become an instrument of intimidation when one or two persons are punished seemingly without due process and outside the confines of the law. The message is passed on to the entire profession that it is a dangerous thing to be a good lawyer. Then lawyers begin not to undertake controversial cases and not to advocate unpopular causes; they may even avoid espousing a normal cause too vigorously. As such these self-defence tactics of the lawyers will hamper their professionalism.

By these and other means lawyers may be silenced. They may still remain vociferous and complain of the indignities they suffer, within private circles. However, in the courts—the real arena in which they are expected to play their role—they will humbly submit themselves to an oppressive ethos. And thus they will only lend themselves to give legitimacy to a process that has partly or completely lost legitimacy. The very professionals that have the legal capacity to expose the hypocrisies, through which various forms of crimes and gross violations of rights take place, become silent partners of the death of freedom. When internal death or paralyses takes place in a society it is evident that freedom of expression suffers through the legal process. This tremendously important

means of the suppression of the freedom of expression needs to be documented and thoroughly fought against. Not primarily for the sake of lawyers but for the sake of preserving the people's freedom of expression.

By Basil Fernando

Daily Mirror: December 24, 2004

<http://www.dailymirror.lk/inside/justice/041225.asp>

Gender issues concerning election to religious (and public) office

Indisputably, organised religion (or a philosophy that has become institutionalised, possessing thereon all the trappings of religious doctrine) is the last bastion of the conservative, if not the unashamedly sexist. Whether it continues to constitute the opium of the masses is of course a connected and vital question still.

The awe-inspiring pomp and circumstance surrounding the recent election of the head of the Roman Catholic Church may have been somewhat removed from the heartrending humility of the life lived by the first fisherman as well as the message passed thereon to humanity. However, there is no belying the historical authority embodied in the process nor the considerable moral power wielded thereto.

A visitor from Mars (hopefully coming from a culture eons ahead in enlightenment as opposed to the struggling masses of humanoids), in witnessing this ceremony, might be puzzled though at the singular absence of women among the magnificent panoply of colour coordinated cardinals. He or she (or 'it' for that matter) might then need to be educated in regard to the precise manner in which organised religion conducts itself on Earth and it is to be hoped that tempers will not fray in the result.

It is not my intention to venture further into this debate in discussing commonalities discriminatory to gender as evidenced in the appointment of trustees of a Hindu kovil or a Muslim mosque or the head of the Catholic church.

This discussion is regarding a different question; namely the emergence of problematic stipulations in connection to the conducting of the elections of the Diyawadana Nilame, which runs contrary to the common perception that the philosophy that the Buddha disseminated was without gender distinction. It is axiomatic that the functioning of institutions needs to be differentiated from the essential tenets of the religious philosophy in any given case. Yet the issues that arise from this analysis have an impact on the functioning of not only religious institutions but public institutions as well, as indicated later on. The discussion concerns questions arising from the election process, its impact on the functioning of public institutions, and the prevailing discriminatory nature of the process.

Pivotal in this regard is Section 40 of the Buddhist Temporalities Ordinance which enacts that: “No person shall be entitled to be a member of the advisory board or to be a member or to nominate a member of the Atamasthana Committee or to be a trustee or to vote at the election of a trustee of a temple unless he is of the male sex, unless he is a Buddhist by religion and unless he has completed his twenty first year.”

While the stipulation regarding the religious beliefs of the persons entitled to vote is obviously logical, the question may be well posed as to whether the same could be asserted of the condition that such person should necessarily be a male? The scheme of the Ordinance as spelt out in its several provisions means that a person of the female sex is debarred from holding any of the said offices as legislatively decreed.

This has also meant that female Divisional Secretaries are debarred from voting in connection with the election of the custodian of the Maligawe, for example, as would be evidenced in the forthcoming elections. Apparently, as revealed in discussions with female Divisional Secretaries, this problem has been met in a singularly expedient manner where female officers are prevailed upon to temporarily relinquish their offices on agreeing to permit persons of the male sex to hold such office in order to enable them to exercise the relevant voting rights at elections in question. Consequent upon the said elections being held, the female officers revert back to the substantive offices.

The reduction of the authority of the female Divisional Secretaries who are public officers in this manner is a dubious practice which amounts not only to a social mockery but is wholly at variance with Articles 27(6) and 12(2) of the Constitution of Sri Lanka.

It is also pertinent that by reason of the provisions of Section 40 of the Ordinance, none of the members of the advisory board assisting the Public Trustee under Section 6(1) of the Ordinance could be from the female sex. This gender restriction applies even in relation to female members of Parliament as evident from Section 6(1). Indeed, on a reading of the relevant sections of the Public Trustees Ordinance read with the Buddhist Temporalities Ordinance, the restriction seems to apply to the office of the Public Trustee itself.

