the right to speak loudly

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Asian Legal Resource Centre

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Introduction

The short essays that constitute this collection arise from my experiences in three different places: Hong Kong, Cambodia, and Sri Lanka. In my view, although Hong Kong is not a democracy it represents one of the most successful models of a society built on the rule of law. By contrast, Cambodia is among the greatest failures. Sri Lanka, my homeland, is somewhere between these two, but in recent decades it has slid further towards the latter. In most essays, direct reference is made to Sri Lanka, and at various points, Hong Kong and Cambodia. In any case, the discussion should not be misunderstood as particular to a country or locale. Most of the questions and issues raised are applicable to countries throughout Asia and further afield.

We desperately need cross-cultural discussions on the rule of law and human rights. Much of the discourse is dominated by the West, as is the language of justice, which is associated with several centuries of struggle there. As a result, many of the problems faced by people in Asia are beyond the comprehension of those who are used to this discourse. Persons from the western tradition struggle to understand how a police officer may so readily resort to torture as his means for routine criminal investigation, or how he may spend more time making a living on the side than dealing with his official duties. They cannot easily accept that a prosecutor may belong to a powerless agency, or that a complete buffoon may sit as Chief Justice and make a mockery of the very institution he represents. An enlightened discourse on the rule of law and human rights

will develop only when we break down the language barriers and bring the persons involved to understand the actual daily experiences of people throughout Asia.

In the appendices to this book I have added a draft document submitted to the National Police Commission of Sri Lanka on establishing a public complaints procedure against the police, as mandated by Section 155(G) of the Constitution, introduced through the 17th Amendment. The National Police Commission has accepted this draft as the basis for developing the procedure. Debate on this issue may allow us to address many of the problems besetting the policing system in Sri Lanka, and the attendant frustrations caused to the public owing to the lack of recourse when police commit abuses. While this debate pertains to Sri Lanka, it is relevant to most other countries in the region.

I have had the opportunity to raise the issues contained in these essays with literally thousands of people from around Asia and also other parts of the world. Together, we are building a common understanding. This understanding now needs to be expressed more fully, to become the prevailing discourse on the rule of law and human rights in Asia.

W J Basil Fernando
Hong Kong
February 2004

chapter one

The right to speak loudly

From free education to freedom of speech

Perhaps the greatest achievement in Sri Lanka during the twentieth century was the introduction of free education for all. It came in response to irresistible demands from the local people of all communities. By 1942, free education from kindergarten to university was in principle available to everyone. The effects were dramatic. Education spread to the remotest villages, as it was taken up enthusiastically by people at all levels of society. Particularly in the distant rural areas, energetic teachers and parents zealously devoted themselves to making the free education policy a success.

As years went by, the challenge laid by universal free education began to be felt in one area in particular: freedom of speech. For most of history, the majority of the population had been kept silent.

Then people began to talk. But one of the most sensitive areas of social development is freedom of speech. That people found their voices due to improved education did not mean an automatic expansion of freedom of speech. In fact, new voices lead to conflict, as they test the limits of censorship and other established rules in the society.

Censorship has many forms. There is the censorship directly imposed by the state, which makes some forms of speech punishable with legal consequences. There is also self-censorship. By self-censorship what is meant is the indirect pressure from the social elite, and state and religious

authorities, intended to restrain certain forms of speech, usually those that directly or indirectly challenge the established authorities. Self-censorship is often mediated through religious and educational institutes, and also the media.

Another kind of censorship is cultural censorship. It is this censorship that had for thousands of years silenced the majority of people in Sri Lanka. Throughout this time, the society was organised according to a caste hierarchy. This division of persons and their social functions was also applied to speech. The extent to which a person had a voice in the society depended on their position within the caste hierarchy, among which the lowest castes had virtually no rights to speak at all.

One way of reinforcing the caste hierarchy and concomitant cultural censorship was through the denial of education. Only the Brahmin caste had an innate right to education. In fact, the Brahmin caste was functionally the educated caste. But it differed from modern educated classes in that it was not an educating caste. In fact, one of its sacred duties was to restrict access to education among other castes. This sacred boundary was broken with the introduction of free education. Education ceased to be a privilege dependent upon one's position in the social hierarchy. Thus, a foundation of caste-based society was broken. Psychologically, the change in the society was irrevocable. It was only a matter of time before practical expressions of this momentous change spread into all areas of life.

The foundation upon which cultural censorship was built in Sri Lanka for centuries no longer exists. So for how much longer can its residual practices persist? This question will be answered as new voices and forms of expression grow in the society in the coming years. Ordinary people are no longer talking in low voices. It is inevitable that their voices will grow louder, as is their right.

chapter two

Social change and underlying problems relating to the rule of law

There is a feeling of emptiness, a vacuum. It is not a complete emptiness, but rather, one that comes at a time of immense social change, which demands dramatic shifts in how people understand the world mentally and spiritually. It is a feeling that causes confusion and leads people to believe they lack solutions to the problems they face. They conclude that solutions can come only from outside, as inside there is nothing upon which to rely.

This feeling exists throughout much of Asia today. Not so long ago, most people throughout the region were accustomed to spending their lives on farms. The conditions in which they lived were relatively simple. Today, by contrast, people across Asia are faced with very complex conditions. But changes in conditions do not always lead to changes in thinking. A great many people in Asia cling to the simple impressions of their societies from earlier decades and centuries. Confronted by the new complex conditions, the feeling of emptiness grows. There is no continuity between past and present, no longer any means by which to relate to either of them.

The new conditions do not oblige people to adjust inside; only outer, mechanical adjustment is necessary. People change their lives to catch the morning bus, arrive at work on time, and use computers. But they do not

necessarily make inner changes. In fact, inner changes are ignored, or treated as irrelevant. People stop trying to deal with new situations inside, and just go about making constant outer adjustments as new situations arise. They stop trying to understand what is happening. One reason for this is because inner adjustment requires much more time than outer changes. Experience is immediate, but understanding often comes much later. The mind must take time to chew on the experience. For someone coming from a simple rural situation to a vastly more complex and differently organised society, daily time is spent dealing with the immediate outer changes. The vast gap inside cannot be so easily filled. It will require many experiences and much time.

But while the feeling of emptiness that comes with this social change is inevitable, eventually there comes the need for a different inner world too. A person's beliefs and inner responses begin changing, often without them knowing it. The person stops trusting institutions and others whom they once thought were there to protect or help them. For instance, a person who once unquestioningly accepted the role and integrity of doctors may begin to reconsider their earlier experiences. Recalling some event, the person may now find that its meaner qualities emerge. As more and more events from the person's earlier experiences take on a different colour, the person's inner world is changing. As distrust of one's own society grows, more solutions are sought from the outside. New and more complex forms of protection are borrowed to take the place of earlier ones. For example, a person who earlier hid away some gold to use as insurance in the event of sickness or family death now subscribes to a company policy. The person looks to more reliable forms of protection that have evolved with the more complex conditions.

The vacuum is also spoken of as a feeling of powerlessness; the powerlessness of people whose inner and outer ways of dealing with the world were developed for the earlier, simple situations. This feeling is manifest in ideologies that denounce complex modern societies and technologies, and in calls to return to earlier simple forms of existence. Sadly, it is also manifest in a great deal of violence, which arises when the earlier relationships are lost. Through such violence, the past and present

are irrevocably torn apart, and the feelings of emptiness, confusion and powerlessness are expressed: “We had such a peaceful and harmonious society. How is it that modernization has brought about only disunity and bloodletting?”

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chapter three

Dealing with torture in Asia

After several years of work, AHRC was forced to arrive at the rather shocking conclusion that there was no real movement against torture in Asia. This situation was due mostly to the human rights organisations themselves being based in the milieu of the affluent classes of society, while torture for the most part is experienced among persons from the poorer classes. There was an emotional alienation among those claiming to help torture victims. Torture was often explained away with comments such as, 'Torture is part of the culture,' 'People accept torture as being necessary,' and 'There is no government will to impose prohibitions against torture seriously'. Thus, while some reports were produced and meetings held on torture, no real work was being done with a firm determination to end the practice.

The question then was how to propose and pursue a strategy sharply different to those prevailing at the time. AHRC realised that its partners in work to eliminate torture must be from social classes closer to the milieu to which the victims themselves belong. They would have to be persons who could understand the language and social circumstances of the victims. They would also have to be willing to give a considerable amount of time to the victims. They also had to be willing to provide food, shelter and solidarity to victims, particularly immediately after the experience of torture. And equally important, they had to create self-confidence in the victims and their families, despite the many pressures and harassment

directed towards them after they make complaints about torture to the authorities. In short, the type of activists required were those willing to take over many of the burdens that the victims and their families would have had to bear on their own.

At this stage AHRC realised that it would have to test its approach in order to acquire experience. This test was undertaken in Sri Lanka, and after several years of work it can now be claimed that a successful movement to eliminate torture has begun there. In the first years of the work, time was spent trying to build contacts with community-based groups, as opposed to city-based elite groups. In the beginning, the community-based groups did not see the relevance of torture to the type of work they were doing. Some even saw such work as dangerous, as it might bring undesirable consequences onto themselves and their work. It was necessary to convince these persons that AHRC was in a position to help them work to support victims of torture by taking away some of the burdens and risks involved. The Urgent Appeals system it operates from Hong Kong was explained to them, and they were shown how to collect information and send information without becoming visible at too early a stage. At this point, AHRC took on the entire task of campaigning. As the use of computers was not yet commonplace among groups in Sri Lanka, it was necessary to provide some and also to bring a few persons to Hong Kong, where they were exposed to the use of modern communications. They became more confident that torture cases could be communicated and acted on quite easily. They also saw how much attention was paid to each case arriving at the AHRC office. This was necessary in order to create the confidence and trust of local groups in their partner, as AHRC had given assurances that it would do all it could to help in these cases.

The early cases of torture that came in were soon transmitted to a global email network that at the time numbered over 200,000 recipients, including many organisations with an interest in human rights, and United Nations agencies and representatives, including the Special Rapporteur against torture. The local groups were surprised by the quick results they got through the reports they had sent to AHRC. There were higher levels

of intervention into police stations where torture was taking place. As a result, in some cases the torture was stopped while in progress, while in others inquiries against the perpetrators were started. Though the inquiries were very much wanting in quality and commitment, the fact that some action was taken on cases affecting very poor persons created a greater confidence among the local groups. They began to be involved more deeply, and were convinced that it was possible to reduce the risk level both to themselves and the victims. Thus a larger number of cases were reported.

Maximum attention to the reported incidents was obtained through constant press releases, statements and letters to the government, National Human Rights Commission and United Nations agencies from the AHRC office. Locally, several events were organised—including a demonstration by torture victims themselves. This event caught the imagination of the media to a surprising extent. Both the print and electronic media in Sri Lanka began to publish reports of torture regularly. Thus, instead of a culture of silence, a nationwide discussion on torture began to emerge.

At this point it was necessary to demonstrate the limitations of existing state mechanisms designed to prevent human rights violations, including torture. An extensive campaign was started to critique the lack of a proper investigative mechanism to deal with torture complaints. This criticism was mainly directed towards the country's prosecution system, under the Attorney General's Department. AHRC asked why the Attorney General's Department had not effectively implemented the Convention against Torture (CAT) Act (Act No. 22 of 1994). Although this law was in the statute book, it was not being used at all. To educate people about this campaign, advertisements were put in newspapers describing the CAT Act and demanding that it be implemented. The local activists were also encouraged to learn about the Act and get involved in the campaign.

Criticism was concentrated on the major obstacle to implementation, namely the lack of a proper investigative body. Publication of every torture story was accompanied by a demand for the creation of such a body. After much work, the Attorney General's Department announced the creation of the Prosecution of Torture Perpetrators Unit. This unit

consisted of a number of competent police officers with good records. However, even after the unit was established its work was slow. Pressure had to be kept up to prevent this and similar actions from being mere gestures, and to make them part of a real solution. The Special Rapporteur against torture intervened in cases about which he had received information, and this had a considerable effect on the unit. It has claimed to have filed about fifty cases under the CAT Act, though none of them has to date been concluded. However, the very filing of cases in the courts has created a positive impression on the victims, activists and society in general. Now there is a greater belief that torture is an evil that can be defeated. This psychological change is very important in achieving nationwide consensus on the problem. In fact, the growing confidence of many local persons that this is a solvable problem is the most important achievement of the campaign so far. Now the media attention is constant. Even when local groups organised a public hearing for child torture victims it received a surprising amount of publicity.

The work done by local groups has also exposed some very serious problems in the National Human Rights Commission (NHRC) in dealing with torture. Extensive information now available indicates that the NHRC has in the past been grossly negligent in dealing with torture. In one shocking case, an area coordinator was found to have a habit of passing complaints made by torture victims to the police perpetrators, thereby endangering the victims' lives. He was also issuing false reports to protect the perpetrators. Closer examination revealed that the NHRC Investigation Department and other authorities had ignored similar widespread practices for some time. The growing criticism against these practices is now forcing the NHRC to undertake reforms to deal with torture more effectively. Recently the NHRC declared a 'zero tolerance of torture' policy. Local groups have even held demonstrations before the NHRC head office, and engaged in postcard campaigns demanding speedy reforms in this institution. AHRC identified the following defects in the NHRC's approach to torture cases:

a. Advising complainant torture victims to pursue cases in the courts by themselves. As expressed by a senior lawyer, J C Weliamuna, "It

takes months and sometimes years before a human rights case has been taken up by the Commission for action. The case being so, the Commission very often informs the victims to take his or her case before the Supreme Court, which put the poor victims in a tight corner against the perpetrators."

b. Lack of investigation into cases where the victim has died in police custody allegedly as a result of torture.

c. Not taking action on cases and not explaining the reasons for not taking action.

d. Calling for further particulars and then abandoning the inquiry. No follow up on requests for further information and no further action being taken.

e. Conducting investigations at police stations. A victim complaining of torture is asked to come back to the same place where he or she has been tortured for further inquiries.

f. Intimating to the perpetrators that a complaint has been made against them, and giving the particulars of the victim. This is done without providing any form of witness protection to the victim.

g. Conducting inquiries in a manner that forces victims to agree to a settlement. Victims who are already fearful because of the torture suffered are pressured to talk and come to a settlement with the actual perpetrators.

h. Stopping of investigations due to interventions on behalf of an alleged perpetrator by affluent or powerful persons.

i. Settlement of torture cases by NHRC officers for payment of sums as small as 1000 rupees (US$10).

j. Arriving at settlements on torture cases while the NHRC officers know that there is no way to ensure a payment of sums agreed during such settlements. There is no legal provision through which the NHRC can impose such settlements.

k. Settlements are used to justify the withdrawal of complaints. In the

complaint file the record shows that the complainant agrees to withdraw the complaint because of a settlement. In some cases where such settlements have been entered, the Prosecution of Torture Perpetrators Unit has conducted further inquiries and filed cases under the CAT Act. However, this has been due to separate complaints made to the Special Rapporteur against torture and others. As far as the NHRC is concerned, these cases are settled. In some instances, NHRC officers have protested against the Prosecution of Torture Perpetrators Unit prosecuting cases that they have settled.

l. Losing files on complaints of torture. In some cases, files are reported has having been sent to the head office but never received and therefore are considered missing. Sometimes an area coordinator fails to comply with an order to send documents to the head office.

m. Open socialising with alleged police perpetrators and high-ranking police officers, thus creating distrust among the victims and deterring them from making complaints.

n. Instances where a police officer has been illegally holding and torturing a person with the knowledge of the NHRC area coordinator. In one case, a human rights activist who called a police station to find out about a victim was mistaken by the police officer for the NHRC area coordinator. The police officer described the way in which he tortured the victim to the activist, believing him to be the area coordinator.

o. Instances where an NHRC area coordinator has provided a place for torture to be committed. When one victim sought the assistance of a local organisation working on torture, an activist offered to accompany the victim to the NHRC area office to make a complaint. The victim fearfully rejected the offer, stating that the police had assaulted him inside the vehicle of the NHRC area coordinator.

p. Extensive work being done to protect perpetrators through false

reports. These include false statements to support the perpetrator's version of events, and even attempts to get medical reports falsified to favour the perpetrator.

q. Forwarding of information received from victims to the perpetrators, and even passing documents received from the victims to the perpetrators.

r. Mismanagement of inquiries into allegations against area coordinators such that no conclusion can be arrived at, thereby preventing further action.

s. Lack of a proper preliminary inquiring procedure. No procedure exists to take down complaints and gather all available evidence in the first instance. Further, no procedure exists for the examination of documents at police stations and the preparing of reliable dossiers on which further action can be reliably taken.

t. Despite numerous 'investigations', to date the lack of a single action that can in any way be called a serious attempt to address an act of torture by a perpetrator as a consequence of an NHRC investigation.

Forcing discussion to get changes in this approach is part of the work undertaken by AHRC's partners in Sri Lanka.

Another body expected to deal with torture is the National Police Commission (NPC). It has also been brought under public scrutiny and demands have been made for its effective involvement on this issue. AHRC volunteered to prepare a draft Public Complaint Procedure for the NPC. The NPC accepted, and the draft has already been submitted (see Appendix I). Local groups will now campaign for the speedy implementation of this procedure.

There is now a national campaign going on, and many local activists who are very closely linked to the victims willing to give their time and effort for this work. One area where they have to develop more skills is in witness protection and in dealing with the psychological aspects of torture. To date, several victims who have faced harassment after

complaining have been removed to places of safety and looked after by solidarity groups. Most of this work is purely voluntary. However, one of the most difficult areas is in getting treatment for trauma. The poor do not generally receive psychological treatment, and it is considered part of their lot to live with psychological problems. Some are even sent to lunatic asylums. It has proven difficult to increase local sensitivities on this issue, and so AHRC and its local partners intend to redouble their efforts in this area in the near future.

Finally, AHRC is now exposing persons from other countries to what is happening in Sri Lanka. In November 2003 a 'Folk School' session lasting for ten days brought victims, local activists and regional human rights groups together to share their experiences. Persons from ten Asian countries participated, and all of them were moved by the experience and expressed wishes to start similar work in their own countries.

chapter four

Impunity as a cause of poverty

Whereas poverty is widely held to be the biggest problem facing most parts of the world today, relatively few persons recognise how poverty is caused by impunity. The tendency has been to treat impunity as a problem of some importance, but not as a key to unlock the reasons for more serious problems of economic deprivation. Development agencies, most of which are led by persons without backgrounds in human rights or law, often relegate human rights concerns in general—and impunity in particular—to secondary places. The real business, they say, is to alleviate poverty by economic and social measures. This approach is wrong. It has been proven wrong: despite years of such measures, global poverty is increasing. It is also a fact that wherever there is increasing poverty, there is deepening impunity.

The measures to alleviate poverty introduced by development agencies fail because they are mediated via defective institutions. These institutions operate counter-productively because impunity has taken root. Development organisations typically fail to account for these defects and instead pour money into institutions from which it drains out of innumerable holes, rather than reaching its intended recipients. Because they do not direct sufficient attention towards the building of effective institutions for the use of development monies, these agencies are also unable to deal properly with attendant problems arising from institutionalised corruption. Consequently, their work fails. There are numerous examples of this from all over the world; what follows are a

few from Asia.

