THE theme common to the articles is the crisis of law in Sri Lanka due to 40 years of assault by several regimes that pursued an authoritarian agenda. With the electoral change on 8th January 2015, the challenge now is, how to undo the damage suffered by the legal and judicial system. This requires a sound understanding of how deep is this damage and what are the basic changes that must be undertaken. These short pieces are an attempt to answer both of these issues.

For an outsider to Sri Lanka, the events discussed in these essays may be disturbing. However, to any adult Sri Lankan, they may even sound like understatements. I hope the essays may give rise to a public discussion on these issues. Every Sri Lankan would have lot to add to this discussion.

We can ignore these fundamental issues only at the cost of further peril.

Basil Fernando is a Sri Lankan born jurist, author, poet, human rights activist, editor of Article 2 and Ethics in Action, and a prolific writer. He was awarded the Kwangju (South Korea) Human Rights Prize in 2001 and the Right Livelihood Award (known also as Alternative Nobel Prize) in 2014

Basil Fernando

Deterioration Of The Legal Intellect in Sri Lanka

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A Miraculous Cure Is Possible

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(Essays)

BASIL FERNANDO

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DEDICATION

To **GERALD PERERA**, the torture victim
who was later assassinated (2004)
to prevent him from giving evidence
before the High Court against the police,
the perpetrators, cases against whom are still
pending in courts…

To **RITA**, a young rape victim whose
case is pending
after 14 years to day…

To **PREMALAL DE SILVA** and his father and mother,
who were all assassinated as revenge
for making a complaint against
some police officers…

And, to **THOUSANDS** of others,
who continue to suffer due
to the defects of our justice institutions.

One of the most significant analysis of the new Sri Lankan sad waves. An in depth study of violence, brutality , and shocking human condition in a modern democracy. A brand new narrative to be told to the whole world. My salute.

- K. G. Sankarapillai

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FOREWORD

I FEEL privileged to write this foreword although I suspect I was not the first choice selected for the task.

The series of articles is presented with clarity and objectivity. The case studies dealt with by Mr. Basil Fernando in his characteristic style demonstrate the common theme pursued in these articles. Mr. Pattani Razeek's Case, among others, is one illustration. Indeed "the way investigation and prosecution of murder is dealt with should be used as a primary test of the authenticity and credibility of ….." any claim to good governance.

This is not a "review" of the articles but only a "Foreword". However I would have liked if Mr. Fernando had suggested a transparent mechanism by which "the way investigations and prosecution of murder is dealt with" could be monitored in order to "undo the damage suffered by the legal and judicial system."

Having said that, there is no doubt that, we, as Sri Lankans, cannot ignore some fundamental issues Mr. Fernando has raised. Therein lies the value in his call for a public discussion on those issues, in order to prevail upon the State and its primary institutions to uphold international and constitutional obligations to respect and protect basic human rights.

Dr. Jayantha de Almeida Gunaratne
President Counsel and Visiting Justice of Appeal of the Republic of Fiji
Colombo
June 2015

INTRODUCTION

THESE twelve essays were written as a series in May and June 2015 and were published in the AHRC network, countercurrents.org, Colombo Telegraph, and Sri Lanka Guardian.

The theme common to the articles is the crisis of law in Sri Lanka due to 40 years of assault by several regimes that pursued an authoritarian agenda. With the electoral change on 8th January 2015, the challenge now is, how to undo the damage suffered by the legal and judicial system. This requires a sound understanding of how deep is this damage and what are the basic changes that must be undertaken. These short pieces are an attempt to answer both of these issues.

For an outsider to Sri Lanka, the events discussed in these essays may be disturbing. However, to any adult Sri Lankan, they may even sound like understatements. I hope the essays may give rise to a public discussion on these issues. Every Sri Lankan would have lot to add to this discussion.

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Basil Fernando
June 2015

1
QUELLING MASS PROTESTS WITH EXTRAJUDICIAL KILLINGS

THE discovery of the bodies of four members of the same family in Wennapuwa on 1 January 2015 is one of the gravest crimes reported in recent times. The victims of these horrific murders were, a dental surgeon attached to the Lunuwila Hospital, her husband who was a businessman, their 13-year-old son, and 15-year-old daughter.

Police Spokesman Ajith Rohana stated to the media that an individual who had served as a watchman has been arrested in connection with these murders and that during investigations this person has confessed to committing the murders with the help of his illicit lover. Spokesman Rohana further said that while three Criminal Investigation Department (CID) officers were escorting the suspect to the crime site in order to recover the murder weapon—an axe used to commit the murders—the suspect committed suicide by jumping into the Ma-Oya River.

It is strange that three CID officers were unable to prevent the suspect, who was in their custody, from jumping into the river, and further still that they have not been able to successfully rescue this suspect even after he plunged into the River. The three CID officers were obliged to take all precautions necessary to prevent the suspect from escaping or attempting suicide while in their

custody. It is also the usual custom to handcuff an arrested suspect when he is taken out of the police station.