Logically, it appears that the appointment of a female Public Trustee (or for that matter, a non-Buddhist Public Trustee) will also pose problems inasmuch as Section 2 of the Buddhist Temporalities Ordinance (read with Section 2 of the Public Trustee Ordinance) does not include 'his' deputy or deputies.

Amendment of relevant sections of the Buddhist Temporalities Ordinance as well as the Public Trustee Ordinance in order to minimise some of these problems has now become imperative. The issues raised in this instance have a special relevance as they impact on not only the functioning of religious institutions but public institutions as well. An impetus towards reform in all these respects should begin in this century, as undoubtedly it will have to begin at some historical point or the other.

By Kishali Pinto-Jayawardena
Sunday Times: Focus on Rights, May 8, 2005

Attha Nattha: Why was the poor victim left out?

The Asian Human Rights Commission (AHRC) has objected to the one-sided manner in which the alleged medical negligence case of Sitti Nazeera was discussed on a talk show broadcast over state television Rupavahini, in the absence of the alleged victim, her representative or organisations advocating her interests.

The programme in question was Attha Nattha telecast on June 6 and repeated on June 7. This particular episode was titled Saukya Sewayata Sambanda Wurthikayange Waga-keema Niweradi Paridi Ituweda? (*Do those responsible for healthcare carry out their duties properly?*). The moderator of the talk show panel was Pathamasiri Gunawardene and the participants were Health Minister Nimal Siripala de Silva, UNP Parliamentarian Jayalath Jayawardena, JVP Parliamentarian Piyasiri Wijenayake, Director General Health Services Dr. Athula Kahanda Liyanage, and Government Medical Officers Association Secretary Dr. Aunruddha Padeniya.

According to the AHRC during this programme, the case of alleged medical negligence involving Sitti Nazeera was discussed at length. However, the ensuing panel discussion attempted to depict Sitti Nazeera's allegations as false and the publicity generated was attributed to ill-intentioned NGOs that were exploiting the situation for monetary gain or for purposes of their own. However it seemed that the organisers of the panel made little attempt to bring the victim herself, or a representative on her behalf, into the discussion. Nor was any invitation extended to those NGOs who have publicly campaigned on this issue. Thus, the programme appeared to be little more than a propaganda campaign against the victim and those who dared to assist her. It did not report on the full facts of the case, nor give an impartial view to the public about what occurred, the AHRC said.

The organisers of the panel should have been aware that Sitti Nazeera has already given an affidavit detailing the fact of her case; the contents of which have been published in many newspapers. Her version of the incident has also been video taped both in Sinhala and English and here too she had explained the allegedly negligent amputation in detail. She and her husband have also afforded details of the incident by way of statements to the police who are now conducting inquiries into this matter.

Therefore, the organisers of Attha Nattha would have been aware that a police inquiry into the matter was under way and also that the GMOA has threatened strike action if the criminal inquiry is continued. Thus, the GMOA representative on this panel was an interested party belonging to an association who seemed actively working to discredit the story and obstructing the criminal investigation in this case. Thus, the organisers of the panel, who one would presume are well informed about this well-publicized case, have failed to act impartially and provide an objective overview of the facts, the AHRC said.

The AHRC also said that during this panel, opportunity was afforded to a JVP MP to lash out against the NGOs. This lashing out seems to be an official line that the JVP has been following in recent months and the organizers of Attha Nattha ought to have been aware that such a panelist would restate this policy line. Therefore it was the responsibility of the organizers to provide an equal opportunity to the relevant NGOs to state their view and reply to any public criticism.

The AHRC was also of the opinion that exclusion of the victim, her representatives and the NGOs from this programme amounted to the use of public media for the deliberate purpose of spreading false propaganda. This, however, could be corrected by hosting another panel with the inclusion of the victim and those who have supported her. The same panelists, who were attempting to discredit the story, could also be invited so that through proper debate and discussion, the facts of this case may be revealed to the public.

The AHRC also raised the issue of public interest regarding this matter. It is the right of everyone in Sri Lanka not to be misinformed by the media, particularly the state media. The only way the media can fulfil this obligation is by allowing various parties involved in an incident or a controversy to be given a hearing so that people themselves could form their informed opinion on the matter. Thus, engaging in bias and one-sided coverage of an event is quite unprofessional and unethical on the part of the media. The state media

should set an example of providing balanced coverage on all issues. Instead, if media coverage involved presenting only the views of persons who have taken a particular stand in a controversy, then the coverage itself would be biased and fail to serve the public interest at large.