Governments, funding agencies and development banks have put an enormous amount of money and effort into Cambodia. Still, all parties agree that not even minimal levels of accountability needed for a functioning economy and society have been established. The response of many has been simply to pull out and blame the government. However, these organisations have not seriously examined the deficiencies in their own approaches. From 1975 to 1979, Cambodian society suffered one of the greatest tragedies of recent history. The Paris Agreement and period of governance by the United Nations constituted an attempt to restore political and economic stability. What the parties to this effort failed to recognise was that the country's institutions had been completely erased. What existed in the country prior to 1975 may have been inadequate, but by comparison, at the time the United Nations took over there was nothing at all upon which to build an economy and administration that would offer security to development agencies and investors. Inevitably, with huge funds being pumped into this institutional vacuum, impunity and corruption flourished, leading to the present undesirable situation. Had serious attempts been made from the start to develop the basic institutions required for a functioning society, based upon rule of law principles, the situation would have been very different. Unfortunately, today Cambodia is burdened with a Stone Age legal system. It will not overcome its persistent problems without addressing this reality, no matter how much attention is paid to economic development.

Indonesia is also a case in point. That its future looks bleak is due not only to economic reasons. Over 35 years, Suharto's ruthless military dictatorship destroyed the basic institutions developing in the country prior to 1964. Corruption became the routine, and it ate away at programmes for national development, causing conflicts that further worsened the situation. Since a social upheaval displaced the dictatorship, the poor have found that they are still getting poorer, and are beset with all the same problems they faced before. Meanwhile, impunity and corruption thrive. However, international agencies are again not directing attention to the need for institutional development as a prerequisite for

economic growth and social stability.

In Burma, hunger and deep poverty is inextricably linked to the absolute impunity enjoyed by the military regime there. The People's Tribunal on Food Scarcity and Militarization in Burma established this in its detailed Voice of the Hungry Nation report, published by the Asian Human Rights Commission in 1999. In that country, starvation deaths are occurring not because of environmental reasons but rather because of the unquestioned authority that the regime exercises. Development agencies operating in that environment have no hope of making genuine progress towards poverty alleviation, because the state institutions are functioning in direct opposition to their aims. The Asian Human Rights Commission has since established a permanent tribunal to continue working on the relationship between denial of the right to food and absence of the rule of law throughout the region.

Recent publications have also pointed to how impunity is causing poverty in India. Unlike the preceding three countries, India claims to have the basic institutions and structure to ensure the rule of law. However, most people in India are still effectively denied legal protection because of thousands of years-old deeply entrenched discriminatory practices. The worst affected persons include Dalits—those once designated as 'untouchables', and ethnic and religious minorities. While laws prohibit discrimination, they are not applied because of widespread impunity. Again, the result is massive, deepening poverty among vast numbers of people across the country. Most international agencies working in India, however, mistakenly believe that these institutions are operating at least to the minimal extent necessary to permit them to carry on with their activities.

Sri Lanka is another example of a country that, with enormous resources and talented people, was once on track for speedy development. The conflicts that then engulfed the country, resulting in massive numbers of extrajudicial killings, acts of torture and disappearances, have made it one of the most violent countries in Asia. Though most of the conflict has been attributed to ethnic hostility, closer examination shows that well-established relations among different groups were severed only because of ruthless practices by the police, military groups, and politicians who

safeguarded themselves by ensuring impunity for their actions through a raft of odious security regulations. At present, peace talks between warring groups have reached an impasse for the same reason. So long as politicians and the security forces continue to be guaranteed impunity, these talks will not make progress. Here also, international parties have not attempted to link the civil conflict with the breakdown in the rule of law and attendant impunity. The civil war has been portrayed as the cause of poverty, but what has been forgotten is that without robust institutions for the rule of law and accountability, the economy cannot recover.

So to deal with poverty, one must also address impunity. This requires more complicated approaches to economic and social development than those ordinarily adopted by international agencies. It means spending money on the development and maintenance of legal institutions, apart from directing it toward the poor themselves. It means working with groups in the society keen upon affording themselves and their peers a protective umbrella from beneath which they may direct their energies towards obtaining their basic human rights and alleviating poverty. In the remainder of this essay, that concept is discussed in more detail.

The Asian Human Rights Commission has often described how a protective umbrella is needed for people seeking to defend their rights. This applies equally to those concerned with civil and political rights as those concerned with economic, social and cultural rights. Most development agencies, however, fail to recognise the heavy obstacles placed in the way of people trying to break free from poverty. These obstacles exist because many persons benefit from others living in poverty. For example, in most Asian countries, vegetable growers are among the poorest of the poor. Wholesalers and retailers eat up the profits of their labour. Even after good harvests, many cannot pay back their loans and sometimes suicides result. When these farmers try to improve their access to markets, send their young away for schooling, and otherwise attempt to improve their lot, they often are met with violence. Various pretexts are used to permit the use of threats, killings, torture and disappearances as a means to deny their aspirations. Often the police or armed forces are sent to intimidate and frighten people. Extraordinary laws may be

introduced that suspend basic safeguards relating to arrest, detention and prosecution.

Intimidation and fear is usually more widespread in the countryside than in the cities. In urban areas, people have more means to protect themselves, through victim support groups, media coverage, and at least a modicum of legal and judicial support. The rural poor have none of these. This is no accident; it is intended that they lack such avenues for support, so that they remain in poverty. Therefore, any attempt to alleviate rural poverty must include a strategy for protection of those persons seeking to defend their rights. It should include groups engaged in a number of different activities:

a. Groups solely dedicated to recording complaints and actively engaged in seeking redress when the police or other state agencies—or persons acting on their behalf—kill, torture, kidnap or commit other acts of violence.

b. Groups constantly exposing the violence and intimidation through the local and international media.

c. Groups lobbying for legal and institutional reforms to the police and other state agencies responsible for the violence and intimidation. These groups need to operate in a sophisticated manner, with the help of legal and other experts, to receive the necessary attention and get the reforms carried through. Such lobbying can be carried internationally, such as through the various committees and special rapporeteurs in the United Nations.

d. Groups developing education programmes to accompany the above-mentioned activities, to encourage wider involvement. In this way, those heavily involved in the opening stages of such work gradually prepare people to take responsibility for the defence of their own rights.

In its own work, the Asian Human Rights Commission emphasises protection from torture, and concomitant police reforms. A widespread misbelief is that torture accompanies civil war, and if fighting stops, torture

is minimised. In fact, torture is endemic in most parts of Asia, and in most cases is connected not with war but with social control of the rural poor. Torture is routinely used because state agencies deliberately fail to train police in modern methods of criminal investigation, monitor their behaviour via independent bodies and introduce community policing programmes or similar techniques. Police, particularly in rural areas, remain uneducated, unmotivated, and free from strict disciplinary control. As such, the police force constitutes the most effective tool for the spread of intimidation and fear that the majority of governments in Asia have at their disposal.

Therefore, all attempts to alleviate poverty and uplift rural people must be accompanied by strong efforts to eliminate torture and create disciplined government agencies that respect the rule of law. To do this, the four types of groups described above are essential. Poverty can be addressed only when the poor are themselves involved, however, they cannot become involved when subjected to threats of horrendous torture, murder and other methods used to keep them in a state of fear. Thus, poverty, impunity, participation and protection are interlinked.

chapter five

The 1997 transition and the place of Hong Kong in the Asian debate on the rule of law

Within the first quarter of the twenty-first century, Asia is expected to be the leading region in the world in terms of economic growth. First world countries are making it a priority in their economic policies to find a place in Asia with the prospect of getting a share of this growth. The United States and European Union have clearly demonstrated that all other considerations, including concerns for human rights, will not be allowed to stand in the way of their pursuit of self-interests in the economic sphere. There is hardly any consensus in the 'West' on the extent of its commitment to the promotion and protection of human rights in Asia. The language of some spokespersons is even apologetic for having tried in the past to impose 'their values and views on others'. The apology is not regarding the colonial past, but about more recent times, when human rights became a criterion for judging the progress of other countries. It is against this background that the transfer of administration and other political changes will take place in Hong Kong from July 1997.

During the last fifty years, Hong Kong has achieved what remains a dream for most Asian states: economic equality with the West. It has achieved this in a much freer atmosphere than Singapore and several other Asian countries where free market economies are coupled with

totalitarian regimes. However, despite such freedom Hong Kong has remained a colony, without the experience of a representative government. The result is a lack of tradition in struggling for justice. Even though a bill of human rights was introduced to Hong Kong in the 1980s, it is confined mostly to civil and political rights and does not account for a just distribution of wealth, or even basic social security measures for the relatively poorer sections of the population. It is this lack of a struggle for justice that has prevented a sense of community among the population. As Professor Yash Ghai has pointed out, "Hong Kong is a good example of that narrow sense of community. It consists of selfishness, self-centeredness and, if you look at the pattern of Chinese capitalism, it takes a rather small view of the community."

Foreigners enjoy very little significance in Hong Kong. The mistreatment of Vietnamese asylum-seekers after 1988 demonstrated the use of sophisticated facilities and resources not to assist, but to deprive these unfortunate people of any humane treatment, and to justify such actions. They remained prisoners in camps, under conditions that received serious criticisms from the judiciary. The existence of a humanitarian tradition of any significance in this affluent city is very much questionable.

The city will go under the administration of China at a time when China itself is experiencing many paradoxes and dilemmas in terms of its communist past and modern aspirations. The fears related to this hand-over seem to arise more out of perceptions regarding the Chinese bureaucracy rather than Chinese communism, which is a thing of the past. After many decades of experiments, the development of laws and an efficient law enforcement bureaucracy in Hong Kong has been rationalized. Compared to most Asian countries, it is generally regarded as less corrupt.

Hong Kong is an open society. Social control is exercised through the use of affluence rather than the abuse of due process rights. On the other hand, the Chinese bureaucracy relies heavily on the abuse and denial of due process rights in dealing with dissent. As Hong Kong is a world centre for media and communications, it is hardly likely that such abuse of due process rights could take place in Hong Kong without receiving

the world's attention. Also, it is not possible to alter the character of Hong Kong as a media and communications centre without altering the nature of Hong Kong as a whole.

The efficiency of the bureaucracy is essential for the very survival of the way of life in Hong Kong. Most people in the city live in tall housing blocks. It is a city in which people depend heavily on elevators, electricity and water supplies. Any inefficiency leading to a few hours of failure of these services can cause chaos. This is different from the situation in a city like Kuala Lumpur, which faced an electricity failure of over one-day recently. That city is still very much reliant on ground-level resources rather than man made contraptions, which is not the case in Hong Kong. The daily running of facilities in Hong Kong has been based on incentives and sanctions offered to a bureaucracy that has had to function with a great deal of technical efficiency. Without regulatory mechanisms, the private ownership system that freely operates in Hong Kong could have many unwelcome results.

Although in the past Hong Kong remained relatively free of the political worries that bedevil other Asian countries, this situation has already begun to change and is likely to change very much in the coming years. That Hong Kong should be left alone, as urged by some, is hardly a realistic option. On the other hand, the view that Hong Kong will have to adjust to whatever consequences that may follow is also not realistic, for the reasons given above.

The debate on what Hong Kong will be in the future is part of the debate on human rights and democracy in Asia. This is neither an anti-China nor pro-China debate. Nor is it an anti-western or pro-western debate. The forces of democracy and the human rights movement in Asia can make a difference by posing the issues relating to people in Hong Kong both to China as well as to the West. At this moment issues of democracy and human rights are being discussed in relation to Burma, Indonesia, Cambodia and several other countries. Hong Kong needs to be added to this list. There is a tendency in Hong Kong to regard human rights only from the point of view of individual protection. While this is important, it is essential to discuss wider issues relating to democracy and

human rights in Asia and their relevance to Hong Kong. In that light, issue may be taken with the waning interest in the West in democracy and human rights in Asia simply to establish better relationships with some in the Asian elite for the purpose of gaining some share in expected regional prosperity. Hong Kong can show, however, that people aspire not only to be prosperous, but also to be just and humane.

chapter six

Something to learn from the people of Hong Kong

On 1 July 2003, more than 500,000 people out of Hong Kong's population of 6.7 million took to the streets on Hong Kong Island. Characteristically, the whole protest was peaceful. People remained in the streets for hours, until they made their point and were counted.

The huge event was in response to a dangerous law introduced by the Hong Kong government that was to be passed in eight days. The proposed law was to implement Article 23 of the Basic Law, Hong Kong's mini-Constitution, which calls on the government to enact "on its own", laws on treason, subversion, sedition, secession and the theft of state secrets. The proposed law was similar in nature to national security legislation in many countries, giving extensive powers to the administration to deal with any perceived threat to security. People feared that the law could be used arbitrarily to curtail their freedoms. Many whistle-blowers alerted others to the adverse aspects of the proposed law. Members of the legal community, academics and human rights organisations explained that countries in Asia that have such laws have, in fact, used them against their own people. Indonesia, Malaysia, Singapore, India and Sri Lanka, among others, were cited as bad examples that Hong Kong should not follow. People said NO to the law by going onto the streets in numbers far beyond the imagination of the protest organisers.

How was such a robust reaction possible? Why do people feel that their freedoms are important, and their way of life worth defending? The answers lie in Hong Kong's recent history. Within the last 40 years or so, it has transformed itself from a corrupt city into a society firmly grounded on the rule of law. This transformation has also helped it to become a modern, relatively prosperous and stable society. Among the pillars holding up this society is the Independent Commission against Corruption (ICAC), one of the greatest anti-corruption success-stories in the world. Hong Kong's people have learned that arbitrary powers given to the government lead to corruption, and that corruption destroys civil liberties. Hong Kong's people were able to realise this link between the elimination of corruption and the extension of civil liberties from their lived and felt experience. In other countries in the region, even democrats refuse to make this connection and therefore do not take a strong stand against corruption. The result is demoralisation among the people, who do not see any opportunities to influence actively the decisions and policies that affect their daily lives.

It is worth recalling the history of the ICAC, to demonstrate how such institutions can contribute to the morale of the people. The ICAC was set up in 1974 in response to public protests against the rampant corruption that plagued the public sector. At that time, even ambulance attendants would demand "tea money" before picking up a sick person. Offering bribes to the right officials was also necessary to obtain access to public housing, schooling and other services. Corrupt police officers covered up vice, gambling and drug activities. Since then, with adequate resources, full autonomy, the legislative will and popular support, the ICAC has carried out a widely publicised programme to eliminate corruption in Hong Kong through investigations and efforts aimed at prevention and education. It has had marked success, as Hong Kong is now deemed one of the least corrupt cities in the world. The success of the ICAC has been due largely to its ability to prosecute the powerful and the rich, who use corruption as a path to economic success. The Commission began by curbing corruption in the police, thus destroying its backbone.

Sri Lanka's attempt to deal with corruption has not yet begun. Recent remarks by the country's most senior judge, Justice Mark Fernando, citing a survey in which most people in the country think the judiciary is corrupt, show the depth of the problem. An attempt to rectify the deficiencies in the system has been made, however, in the 17th Amendment to the Constitution. Through this amendment, the Constitutional Council is empowered to depoliticise all state institutions by making proper appointments to the country's highest bodies based on merit. It is quite natural that to hold high public office one must declare personal assets and submit to credible criteria in order to earn the job. All attempts to dilute the criteria will be an encouragement to corruption. But if such criteria discourage those with a doubtful record from aspiring to high positions, then it is a blessing for the country. This is something that can be learned from Hong Kong.


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chapter seven

Demonstration of an aspiration

The July 1 demonstration affirmed the people of Hong Kong's commitment to democracy and the rule of law. It was an event in which people gathered to tell the world that Hong Kong's way of life based on respect for democracy and an abhorrence of authoritarianism must continue. Hong Kong's July 1 protest was a day in which people celebrated an aspiration: an aspiration to preserve liberty.

The roots of this aspiration lie in the people's history of Hong Kong, which is so little spoken about. What is spoken about more often is the economic success of Hong Kong and its modernity. It is not surprising. Hong Kong is a small territory with tall buildings connected by an underground railway. It is a high-speed city. Technological sophistication is central to its metropolitan culture. Its finance and banking sectors are of high quality, as are its modern communication and transportation facilities.

However, there is a people's history that has made the technological progress sustainable. Although Hong Kong was once known as one of the most corrupt cities in Asia, people were able to subdue corruption and bring the city under their control: an achievement that most countries would like to imitate. One of the benchmarks in measuring people's progress is to look at whether they have been able to bring their law enforcement agencies, particularly the police, under the control of the rule of law. There are very few places in Asia in which this has been

achieved. It was the people's initiatives that created the political will to pressure those in power to create the Independent Commission against Corruption (ICAC), a body to check corruption that is located entirely outside the domain of the police. It is quite natural that people do not want to lose these achievements and return to naked forms of aggression by the police and other authorities.

Often political will is misunderstood as the will of the rulers. However, a closer study of events that have led to positive social developments shows that political will grows from below and wins support from people at the top. Hong Kong's experience also demonstrates this phenomenon. The source of political wisdom is the free participation of the people. When people's common sense has a greater say, rulers adopt saner policies and avoid disastrous ones.

Hong Kong's young people are a different generation. They have had a sophisticated education and they have grown up in very different social circumstances from earlier generations. They may not even understand the anxieties of former generations and are not retarded by the unhappy experiences of the past. The aspiration for liberty is quite natural to them. For them the July demonstration will have had a futuristic perspective, a future where transparency and accountability will be more common, where freedom is respected and all forms of social control are subjected to democratic norms and standards.

The demonstrations in July against the Hong Kong government's proposed Article 23 brought forth the inner mood of the Hong Kong people. The huge demonstration that surprised the world on July 1 and other protests manifested the inner aspirations of the people of Hong Kong for a better future in which they can participate to a greater extent in the public affairs of their society.

chapter eight

Some features of the new authoritarianism

These days, it is common to find governments that use the trappings of democracy to conceal an authoritarian character. For example, regimes are elected to power at one time or another and maintain the facade of being re-elected by elections conducted on their own terms. Despite this democratic exterior, the new regimes engage in certain activities that make them unmistakably authoritarian.

Creating confusion about the role of the judiciary and judicial process

The new authoritarian regimes keep the façade of judicial organisation established in an earlier era intact, but so deeply interfere with the actual functioning of the judiciary that it all but ceases to operate as originally intended, particularly in relation to disputes between citizens and the state. Many strategies are used. Initially, there may be threats and intimidation directed towards the judiciary as a whole, or towards individual judges not willing to comply with orders. Attachment to liberal ideas may be discouraged. Uncooperative judges may be dismissed or transferred to unimportant roles, thus passing the message that such behavior will no longer be tolerated. This may go on for some time until, by and large, the message sinks in.