Given many previous examples of serious crimes of suspects being killed in custody, it is hard to believe the version given by the three CID officers regarding the death of this suspect. It is the obligation of the Inspector General of Police and other senior police officers in the area to conduct an inquiry into the death of the suspect. So far, there has been no report of any such inquiry. The Police Spokesman did not inform the public of any such inquiry into the circumstances of this custodial death.

The practice of reporting the deaths of suspects in custody, particularly in cases where the crimes are of a very serious nature, has now become frequent. This practice—of police officers claiming that suspects of a serious crime, while in custody, causing their own death, either by jumping into a river or by attempting to attack the officers that were then forced to shoot—became most frequent during the second term of the Mahinda Rajapaksa government.

After the conflict with the LTTE was over people gradually became aware that law enforcement in Sri Lanka had been seriously undermined and that there were pressures on the government to take effective action to restore law and order. Such demands became more acute due to a series of very serious crimes that began to occur in various parts of the country.

Obviously, the criminals were utilising widespread instability in the country and very visible inaction on the part of law enforcement officers. This mass dissatisfaction began to be expressed by way of shock waves, particularly when a whole family was murdered. This compelled the government to demonstrate that the situation was still under their control.

The method that was adopted by the government to demonstrate their control was to announce that a special team from the Special Task Force (STF) had been sent into the area where the crime had occurred and that this team was seriously investigating the matter. The pictures of the officers in action were

also often exhibited in newspapers. The next thing people would hear is that the culprits had been captured and as they tried to escape from custody, the officers had been compelled to shoot them to death.

With this, the idea of bringing such suspects before the courts, and investigating and prosecuting them, as was the practice in the country for a long time, was replaced by the type of drama described above.

This method of trying to quell the people, after they had been shocked enough to protest, was a product of the Ministry of Defence, which was then under the control the Secretary of the Ministry, Gotabaya Rajapaksa. He would himself appear at news conferences and quite triumphantly claim that whenever serious crimes have occurred the government has intervened decisively and brought the matter to a successful end.

Thus, the successful end to a crime was no longer the enforcement of the law within the framework of due process, followed by bringing the culprits to court to face a fair trial, the outcome of which could only be determined by the judge presiding over the case.

The law and the judge were both displaced. Even the criminal investigative process was displaced. In its place, a group of paramilitary officers were assigned. And the ultimate outcome was a summary execution, disguised as a killing in self-defence or a suicide by the culprits themselves. Of course, no one would have taken the story of the attempted escape or the suicide seriously. Everybody guessed what had really taken place. Thus, with such interventions from the very top of government, the legal process, when it came to such scandalous crimes, was suspended.

The legal intellect was simply silenced. The prosecuting lawyers and the defence lawyers and the judge all became irrelevant factors when dealing with crime. In fact, the legal intellect was considered irrelevant. It was in the aftermath of the second Janatha Vimukthi Peramuna (JVP) that the then Deputy Defence Minister Ranjan Wijeratne claimed in Parliament that these things couldn't be done

following legal rules. Gradually, this was extended to crime control in general. In tracing the rapid deterioration of the legal intellect in Sri Lanka, the extrajudicial killings committed by the State should be scrutinised as one of the most significant factors for such a deterioration.

2

FATHER, MOTHER, AND SON KILLED IN RETALIATION FOR FILING A FUNDAMENTAL RIGHTS PETITION AGAINST FIVE POLICE OFFICERS

GEEKIYANAGE Premalal De Silva filed a Petition in the Supreme Court of Sri Lanka in 1989 alleging that some officers of the Panadura Police arrested him in May 1989, without a warrant, on a false charge of robbery and that he was tortured and subjected to cruel, inhuman, and degrading treatment while in custody.

In September 1990, the Court delivered a judgment confirming the arrest of De Silva as alleged by him. The judgment held that no cogent evidence had been produced by the respondent police officers to justify suspicion against De Silva and that his detention following arrest, without producing him before a Magistrate as required by Section 36 and 37 of the Criminal Procedure Code, was unlawful. It also confirmed that while in police custody De Silva was subjected to torture and inhumane treatment and that the 2nd and 3rd Respondents had been adequately identified as police officers involved in De Silva's arrest and the subsequent violation of his rights and that by such acts the officers had violated Article 13(1), Article 13(2), Article 13(4), and Article 11 of the Constitution [Premalal De Silva v. Inspector Rodrigo and others, SC Application No 24 /89].

The Court held that the two police officers, named as 2nd and 3rd Respondents, and the State are jointly and severally liable to compensate the Petitioner. However, the Court made the following unusual order: "…if the Petitioner has disappeared the compensation is payable to his legal representative…."

While the Supreme Court was considering the Petition, the police officers arrested De Silva. They arrested him when he went to sign the Police Book, as required by the Order of the Magistrate. Thereafter, De Silva disappeared. When De Silva did not return home after several hours of his visit to the Panadura Police Station his father went to the Police Station to look for him. Thereafter, De Silva's father also disappeared. A short time after the father's visit to the Police Station, the mother of De Silva went to look for both of them. She too disappeared.