The panel's alleged subjectivity and the propaganda it provided through such a powerful media source is worsened by its targeting of an individual citizen who is poor. Sitti Nazeera has spent her entire life working hard to support her family. This incident has virtually ruined her life as it has seriously affected her ability to work. In such a position she can do no more than raise awareness about her plight and the negligence that caused it. The least the media can do in such circumstances, is provide her with the respect she deserves and allow for her voice to be heard, the AHRC said. Yet the Sri Lankan Rupavahini has done the opposite.

They have permitted this woman to be attacked and virtually labelled her a liar. They have allowed attack on those who have supported her and the cause that she is trying to fight. And, they have given neither her nor her supporters the same platform as others, to voice their concerns regarding this case.

The rights group queried whether it is a function of the Sri Lankan Rupavahini to engage in such attacks on the poor. Is it a function of the JVP to do likewise given that they attacked this poor woman without even having the courtesy to meet with her? Such courtesy, at the least, should have been afforded to Sitti Nazeera. Therefore, the AHRC has requested the authorities of Sri Lankan Rupavahini and those in charge of the programme Attha Nattha, to provide the victim the opportunity to express her version of the events.

Daily Mirror: June 11, 2005

<http://www.dailymirror.lk/inside/justice/110605.asp>

More injustice from schools: Abusing the rod and ruining the child

A few weeks ago, Janasansadaya, an organisation working towards safeguarding the rights of the marginalised and downtrodden people in society, decided as part of its media campaign to publish two newspaper advertisements that were intended to raise awareness of the rights of our children.

Enumerated in the ads were the right of a child to an education, free from physical assault, mental anguish, intimidation, insult and other forms of inhuman and degrading treatment whilst pursuing that education, as well as the right not to be arbitrarily dismissed or suspended from institutions of learning at the whims and fancies of the authorities. The publications were also intended to raise awareness among the general public as to what they could do and to whom they could complain when school authorities violated their children's right to education.

Janasansadaya's dynamic leader, Chitral Perera, said he decided on these ads mainly due to the ever-increasing number of parents and children who sought his assistance regarding the harsh treatment and harassment meted out to them by school principals and teachers. Mr. Perera also said he was delighted at the response he received to his ads—from distraught parents all over the country, both from the cities as well as the village. According to Mr. Perera, he realised the enormity of the problem when one father confided that so angry and helpless had he become when he saw his six-year-old daughter cry and refuse to go to school—because she was being harassed by her class teacher—that he had decided to take matters into his hands and 'deal with the teacher'. Luckily he had read the advertisement and now thinks—just maybe—there is another way to ease his daughter's anguish.

Another such incident brought to Janasansadaya's notice recently was that of a 16-year-old schoolgirl who claimed that she had not only been severely assaulted and insulted by her school principal, but also barred from school as revenge for daring to complain.

'I have already hit her'

Naomi Dilhara Jayasekera was a grade 11 student at the school in Ratnapura. She complained that on July 25 this year, at the conclusion of morning assembly, the principal of the school had called her and allegedly hit her on her face and head. She said that several teachers of the school witnessed this inhuman assault—carried out by a male school head on a female student. He had then queried from another teacher whether Dilhara had participated in an after-school class conducted by that teacher on a previous day. The teacher had assured him that she had been present for the entire duration of the class. The teacher also pleaded with the principal not to beat the victim, but the principal had allegedly exclaimed, "Well, I have already hit her".

The principal then ordered Dilhara to fetch her parents to school, so she went home and returned with her parents. Before them, the principal accused Dilhara of cutting classes and going out with a boy. While Dilhara strongly denied this allegation, her parents insisted that even if this were true, it hardly warranted the assault on their daughter. Not done, the principal had then allegedly insulted them in obscene and degrading language. Perturbed, the parents said they lodged a complaint at the Nivithigala police station.

Hospitalised

That night, Dilhara complained of severe head pain and of feeling faint and nauseous. The parents said she also bled from her nose. Hence the next day they visited the police who recorded the child's statement and directed them to the Wathupitiwela hospital where the child was warded for three days.

On August 3 the parents complained that several teachers from the school visited their home and demanded they withdraw the police complaints against the principal. Later, due to threats and intimidation, the child refused to go to school. Then, two weeks later when Dilhara was finally coaxed into resuming her studies, the parents said that the principal had chased her away.