After the judiciary is brought to heel, more blatant steps are taken. Persons who will comply with the regime's demands are put into positions of authority. At this stage, conflicts are likely to occur within the judiciary itself, although they may be unknown to outsiders. Sometimes the conflicts may spread throughout the whole legal profession, with a few persons trying to continue as before, while others try to adjust to the new situation. The result can be traumatic for the majority of lawyers otherwise unwilling to get involved in political conflicts or other disputes relating to their professional engagements. However, by this time there is no longer any neutral space. Those deeply committed to maintaining professional integrity may choose to withdraw, rather than be corrupted. Complete or partial withdrawal of such persons may happen on a large scale, allowing for more cynical attitudes to emerge within the profession as a whole, poisoning the relationship between the judiciary and lawyers. This new situation suits the executive, which wants to weaken judicial process so that the judiciary will not monitor or disrupt its activities.

Finally, the executive may try to show the society that the judiciary is basically under its control. By giving this impression it gains a great deal of power over the ordinary citizens, who are virtually told that they have no legal means through which they can challenge the government's actions. The lack of legitimate space to canvass for whatever citizens think is right or wrong creates a social paralysis, particularly among the more educated segments. While a few may think of extralegal measures with which to challenge the executive, the average citizen thinks only of the possibilities that exist within the law. When the executive is able to convince the citizens that no such space exists, it has secured for itself a situation of near absolute power while not completely wiping out the judicial institutions. As far as the outside world is concerned, courts, judges and lawyers exist: some kind of activity goes on, and it may even appear similar to what went on before the executive displaced judicial power, but in fact nothing remains besides.

Creating confusion about the place of law

New authoritarian regimes do not necessarily abolish all the existing laws, or even declare martial law or emergency regulations. The executive gains such control over the legal process that it can have near absolute power without needing such laws. Even if they are introduced, emergency regulations may be retracted after a short period, but meanwhile the new power of the executive has become part of the normal situation. How is this achieved? Over time, the executive claims a mandate for itself that does not require the making of new laws to do this or that. Parliament is maintained, but the executive goes about its business without reference to the legislature. By various means, the legislature is relegated to an unimportant position. Over time it loses its habit of operating as a check against the executive. Only if an opposition party at some stage gains such a huge majority that it becomes determined to challenge the government is the situation likely to be altered. But such situations rarely occur and for the most part opposition parties enter into compromises to avoid conflicts with the regime. The executive can also threaten to dissolve the legislature if it becomes too much of an obstruction. Thus members of parliament enter into tacit agreements not to challenge each other or worry very much about the role of the executive. The executive in turn provides various facilities and amenities to the members of the legislature, as a reward for their non-interference.

Making law enforcement agencies dysfunctional

A properly functioning law enforcement agency is a threat to an authoritarian regime. The executive needs to be sure that it will not be subjected to criminal investigations. However, it is not possible to achieve this simply by giving orders to law enforcement officials not to investigate this or that matter. What the executive does instead is to create conditions in which law enforcement officers become lethargic. This can be achieved in many ways. One common method is to appoint key officials who understand the requirements of the executive and set about complying by destroying the internal workings of their agency. These persons can create sufficient conflict among the higher ranks that the agency loses its

capacity to act with a common vision and purpose. Avenues for corruption are then encouraged, and these spread quite fast to the lower ranks. Police become engaged in making money rather than conducting criminal investigations. The executive and law enforcement heads connive to ensure that internal discipline decays, and perhaps completely collapses. Hardly anyone gets punished for anything. Mutual reprimands among culprit officers become a substitute for effective disciplinary action. Officers are assured that whatever happens, they are safe from retribution. This psychology spreads and creates a sense of total impunity. Under these circumstances, crimes increase and more public complaints follow. The executive makes public gestures, and may talk of introducing the death sentence or performing some dramatic acts to stop crime and to ensure the rights of the victims. However, these promises will be mere rhetoric. The efficiency of the police cannot be increased, because they would threaten the persons that the executive wishes to protect. Thus, the policy of self-protection overrides concerns for public security and social stability.

Using the very poor as political slaves

Sometimes governments are provided foreign donors' money for poverty alleviation, which may include direct contributions to people below the poverty line. On the face of it, such actions are harmless, and perhaps laudable. However, there is a strong link between the electoral programmes of new authoritarian regimes and the politics of poverty alleviation. Leaders of an authoritarian government will help "their poor": those who have demonstrated political allegiance. In each locality, the regime's representatives become channels for aid to the poor, and as a result they increase their own power. They become capable of mobilizing large masses for whatever political activity they dictate, which may include spying on and silencing "the other's poor", often though violence and intimidation. Political manipulations are made to appear as mindless mob actions. In this way, deep divisions grow among the poor themselves. The "other's poor" wait for their chance to get revenge if or when political power changes hands.

Local political leaders with large numbers of supporters behind them also impose their will on law enforcement officers. Police are compelled to side with "their people" and stay silent about criminal acts committed by supporters. The officers' sense of loyalty to their agency is weakened, and in its place grows a sense of loyalty towards local political leaders. Higher-ranking officers are unable to impose discipline. Police stations develop their own ways of doing things, knowing that they are politically protected. Often, localised corruption becomes associated with torture and killing, as police use their powers to enrich themselves and help their friends.

For a foreign donor agency entering this situation, it is very difficult to understand the ways that local political leaders may use foreign assistance to strengthen anti-democratic forces. Only if the donor agencies take the time to develop sufficiently deep links and understand local realities can they mitigate the negative effects likely to arise out of their contributions. But the issue should not be about how to avoid doing harm locally, but rather about how to avoid the greater harm that may be done to those working for democratization and human rights at the national level. Ultimately, if poverty alleviation programmes help new authoritarian regimes build an army of political slaves among the poor, then their results will be very harmful indeed, despite intentions to the contrary.

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chapter nine

Disappearances of persons and the disappearance of a system

The Sri Lankan *Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces* (the Commission Report) among its recommendations mentions the need for a training programme in investigations for all police officers (pp. 80, 174). Besides this, the Commission Report recommends that Police-Lay Visitors Panels be instituted for each police area and Citizens Advisory Bureaus for each district level (pp. 80, 174). Obviously these are measures recommended to reverse the consequences caused to the law enforcement machinery by processes that made large-scale disappearances possible in Sri Lanka. (It must be noted that even politically related disappearances are not past events, as several hundred disappearances have been reported in the country quite recently.)

In fact, the law enforcement mechanism has collapsed. Extra-judicial killings are no longer a phenomenon that merely relate to insurgency investigations, but have subtly entered into criminal investigations as a whole. In many parts of the country there are complaints of so-called self-defence killings, shootings of fleeing suspects, and the like. Complaints about the lack of, or inadequate investigation of, serious crimes have also become common. It is also no exaggeration to state that bribery in criminal cases has reached epidemic levels.

The present situation is a byproduct of the large-scale disappearances that were achieved through loosening all the hard knots that keep criminal investigations tied to the rule of law and the elementary norms of human decency. The set of Emergency Regulations used at the time of mass disappearances removed limitations from the powers of law enforcement officers. As a result, Sri Lanka lost the human resources necessary for law enforcement: i.e., a group of law-abiding law enforcement officers committed to observing an extremely high degree of caution, while also being skilful in the detection, prevention, and investigation of crimes. In the past, although the Sri Lankan achievements in developing such a professional group of law enforcement officers had their limits, they were considerable. These hard-earned habits of professional behaviour were undermined in order to encourage law enforcement officers to engage in illegal arrests and detention, torture and killings.

Control of the behaviour of law enforcement officers is usually achieved through various forms of supervision in which departments deal with law enforcement and ultimate supervision rests with the courts. The set of Emergency Regulations used at the time of these disappearances was designed to remove such controls. One control removed was judicial supervision of post-mortem inquiries; this allowed for the easy disposal of bodies. What logically followed were executions without judicial inquiries. Law enforcement officers thus got the 'freedom' to deal with 'crime' in any way they liked. The Emergency Regulations removed the most fundamental checks necessary to maintain a proper law enforcement mechanism.

Although the removal of controls was easy, effective re-imposition of these controls is not. It is easy to remove the Emergency Regulations. The chief executive or the legislature does this by means of a simple declaration. However to re-introduce controls to the same officers who have become used to operating without them is no easy task. The behaviour of a good watchdog that had been prevented from tasting blood can never be the same after the dog has tasted it. In a country that does not make a priority of incurring all the expenses necessary for human resource training and providing attractive conditions for law enforcement officers,

the re-creation of an orderly law enforcement system will remain a formidable task. Nevertheless, the delay in achieving this task poses a continuing threat to the society.

A greater danger is that even the memory of a rational system of law enforcement may be lost. Alleged criminals may be at the mercy of law enforcement officers. Contract killings may take place with varying degrees of consent on the part of the law enforcement officers. Corruption may become the deciding factor in the treatment of persons who seek recourse in the law. Politicians may exploit the situation and may themselves become compromised as a result.

Under these circumstances the Commission Report's recommendations for training programmes in investigation for police officers are quite welcome and even laudable. However, such measures are wholly inadequate to deal with the situation now prevalent in the law enforcement machinery, one in which the internal structures of proper supervision have collapsed. Any attempt at finding solutions must begin with realising the enormity of the problem and with understanding the structural issues gone wrong in the law enforcement machinery.

The social philosophy on the basis of which disappearances were encouraged: The need to maintain order, with or without law

The situation of instability and insecurity prevailing in the country during the last three decades, particularly during the last decade, has given rise to a 'consensus' that order has to be maintained with or without law. The underlying assumption is that the law itself could be an enemy of order. According to this way of thinking, certain provisions of law restrict the powers of law enforcement officers to deal with disorderly conduct by some persons or groups. It follows that the perceived restrictions need to be removed and that, once freed from such restrictions, the law enforcement officers may return order and stability to society.

This way of thinking is usually regarded as 'realistic.' The maintenance of order through legal means is considered unrealistic for the following

reasons, among others:

- The country cannot afford to have well-functioning law enforcement machinery and must therefore be resigned to defective machinery;
- Too much insistence on law may discourage law enforcement officers from carrying out their functions even to the extent that they are doing them;
- As corruption and abuse of power are facts of life in the country, it may not be a wise policy to fight too hard against them; and,
- As the insistence on law may lead to conflict, it may be necessary to restrict such agencies that insist on observing the rule of law, such as the judiciary.

These and other similar considerations form the basis for encouraging practices such as killing under certain circumstances.

The country now has the lessons gained by the experience of testing the practices ruthlessly launched on the basis of such a social philosophy. Instead of bringing about order, these practices have confounded the situation a thousandfold. Ironically, the worsening of the situation may reinforce this same philosophy. It is like the situation of a creditor who gives further credit to a debtor in the hope of regaining his earlier loans.

The recovery of the system

After the Cultural Revolution, the Chinese realised that their society's existence had been threatened. The slogan "Rule of Law as against the Rule of Man" was developed at the time. Since then, for over twenty years the Chinese have constantly struggled to rebuild a society based on the rule of law. Despite many setbacks and such cruel incidents as the Tiananmen Square killings, they have made enormous gains. Even with regard to Tiananmen Square, the killing of about 400 persons evoked tremendous adverse protests, which the disappearance of tens of thousands of persons in Sri Lanka failed to evoke. An impressive attempt to build a system based on law is taking place in China, despite the difficulties in

developing such a system in a vast country with over a billion people.

Addressing the issues of developing the rule of law and of repudiating past practices remains a fundamental challenge to all persons who wish to help the system recover from the damage suffered in its 'great fall.' A serious crisis in a system of law enforcement can also bring about the dangerous consequence of a changing mentality among persons who have been beneficiaries of the system. They may shed their loyalty to the system because it has become ineffective. They may adjust their minds to the new situation.

It is only through the efforts of those engaged in various activities relating to social change that the situation can be saved. Political thinkers, social critics, jurists, judges, journalists, those who deal with moral and ethical matters and organisations including NGOs need to help create a social fabric upon which the society can develop.

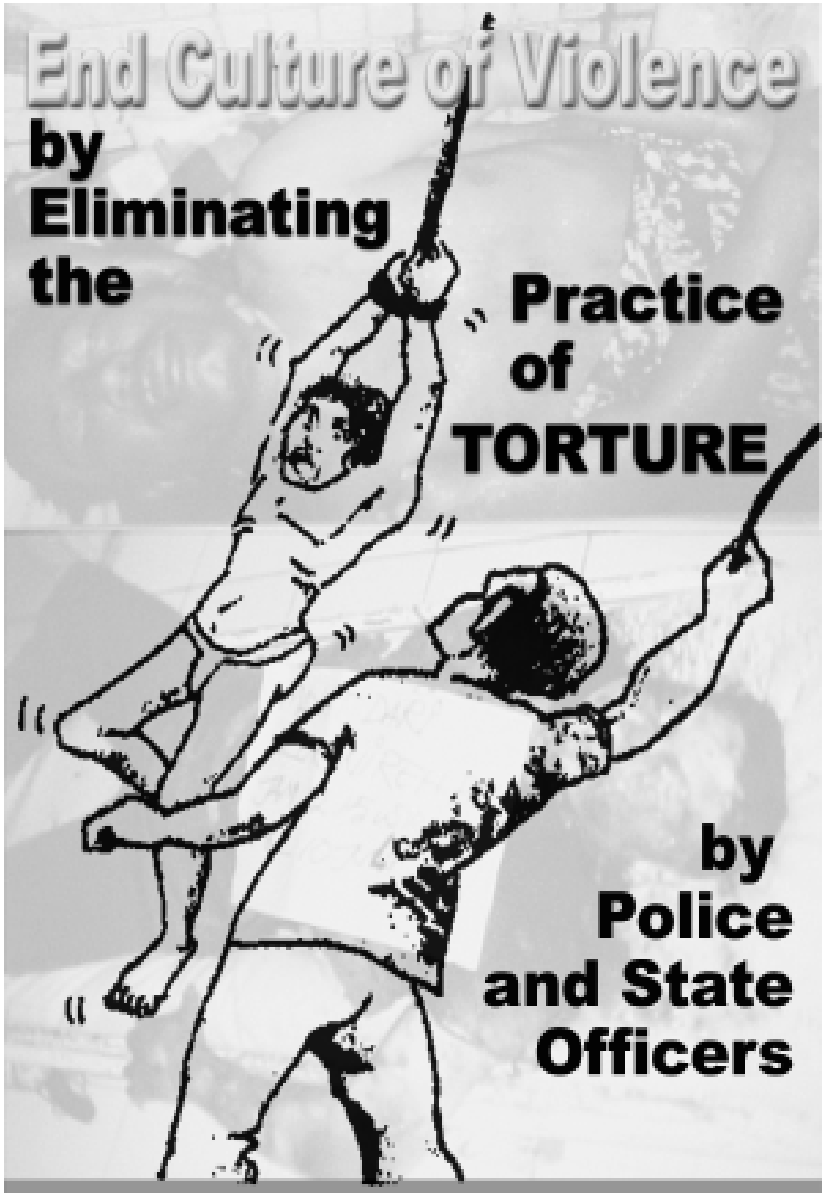
The *Interim Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces* contained the following recommendation:

> Finally, we recommend the creation of a 'Wall of Reconciliation' wherein are inscribed the names of all who have disappeared or died in this tragic period of our country's history.
>
> Your Commissioners consider this recommendation to represent a very important aspect of national reconciliation. This Memorial Wall which will contain names denoting all sections of the Sri Lankan people, will be a symbol of our essential unity to future generations, a place to which everyone in this country could come and pay respect to those lost to us.

This may be useful, as have been similar monuments in Cambodia, such as the Genocide Museum (located in a school transformed into a Khmer Rouge interrogation centre) and the Killing Fields (the location where these prisoners were later taken, executed and buried). Beyond providing an opportunity to pay respect to the dead and preserve their memory, such a wall can act as a reminder of the enormous crisis we face as a society and of the need to develop civilised ways to emerge from this situation.

End Culture of Violence

by Eliminating the Practice of TORTURE



by Police and State Officers

Religious Groups for Human Rights (RGHR) and Asian Human Rights Commission (AHRC)
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chapter ten

Trying to understand the police crisis in Sri Lanka

The case studies of torture committed by the police in Sri Lanka outlined in this special report ('Torture committed by the police in Sri Lanka, article 2, vol. 1, no. 4, 2002) are exceptional when compared to cases of torture in other countries, in that they all relate to inquiries into common crimes, or mere grievances between a police officer and his victim. They indicate a severe crisis in the way the Sri Lankan police conduct criminal investigations. Under the law, there are prescribed procedures for criminal investigations. These procedures seem to be completely ignored.

The type of assaults committed also show that police officers are not making any attempts to collect information relating to crimes in an independent or rational manner, as the law requires of them. In all these cases, and many others, the very first thing the police seem to do is to beat people mercilessly, with the hope that some information may come from their suspects. However, the extraordinary level of torture frequently committed makes the victim incapable of giving a normal answer.

Gerald Perera's case demonstrates the problem very clearly. The police were inquiring into a triple murder that had taken place some time before his arrest. The police apparently were under enormous pressure to show the results of their investigations into this very serious crime. They were unable to deal with forensic evidence. They were also not qualified in the

use of rational methods for discovering information. They seem to have been arresting people on unverified information. All these factors, when added together, had serious consequences. One of the first persons to be arrested in this triple murder case was a three-wheel taxi driver. He was harassed into admitting involvement in the crime. He has since attempted to commit suicide, unable to bear the accusations, about which he knew nothing. He was a pious Catholic and became horrified as a result. Unable to face his neighborhood community and family, he took pesticide. He has been saved, and there has been no official allegation against him to suggest involvement in the crime. This incident was highly publicised, yet even at that stage, the higher officers did not evaluate the quality of the criminal investigation. The same investigating officers remained at their posts to carry out another horrible experiment. The second victim was Gerald Perera, who also has subsequently been declared innocent. In his case, as in so many others, no evidence of any sort existed against him at the time of arrest. Someone's casual remark was enough. No statements were recorded from anyone making accusations. A belief that beating people is the path to discovering the truth was all that these criminal investigators went by. It is on that basis that the Asian Human Rights Commission has stated that there needs to be a serious inquiry into the manner in which criminal investigations are conducted at police stations.

Most disconcerting is the popular perceptions that develop among the people regarding police stations. The atmosphere in police stations is one of terror, and that does not in any way help in obtaining the type of cooperation from the public that is essential for criminal investigations. On the one hand, there is an extreme breakdown in cooperation between the public and police. On the other hand, as a result, there is even more torture, which results in a further loss of confidence and contact with the people. The criminal investigator thus functions in a vacuum.

Is torture committed due to the pressures under which police work?

There may be many factors contributing to the pressures on police officers to engage in torture. Some of these pressures are as follows:

1. Personal obligations

In the case of Angeline Roshana Michael, the police officer who engaged in the torture was the friend of a very rich family. The lady of the family complained of the loss of a gold watch and suspected the part-time domestic helper was the thief. The officer set about getting the watch back by first using verbal threats and then torture. He was trying to do a favour to his friends. In fact, the complainants were present for some time when the police tortured the victim. They were allowed to observe the abuse.