The parents obtained a letter from the Zonal Director of Education directing the principal to take her back, and armed with the letter, attempted to take their child to school. But the principal had ignored the letter and refused their request.

Since her daughter had been deprived of her right to education for more than one month and with no respite in sight, on August 31 the mother complained to the Ratnapura District Education Officer, who had directed the school authorities to take her back to school.

Two days later, a Vice Principal and two teachers informed the mother to bring her daughter to school. Dilhara gladly went back to school and was even able to sit for her term-end examinations.

Coerced

Then on September 3 the family was informed to appear before the Conciliation Board. Apparently the police had referred their complaint to the Board instead of investigating and bringing charges against the school head. This is a typical tactic employed by the police in an attempt to pressurise complainants into settling their grievances. Anyway, at the first Board hearing the principal had allegedly threatened to leave the school if Dilhara ever attended school again. Later on however, he had informed the Board that he was awaiting a transfer to another school and therefore wished to settle the matter amicably. Wearing of being at the receiving end and anxious for their daughter to resume her education, the parents were reluctantly coerced into agreeing.

Dilhara was allowed to attend school until the end of term. She also participated in several extra classes conducted at school during the holidays. However, when school reopened on September 27 her nightmare had resumed—because according to her parents, Dilhara was once again chased away from school.

According to Chitral Perera, ever since, Dilhara has been arbitrarily deprived of her education. What is worse, she is due to sit for her O/Level examination in a few months, and the continued and vicious attack on her as well her character has seriously jeopardised this child's chances of sitting for or passing that examination.

He also said that due to the lack of concern of the education authorities as well as their seeming powerlessness to take action against an errant school

head, and the neglect and/or inefficiency of the police—who should have arrested and charged the errant principal for assaulting an under-aged female child instead of referring the matter to the Conciliation Board—a 16-year-old has been deprived of her education.

But despite the numerous complaints and petitions made to the various authorities by the mother, more than two months since the incident, seemingly no action has been taken against the alleged perpetrator.

Daily Mirror: October 15, 2005

<http://www.dailymirror.lk/inside/justice/151005.asp>

Chapter X

Duties and responsibilities of civil society

Rising out of the ashes — We need accountability not words

Words seem superfluous in the wake of the magnitude of the disasters that engulfed this country just a week prior to this day. All the platitudes that have been expressed as well as the pious hopes of a new and just society that can be born like the proverbial Phoenix arising out of the ashes have their limitations. Nothing can ever hope to match the cataclysmic loss of human life and the terrible agonies of those left behind. It is presumptuous even to try.

In retrospect, Sunday's tsunami waves and the destruction in its wake underscores the impermanence of life and the follies of power, politics, prejudice, greed and ambition which make up the sum of our existence, that can be so very easily disposed of in one fell swoop by forces of nature that not all the ambitious strivings of humankind through the ages have managed to equal by one zillionth. So much therefore for our pitiable and angry rantings on religion, race, caste and creed. This is the manner in which the elements of nature take their revenge. What is tragic however, is that its counter force is indiscriminate, catching up in its midst good and decent people who ought not to have died in such a meaningless way.

We have now seen our political leaders emerging on one stage to urge national amity with a fraction more sincerity on their faces than what is normally evidenced. In general, many Sri Lankans have been jolted out of their normal somnolent state to respond to a grief stricken South and North/East. This is not however, to forget the young and not-so-young city based yuppies who are flippantly pained by the canceling of the New Year celebrations rather than by the dead, the dying and the suffering. These individuals (to borrow an apt presidential quote this week in relation to those who engage in fear mongering) ought to be hanged. So should those unspeakable human beings

engaged in looting and mutilating dead bodies in the South. For these aberrations, there should be no mercy.

But from a practical perspective, it is necessary to look at mechanisms of accountability in regard to the disasters which occurred. In any other country, the heads of crucial monitoring bodies such as the Geological Survey and Mines Bureau as well as responsible officials of that institution would have resigned or would have been sacked from their posts for their colossal failure to provide the Sri Lankan nation with some inkling at least of the dangers that were headed our way. This week, a reader to one of the daily newspapers wrote of the gall of some of these individuals who are now taking on the mantle of “aftermath experts” and expounding on their theories to a shocked and traumatised nation. This is, classically, adding insult to unprecedented injury.

Insofar as Sunday’s tsunami waves were concerned, there would have been ample time for a warning to have been received in order that evacuation of the beaches could have taken place, if the Bureau had kept steady contact with any of the US based institutes monitoring seismic activity around the world. The fact that no one thought this necessary as the Indian Ocean had never been the target of tsunami waves before is but a feeble excuse, (reflecting on the ignorance of those very persons who make such assertions), as even a child who knows the vagaries of nature will comprehend, let alone trained scientists. Unless and until we have accountability in this regard, the installing of early warning systems will accomplish little.

Even at this present moment in time, debates are ongoing as to whether a seismology station at Pallekelle recorded the earthquake in Indonesia at 6:58 am Sri Lankan time and as to whether the failure to disseminate this information was due to lapses on the part of the officials of the Mines Bureau. This station had been set up on the initiative of the University of California more than ten years back, but had reportedly not been functioning at its full capacity for the past several years. Though President Chandrika Kumaratunge has stated that this station was not equipped to sense tsunamis, the matter is yet in doubt and has not been clarified directly by the Mines Bureau through the issuing of a responsible and factually accurate statement for whatever reason.

In any event, even if we take it as a given that this country did not have sufficiently sophisticated equipment to detect the quake, one is monumentally puzzled as to how even the most basic telephone contact was not maintained by Mines Bureau officials with their counterparts in the US and Japan who

could have informed them, hours in advance, of the tsunami waves hitting Sri Lanka.

In fact, verified accounts abound of individuals who had picked up the news of the earthquake by chance and had warned friends and relatives near the coastline in Sri Lanka and India to move out of harms' way. If ordinary individuals could have issued these warnings, where was the monitoring of the Mines Bureau even in the most elementary sense? But in a country where the almost consistent failure on the part of the Meteorology Department to correctly predict normal weather conditions is a matter for general hilarity, perhaps one is asking for too much to expect any commonsensical awareness of seismic activity that would have an impact on the region.

This is all, of course, in the past. The issue is again accountability, which must not be lost sight of, if we are to avert another cataclysm akin to last Sunday. The Bureau as well as the Coast Conservation Department has called for strict regulations governing coastal house building, hotel building and mining in areas adjacent to the coast. We all know the manner in which, up to now, the coastal zone had been ravaged by many individuals favored enough to obtain political support for their activities while others trying to work by the law but minus any political backing had been deprived of their livelihood. This has to change. We need strong systems of accountability put in place and adequate cooperation in this regard between the various agencies involved.

If Sunday's disaster will not change our casually sybaritic way of thinking in relation to this country and its plentiful natural bounty, nothing ever will.

By Kishali Pinto-Jayawardena
Sunday Times: Focus on Rights, January 2, 2005

Are we shrugging off our obligations in international law?

During recent times, certain misleading views in relation to the right to lodge individual communications before the Geneva based UN Human Rights Committee (UNHRC) in terms of the International Covenant on Civil and Political Rights (ICCPR) and its first Optional Protocol have surfaced in national discussions.

It is not my intention to engage in discussion of the specific communications of views delivered by the Committee against Sri Lanka in this column. However, some general clarifications in relation to the consideration of individual communications by the Committee may not be out of order given the above misconceptions.

Assuredly, the viewpoint advanced by some probably well meaning but misguided souls that the UNHRC reprimands only the lesser developed countries such as Sri Lanka is far from the actual truth as any international human rights student, even in this most rapidly deteriorating educational system, should be well aware. Suffice to say that certain of the Committee's most jurisprudentially advanced decisions have been made in relation to countries such as the Netherlands, Canada and France.

One case in point was a communication brought against Canada concerning the applicant's loss of rights and status as an Indian when she married a non-Indian as opposed to an Indian man who married a non-Indian woman (see *Lovelace vs Canada*, Decisions of the UNHRC, Doc A/36/40, p166). The Committee found a violation of ICCPR Article 27, which protects the rights of linguistic, religious or ethnic minorities.

More recently, the Committee has conceded (in the Finnish reindeer cases) that protection of “culture” within the meaning of ICCPR Article 27 includes protection of the traditional means of livelihood for national minorities, in so far as they are essential to the culture and necessary for its survival. In *EHP vs Canada* (Communication No. 67/1980, *EHP v. Canada*, 2 Selected Decisions of the Human Rights Committee (1990), 20), the right to life in ICCPR Article 6 was held to include the right to live without life threatening impacts from the environment.

Similarly, in cases brought against the Netherlands, Dutch social security laws were found to be unreasonable and discriminatory on the basis of sex, thereby violating ICCPR, Article 26 (see *Broeks vs Netherlands* and *Zwaan de Vries vs Netherlands*, Decisions of the UNHRC, Doc A/42/40, at p139 and p160 respectively).