In the case of Eric Kramer, the police were trying to oblige some staff members of a company. These people wanted to find out who made an attempt to cut open one of their safes. Eric was tortured without any evidence against him. In fact, the purpose of the torture was to find something that could be used. In this case too, police officers allowed the torture to be witnessed by the staff members of the company: "See, we have done our part of the job", was the message given.

Such favours may not be purely personal. They can be in conjunction with bribery or political pressures too. It is common enough to hear of arrests and assaults made after a payment.

2. Gang behaviour

Another remarkable feature of these cases is that the police seem to be acting as a gang, rather than people doing independent work on criminal investigations. Led by one or two persons, they engage in beating suspects like thugs. Torture typically takes place at night, and is done by more than one person. In many cases the officers involved get drunk as they engage in the act.

In the case of Gerald Perera, about eight people participated in torturing him. He was hung up and assaulted by a group of police. The case of Gresha De Silva was similar. He too was hung up and beaten by a group. The beating was stopped when the officers obeyed a superior's command. When he was to be taken down, they obeyed. When the body was to be hung up and assaulted they did that also.

In the case of Nandini Sriyalatha Herat, the behavior of a male gang was very evident. One officer, on seeing the woman as their victim for that particular evening said, "Today we have a good bite." They all participated in beating the woman, stripping her, and watched while one officer put a pipe-like object into her vagina. They continued to beat her even after that. At a later stage when one officer wanted to beat her up again, another signalled him not to and he stopped. Thus, the group did work according to commands.

In the case of Lalith Rajapakse too it was just routine behaviour of a gang at that police station to spend the evening beating up people. A similar pattern is shown in cases from the Ja-ela Police Station. When the case of Angeline Roshana came to light, a woman warden—who did not want to be named—revealed that during the few days before Angeline's incident two other women were brought to the same police station and stripped, hung and beaten up. Such seems to be the evening pleasures of these officers.

3. Orders of superiors

In the case of Gresha de Silva, he clearly remembers that when he was brought to the police station, the Officer in Charge took a telephone call and reported to someone that Gresha had arrived. It was after this conversation that Gresha was taken away and tortured. The officers who tortured Gresha later told him that it was on orders from above that he was arrested. They admitted that he was innocent.

Evidence of such direct orders are few. In most cases police seem to act independently and without directly informing whoever has been arrested on how they are conducting the investigation. However, there seems to be tacit approval by immediate superiors. The common practice of torture taking place in the evenings cannot be a secret to higher officers. The departmental orders do prescribe rules for very rigid supervision by superior officers. The connivance of the superior officers is evident from the fact that when complaints are made of torture, no prompt action is taken. Action is taken only when there is strong external pressure. In the case of Lalith Rajapakse, even after huge exposure the superior officers

did not proceed against the alleged culprits. When the officers concerned filed fabricated cases against him, the superior officers did not examine these records and did not try to stop the mockery of justice.

A retired Senior Deputy Inspector General recently commented in private that there was an understanding in "the good old days", meaning till the nineties, that when a person was tortured it had to be done under the supervision of a senior officer. The idea had been to prevent uncontrolled torture, which may create problems for the victim and the department. There was no absolute prohibition against torture. Instead there was a basic belief that successful investigation into crime was impossible without torture. Thus, the gruesome torture that now occurs with such frequency has its origin in the acceptance of 'controlled' torture by the higher authorities. Clearly, there is a tradition of approval of torture by senior officers. Thus, these cases are not exceptions but part of institutional practices.

4. Pressure of publicity

Crime receives a lot of publicity in Sri Lanka. This may also put pressure on the police. The media exposes unsolved crimes. At the time Gerald Perera was tortured, officers of Wattala Police Station were investigating a triple murder. At the time of Gresha de Silva's torture, the police at Habaraduwa Police Station were investigating another murder which had received a lot of publicity.

Under such circumstances, the police may want to create the impression that they have solved the problem by getting a confession. The arrest of a person also receives publicity, whether the person is actually the culprit or not. With that, public criticism against police dies down and sometimes police officers even get promotions. Whether the actual culprits are found or someone is merely accused of the crime are two different things. It satisfies the police if someone is accused and prosecuted.

However, it must also be noted that many cases recorded by the Asian Human Rights Commission are not related to highly publicised crimes. In fact, some may not be related to any crime at all. Lalith Rajapakse's case is one such instance. The case was fabricated after the

event, in order to create an excuse to use "minimum force".

Closer study of the idea that pressures on the police result in torture show that it does not sufficiently explain such common use of torture, nor its severity. It does offer some explanation, but not a sufficient one.

The presumption behind these explanations is that police officers are seriously investigating crimes, though they make mistakes, and even grave mistakes. Is this correct about the police officers of present day Sri Lanka? How much interest do they have in criminal investigations? How much time do they spend on such investigations? Do they have more pressing concerns than crime investigations, for example, making extra money by various means each day? Do they spend as little time on investigations as possible each day, so that they may have more time for other things? In short, what is the behavioural pattern of a modern police officer? Are we seeing officially full-time but really part-time officers whose main interest lies in pursuing extra incomes? Has an understanding developed among the higher and lower ranks to keep the appearance of policing while safeguarding each other's outside interests?

"Torture is the cheapest method of criminal investigation"

One of the most common justifications of torture is that it is the cheapest method of criminal investigation. Though not expressed openly, this view is shared by the state, though publicly—and particularly for international audiences—it expresses the opposite view.

How has torture become the cheapest method of criminal investigation? By relying on cheap labour. The average police officer in Sri Lanka counts among the least educated persons in the country. Becoming a lawyer, doctor, or even a teacher takes years of education. Achieving some prominence in these or another profession requires many years of patient practice. No such basic education is necessary to be a police officer. (This is not to deny there are a handful at the top with basic degrees, and a few with longer training.) Those police officers with hardly any basic skills associated with an inquiring mind are the investigators of crime under normal circumstances. Their sensibilities are so underdeveloped that engaging in acts of brutality does not create much of a problem for

them. "The rougher the person, the better", is an underlying principle of selection, though this is not openly expressed. The recruitment, use and manipulation of cheap labour are primary elements of policing in Sri Lanka. The result is that no real selection criteria are applied in practice, though they may be used for publicity purposes.

Professional training of police in many countries now takes several years, after which they are selected on the basis of particular criteria. In some countries it takes three to four years. No such expense needs to be spent when the aim is simply to use cheap labour for policing. Just three months of 'training', if any—most of which is spent on physical exercises—is all there is. In fact, this may be a matter of policy. How can a better-trained officer adjust to the rough and brutal practices that go on in police stations?

Both the elements of cheap labour and inadequate training reveal why it is difficult for the institution to impose a high degree of discipline on the average police officer. The subject is not really capable of such discipline. Thus, cheap labour implies a high degree of tolerance of corruption within the police institution.

Under such circumstances, nothing more than cheap investigations can be expected. Cheap labour in policing means use of muscle, rather than mind. Thus, the whole police institution becomes a monster that challenges every principle of decent social dealings and shows its fist to everyone, saying, "If you have us cheap, you have no grounds to complain about what we do."

"No one can catch us"

Torture victims and their supporters who seek redress are told by police officers and their associates time and again, "Do not strike your head on a stone. No one can do us any harm." The knowledge that law enforcement officers have of the weak nature of the law enforcement system in Sri Lanka gives them the assurance that their misdeeds will not be discovered and that to escape criminal liability is not difficult. The "catch me if you can" game goes on all the time. Awareness of the difficulties that a victim will have in getting redress gives a police officer

the psychological assurance necessary to continue to commit violence against the citizenry.

Added to this is the taste of blood acquired during the period from 1971: the Emergency Regulations and later anti-terrorist laws lifted all legal safeguards against extrajudicial killings and the cruelest forms of torture and other endemic violations of rights. The killing of arrested persons became so common that in the late eighties and early nineties over 30,000 people simply disappeared, sucked through detention centres cum-torture chambers into mass graves and other anonymous sites. It was the security forces—both police and military, with criminal collaborators—that were used for that purpose. Although those terrible times have been accounted for in official reports, adequate recording and examination is yet to occur.

Having tasted blood, the habits of normal law enforcement gave way to the brutal use of force. This practice will continue if deliberate action is not taken to purposefully eliminate it. That in turn will be possible only if Sri Lankans themselves take the initiative and demand that their law enforcement agencies respect the rule of law, and in so doing, respect the people also.

chapter eleven

"Good roads or a law-abiding society?"

Investing in the rule of law

> I will only pose a simple question. Is it more important in a civilized society to build roads to match with international standards, spending literally millions of dollars, rather than to have a peaceful and law abiding society where the rule of law prevails?
>
> (K C Kamlasabayson, PC, Attorney General of Sri Lanka, 13th Kanchana Abhayapala Memorial Lecture, 2 December 2003)

Investment in the rule of law is given low priority by most states in Asia. More words are spoken on law and order and the rule of law than virtually anything else, but when it comes to money, the words lose significance. However, experience shows that to establish the rule of law with some success, such as in Hong Kong, there must be relatively heavy expenditure on the creation and maintenance of the necessary services.

Money and quality are related. As the old saying goes, "Cheap things are not good and good things are not cheap." If the rule of law is to depend on cheap services then inevitably corruption will succeed and not the rule of law. Sadly, often this seems to be the deliberate intention when the rule of law is waning. The reason is not hard to see. The rule of law is based on the strict principle of equality before law. Those who want the rule of law must also be willing to suffer if they themselves break the law. However, some groups in society commonly wish to remain outside

the law. Some want it to apply to their opponents or perceived opponents, but not to themselves. If this group of people also happens to have the largest share of power in the society then the rule of law cannot be successfully established.

Thus, to have or not to have the rule of law is somewhat like Hamlet's choice, to be or not to be. However, in society this is not an individual choice. It depends on the balance of forces, in this case, between those who wish for social stability on the basis of equality before the law and those who wish for a society that they can manipulate to their advantage without being subject to its rules. Where the rule of law is at a low ebb, those who want chaos, confusion and arbitrary ways of living and enriching themselves have prevailed over the vast majority of persons, who want to live peaceful lives in cooperation with each other.

The Attorney General's question is valid. The strange thing, however, is that those who may want good roads often succeed over those who want a good society. To understand and reveal how this happens in a particular society is to reveal how the rule of law is sacrificed to selfish interests. Whether or not this can be done depends on the public. Does a society have the maturity to accept and examine the causes leading to its own decay and possible collapse? Where the answer is yes, it will lead to dynamic interventions and actions that will tilt the balance in favour of the rule of law and against confusion, anarchy and the arbitrary rules of the few.

chapter twelve

Forensic science, mortuaries and the rights of victims of crime

The neglect of mortuaries in any place is a most distressing piece of news. Sadly, in recent months reports from several hospitals in Sri Lanka have described the careless neglect of mortuaries there. The latest comes from Anuradhapura, the country's most ancient and sacred city. It is worth setting out in full the report published in the *Sunday Observer* of 4 January 2004, titled 'Anuradhapura morgue dead, patients and staff suffer', by Athula Bandara:

> The staff and patients of the Anuradhapura Hospital have to undergo much hardship due to the odour from putrefying bodies, as the freezers at the mortuary do not work.
>
> Although two new freezer units, each which has four drawers in which only four bodies can be placed, were installed three and a half years ago, one had malfunctioned earlier and the other had ceased functioning from January 2, bringing all functions of the morgue to a standstill.
>
> Consultant [Judicial Medical Officer] of the hospital Dr D L Waidyaratne said that although one body should be placed in one drawer at a time, they have no choice but to place two bodies in one drawer. Unidentified bodies as well as bodies awaiting court orders for post mortems have to be kept outside in polythene bags, as new bodies brought to the morgue are given preference. The bodies left outside are decomposed, infested with maggots and flies swarm over them, posing a threat to the patients at the hospital.

> Due to these reasons Judicial Medical Officers at the hospital say they have no choice but to suspend carrying out all post mortems. Medical Superintendent of the hospital Dr. Laksman Gamlath said the hospital authorities have decided not to accept bodies brought from outside for post mortems on court orders but to transfer such bodies to the Kurunegala Hospital morgue. Dr. Gamlath further said that as the freezers are not in a condition to be repaired the hospital has to suspend all functions of the morgue until new freezers are installed.
>
> A source inside said that although the provincial health authorities had been informed that the equipment was below standard when it was being installed, the authorities paid no heed. He further said that the North Central Provincial Health Ministry had imported this equipment from India and it broke down quickly.

Mortuaries and culture

In the immediate hours after the death of a loved one the family suffers the shock and sadness of their loss. For them, the dead body is the most sacred thing that exists at that moment. To pay respect to their loved one, they will do all they can to keep the body in a pleasant condition. When friends and associates read the obituaries the first thing that comes to mind is to go and pay their last respects. Whether the body is buried or cremated, culture requires the utmost respect in the manner it is dealt with, which should extend to how the body is treated in the mortuary, before being handed over to the family. To do otherwise is an enormous affront in any culture. Allowing bodies to rot and decay in a mortuary is a high act of inhumanity.

Mortuaries and the law

A dead body requiring examination for legal purposes is the last and best evidence of any foul play. The loss of evidence due to decay can permanently damage a case in a court of law. Usually, the law requires qualified and licensed judicial medical officers to examine and report on the state of a dead body. If a doctor is unable to carry out such examinations due to decay, it may be the deathblow to a criminal investigation.

These days there is much campaigning about the rights of victims of crime. One of the most important rights is for a victim of murder to have his dead body preserved in a manner that all necessary examinations can be made before it is buried or cremated. Where such examination is obstructed it amounts to a gross violation of the dead person's rights. Hospitals have the duty to protect and preserve the bodies in their care. Where they mishandle bodies, they not only breach this duty but double the injustice caused to the person. To allow refrigerators to break down is not just a technical matter: it violates the most basic social obligations of the hospital authorities. To claim that the money and other resources do not exist for proper maintenance is no excuse. The state also has an obligation to provide these resources. Thus, in this case both the political and bureaucratic authorities have completely failed to do their duties.

The ultimate duty lies with the public. It is a shocking indictment of public attitudes to have many instances of gross neglect reported without them provoking angry mass protests. The public should be demanding enquiries and resignations, however, no visible protests have emerged. Organisations claiming to protect the rights of victims of crime have not even raised a murmur. Some newspapers that have devoted quite a lot of space to these rights have remained silent on this issue.

These days it is also fashionable to refer to the poor state of forensic science in the country as one of the main reasons that the authorities are unable to detect crime and convict criminals successfully. The Attorney General himself spoke on this matter at a recent lecture. However, the conditions of mortuaries are also part of the forensic science issue. If a body cannot even be preserved so that legal formalities can be undertaken, what hope is there for forensic science in the country? In fact, one achievement in Sri Lanka in the past was that competent doctors conducted proper post mortem inquiries at our hospitals. If even this has been lost, how can we expect other advances? Thus, mortuaries are a concern not only for the health authorities but also the legal authorities. It is within the power of the Attorney General to call for reports on the state of the country's mortuaries, and take appropriate action to ensure that the neglect of the bodies contained therein is ended as a matter of professional urgency.

The Government of Sri Lanka should act to normalise the situation at Anuradhapura Hospital without delay. It should then study all the mortuaries in the country with a view to bringing about widespread improvements. The government also must apologise to the families of the deceased whose bodies have been desecrated, and compensate them for their suffering. Finally, the National Human Rights Commission should take up the matter as a serious violation of human rights. A report from the Commission would be useful to awaken public opinion.

chapter thirteen

Who is responsible for the increase in crime?

The role of the underworld in causing increased crime is usually exaggerated. The underworld is often attributed superhuman capabilities, and even magical criminal powers. People talking about underworld figures say, "They can do whatever horrible thing they want." But where lies their power? Is it in money and ruthlessness? Is it in their willingness to use firearms? Is it in the intricate networks they are purported to construct? No doubt these are all factors that contribute to the image and character of the underworld, wherever it is. However, do any of these factors explain how the underworld is capable of committing grave crimes with impunity?

By contrast, the role of law enforcement agencies in failing to prevent crime is usually understated. Law enforcement agencies also have firearms and are trained to use them. They also have resources to pursue their mandate. Above all, they alone have the legitimate right to use force to achieve this mandate, and the moral support of the society for their actions. So what makes the underworld superior to the law enforcement agencies?

The question of superiority implies that there is a contest between the underworld, wanting to engage in crime, and the law enforcement agencies, wanting to suppress it. This is publicly portrayed as the bad guy versus the good guy. However, in the real world is there really such a contest?

Or is it possible that there is not competition but rather collaboration between the underworld and law enforcement agencies? Can the increase in crime be attributed to the lack of a proper contest between the two parties?

In places where the power of the underworld has been curtailed, it has generally been due not to a change within it, but rather, due to changes in the law enforcement agencies themselves. Policies directed towards cleaning up these agencies have resulted both in their own strengthening and also in suppression of the underworld itself. Hong Kong is a clear example of a place that after the police were overhauled and monitored from the 1970s onwards, the power of the underworld was greatly diminished.

There is no such thing as a powerful isolated underworld. Its power comes only with its ability to enter into close and deep cooperation with law enforcement agencies. When law enforcement agencies break down internally, the result is spreading inefficiency and corruption, and it is this from which the underworld derives its strength. When police become unwilling or incapable of investigating crimes then the underworld has made its greatest gain. When excuses are made about the weaknesses of criminal investigations—such as that there are no forensic investigation facilities, or that investigators are incompetent or are not paid enough—the underworld has much less to worry about, and can concentrate on its business unfettered. It has no superhuman powers or magical qualities. It just has nothing to fear from law enforcement agencies. Thus, any serious strategy to deal with increasing crime must concentrate on severing law enforcement agencies from the underworld, and ensuring that they are free from corruption.

chapter fourteen

National Police Commission a welcome move

Asiff Hussein talks with Basil Fernando

The newly established National Police Commission, which was constituted under the 17th Amendment of the Constitution, has been hailed as a positive step towards eliminating police torture and safeguarding the rights of the people by human rights activists.

Here, a prominent human rights campaigner, Basil Fernando, Executive Director of the Hong Kong-based Asian Human Rights Commission, speaks to the *Sunday Observer* on why he feels the National Police Commission offers the best hope yet for eliminating human rights abuses in the country, and the role the mass media and the general public could play in this process. Fernando is a qualified lawyer who has handled several cases involving human rights violations. He has been actively involved in a number of UN agencies including the Office of the United Nations Human Rights Commissioner in Cambodia. Since 1995, he has been heading the Asian Human Rights Commission and the Asian Legal Resource Centre, both based in Hong Kong.

Given your experience in mechanisms to prevent human rights violations, do you feel that the National Police Commission would be able to eliminate police torture altogether?