In one decision in respect of Mauritius (the Mauritian Women Case) the country took action thereafter to change its laws in order to bring them into conformity with the Covenant. In other cases against France, the Committee found a violation of ICCPR Article 26 resulting from a denial of pension benefits due to subsequent change in nationality. Administrative convenience was held not to justify the actions of the state party (see *Guye and others vs France*, Decisions of the UNHRC Doc A/44/40, p189).

While these are some of the earlier decisions of the Committee, its more recent jurisprudence has included several interventions into protection of life and liberty rights. This is well illustrated by the five Communications of Views against Sri Lanka delivered in response to pleas filed by individuals as diverse as a politician, a father whose son ‘disappeared’ in army custody, a newspaper editor, a detainee under the Prevention of Terrorism Act and a lay litigant committed for contempt of court.

Some of these decisions and their impact on Sri Lanka’s legal and judicial system have been commented upon in past issues of this column as well as elsewhere.

It is important to note that the Committee is not a ‘trigger happy’ body of foreign legal personalities operating from beyond the shores of the country. It constitutes jurists who have earned a well-deserved reputation of erudition and integrity in their home countries. The Committee responds to clear and egregious violations of Covenant rights as opposed to jurisprudentially unsound

applications. In one instance, for example, it dismissed a communication lodged against Sri Lanka in respect of judicial action on the basis that it did not disclose an adequately substantiated grievance (See *Wanakuwatte vs Sri Lanka*, CCPR/C/78/D/1091/2002 (Jurisprudence)).

Insofar as the five adverse communication of views are concerned, the Sri Lankan State has been necessarily guarded in its response, despite comments by quite naturally 'unnamed' sources of information (who appear not to be familiar with the most rudimentary norms of international legal obligations) that the government would not comply with the views of the Committee

Such a response has not been advanced from an official department, ministry or official. The reasons for this are not hard to find. At the very least, such defiance would make Sri Lanka look notably ridiculous. At its most dangerous level, it would reduce the country to the level of an outlawed state in the international legal arena as a consequence of shrugging off obligations that itself willingly incurred upon accession to not only the ICCPR, but also its Optional Protocol.

This is distinguished from India, for example, which has intentionally refrained from acceding to the Optional Protocol, thus denying to individuals within its jurisdiction the right to go before the Committee.

This country however, out of an excess of good will and buoyant self-confidence, acceded to the Protocol in October 1997, which thereafter entered into force on 3 January 1998. Sri Lanka also made a declaration according to which it specifically recognised the competence of the Human Rights Committee to determine individual communications.

In the light of these specific actions on the part of the State in international law, it would be an act of veritably fiendish Houdinistic ingenuity for government authorities to extricate themselves from implementing decisions of the Committee purely because they call the government or its judicial branch to account. Whether it would, in fact, court the consequences of such disobedience needs obviously, to be closely monitored.

By Kishali Pinto-Jayawardena

Sunday Times: Focus on Rights, May 29, 2005

Civic action to make courts more efficient

The Asian Human Rights Commission (AHRC) has said that though the four per cent conviction rate prevalent in Sri Lanka's criminal justice system is often noted, what is less emphasised is the primary cause for this dismal rate—the delays in justice. And though these delays are usually attributed to heavy court workloads, the problem of workloads is itself the product of far serious defects.

Why do delays occur in Sri Lankan courts, particularly in serious cases tried in the High Courts, queried the human rights group in a statement on Wednesday. The AHRC said that a former high court judge had once recounted the first lesson given to him by a senior colleague in whose court this judge had begun his work. Accordingly, he was told that at least ten cases should be completed per month. Twelve cases if completed would be reasonable, while 15 cases would be a good performance. He recalled those days with some admiration, stating that today not even two cases are completed within a month.

Jury trials are now optional. The choice is with the accused, or rather, with the lawyers of the accused. One advantage of a jury trial is that when a hearing begins it will usually continue each day until completed. However, when trials are heard without juries there are usually many postponements. Many partly heard cases would be fixed for a single working day and often, only parts of a witness's evidence can be heard on that day. In some cases the evidence of a single person is stretched across several days that are spread over several months or more. From the evidence of one witness to the next there may be gaps of one or two years, prolonging the whole trial process and defeating the possibility of speedy justice, the AHRC said. Judges and prosecutors are unable to work effectively under these conditions. With a pile of partly heard cases, they have inadequate time to prepare for each one, in contrast to when a case is heard from start to finish. Also, to succeed under the adversarial justice system, prosecutors need to develop a strategy and carry it through.

This is made much more difficult when cases are spread out across months and years. Meanwhile, a judge may be transferred before a case is completed and to hear the case to its end, the judge must be gazetted to return to the same court. Alternatively, trials are begun all over again, particularly when judges are promoted to higher courts or retired.

Victims of crime and their witnesses face even greater obstacles. Many endure threats and harassment until the giving of evidence is completed. The threats are often realised, as in the case of Gerald Perera, who was killed allegedly to prevent him from giving evidence against the policemen accused of torturing him. In many other cases, lesser known victims and witnesses have suffered a similar fate. The exacerbation of threats against witnesses by delays in justice is of particular concern in view of the absence of an effective witness protection scheme in Sri Lanka. A Solicitor General recently admitted that the low conviction rate is mostly due to the fact that witnesses do not come to court—or change their evidence—due to fear of retribution.

The delays in justice experienced by Sri Lankans will not be overcome simply by increasing the number of judges, prosecutors and courts the AHRC reiterated. The question is how the workload can be better managed to enhance basic principles of fair trial and improve efficiency. This is a question that needs close examination by competent and independent judicial authorities. Whereas in many countries reviews of judicial management and adoption of new approaches through well-considered recommendations are common, the same cannot be said of Sri Lanka.

Social stability depends upon speedy and effective courts. An enlightened public discussion is desperately needed in Sri Lanka in order that justice institutions function more efficiently. The protection and promotion of human rights is not possible without strong expressions of public interest. Therefore the delays that currently occur in Sri Lanka's courts deserve a far greater amount of concern among those who care for the rule of law as well as social stability, the rights group said.

Daily Mirror: June 18, 2005

<http://www.dailymirror.lk/inside/justice/180605.asp>

Reduce the powers of the President

The Asian Human Rights Commission (AHRC) has said that public pressure and the courageous stand taken by Sri Lanka's Commissioner of Elections have ensured that the next presidential election will be held this year. President Kumaratunga's claim to a further year in power has been rejected. This achievement is of enormous importance for both social and political morale, for had this occurred during the referendum to extend parliament by the government of J.R. Jayewardene in 1982, Sri Lanka's development would have taken a different course, AHRC said.

However, the AHRC also said that the forthcoming presidential elections would be taking place in an atmosphere of distrust on the part of the people against the executive presidency as envisaged under the 1978 Constitution. The future president will be faced with the challenge of radically curtailing the powers of the executive and strengthening the government so that public authorities could function in an orderly manner.

The future president must abdicate the legacy of earlier executives and ensure that the presidency does not become a means of generating social instability and political anarchy, the AHRC said. A nation needs not an individual with extraordinary power to rule, but a government with the ordinary capacity to govern. The Executive Presidency in Sri Lanka however, has diminished the role of the government by vesting extraordinary power in a single individual, who in reality has little capacity to execute that power. The result had been chaos.

Public institutions need to play a significant role in the governance of a nation. The unanimous adoption of the 17th Amendment to the 1978 Constitution was admission that the executive presidents had destroyed these institutions, which now needed to be protected from such abuse of power. Although the

provisions of the 17th Amendment have been observed only minimally, they have still benefited the people. By not taking responsibility for the effective functioning of the commissions under the 17th Amendment, the executive president has still been able to interfere with the performance of these institutions.

While there is much rhetoric at present about the breakdown in law and order and the increase of crime, it is not possible to improve the situation without first strengthening the government and enhancing the functioning of public institutions. In the coming elections therefore, the AHRC urged Sri Lankan civil society to focus on the issues rather than the individual candidates. If serious debates on the causes of the present instability take place during the election period, people will be in a position to demand the necessary reforms from whoever is elected to power.

For this reason, enlightened public opinion on these issues must be created and sustained. The protection of democracy and the realisation of human rights for all will depend greatly on how such a debate takes root in the country, the AHRC said.

Daily Mirror: September 10, 2005

<http://www.dailymirror.lk/inside/justice/100905.asp>

Somber reflections on a year gone bye

We face next week, the fading away of a year during which we have marked our country's failures in more grandiose ways than usual. From one extreme end of the scale, daily life has become even more perilous for the ordinary Sri Lankan. The spiraling rise in crime, car-jackings in broad daylight and the general breakdown of law and order coupled with dangerous linkages of the underworld with policemen and politicians is now part of a fundamentally distorted social ethos.

Lodging a mundane entry at a police station in relation to the loss of an identity card or a breach of the peace has become a task that anyone will avoid at all costs. Indeed, coping with the most basic societal necessities from the disposal of garbage to the proper control of traffic systems is now fraught with tension. And thousands of tsunami victims still languish in their misery, adding their numbers to the thousands of persons internally displaced by the decades long war. Despite the massive quantities of aid that have poured in, their plight remains only as grist for the newspaper mill rather than constituting the core around which serious efforts to remedy their situation are centered. The collective psychological and social trauma that this country will continue to experience therein for generations yet unborn, is incalculable.