From the point of view of its powers, the National Police Commission is one of the most extraordinary mechanisms that has been created in Sri Lanka to check human rights violations. It has been vested with powers to act independently and is outside the policing structure. We feel that once it becomes operational, it would be able to redress cases of torture as well as other rights violations to a very high degree. This is because when we consider the rules and the powers which this body has been vested with, it has the capacity to make a difference more than any other institution. It is far more powerful than the National Human Rights Commission which has only been vested with powers of recommendation or any other similar institution. However, the Commission has yet to put in place a procedure for the making of public complaints under Section 155G. This procedure must include entertaining complaints, inquiring into complaints and deciding on redress. The Commission has been vested with the authority to conduct investigations by bodies coming under its control. They could therefore set up an investigative unit and enlist inquiring officers for the purpose. Such officers however need not necessarily be from the police. They may even be qualified civilians. The main consideration here is that they should act objectively and not come under the pressure of the police in any manner whatsoever. The Commission has also been vested with the power of making all appointments, promotions and dismissals, except for the Inspector General of Police who is appointed and dismissed by the President of the Republic. All disciplinary inquiries will also come under its purview. In short, all the basic powers of the police which earlier came under the control of the IGP [Inspector General of Police] is now vested in the Commission. Furthermore, the IGP himself comes under the control of the Commission and is directly accountable to the Commission. We therefore feel that the Commission has been vested with sufficient powers to make a change for the better. It is now up to the Commission to put its powers into practice and the duty of the state to provide them with the necessary resources. It will however be mostly dependent on the people.

Public awareness is necessary to bear pressure on the Commission to get itself going. Further, the public perception of police torture must also change and they should be made to realise that something indeed could be done about it. They should turn their attention away from the IGP, DIGs [Deputy Inspector Generals] etc. and focus it on the Commission. The media too has a very important role to play in this connection.

What are the measures that have been taken to safeguard the independence of the Commission?

The Commission could only be appointed by the Constitutional Council and its removal could be accomplished only according to procedure. The Commission will hold office for a three-year term and will have to function within a constitutional framework. Anybody appointed as the Commissioner would have to resign from whatever post he holds in public service which includes the police service. At that point, even if he were a police officer he would no longer function as one. In the case of the lower ranking jobs, police officers could be recruited, but would have to function under the control and guidelines of the Commission. We are confident that once the Commission becomes fully operational, it could, within as little as three months, build up public confidence as no other institution has and will not fail like the other institutions such as the National Human Rights Commission and the Bribery Commission which have today virtually become toothless organisations. We have been very critical of the earlier institutions, but from the very first day the proposal to establish the National Police Commission was mooted, we saw in it a great opportunity to mobilise people's confidence for change. We even went to the extent of publicising our approval in the mass media. It has been further provided that if anybody interferes with the activities of the Commission with a view to exerting undue influence, he would be committing a criminal offence which is punishable in a high court. It is a very serious offence similar to interfering with the judiciary. It is therefore up to the Commission to safeguard its independence. They cannot claim to be victims like certain officials whose jobs depend on the favours of politicians. As such, they have all the reason to act independently.

What are the reasons which you feel prompted the government to establish the Commission?

There are many reasons. We must however bear in mind that the Commission was not established at the instance of any one single party. The required amendment obtained a two thirds majority with all the major parties supporting it. I think the realisation which we all have is that things have gone too far. We are constantly reminded of this not only by the high level of crime in the country which is everybody's concern, but also the concerns of investors. No foreign investor is likely to invest in a country where the rule of law does not exist. We therefore find a situation where not only the freedom of the individual is at stake, but also the survival of the state. The major influence has however been public pressure.

How could a member of the public make a complaint of torture against the police? What are the measures that could be taken against the police officer concerned? Could complainants seek compensation from the Commission or are they to seek legal redress?

A member of the public could make a complaint orally by being present at the office of the Commission or could submit it in writing, giving all the details and addressing the complaint directly to the Commissioner. The situation will however change a lot after a proper procedure for public complaints has been established. This is one of their many constitutional duties and public pressure should be exerted to set it in place as soon as possible. With regard to the measures that could be taken against the police officer concerned, the Commission has been vested with powers of inquiry and could direct such an inquiry to a final prosecution under Act No.22 of 1994. This Act has incorporated the UN Convention against Torture under which the minimum punishment for torture is seven years imprisonment. The Prosecution of Torture Perpetrators Unit which functions under the Attorney General's Department would be controlling the inquiry while the Attorney General would be prosecuting the case. Besides being handed over for prosecution

by the state, police officers found guilty of torture could also be subjected to disciplinary action and could be dismissed from service at the discretion of the Commission as dismissals come under its purview. The Commission could even go to the extent of depriving offending police officers of their pensions in cases of very serious offences as happens in some other countries. It is up to the Commission to lay down the consequences to follow. As for the question of compensation, the Commission will be entitled to grant compensation to victims of torture. Since torture is considered one of the most heinous crimes today under international law, very high payments for compensation could be awarded to victims as per international standards. Such compensation would have to be borne by the state which should further prompt the government to take some positive measures to prevent police torture from taking place. We therefore feel that the National Police Commission will go a long way in eliminating police torture in the country.

Debate on Reintroduction of the Death Sentence

Let us not return to

the barbaric past

The way to prevent crime is to create a trained, efficient, honest and law-abiding police service.

By supplying all the necessary resources to the National Police Commission, the police service CAN BE reformed.

Asian Human Rights Commission - AHRC

chapter fifteen

An Asian framework for governance

The word 'governance' has been used with different meanings in different parts of Asia during different times. Different meanings occur in documents such as constitutions and in actual practice. In present-day Singapore the state interpretation of governance is complete control of society. In Hong Kong—which till 1997 was a British colony—state control is minimal. Yet in both of these cases the state plays very little role in recognizing and promoting the rights of its subjects. Conceptions of governance in China and Vietnam also do not include respect for the rights of individuals. Under the military dictatorship in Pakistan there is hardly any conception of systematic governance. Since the establishment of military dictatorship in Cambodia in the early seventies, followed by the Pol Pot regime—which destroyed both a large section of the population and the entire fabric of society—governance has remained at a very rudimentary level. This situation prevails despite UN intervention by way of a peacekeeping force. The 35-year-long dictatorship in Indonesia brought the military into all aspects of life. Though the upper leadership of the country changed with the fall of Suharto, the massive influence of the army within the state structure has created virtual anarchy. The Burmese dictatorship has reduced governance to direct military will, without any recognition for the rights of the people. The Indian state is a very different model, in which a democratic form of governance is in serious conflict with a social structure based on caste; there, all minorities suffer severe forms of discrimination. Other countries in South Asia—such as Nepal,

Sri Lanka and Bangladesh—follow a similar pattern.

Present day realities are very much related to the past. Under colonial domination, the development of the state in Asian countries was disrupted and retarded. This happened in some countries for three to four centuries and in others for lesser periods. The conflicts between previously existing systems and the subsequent colonial models have left tremendous confusion. This confusion has been inherent in the various models of governance that have followed the colonial period.

Prior to colonial times there had been many forms of governance during different periods in the region. Even within a given territory now known as a single nation there were many kingdoms with different ways of governance. Among these I wish to mention three models that had wide influence: first, the Indian model of absolute power known as Arthasastra model, second, the Buddhist-Asokan model, and third, the Confucian model. These are referred to as 'models' for convenience, pointing to some central feature of each which may be relevant for present day discussion. (It must, however, be noted that there are ways of governance among the adivasi—ancient indigenous peoples, also called tribal peoples—which are very different to the three dominant models mentioned here.)

The Arthasastra was written by Canakya or Kautalya around the fourth century BC. One of the eminent historians of Indian History, D D Kosambi, has observed that

> The title Arthasastra means 'The science of material gain'—for a very special type of state, not for the individual. The end was always crystal clear. Means used to attain it needed no justification. There is not the least pretence of morality or altruism. [In the Arhtasastra] the only difficulties ever discussed, no matter how gruesome and treacherous the methods, are practical, with due consideration to costs and possible effects... Espionage and the constant use of agent-provecateurs is recommended on a massive and universal scale by the Arthasastra. The sole purpose of every action was safety and profit of the state. Abstract questions of ethics are never raised or discussed in the whole book. Murder, poison, subversion were used at need by the king's secret agents, methodically and without a qualm... Strife for the throne is treated as a minor

> occupational hazard by Canakya. No regard to morality or filial piety is ever questioned. He quotes a predecessor's axiom; 'Princes, like crabs, are father eaters…' The eleventh book (probably shortened in transmission) of the Arthasastra is devoted to the methods of systematically breaking up free, powerful, armed tribes of food producers that had not yet degenerated into absolute kingdoms. The main technique was to soften them up for disintegration from within, to convert the tribesmen into members of class society based upon individual private property..
>
> (D D Kosambi, *The culture and civilization of Ancient India*, Vikas Publishing House, New Delhi, 1977, pp. 141-46.)

The use of absolute power grew even worse under the caste system, which classified people into separate categories on the basis of birth. The caste system became even more draconian by about the eight century AD, with the introduction of the Law of Manu, one of the worst forms of repressive governance ever known to humanity. Though democratic governance under the new Indian constitution (adopted in 1950) replaced the Law of Manu, the latter remains powerful, and has even eaten up much of the influence of the new constitution.

Divisions of caste split India's heart and soul. The historical beneficiaries of this model of governance were the upper castes, led by the Brahmin caste. The system that they developed over thousands of years is known as Brahminism: a collection of social regulations that amounted to the world's most comprehensive system of repression. Through a small percentage of the population being able to gain total control of the vast majority, Brahminism was able to create extreme self-contempt among the larger part of the population, and extreme self-confidence among the ruling minority. The millions of tricks the Brahmins put together to achieve this system were called 'religious rituals'. No religious ritual was too mundane and hypocritical. Brahmins gave prescriptions about eating, sitting, drinking water, use of toilets, marriage, love making, reading, dress, and everything that is possible for a human being to do. Without a place for morality, ideas of transparency and accountability were alien to this system of governance.

The Buddhist–Asokan model fundamentally differs from the

Arthasatra model in that it accepts and treasures the equality of everyone. Asoka's acceptance of Buddhist ideals is described by another eminent Indian historian, Romila Thapar, thus:

> Buddhism of [Emperor Ashoka's] age was not merely a religious belief; it was in addition a social and intellectual movement at many levels, influencing many aspects of society. Obviously, any statesman worth their name would have had to come to terms with it.
>
> (Romila Thapar, *History of India*, Volume 1, Penguin Books, 1966, p. 85.)

Kosambi has also written:

> The fundamental change was not religious so much as in the attitude shown for the first time by an Indian monarch towards his subjects: 'Whatever exertion I make, I strive only to discharge the debt that I owe to all living creatures.' This was a startlingly new and inspiring ideal of kingship, completely strange to earlier Magadhan statecraft, where the king symbolised the state's absolute power. The Arthasastra king owed nothing to anyone; his sole business was to rule for the profit of the state, with efficiency as the one ultimate criterion. With Asoka, the social philosophy expressed in the sixth-century Magadhan religions had at last penetrated the state mechanism... The king himself would now make a complete tour of inspection throughout his domains every five years. Such a tour must have taken up a good part of the five years, which implies constant travelling except in the rains. All previous royal journeys of the sort had been for personal pleasure such as hunting, or on military campaigns. Every high administrative official was likewise ordered to make a similar quinquennial tour through the entire territory under his own jurisdiction. In addition, there was created a new class of plenipotentiary supervisors with control over officials and special funds. The title was Dharma-mahamatra, which can be translated 'minister of morality', and would later be 'senior regulator of charity and religious affairs'. The correct translation at the Asokan stage is 'High Commissioner of Equity'. Equity is the principle beyond formal codified law and common law upon which both law and justice are supposedly based.
>
> (Kosambi, *The culture and civilization of Ancient India*, pp. 141-48.)

During this period, Buddhism spread to all parts of India and many other parts of Asia. Though Buddhism was wiped out brutally from India, in a genocide that is yet to be fully studied, Buddhist influence and Asoka's ruling style have remained in the Indian psyche. In fact, Gandhi's

non-violence was based on Buddhist ideas. In other lands where Buddhism spread—like Sri Lanka, Nepal, Burma, Cambodia and Thailand—its influence later waned when the Brahmin influence and that of the Law of Manu followed. Even in countries that later became Islamic—such as Pakistan, Afghanistan and Bangladesh—the underlying influence of these two models remains. Countries such as China, Vietnam and Japan came under the sway of both Buddhism and Confucianism and thus a blend of the two is found to varying degrees in the traditions of these countries.

Confucius had a strong belief in a natural order that was also a moral order reflecting ancient virtues. The task of government was to rectify society and restore it to ancient virtues. Under this approach, good governance is a matter of setting a moral example for people to follow. People have to be properly instructed in how to practice ancient virtues. To accomplish this task, the government must be run by persons of morality. Confucius said, "If a ruler himself is upright, all will go well without orders. But if he himself is not upright, even though he gives orders they will not be obeyed"(Analects XII:17). In this sense, the Confucian tradition favours the rule of men rather than the rule of law. What matters to good governance is the moral character of officials.

The traditional Chinese government was composed of a single bureaucracy headed by the emperor, with all officials sharing a common ideological orientation based on the Confucian tradition. The legitimacy of the emperor was built upon a mandate from heaven. The government stressed the importance of authority and order. It was very difficult for normal people to exert political influence; they were obliged to obey officials. But the mandate of heaven also required the emperor to look after the interests the people. If the emperor turned to oppressive rule, the officials had a responsibility to persuade him to go back on the right track. However, this internal check often did not work, because it required the officials to have great courage and to risk their lives. Without external checks and the rule of law, absolute power finally led to the corruption of government, as persons of virtue left. In this situation, the Confucian tradition allowed for a revolt against the government by the people, as the emperor was seen as having violated the mandate of heaven. However,

in Chinese history, successful revolts only brought a new emperor and left the system unchanged, starting another cycle of rule and chaos.

The evidence from various projects on governance in Asia shows clearly a very superficial approach to the political and social changes required to achieve good governance; that is, democratic governance. In fact, the term 'governance' is often regarded with cynicism in the region. Words such as 'transparency' and 'accountability' are of little meaning when the very state system stands opposed to the basic norms of democracy. Huge sums spent on projects for good governance only provide a cover for dictators engaged in brutal repression, keeping good face in Western forums and offering a defense for human rights abuses when criticized by United Nations agencies.

For systems of governance to be relevant to Asia, sensitivity both to the contemporary realties and past traditions is required. Such knowledge cannot be expected of persons who come from the west with masters degrees on governance, eager to teach what they have learned. New forms of governance only become relevant to a place when introduced through dialogue with the people, cultivating cultural sensitivity over many years.

What is common to all Asian countries developing forms of good governance is the need to create a space for genuine participation. Participation is not possible without institutional reforms that make it possible. The institutions requiring reform that are most relevant to ensuring such participation are the judicial and law-enforcement agencies. Westerners often stress the need for elections as the most important aspect of promoting good governance. However, elections without the proper intervention of a functioning judicial system and democratic law enforcement agencies end in corruption of the electoral process itself. This is the actual situation in most Asian countries today. Those who talk of governance show a remarkable incapacity to understand that judicial and law enforcement reforms are vital to its success. One reason may be that the westerners of today have mostly inherited developed judicial and law-enforcement systems and so fail to adequately reflect on these matters when discussing governance. Unless this is corrected, the discourse on governance in Asia will be futile.

It is essential that debates and discussions on cultural traditions go on in Asian civil society, in order to prepare the ground for worthwhile projects on governance. Such debates are in fact taking place. Attempts to repudiate authoritarian traditions and enhance more democratic traditions are very much a part of the current discussion on democratization, human rights and good governance. While fundamentalists attempt to interpret tradition to support modern projects of restrictive governance, there are other attempts to interpret tradition creatively, by allowing for historic circumstances and choosing paths that support democratic developments and make participation, accountability and transparency possible. It follows that the Arthasastran, Buddhist-Asokan and Confucian models, among others, are a part of our historic roots that deserve critical evaluation today.

The feudal concept of respect

has NO PLACE in a democratic society

Asian Human Rights Commission - AHRC

chapter sixteen

Democracy and the law of contempt

The appointment of a select committee of [the Sri Lankan] Parliament to inquire into and report on the Law Relating to Contempt of Court and to make recommendations regarding the codification of the existing law is a welcome move that addresses an urgent need.

The envisaged law must ensure that the law of contempt be one suitable for a democracy. Ideas of contempt in a democracy are very different to those of a feudal society. In a feudal society, as in medieval Sri Lanka, those in authority required people to kneel down before them, not even to look at them, and at all times to talk in a low voice. Such descriptions and pictures as found in Robert Knox's book *An historical relation of Ceylon* demonstrate the type of respect demanded by the authorities and elite of that society. The citizens had to humiliate themselves before those considered important. Such marks of respect were a means by which relations between those deemed to be superior and inferior were enforced and reinforced. Thus, the codes of conduct required in feudal times were methods of intimidation used as a means of social control.

The fundamental principle of a democracy is equality. No one owes any special respect to anyone else. Respect is owed to each other as human beings collectively seeking the betterment of each other. In the courtroom, judges and litigants are equals as citizens and need to mutually respect each other. The application of the equality principle in this respect is of

paramount importance to a litigant coming before the court to plead a case as a person with dignity.

The right to be heard fully and clearly is at the heart of the relationship between judges and litigants. All that can be expected from each party is that the decencies of social discourse be commonly applied to everyone. The rights of lawyers are also bound up with the rights of litigants. That each litigating party can express themselves without being afraid of hurting the sensitivities of a judge is essential to decent discourse. The litigants, including their lawyers, must be able to expect a high sense of culture and tolerance from their judges. A dynamic process of legal presentation and vigorous argumentation must be possible.

The mere fact that one or more judges in a particular case may arrive at a different conclusion to that urged by a particular litigant should not be reason enough for a litigant to cease arguing their case with a view to convincing the court of their position. Like other human beings, judges also change their minds in the course of listening to arguments.

The purpose of a contempt of court law is to safeguard the dignity of the court so that it can conduct its affairs and carry out its duties in a proper manner. Thus, such a law applies to many different situations, for example, court hearings, court orders, court attendance, etc. The issue in all circumstances is whether there is a deliberate attempt to obstruct the functioning of the court and to prevent it from carrying out its responsibilities. At the core of the doctrine of contempt is the importance of the administration of justice. If the administration of justice is obstructed in some manner, it affects the whole society, and the democratic foundations of society can be adversely impacted by such obstruction. The ultimate justification for punishment because of contempt of court is the doctrine of separation of powers.