This prevailing state of national grief is, of course, aggravated by the escalating conflict in the North. The coming year will show us whether, as the optimists predict, the LTTE will not resort to war as part of their harassment strategy. Given the increased ferocity of their attacks during these months, the optimists may well be disastrously wrong. If so, our capacity to cope with the rigours of the battlefield despite a currently weakened intelligence and chronically dysfunctional political systems, will be tested to its utmost.

In the process, inflammatory statements that the army should not hesitate to march into the North by individuals who are apt to pontificate on such matters

from the safety of the capital city with their sons and daughters ensconced in some city abroad, will be of little worth. In fact, it is high time that these persons are exposed for the oratorical hypocrites that they really are.

From another extreme, in so far as institutional integrity is concerned, public respect for institutions such as the public service, the police and the judiciary remain at the lower end of the scale. By year end, appointments to the second term of the Constitutional Council around which the viability of the 17th Amendment to the Constitution revolves, have yet not been made.

Hilariously, blame is cast on different entities at different times. At one point, we are still told that the minority parties have not still been able to agree on a nominee despite contrary news reports some time back indicating that a consensus had, in fact, been reached. At another time, the government blames the stalemate on the opposition, saying that opposition consent had not been given to the joint nominees to the Council. This is however, in contradiction to a request made previously by a high ranker in the opposition benches who writes to a newly elected President, requesting him to ensure that the independent Police, Public Service and Elections Commissions are in place. Constituting the Constitutional Council is mandatory for this purpose as they exercise powers in the recommending of appointments to those Commissions. And so the merry go round continues.

In the meantime, we have a non-functioning National Police Commission, no Election Commission (despite the public pledge by President Mahinda Rajapakse on the acceptance of his electoral victory that one of his first tasks would be to allow the current Elections Commissioner to relinquish office) and no Public Service Commission. The term of the current National Human Rights Commission (NHRC) will also expire early next year, which means that if the Constitutional Council is not appointed by that date, there will be no NHRC as well. Protests have been made in this regard by some civil society organisations, including most recently the Organisation of Professional Associations (OPA).

What is important to note is the clear lack of political will to have these Commissions functioning independently. A recent pointer to this are statements attributed this week by some newspapers to President Rajapakse, wherein the Cabinet had reportedly been informed by him that the government does not intend to re-commence the National Police Commission until the 17th Amendment is further amended to enable the Inspector General of Police (IGP) to also constitute part of the Commission.

On an earlier occasion, Minister of Law and Order Ratnasiri Wickremenayake also made similar remarks. While Minister Wickremenayake's observations may be taken in a somewhat lackadaisical manner given his tendency for off the cuff remarks, similar statements made by the incumbent in the Office of the Presidency, embodying as they do, a definite government policy, carries far more alarming import. It must be recalled that the Commission was set up precisely for the purpose of monitoring the police system independently from the system and consequently, from the IGP himself. This is how bodies of this nature function worldwide.

For example, the much respected Independent Police Commission in the United Kingdom whose role in the inquiry into the Menzies shooting by the London police during the terror attack this year, is presently the subject of wide public discussion, does not have the Metropolitan Police Commissioner as one of its members. To suggest that Sri Lanka's National Police Commission should have the IGP sitting within its ranks is a notion so absurd that it would be laughable if it not were so tragic. The fact that such an idea reportedly originated from the office of the Presidency is worse.

And all this while government spokesmen make themselves hoarse at international human rights fora on their commitment to improve the functioning of the country's institutions. I wonder as to what the situation would be if representatives of the Attorney General's Department and the Foreign Ministry put forward this novel addition to the ranks of the National Police Commission next time they defend the country's record before the United Nations Sub Commission or for that matter, the UN Human Rights Committee or the Committee Against Torture. Stern initiatives need to be launched both domestically and internationally in regard to any efforts by the government to effect such changes to the composition of the National Police Commission if these reports are indeed grounded in fact.

Within the past year, the only positive feature was that we were able to have an election in the country without the levels of electoral violence evidenced earlier. But is that sufficient? Confronting a new year which shows little potential that the country will be able to redeem its past legacies of renewed war, a backsliding economy and basic institutional failures, this is a question that commands its own deeply troubling negative answer.

By Kishali Pinto-Jayawardena
Sunday Times: Focus on Rights, 2005

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