In fact, the normal citizens do not constitute the main threat to the courts in this respect, but rather those holding authority who do not comply with court orders, do not come to court despite being summoned, and whose actions or inaction delay or undo the work of the courts. In fact, the failure of the police authorities to comply with court orders to

conduct disciplinary inquires against some officers and initiate prosecutions after the courts have made orders to this effect must be seriously considered. A further issue is whether any harm done to a person in prison, over whom the court has handed custody is, or is not, an act of contempt of court. Another interesting issue is whether any court officer who solicits or accepts payments except those that are legally due for official acts, such as issuing certified copies of documents, is not, in fact, acting in contempt of court. This list of offences should also include the acts of politicians who attempt to obstruct justice. Moreover, even political acts in which the collective position of judges is diminished or their powers removed so that they cannot fully carry out their functions to safeguard the rights of citizens in a democratic society need examination. The humiliation of judges by those in power, including the degrading removal of judges by amending the Constitution, is a matter of concern to those who care for the importance of the central role that judges play in a society. Thus, there is a vast area of official behaviour that should be considered when dealing with contempt of court.

When it comes to the cases of individual litigants, the test of contempt must be whether such conduct would be considered contemptuous behaviour under normal circumstances within a particular society. Terms such as "disturbing the court" or "scandalising the court" must be interpreted with a high degree of rationality, culture and humour. Tolerance of merely irritating behaviour by one or another party can be dealt with subtly, rather than by the use of a contempt law. All human relationships bring about situations that might not be acceptable to everyone. There are differences in education, culture and personality among people. There are also variations in expressions. This is particularly important in instances when a person is confused, or when they are out of their depth. Furthermore, if the person is deeply disturbed, shocked or frustrated, they may express themselves in an unusual way. Unusual behaviour, however, is not in itself contemptuous behaviour. The complex nature of human beings requires understanding, sympathy and compassionate treatment if decent human discourse is to be maintained.

Even after a decision is reached on the guilt of a person following an

objective assessment, the consideration of mitigating circumstances is essential in dispensing justice. In exercising powers of punishment, civilisation requires that the principle of proportionality be thoroughly honoured. Without adhering to this principle, justice can degenerate into revenge, and can have more cynical consequences than acting as a deterrence. In Sri Lanka's recent history, many young people who may have done no more than read a pamphlet were extrajudicially executed. Overcoming this feudal tradition of disproportionate punishments remains a major task that the justice system in the country must confront. As a group of people legally vested with the power to deprive a person of liberty, judges need to set an example of great restraint. If abuse of authority comes from the executive branch or anywhere else, people can turn to the judiciary to correct it. However, if the abuse emanates from the hands of a judge, people have nowhere else to turn. Consequently, judges must exercise such awesome power with the highest degree of civility possible.

In closing, the following elements should be incorporated into the law:

1. Any person accused of contempt of court must be provided with all due process rights granted to any other person accused of a crime.
2. Article 14 of the International Covenant on Civil and Political Rights, and other relevant provisions of the law must be respected.
3. A particular bench of a court that accuses a person of acting in contempt should not hear the contempt case and pronounce a verdict.
4. A court that accuses a person of acting in contempt must set out in writing the details of the acts or utterances that it deems constitute contempt, with the court presenting the facts and not just its impressions.
5. An intention to cause contempt must be treated as an element of the crime.

6. The accused must be given a charge sheet, like any person accused of a crime, in compliance with the legal requirements stipulated in the law.
7. The accused must be given sufficient time, as in other criminal case, to prepare and present his case.
8. The accused must be entitled to legal advice and legal representation.
9. The accused, if pleading guilty or found guilty, must be heard before sentencing in order to offer grounds for mitigation of the sentence.

CORRUPTION
and abuse of power by the judiciary strangle JUSTICE

Asian Human Rights Commission

chapter seventeen

"Is the judiciary a holy cow?"

The Indian debate

The Zee-TV Network raised the question of whether the Indian judiciary is a holy cow after successfully exposing a magistrate conniving with lawyers to sell arrest warrants. On 13 January 2004, its reporter and cameraman approached two advocates of Mehani Nagar Court, in Ahmedabad, Gujarat, and informed them that they were businessmen wanting to obtain arrest warrants against a few of their business rivals. They inquired whether they could manage this through the court. The lawyers accepted the challenge and demanded 40,000 rupees (US$900) as their fee, and 5000 rupees (US$110) for the magistrate. Just to check how bad the situation was, the reporter included the names of the President of India, Chief Justice of the Supreme Court, and former Chairman of the Bar Council on the list. Warrants were issued accordingly, after the magistrate got his money.

The story is now well known in India and has become an embarrassment not only to the judiciary but also to the government. India has long asserted that it has an independent and well-trained judiciary. Within India the claim has lost much of its credibility in recent decades. The Zee-TV expose has now laid bare the great myth for all to see. In the debate that followed, while there was unanimity that the lower judiciary is corrupt, some senior figures challenged the validity of making a distinction between the higher and lower judiciary when it comes to corruption.

The public debate on the judiciary had been prevented by various taboos existing in the Indian media, as well as the fear of possible contempt of court proceedings. However, after the Zee-TV revelations, many people—including past victims who have suffered due to warrants obtained in a similar manner—asked why they had been forced to remain silent about corruption in the judiciary.

Some others interviewed stated that after paying the magistrate for a warrant the matter could be completed by paying the police to organise an encounter killing at the time of arrest. Hence, from the issuing of a warrant to the extrajudicial killing, the entire business of having someone murdered could obtain a semblance of legitimacy. "Why is the judiciary treated as a holy cow?" the reporter asked his audience while showing footage of the lawyers negotiating the bribe, and the magistrate accepting his share and issuing the warrants.

Can this situation be changed? Indians know how bad it is, and it will be very difficult to convince them that a serious effort at reform can be made. It would take a massive attempt on the part of those trying to assert the independence of the judiciary in Indian politics, and those lawyers and sections of the judiciary who want to zealously safeguard their credibility, to make any good impression on the Indian mind. Those who profit from the present deplorable situation are many. Aside from the judges and lawyers collecting the bribes, they include the strong right-wing politicians who want to establish an authoritarian regime in India and therefore wish to debase the judiciary. They also include the businessmen who make profits from being able to manipulate judicial institutions through bribery. And they include the many criminal elements spread across all parts of Indian society, making it a nightmare for ordinary citizens struggling to continue their lives with a sense of security. Sadly, another group that can be added to this list is the so-called legal reformers who have organised themselves under those agitating for a new authoritarianism in the country, and who are lending their services to this end. The by now infamous Malimath Committee falls into this category. The recent introduction of a plea bargaining law, pursuant to recommendations made by this Committee, will increase judicial corruption

a thousandfold, as witnessed in neighbouring countries that have in recent decades introduced similar measures.

The entire Indian justice system is now under severe threat. Where can justice be found in a society burdened with an incompetent and corrupt police force, an inept and selective prosecution system and a rotten judiciary? The lack of a credible system of justice is not a new situation for India, however. For thousands of years, people there subsisted under the draconian Law of Manu. Whatever progress was made since independence towards a judicial system based on democratic principles has now been almost completely lost. Perhaps the only hope for reform lies in independent organisations and the media. The example given by Zee-TV is tremendously encouraging. Such initiatives to boldly expose the crass corruption and injustice inherent in the system are desperately needed. The future lies with the willingness of those who love freedom to speak loudly, and act boldly.

appendix one

Procedural implementation of Article 155G(2) of the 17th Amendment to the Constitution of Sri Lanka

A letter to the Chairman of the Sri Lankan National Police Commission

2 December 2003

Mr. Ranjith Abeysuriya PC
Chairman
National Police Commission
69-1 Ward Place,
Colombo 7
Sri Lanka

Dear Mr Chairman

Re: NPC Complaints Procedure

I am submitting the final draft of the Complaint Procedure under 155G(2) of the Constitution of Sri Lanka.

The initial draft made by AHRC [Asian Human Rights Commission]

has been studied by Dr. Jayantha Almeida Gunaratne and Kishali Pinto Jayawardene, Attorneys at Law, who have made the final draft, which is submitted herein.

May we thank the National Police Commission for giving AHRC this opportunity to cooperate with the Commission on this important task.

We are also making some suggestions as to how the whole process can begin.

If there is any other manner in which AHRC can be of assistance to the Commission in fulfilling its mandate we would be happy to do so.

Actions required in order to begin this procedure immediately:

1. The National Police Commission should discuss and adopt this procedure formally. It could adopt the procedure as a working document, which may be further adjusted after experimenting for one year or even a shorter period.

2. To assign one or more persons from the Commission to initiate the beginning of this procedure.

3. To have a training program of two to three days for all the provincial officers, on how to operate within this procedure. This would include the taking down of complaints, the communication of complaints to the Head Quarters, initial preliminary inquiries and related matters.

4. To set aside at least one session a week for dealing with the complaints procedure in relation to the complaints received. This may either be done by the Commission as a whole or by one or more persons assigned for the purpose who could report to the Commission on the progress from time to time.

5. To set aside at least one staff member at the Head Office of the NHRC to deal with the complaints procedure. His or her duties would be to receive complaints, to ensure that they are sent to the relevant provincial officers for inquiries, to receive inquiry reports within prescribed periods and attend to any matters related to this issue.

6. To seek the assistance of at least three to four professional persons

on a voluntary basis (until funds are found for this purpose) to operate as the inquiring body responsible for looking into the complaints and the actions that should be taken in terms of the complaints procedure. This group should be assigned the duties of holding inquiries when necessary and recommending action that the Commission should take. It is quite likely that there would be qualified professionals with experience who would, at this stage of the formation of the Commission, help voluntarily in this venture. It should not be a criterion to look only for retired persons, as other professionals of much younger age with sufficient experience may bring new blood into the process.

7. The very initiation of this process will be a deterrent against some of the more gross abuses by police officers, such as torture, custodial deaths and intimidation of victims and witnesses who have made complaints against the police.

8. If requested, the Asian Human Rights Commission is willing to assist the Commission by way of an initial training program and any other activities, without financial implications for the NPC.

Thank you.

Sincerely yours,

Basil Fernando
Executive Director
Asian Human Rights Commission

Article 155G(2)

> The Commission shall establish a procedure to entertain and investigate public complaints and complaints of any aggrieved person made against a police officer or the police service, and provide redress in accordance with the provisions of any law enacted by Parliament for such purposes.

Explanatory Note

The 17th Amendment to the Constitution of Sri Lanka, insofar as it provides in Article 155G(2) for the mechanism of complaints against the police, is a unique provision compared with any other legal procedures:

a. Other complaint procedures provide only for internal inquiries;

b. Under 155G(1), disciplinary control of the police service belongs to the Police Commission. Thus control of all aspects of procedures for public complaints is the responsibility of the Police Commission.

The creation of procedures is a constitutional obligation that has yet to be realised. Although ASPs [Assistant Superintendents of Police], DIGs [Deputy Inspector Generals] and the like have, so far, had the duty of investigation of complaints, disciplinary procedures in the police have been arbitrary and ad hoc. The following submission is a working template that seeks to fulfill the mandate of Section 155G(2) of the 17th Amendment.

With reference to the scope of the submissions, the procedure is not related to all aspects of police discipline, but rather confined to complaints by aggrieved parties and public complaints. Thus issues of disobedience to superiors and other internal matters are not part of this procedure, though in other jurisdictions these are taken together. This implies that our draft can exclude these aspects.

Draft Complaint Procedure under 155G(2) of the Constitution of Sri Lanka

Preamble: Principles of the Amendment

Whereas the 17th Amendment to the Constitution of Sri Lanka was passed by the Parliament of Sri Lanka in order to bring about greater transparency and accountability in public institutions and in the process of governance, in order that citizens' rights be safeguarded, particularly in so far as restoring law and order and public confidence in the rule of law is concerned;

Whereas the Police Commission was created under the 17th Amendment as foresaid, to engage in reform of the police service by functioning as an independent inquiry body into public complaints against the service as a whole, as well as individual police officers;

Whereas the 17th Amendment, by virtue of Article 155G(2) imposes a specific duty on the Police Commission to establish procedures to entertain and investigate public complaints or complaints of aggrieved persons against an individual police officer or the police service and provide redress in accordance with law;

Whereas there is tremendous public concern about the police force in general and its capacity to enforce law and order in the context of a severe deterioration of discipline, inadequate training and prevalence of practices of torture by the police resulting in public confidence in an independent police service deteriorating to an extent that threatens the very foundations of law and order in Sri Lanka;

And given therefore, that an urgent need exists for the establishing of systematic and transparent procedures under Article 155G(2), in order that public complaints are entertained, investigated and redressed in the manner required by the Constitution;

These following Rules are established by the Police Commission under Article 155G(2) of the Constitution.

Chapter 1: Entertainment of complaints

1.1 Public complaints and complaints by aggrieved parties against offender(s) regarding specific incidents

1. Any person, persons or body of persons, who are personally aggrieved or who may become aware of any action or inaction on the part of any police officer or officers leading to a violation of statutory and/or constitutional and/or public duties imposed on such officer or officers or involving a violation of the rights of any person, may complain to the Commission in the manner hereinafter provided for;

2. Such action/inaction or violation of statutory and/or constitutional duties and/or public duties by police officer/s in respect of which a complaint may be lodged as aforesaid, includes particularly;

a) Death of a person in police care or custody;

b) Allegations of torture and/or cruel, inhuman or degrading treatment and/or injury to a member of the public in police care / custody and by any action of a police official;

c) Road traffic incidents in which a police vehicle is involved;

d) Shooting incidents in which a police officer discharges a firearm in the course of a police operation;

e) Allegations of bribery or corruption involving police officers;

f) Miscarriage of justice resulting from misconduct by a police officer;

This would include:

(i) Refusal/ failure/postponement to record a statement sought to be made to the police;

(ii) Undue delay in making available certified copies of statements made to the police by any person on payment of the usual charges. Explanation:- a lapse of more than 48 hours shall be regarded as an 'undue delay' unless the Officer-in-Charge of the relevant police station or any officer under delegation of authority by such Officer-in-Charge gives in writing the reasons for any delay beyond the stipulated period which may be brought to the notice of the Commission which shall

inquire into the said alleged cause for the delay.

(iii) Discouraging complainants or witnesses from making statements;

(iv) Use of abusive words, threats or intimidation on complainants or witnesses;

(v) Chasing away complainants/witnesses who come to make complaints or statements;

(vi) Failure to maintain records - Erasing or otherwise altering records;

(vii) Making deliberate distortions in statements recorded;

(viii) Failure to read the statements over to the signatories before getting the signatures;

(ix) Exhibiting partiality towards members of political parties in the carrying out of official duties;

(x) Making false reports and statements to court;

(xi) Deliberate fabrication of cases;

(xii) Negligence in filing cases without evidence;

(xiii) Failure and/or refusal on the part of any police officer to co-operate with any Attorney-at-Law looking after the interests of his or her client and/or any attempt to deny a person his or her unfettered right to obtain legal representation.

g) Any alleged misconduct and/or breach of discipline (vide Annexure I to these Rules) on the part of a police officer or officers;

h) Racist and/or discriminatory and/or sexist conduct by police officers or conduct which offends the constitutional guarantee of equality before the law;

i) Arrestable offences allegedly committed by a police officer;

j) Any dereliction of the mandatory duties imposed on police officers by virtue of Section 56 of the Police Ordinance;

k) Any attempt to deny any individual the freedom of speech or freedom to engage in a lawful occupation, profession and business;

l) Any attempt to coerce/intimidate/subvert a medical officer or any other public officer into submitting false documents or engage in dereliction of that officer's duties;

m) In relation to arrests:

(i) Failure to make notes on each stage of the arrest;

(ii) Failure to wear a uniform or identification items as police officers;

(iii) Failure to use official transport with identification marks as a police vehicle;

(iv) Failure to inform the reasons for arrest

Provided that where a complaint is pending investigation by a police officer, the complainant will have a right of appeal to the Police Commission if reasons are provided for in writing by the complainant as to why investigations have been unsatisfactory and such reasons are accepted by the Police Commission or an officer delegated by the Police Commission.

1.2 Public complaints and complaints by aggrieved parties against the police service

Individuals or organisations may submit complaints relating to general deficiencies or concerns in the police service.

These may relate to general issues of police "mis-management and abuse of power in the public sphere" pertaining to a particular locality or in general. For example, the prevalence of torture in a particular police station may be the subject of such a complaint. Similarly, misbehaviour by police officers in a particular area or acts or omissions by police officers in a specific area, absence of some services generally expected from the police, such as an immediate police response to crimes in a locality, and similar violations, such as a number of fabricated cases and delayed investigations and alike are issues of police "mis-management and abuse of power in public sphere" pertaining to a particular area that can come under this category.

Public inquiries undertaken by the Police Commission on its own initiative or by the request or order of the courts, or at the request of the

state with regard to the police service in general may come under this category.

1.3 Submission and entertainment of complaints

1. Where the complaints are to be made: Complaints can be made at the head office and local offices of the Police Commission.

2. The manner in which complaints could be made: Complaints could be made (a) through the post, (b) by fax, (c) by telephone, (d) in person, (e) by electronic mail.

3. What is necessary for a complaint: The complaint should be made in the manner set out in the First Schedule to these Rules.

1.4 Automatic complaints system

All Officers–in-Charge of police stations, ASPs and/or DIGs and/or SPs [Superintendents of Police] shall refer to the Commission all cases specified in the following categories regardless of whether there has been a complaint or not:

a) Deaths in police care or custody;

b) Fatal road traffic incidents in which a police vehicle is involved;

c) Shooting incidents in which a police officer discharges a firearm in the course of a police operation;

d) Allegations of corruption involving police officers;

e) Miscarriages of justice resulting allegedly from misconduct by a police officer;

f) Allegations of racist and/or discriminatory and/or sexist conduct by police officers;

g) An arrestable offence allegedly committed by a police officer; and

h) Allegations of torture and injury of a person in police custody or care and by any action of a police officer.

1.5 Pro-active role of the Police Commission

The Police Commission may undertake suo moto investigations into

all or any of the instances set out in subsection 1.4 above.

1.6 Registering, documenting and (archiving is separate of registration and documentation) of complaints

How to register and document a complaint: There should be guidelines as to how the complaints are registered and documented.

a) If the complaint has been made orally, it should be reduced to writing and read to the complainant who would sign himself to attest the contents of the written complaint.

b) Written complaints received directly or by post or electronic means should be stamped by the receiving officer, indicating the time and date received.

c) All complaints should be registered on a register of complaints with a unique number, which will be the case number for further follow-up. The complainant must be informed of the unique number for further follow-up.

d) The copies of complaints should also be maintained on a computerised database in which the same unique numbering system should be followed and should also include proceeding tracking information indicating current status and responsible officer.

e) Care should be taken to maintain cross-referencing with regard to complaints received, in order that similar complaints received with regard to police officer/s under subsections 1.1, 1.2 and 1.4 can be cumulatively evaluated by the Police Commission at a given time and/or referred to by a member of the public upon authorisation given to that effect by the Police Commission.

f) All steps towards the protection of records must be followed. The Police Commission should draft regulations relating to the protection of documents which would allow aggrieved parties and/or members of the public access to completed case records upon permission given by the Police Commission.

How the complaints will be archived: The Police Commission should also issue guidelines as to how these complaints will be maintained and

protected, either through protection of written records or use of electronic recording.

Chapter 2: Procedure relating to the investigation of complaints and disciplinary inquiries thereto

2.1 Procedure relating to investigations against particular police officers under Section 1.1 and/or the automatic complaints procedure under Section 1.4

STAGE ONE

a) Immediate inquiries (Quick Response) to intervene and stop an ongoing violation against a person to ensure his/her protection and to record the initial statements and observation.

b) Inquiries to determine whether there is a prima facie case to proceed with,

c) Comprehensive fact-finding inquiries to collect all the evidence relating to the complaint.

STAGE TWO

a) Recommendations made to appropriate prosecutorial authority for the purpose of instituting criminal action against the perpetrators;

b) Where findings of such investigation indicate a breach of statutory and/or constitutional and/or public duty on the part of any police officer, the provisions of subsection 2.2 shall apply mutatis mutandis.

STAGE ONE

Immediate inquiries (Quick Response) to intervene on an ongoing violation against a person to ensure his or her protection and to record the initial statements and observation.

Duties of the First Response Officer:

- On reception of the complaint, he will visit the premises where the alleged violation has taken place or continues to take place

- He will record the statements of the victims and the alleged perpetrators and make observations on the condition of the victim/s

and record such observations.

- He/she will issue such instructions as required for the protection of the victim such as immediate medical attention when required, or relocation of the victim to stop re-victimisation by the perpetrators, and recommend such other measures as to ensure protection of the victim, family and witnesses.

a) Inquiries to determine whether there is a prima facie case to proceed with,

Duties of a Police Commission authorized officer

An authorized officer(s) will go through the available evidence and make a determination as to whether there is a prima facie case to proceed with. Where the determination is not to proceed with further investigation, the reason for such determination should be recorded by the authorized officer. Any such recommendation must be conveyed to the complainant.

b) Comprehensive fact-finding inquiries to collect all the evidence relating to the complaint.

An authorized Special Investigation Unit should conduct a comprehensive investigation.

Duties of investigators

- Recording all the statements of witnesses available;

- Viewing/examining and copying necessary records;

- Making photographs and causing forensic examination as required by the circumstances

- Referring the case for an expert opinion as and when required;

- Taking all other necessary steps to ensure that all the available evidence has been collected.

- At the end of the investigations, to review the evidence and make recommendations and submit the file for subsequent action by the Police Commission.

STAGE TWO

Recommendations made to appropriate prosecutorial authority for the purpose of instituting criminal action against the perpetrators.

- Where the Police Commission is satisfied that evidence of a criminal offense or offences exist under the prevalent law the Police Commission will refer the matter for investigation to the relevant authorities with the observation of the Police Commission that a prima facie case exists against the alleged perpetrators. An information note should be conveyed to the complainant.

- The Police Commission should follow up such reference and obtain reports on the progress of such investigations and subsequent prosecutions.

- Such reports should be made available for public scrutiny at the offices of the Police Commission unless the said reports are excluded from public scrutiny on express orders of the Police Commission.

2.2 Procedure relating to complaints that constitute breaches of public and/or statutory and/or constitutional duties

Explanation: Breach of public and/or statutory and/or constitutional duties shall include actions of police officers prohibited in terms of sub-sections (f), (g), (i), (j), (k), (l) and (m) of Section (02) of Section 1.1 above and shall also include adverse findings against any police officer by the Supreme Court in the exercise of its fundamental rights jurisdiction under Article 126 of the Constitution and willful refusal and/or failure of any police officer to comply with a request made by the Police Commission (or an officer delegated by the Police Commission) in pursuance of investigations carried out under these Rules read with the duties imposed upon such police officer under Section 3.1 of these Rules.

Upon a complaint being received to this effect or upon such breach being disclosed during investigations conducted under the preceding sub-section of these Rules, an officer of the Police Commission will record all the relevant statements and collect all evidence of acts of police officer/s that are categorised as breaches of Public and/or Statutory and/or Constitutional Duties, as defined above, within two months of the said

complaint being received or disclosed, and will refer the report therein to a Committee of the Police Commission for inquiry:

- On the basis of the comprehensive investigation contemplated in the preceding sub-section, the Police Commission will conduct a disciplinary inquiry into whether disciplinary action should be taken against the alleged perpetrators, during which inquiry, the alleged perpetrators will be charge sheeted and interdicted from service.

- The inquiry will be conducted within two months of the preliminary report being submitted to the Police Commission and will be conducted by a three-member panel of the Police Commission presided over by the Chairman or by a member of the Police Commission with authority delegated thereto by the Chairman of the Police Commission.

- The complainant and/or affected persons thereto will be notified by the Police Commission of the said inquiry. The alleged perpetrators will be given the right to defend themselves as required by law.

- After the inquiry, the Committee of the Police Commission shall make their findings in writing to the Police Commission.

- On the basis of such findings, the Police Commission will take appropriate disciplinary action as provided by law. Such a decision must be conveyed in writing to the complainants, the perpetrators and the IGP [Inspector General of Police].

- A right of appeal from such a decision of the Police Commission will exist to the Administrative Appeals Tribunal established under Article 59 of the Constitution.

2.3 Procedure relating to investigation of complaints against the police service under Section 1.2

Procedure relating to complaints against the police service

a) Upon the receipt of complaints against the police service, the Police Commission shall delegate the complaint to an officer of the Special Investigation Unit of the Police Commission for follow up action.

b) Such officers shall record all the statements of witnesses available,

view/examine and copy necessary records, make photographs and cause forensic examination as required by the circumstances, refer the case for an expert opinion as and when required, and take all other necessary steps to ensure that all the available evidence has been collected.

c) At the end of the investigations, which shall not be longer than a period of three months, the officer shall submit the report to the Police Commission.

d) Provided that, if a written request is made to the Police Commission for an extension of this time period for explainable reasons, such extensions may be granted for one month at a time, provided that the entire time period shall not extend for more than six months.

e) Upon the receipt of the report, a three member Committee of the Police Commission shall deliberate upon the report and shall cause the same to be notified to the complainant. Written representations may be called for by the public under the hand of the Secretary to the Police Commission if such is considered to be necessary. Such views may be furnished in writing or the committee of the Police Commission may also make available time for oral representations.

f) Such deliberations shall be in public unless the Police Commission sets down in writing, the reasons why it should be held in camera;

g) The report of such sub-committee of the Police Commission shall be submitted to the Police Commission sitting as a body within three months of the complaint being made along with the findings and/or recommendations of the said committee and the Police Commission shall, within two months of the report being submitted, authorise the implementation of the same with suitable modifications.

h) The findings of the Police Commission shall, along with the investigative report, be filed in the offices of the Police Commission to enable public scrutiny unless reasons are given in writing by the Police Commission as to why the report and/or the findings cannot be made public.

Chapter 3: The powers of the Police Commission, its public accountability and matters incidental thereto

3.1. The accessibility of information for an effective completion of investigations

For investigations to be thorough, the Police Commission will need open access to all relevant information.

In terms of the power given to the Police Commission under Article 155G(2) to investigate complaints against any police officer or the police service, which has been given effect to in these Rules read together with the MOU [Memorandum of Understanding] entered into between the IGP (or the acting IGP) and the Police Commission, all police officers are under a legal obligation to

a) Produce and/or give access to the Police Commission documents or other material as called for;

b) Allow members of the Police Commission to take away the actual or copies of the documents or other material; and

c) Allow entry to police premises.

Explanatory Note: Breach of these duties will result in disciplinary sanctions being visited on the errant police officer by the Police Commission acting under Section 2.2 of these Rules

1. The Police Commission should have full access, when appropriate, to all necessary information from both the public and private sector;

2. Simultaneously, the Police Commission should abide by the following guidelines when handling the information;

3. The Police Commission in its dealings with the complainant should have the discretion to disclose information from the investigation of complaints subject only to a harm test.

4. The Police Commission should have the freedom to use information received from reports and other documents from the police force, after excluding sensitive or demonstrably confidential material, to compile guidance, promotional and other material for the purpose of continuous improvement in the complaints procedure and in raising the public

awareness and understanding of the complaints procedure.

3.2 The Police Commission and its response to the complainant/s

1. Once the investigatory process mandated with regard to all complaints against a police officer is complete, the complainant/s should be sent a full written account of the investigation, setting out the way the investigation had been conducted, a summary of the evidence, the conclusions, which include the proposed action to be taken against the officer concerned, reasons for those conclusions and any action taken to prevent a recurrence.

2. If necessary, a member of the Police Commission should meet the complainant or the family of the complainant, and explain the results of the investigation and findings.

3.3 Duty of fairness on the part of Police Commission officers and prohibition on collusion with the police in any form or manner whatsover

1. All officers of the Police Commission shall be under a duty to act fairly in entertaining, acting upon or investigating complaints as mandated under Sections 1 and 2 of these Rules.

2. Any officer of the Police Commission found colluding with any police officer or officers in any form or manner whatsoever in the carrying out of their duties as contemplated by these Rules will be immediately suspended from work and upon inquiry being held, will be forthwith dismissed from the service of the Police Commission.

3.4 Police Commission and public accountability

The Police Commission should not only be unbiased, but must be perceived by the public to be unbiased. To ensure transparency and maintain the public confidence the Police Commission.

1. The Police Commission should present an annual report of its activities through means that will be accessible to the public.

2. Police Commission finances should generally be made available.

3. The Police Commission should provide an opportunity to assess the public confidence in it, through public debates and surveys.

ANNEXURES

ANNEXURE I

Breaches of discipline would include:

Violation of duties imposed by the Establishment Code of the Government of the Democratic Socialist Republic of Sri Lanka

Volume II, Issued by the Secretary to the Ministry in charge of the subject of Public Administers, 1999

The First Schedule of Offences Committed by Public Officers

1. Non-allegiance to the Constitution of the Democratic Socialist Republic of Sri Lanka.

2. Act or cause to act in such manner as to bring the Democratic Socialist Republic of Sri Lanka into disrepute.

3. Anti-government or terrorist or criminal offences.

4. Bribery or Corruption.

5. Being drunk or smelling of liquor within duty hours or within Government premises.

6. Use or be in possession of narcotic drugs within hours or within Government premises.

7. Misappropriate or cause another to misappropriate public funds.

8. Misappropriate government resources or cause such misappropriation or causes destruction or depreciation of government resources willfully or negligently.

9. Act or cause to act negligently or inadvertently or willfully in such manner as to harm government interests.

10. Act in such manner as to bring the public service into disrepute.

11. Divulge information that may harm the State, the State Service or other State Institution or make available or cause to make available State documents or copies thereof of outside parties without the permission of an appropriate authority.

12. Alter, distort, destroy or fudge State documents.

13. Conduct oneself or act in such manner as to obstruct a public officer in the discharge of his duties, or insult, or cause or threaten to cause bodily harm to a public officer.

14. Refuse to carry out lawful orders given by a senior officer or insubordination.

15. Any violation of provisions of the Establishments Cord, Financial Regulations, Public Service Commission Circulars, Public Administration Circulars, Treasury Circulars, Departmental handbooks or Manuals or willfully, inadvertently or negligently act in act in circumvention of such provisions.

16. Aid and abet, or cause to commit the above offences.

The Second Schedule of Offences Committed by Public Officers

Offences, though not falling within the First Schedule above, are caused owing to the inefficiency, incompetence, inadvertence, lack of integrity, improper negligence and indiscipline of an officer.

Explanatory Note

Disciplinary control: What does this involve?

It involves a clear understanding of what are the breaches of discipline. Thus,

1. The Police Commission, as well as all members of the police service, should know what constitute breaches of discipline in the police force and what are the consequences of each type of discipline that is breached.

2. For this to happen it is necessary to write it down; acts which will lead to disciplinary actions and possible punishments must be written down to avoid uncertainty and confusion. This is not difficult and the list needs not to be too long; however, breaches of discipline common to Sri Lankan police must be included in such a listing.

3. The procedure of entering complaints, inquiring and redress must also be written down.

ANNEXURE II

Rules relating to arrest laid down by the Indian Supreme Court in case of D K Basu vs State of West Bengal

We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures:

1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee insist be recorded in a register.

2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his / herbed, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record.

10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

11) A police control room should be provided at all District and State Headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should bc displayed on conspicuous notice board.

37. Failure to comply with the requirements herein above mentioned shall apart form rendering the concerned official liable for departmental action also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the Country, having territorial jurisdiction over the matter.

38. The requirements, referred to above flow from Articles 21 and 22(1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to which a reference has been made earlier.

A reply letter from the Chairman of the National Police Commission

NATIONAL POLICE COMMISSION
No. 69/1, Ward Place, Colombo 07.

Mr. Basil Fernando
Executive Director
Asian Human Rights Commission
Hong Kong

My Dear Basil,

Re: National Police Commission Complaints Procedure

I thank you very much for your letter of 2 December 2003 sending the final draft of the Complaints Procedure under Article 155 G (2) of the Constitution of Sri Lanka, (and also the picture showing the both of us, which I treasure very much.)

National Police Commission is extremely touched by the readiness with which you have offered to provide us with this well thought out document. Thank you, very much indeed.

I also note that you are willing to assist us in our future activities too in this regard. Shall keep in touch with you.

Sincerely yours,

Ranjith Abeysuriya PC
Chairman
National Police Commission

appendix two

Concluding observations of the United Nations Human Rights Committee on the Fifth Periodic Report of Sri Lanka

CCPR/CO/79/LKA (future)
HUMAN RIGHTS COMMITTEE
Seventy-ninth session

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

Concluding observations of the Human Rights Committee

SRI LANKA

1. The Human Rights Committee considered the combined fourth and fifth reports of Sri Lanka (CCPR/C/LKA/2002/4) during its 2156th, and 2157th meetings, held on 31 October and 3 November 2003 (see CCPR/C/SR.2156 and 2157) It adopted the present concluding observations during its 2164th meeting (CCPR/C/SR. 2164), held on .6 November 2003.

Introduction

2. The Committee notes that the report was submitted after considerable delay and combines the fourth and fifth periodic reports of Sri Lanka. It notes that the report contains detailed information on domestic legislation and relevant national case law in the field of civil and political rights, but regrets that it does not provide full information on the follow-up of the Committee's concluding observations on Sri Lanka's previous report. The Committee expresses its appreciation for the discussion with the delegation, and notes the answers, both oral and written, that were provided to its questions.

B. Positive aspects

3. The Committee welcomes the conclusion, on 24 February 2002, of a cease-fire agreement between the Government of Sri Lanka and the LTTE, and expresses the hope that the implementation and monitoring of the agreement will help to achieve a peaceful and lasting solution to a conflict which has given rise to serious violations of human rights on both sides.

4. The Committee welcomes the establishment of the National Human Rights Commission in March 1997. It notes that the Commission has begun to play an active role in the area of promotion and protection of human rights in the peace process. It expresses the hope that the Commission's monitoring and educational activities, including those projected under the Strategic Plan for 2003-2006, will receive appropriate resources.

5. The Committee notes the measures taken by the State party to improve awareness of human rights standards among public officials and members of the armed forces, and to facilitate the investigation of human rights violations. These measures include improved human rights education for all law enforcement officers, members of the armed forces and prison officers, the establishment of a central register of detainees in all parts of the country and the creation of the National Police Commission.

6. The Committee welcomes the State party's ratification of the Optional Protocol to the Covenant in October 1997, and the training workshop on the procedure under the Optional Protocol to the Covenant co-organized by the National Human Rights Commission and the UN Development Programme in December 2002.

C. Principal subjects of concern and recommendations

7. While taking note of the proposed constitutional reform and the legislative review project currently being undertaken by the National Human Rights Commission, the Committee remains concerned that Sri Lanka's legal system still does not contain provisions which cover all of the substantive rights set forth in the Covenant, or all the necessary safeguards required to prevent the restriction of Covenant rights beyond the limits permissible under the Covenant. It regrets in particular that the right to life is not expressly mentioned as a fundamental right in Chapter III of the Constitution even though the Supreme Court has, through judicial interpretation, derived protection of the right to life from other provisions of the Constitution. It is also concerned that contrary to the principles enshrined in the Covenant (e.g. the principle of non-discrimination), some Covenant rights are denied to non-citizens without any justification. It remains concerned about the provisions of article 16(1) of the Constitution, which permits existing laws to remain valid and operative notwithstanding their incompatibility with the Constitution's provisions relating to fundamental rights. There is no mechanism to challenge legislation incompatible with the provisions of the Covenant (articles 2 and 26). It considers that a limitation of one month to any challenges to the validity or legality of any "administrative or executive action" jeopardizes the enforcement of human rights, even though the Supreme Court has found that the one-month rule does not apply if sufficiently compelling circumstances exist.

The State party should ensure that its legislation gives full effect to the rights recognized in the Covenant and that domestic law is harmonized with the obligations undertaken under the Covenant.

8. The Committee is concerned that article 15 of the Constitution permits restrictions on the exercise of the fundamental rights set out in Chapter III (other than those set out in articles 10, 11, 13.3 and 13.4) which go beyond what is permissible under the provisions of the Covenant, and in particular under article 4(1) of the Covenant. It is further concerned that article 15 of the Constitution permits derogation from article15 of the Covenant, which is non-derogable, by making it possible to impose restrictions on the freedom from retroactive punishment (article 13(6) of the Constitution).

The State party should bring the provisions of Chapter III of the Constitution into conformity with articles 4 and 15 of the Covenant.

9. The Committee remains concerned about persistent reports of torture and cruel, inhuman or degrading treatment or punishment of detainees by law enforcement officials and members of the armed forces, and that the restrictive definition of torture in the 1994 Convention against Torture Act continues to raise problems in the light of article 7 of the Covenant. It regrets that the majority of prosecutions initiated against police officers or members of the armed forces on charges of abduction and unlawful confinement, as well as on charges of torture, have been inconclusive due to lack of satisfactory evidence and unavailability of witnesses, despite a number of acknowledged instances of abduction and/or unlawful confinement and/or torture, and only very few police or army officers have been found guilty and punished. The Committee also notes with concern reports that victims of human rights violations feel intimidated from bringing complaints or have been subjected to intimidation and/or threats, thereby discouraging them from pursuing appropriate avenues to obtain an effective remedy (article 2 of the Covenant).

The State party should adopt legislative and other measures to prevent such violations, in keeping with articles 2, 7 and 9 of the Covenant, and ensure effective enforcement of the legislation. It should ensure in particular that allegations of crimes committed by state security forces, especially allegations

of torture, abduction and illegal confinement, are investigated promptly and effectively with a view to prosecuting perpetrators. The National Police Commission complaints procedure should be implemented as soon as possible. The authorities should diligently enquire into all cases of suspected intimidation of witnesses and establish a witness protection program in order to put an end to the climate of fear that plagues the investigation and prosecution of such cases The capacity of the National Human Rights Commission to investigate and prosecute alleged human rights violations should be strengthened.

10. The Committee is concerned about the large number of enforced or involuntary disappearances of persons during the time of the armed conflict, and particularly about the State party's inability to identify, or inaction in identifying those responsible and to bring them to justice. This situation, taken together with the reluctance of victims to file or pursue complaints (see paragraph 9 above), creates an environment that is conducive to a culture of impunity.

The State party is urged to implement fully the right to life and physical integrity of all persons (Art 6, 7, 9 and 10, in particular) and give effect to the relevant recommendations made by the UN Working Group on Enforced or Involuntary Disappearances and the Presidential Commissions for Investigation into Enforced or Involuntary Disappearances. The National Human Rights Commission should be allocated sufficient resources to monitor the investigation and prosecution of all cases of disappearances.

11. While noting that corporal punishment has not been imposed as a sanction by the courts for about 20 years, the Committee expresses concern that it is still statutorily permitted, and that it is still used as a prison disciplinary punishment. Moreover, despite directives issued by the Ministry of Education in 2001, corporal punishment still takes place in schools (article 7).

The State party is urged to abolish all forms of corporal punishment as a matter of law and effectively to enforce these measures in primary and secondary schools, and in prisons.

12. The Committee is concerned that abortion remains a criminal offence under Sri Lankan law, except where it is performed to save the life of the mother. The Committee is also concerned by the high number of abortions in unsafe conditions, imperiling the life and health of the women concerned, in violation of articles 6 and 7 of the Covenant.

The State party should ensure that women are not compelled to continue with pregnancies, where this would be incompatible with obligations arising under the Covenant (article 7 and General Comment 28), and repeal the provisions criminalizing abortion.

13. The Committee is concerned that the Prevention of Terrorism Act (PTA) remains in force and that several of its provisions are incompatible with the Covenant (articles 4, 9 and 14). The Committee welcomes the decision of the Government, consistent with the Ceasefire Agreement of February 2002, not to apply the provisions of the PTA and to ensure that normal procedures for arrest, detention and investigation prescribed by the Criminal Procedure Code are followed. Tthe Committee is also concerned that the continued existence of the PTA allows arrest without a warrant and permits detention for an initial period of 72 hours without the person being produced before the court (sec. 7), and thereafter for up to 18 months on the basis of an administrative order issued by the Minister of Defence (sec.9). There is no legal obligation on the State to inform the detainee of the reasons for the arrest; moreover, the lawfulness of a detention order issued by the Minister of Defense cannot be challenged in court. The PTA also eliminates the power of the judge to order bail or impose a suspended sentence, and places the burden of proof on the accused that a confession was obtained under duress. The Committee is concerned that such provisions, incompatible with the Covenant, still remain legally enforceable, and that it is envisaged that they might also be incorporated into the Prevention of Organized Crimes Bill 2003.

The State party is urged to ensure that all legislation and other measure enacted taken to fight terrorism are compatible with the provisions of the Covenant. The provisions of the PTA designed to fight terrorism should not be incorporated into the draft Prevention of Organized Crime Bill to the extent that they are incompatible with the Covenant.

14. The Committee is concerned about recurrent allegations of trafficking in the State party, especially of children (article 8).

The State party should vigorously pursue its public policy to combat trafficking in children for exploitative employment and sexual exploitation, in particular through the effective implementation of all the components of the National Plan of Action adopted to give effect to this policy.

15. The Committee notes with concern that overcrowding remains a serious problem in many penitentiary institutions, with the inevitable adverse impact on conditions of detention in these facilities (article 10).

.The State party should pursue appropriate steps to reduce overcrowding in prisons, including through resorting to alternative forms of punishment. The National Human Rights Commission should be granted sufficient resources to allow it to monitor prison conditions effectively.

16. The Committee expresses concern that the procedure for the removal of judges of the Supreme Court and the Courts of Appeal set out in article 107 of the Constitution, read together with Standing Orders of Parliament, is incompatible with article 14 of the Covenant, in that it allows Parliament to exercise considerable control over the procedure for removal of judges.

The State party should strengthen the independence of the judiciary by providing for judicial, rather than parliamentary, supervision and discipline of judicial conduct.

17. While appreciating the repeal of the statutory provisions relating to criminal defamation, the Committee notes with concern that State radio and television programs still enjoy broader dissemination than privately owned stations, even though the Government has taken media-related initiatives, by repealing the laws that provide for state control of the media, by amending the National Security Act and by creating a Press Complaints Commission (article 19).

The State party is urged to protect media pluralism and avoid state monopolization of media, which would undermine the principle of freedom of expression enshrined in article 19 of the Covenant. The State party should take measures to ensure the impartiality of the Press Complaints Commission.

18. The Committee is concerned about persistent reports that media personnel and journalists face harassment, and that the majority of allegations of violations of freedom of expression have been ignored or rejected by the competent authorities. The Committee observes that the police and other government agencies frequently do not appear to take the required measures of protection to combat such practices (articles 7, 14 and 19).

The State party should take appropriate steps to prevent all cases of harassment of media personnel and journalists, and ensure that such cases are investigated promptly, thoroughly and impartially, and that those found responsible are prosecuted.

19. While commending the introduction since 1995 of legislation designed to improve the condition of women, the Committee remains concerned about the contradiction between constitutional guarantees of fundamental rights and the continuing existence of certain aspects of personal laws discriminating against women, in regard to marriage, notable the age of marriage, divorce and devolution of property (articles 3, 23, 24, and 26).

The State party should complete the ongoing process of legislative review and reform of all discriminatory laws, so as to bring them into conformity with articles 3, 23, 24 and 26 of the Covenant.

20. The Committee deplores the high incidence of violence against women, including domestic violence. It regrets that specific legislation to combat domestic violence still awaits adoption and notes with concern that marital rape is criminalized only in the case of judicial separation (article 7).

The State party is urged to enact the appropriate legislation in conformity with the Covenant without delay. It should criminalize marital rape in all circumstances. The State party is also urged to initiate awareness-raising campaigns about violence against women.

D. Dissemination of information about the Covenant (article 2)

21. The fifth periodic report should be prepared in accordance with the Committee's reporting guidelines (CCPR/C/66/GUI/Rev.1) and be submitted by 1 November 2007. The State party should pay particular attention to indicating the measures taken to give effect to these concluding observations. The Committee requests that the text of the State party's fourth periodic report and the present concluding observations be published and widely disseminated throughout the country.

22. In accordance with rule 70, paragraph 5, of the Committee's rules of procedure, the State party should provide information, within one year, on its response to the Committee's recommendations contained in paragraphs 8, 9, 10 and 18. The Committee requests the State party to provide information in its next report on the other recommendations made and on the implementation of the Covenant as a whole.

appendix three

Open letter to the international community: Let us rise to article 2 of the ICCPR

Editorial board, *article 2*
(vol. 1, no. 1, February 2002)

The inauguration of *article 2* is an occasion to address the global human rights community on a matter of primary importance: the need to deal with problems of human rights implementation, rather than confining our work merely to the propagating of ideals.

Since the adoption of the Universal Declaration of Human Rights in 1948, the human rights movement has worked hard to spread its gospel. The development of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights was a major milestone. Numerous other conventions and declarations have further improved and enhanced the body of human rights principles, and articulated them to the global community. United Nations mechanisms have provided a base for monitoring the observance of rights, not least of all through the establishment of the High Commissioner on Human Rights.

All over the world extensive programmes are now taking place to

educate people on human rights. States engage in this work to varying degrees, United Nations agencies facilitate them, and academic institutions participate. The most important education work is done by human rights organisations, predominantly voluntary bodies. As a result, today there exists a vast network of persons and organisations firmly committed to human rights: more than at any other time in the history of humankind.

Yet the actual situation is that human rights continue to be monstrously violated all over the world. The most visible abuses take place where the majority of the world's population lives: the so-called 'Third World', or 'Underdeveloped World'.

It is time for the global human rights movement to examine why it may not yet be achieving real improvement in the global human rights situation. One factor hindering honest examination is the belief that improvement of knowledge about human rights will by itself end human rights violations. This is a myth based on the corresponding belief that education is itself capable of improving things. In reality human rights can only be implemented through a system of justice. If this system is fundamentally flawed, no amount of knowledge - no amount of repetition of human rights concepts - will by itself correct the defects. Rather, they need to be studied and corrected by practical actions. Hence research and intimate knowledge of micro-level issues must become an integral part of human rights education and related work. This is the key issue in promoting and protecting human rights.

The work of human rights monitoring mechanisms is mainly focused on the correction of individual violations. This approach is inadequate when dealing with systemic breaches. For example, a country may be condemned for acts of torture, mass murder, crimes against humanity and other violations, and a monitoring body may make some recommendations to correct these. However, monitoring bodies have neither the mandate nor capacity to engage in studies on the actual functioning of components within the justice system - the police, prosecutors and judiciary - through which such recommendations have to be achieved. Thus, even if one person or another is punished, the actual system allowing violations remains, and may even get worse.

Another wrongly held belief is that enacting legislation on human rights will by itself result in improvements of rights. Legislation can work only through the mechanisms for administration of justice in each country. If those mechanisms are fundamentally flawed then legislation will remain simply in the books and will be used merely to confuse monitoring bodies into believing that actions have been taken to improve conditions. For example, a constitution may provide for fair trial, however the criminal investigation, prosecution and judicial systems may not have reached a credible standard. Such legislation then only mocks the victims and cynically manipulates monitoring bodies and the international community.

article 2 is being inaugurated to draw global attention to article 2 of the International Covenant on Civil and Political Rights (ICCPR), and make it a key concern of all partners in the global human rights community. This integral article deals with provision of adequate remedies for human rights violations by legislative, administrative and judicial means. Sadly, article 2 has become the forgotten component of the ICCPR. There is a dearth of relevant international jurisprudence, and hardly any mention of it in the enormous volumes of annual literature on human rights.

There is a reason for this neglect of article 2. In the 'Developed World', the existence of basically functioning judicial systems is taken for granted. This does not mean that these systems are perfect; in some instances there may be important challenges to them. However, to assume that these systems exist even minimally in other parts of the world is to ignore reality. A person coming from a 'developed' country may have many problems understanding this. We human beings are often prisoners of our own histories: conditions outside our upbringing and experience may be incomprehensible. Even an open-minded person may not have the means to abandon her or his framework for understanding society.

Other difficulties also arise. One is the fear to meddle in the 'internal affairs' of other countries. State parties especially can create many obstacles for those trying to go deep down to the roots of problems. Thus, inadequate knowledge of actual situations may be guaranteed by the nature of interactions in the monitoring system itself. A further and quite recent disturbing factor is the portrayal of national human rights institutions and

their equivalents as surrogate agencies for dealing with issues related to article 2. Some state parties may agree to new national human rights institutions taking on this role because they know that by doing so they may avoid criticisms of a more fundamental nature.

To overcome these difficulties, human rights movements in different parts of the world should cooperate closely in analysing and solving their respective problems. Cooperation can bring much needed in-depth knowledge of systemic obstacles to human rights implementation. Without cooperation it will not be possible to address some of the key questions facing the global human rights movement today.

After many years of study and work on these issues, the Asian Legal Resource Centre has decided that it is time to ring the alarm bells. We hope that the global human rights community will respond positively to this publication by looking into its own limitations and by trying to improve the human rights situation in different parts of the world. In the meantime, *article 2* will lead the call to arms.

appendix four

A law to encourage and reward torture: A comment on the Bill on Organized Crime

A statement by the Asian Human Rights Commission (AS-11-2003), 17 April 2003

A Bill entitled Prevention of Organized Crime was gazetted on 24 January 2003. There was hardly any publicity given to the Bill and thus there was no public debate on the matter. The speaker presented it to the Supreme Court for its opinion on constitutionality, and two citizens objected to the bill on various grounds. The court, while recording the same agreements for the same amendment by the counsel representing the state, held that that Bill does not conflict with the Constitution. The court among other things held that,

> The equality clause in our Constitution is applicable only to equals. The present Bill deals with a separate group of people who would come within a different category. Members of an organized criminal group cannot be said to be similarly circumstanced as the other petty offenders.

Obviously such division of people into equals and not equals does not have any basis in law or morality. On 11 April 2003, *The Island* reported that the President had intervened and objected to the Bill, stating that

> A democratic legal system could not tolerate a situation which encouraged unsafe convictions in the criminal justice process. Normally the more serious the possible outcome, the more stringent are the safeguards for the accused. The proposed legislation seeks to significantly dilute due procedural process and the rights of the accused to a fair trial.

The same report mentioned a government spokesman saying that the Bill would be withheld to allow public debate.

The Asian Human Rights Commission (AHRC) states that the result of this Bill will be the encouraging and rewarding of torture. The Bill gives in to the pressure of some law enforcement officers who have been demanding greater freedom to be tough in order to deal with the increase in crime. Sri Lankan police have a reputation for having caused tens of thousands of disappearances in the South and the North, and for using severe torture during criminal investigations. There has been much international and local outcry against such gross abuses of human rights.

The proposed law, which abrogates vital provisions of the Criminal Procedure Code of Sri Lanka for crimes coming within the purview of the Bill (Sections 36, 37 and 38), removes vital safeguards against torture and self-incrimination made available to persons. These safeguards, recognised in the Constitution, are to be denied persons brought under the provisions of the Bill. The Constitution does not make any provision for such abrogation. Such abrogation also clearly violates Sri Lanka's obligations as a party to the International Covenant on Civil and Political Rights and the Convention against Torture.

In the place of the abrogated provisions, the Bill introduces a new provision by which the possibility of torture is much increased. The Bill allows a person to be kept in a police station for seven days, instead of 24 hours, as it is now. The amount of torture that takes place within 24 hours is well known. What might happen when that time is increased to seven days is frightening to contemplate. Without doubt, deaths in police stations will increase. Already there are many cases of extreme torture leading to death or grave injuries within 24 hours of custody. One victim, Gerald Perera, a completely innocent man, was so tortured that the Supreme Court thought it fit to award over sixteen lakhs of rupees

(US$16,000) in compensation. It is also frightening to imagine the situation of women suspects, given what has happened in several cases in much shorter time. What comes to the imagination of some policemen when women are at their mercy has received a lot of publicity recently.

The Bill also curtails the normal safeguards by limiting the powers of the magistrates. All discretion of the magistrates for making interim orders is removed. There is no justification for such limitations, except distrust of the magistrates' capacity to make appropriate orders as required by the circumstances. Given the limitation for legal access, the persons who would be most affected would be the poor.

The Bill also removes some of the safeguards relating to fair trial. These provisions limit the discretion of High Court judges who will conduct the trials. The normal safeguards against self-incriminating statements are removed, to admit statements made under torture. The provision that a statement must be made to an officer not below the rank of Assistant Superintendent of Police (ASP), under article 30 of the Bill, is no safeguard at all. Under Emergency Regulations, only officers above the rank of Superintendent of Police could issue orders for burials. This did not prevent tens of thousands of disappearances. All gross violations of human rights involve a breakdown of proper supervision by high-ranking officers. If they had the determination to ensure discipline in the police, the present situation would be a different one. Thus, article 30 will perpetuate the prevailing bad practices. The remark this April by Justice Mark Fernando in Gerald Perera's case, regarding the Inspector General of Police, applies equally to all other high ranking officers:

> A prolonged failure to give effective directions designed to prevent violations of Article 11 (Torture), and to ensure the proper investigations, may well justify the inference of acquiescence and condonation (if not also of approval and authorization).
>
> (SCFR. 328/2002 - Gerald Perera vs. Sena Suraweera [Inspector] and eight others)

The proposed Bill fundamentally alters criminal law and procedure in Sri Lanka. By undermining the core provisions contained in sections 36, 37, and 38 of the Code of Criminal Procedure it virtually overturns the

entire code and makes it an insignificant piece of legislation. This is a consequence of making sections 25, 26, 30 and several other provisions of the Evidence Ordinance inapplicable to offences coming under the Bill. The Criminal Procedure Code and the Evidence Ordinance are two fundamental laws in the criminal jurisprudence of Sri Lanka. If this Bill becomes law, these two documents will be worthless. The trick in this Bill is to make these basic laws applicable only to petty crimes. Thus, a new logic is introduced: in petty crimes you have more safeguards, but for more serious crimes, less safeguards.

The discarding of basic laws by way of Emergency Regulations and anti-terrorism laws caused serious chaos in the justice system of Sri Lanka. Even Premadasa Udugampola, whose name was associated with the rather unhappy collapse of law in the period known as the Time of Terror—*beeshanaya*—was able to say that everything was done according to the law. In fact, the law was changed and what was otherwise grossly illegal and immoral was made law. The basic philosophy behind that approach was stated in parliament by Ranjan Wijeratne, then Minister of Defense: "We are in the process of cleaning up the local mafia. That is why we want the Emergency extended for a little more time to finish up all this also. You cannot do these things under the normal law."

Ultimately, this Bill seems to give police officers permission to freely engage in torture and make convictions easy by displacing rules relating to fair trial as too high a standard to be observed in dealing with serious crimes. This mentality, which also prevailed in making of the Emergency Regulations since 1971, was the cause for the much-lamented degeneration of the justice system, particularly the police system. A senior counsel Daya Perera, President's Counsel, described this situation at a conference held in April thus: "Criminals don't treat the Police even as equals, but as an inferior strata that can be dealt with as such. It's only a question of price" (*The Island*, 14 April 2003).

The failure to prevent serious crimes is the result mainly of the collapse of the policing system. There have been some attempts at serious measures to deal with that situation. The Torture Prevention Act (Act No 22 of 1994), which prescribes a 7-year minimum sentence for torture, is one

such measure. At last some prosecutions under that Act have started, though no one has been convicted under it yet. The implementation of the 17th Amendment is yet another very important measure to achieve the same objective. The appointment of the National Police Commission (NPC) has paved the way for an authority over the police force to deal with all matters relating to the police, including maintenance of discipline. One of the constitutional functions of the NPC is to lay down a complaint procedure to receive, investigate and redress complaints against the police.

The impact of all these measures can be lost if the proposed Bill becomes law. If that happens, crime will increase, as the most important aspect of decreasing crime is to break the police and criminal nexus. Without breaking this nexus, it is not possible to achieve the ostensible aim of the Bill, which is to eliminate serious crime. In fact, it can be seen that the Schedule of the Bill, which lists organized crimes, is entirely arbitrary and leaves out grave crimes involving a degree of organisation only manageable by the state and police, such as causing of mass disappearances, torture, and other gross violations of rights.

AHRC calls upon everyone to work to prevent this Bill from becoming law. Silence on such laws in the past has led to so many disasters. This must not be allowed to happen again.

We desperately need cross-cultural discussions on the rule of law and human rights. Much of the discourse is dominated by the West, as is the language of justice, which is associated with several centuries of struggle there. As a result, many of the problems faced by people in Asia are beyond the comprehension of those who are used to this discourse. Persons from the western tradition struggle to understand how a police officer may so readily resort to torture as his means for routine criminal investigation, or how he may spend more time making a living on the side than dealing with his official duties. They cannot easily accept that a prosecutor may belong to a powerless agency, or that a complete buffoon may sit as Chief Justice and make a mockery of the very institution he represents. An enlightened discourse on the rule of law and human rights will develop only when we break down the language barriers and understand the actual daily experiences of people throughout Asia. (from the Introduction)

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