Thus, as revenge against a complaint being lodged by De Silva, De Silva himself, his father, and his mother were made to disappear, and they remain disappeared to this day. In other words, they were illegally arrested, killed, and their bodies disposed of in secret.

The very same day, when the three members of the family had been subjected to this treatment, a group of police officers also

came looking for De Silva's younger brother. The younger brother managed to escape by giving a false identity and thereafter went into hiding. Today, De Silva's younger brother is the sole survivor of that family.

This triple disappearance in revenge of a complaint made by a citizen against illegal arrests and torture by police officers showcases the absence of redress for human rights abuses suffered at the hands of security officers in Sri Lanka. By way of severe reprisals, the complainants are intimidated and thus discouraged from making complaints against security officers.

The name of the petitioner in the fundamental rights case was Premalal De Silva; the name of his father was Jinson De Silva, the name of his mother was Greta De Soyza. While Premalal had filed the fundamental rights petition, his father and mother had submitted affidavits affirming that they have visited the Petitioner while he was in the custody at the Panadura Police Station.

In his Petition, Premalal complained, among other things, of being taken into a room by five police officers and treated in the following way:

> "… he was taken tied up in a crouched position with his hands over his knees and suspended on a pole passed through his hands and knees. The two ends of the pole were placed on two tables. The 3rd respondent then rotated him and the 2nd respondent struck his soles with an iron rod. The 4th respondent too assaulted him with the iron rod. The 3rd respondent walked on his body and kicked him. At the same time, they questioned him about a robbery said to have been committed with one Sisira at a cigarette agency. One Sisira was brought in and the police questioned him as to whether the petitioner is the other person who joined in the robbery to which Sisira answered in the negative. As a result of the assault, he sustained injuries on his hands and legs…."

The Judicial Medical Officer's Report indicated 11 injuries and the Officer reported that the injuries were consistent with the history given by the Petitioner. It was after the examination of all

evidence in the case that three judges of the Supreme Court – Kulatunge J, H.A.G. De Silva J, and Dheeraratne J, concurred that the arrest of the Petitioner was violative of his rights under Article 13(1), that his detention was violative of Article 13(2) and 13(4), and that the Petitioner had been subjected to torture and inhumane treatment in breach of Article 11 of the Constitution. Furthermore, they held that the 2nd and 3rd Respondent police officers and the State are jointly and severally liable to compensate the Petitioner.

However, what the police officers did in order to cover up their wrongdoing against the Petitioner, was to have the Petitioner and his two witnesses, his father and mother, killed. It was sheer luck that his younger brother was able to escape the same fate by falsifying his identity. The intention of the police officers was to kill the entire family, with the expectation that, thereby, there would be no one to pursue the case being heard against them in the Supreme Court.

Despite the Supreme Court finding two officers to have violated the fundamental rights of the Petitioner, both officers continued to work and continued to receive promotions in their capacities as officers. One of them retired at the end of his term; the other still continues to work in the police service as an officer in charge of a police station.

In any country, cold-blooded and planned murders of a father, a mother, and a son would have shocked the entire society and the State would have been prevented from ignoring such a heinous crime. But in Sri Lanka, even such a crime committed by those meant to enforce the law, did not disturb anyone's conscience. The extent to which the legal intellect of Sri Lanka has been paralysed is bewildering. However, today there is hardly anyone left whom such terrible spectacles may bewilder.

One fundamental element of a civilised legal system is that the state will do everything it can, and put all its resources in order, to take legal notice of every murder, and to have the perpetrators of such murders brought to justice. This norm is no longer operative in Sri Lanka.

The state has demonstrably failed to act in the face of murder and other serious crimes. People who hold office as law enforcement officers, prosecutors, and judges do not feel a sense of obligation to ensure the implementation of law, even in the face of gruesome murders and other serious crimes.

Discussions on the impact of the 1978 Constitution and its so-called system of power of the executive presidency remain superficial even as measures are being discussed to amend the obnoxious clauses of this Constitution. What no one wants to consider is that the 1978 Constitution was made with the view to completely derail the rule of law system in Sri Lanka. The success of that derailing project is so complete that today, even the failure to prosecute a murder has become an insignificant matter.

To anyone who is left with an iota of legal sensitivity, this triple murder of a father, a mother, and a son, carried out solely with the view of subverting the law, should become a challenge.

If there is a will, even now, it is not too late to investigate this ugly and horrible affair.

3
DESCENT INTO THE SELLING OF CHILDREN

IN April 2015, several news reports revealed the story of an 8-year-old child (reported as a 10-year-old by some media houses) from Ambathenna, Katugastota. The mother made the initial report about her missing child to the Katugastota police. Initially, the police ignored the complaint and did nothing to begin searching for the child. It was only after a tip-off from a woman who witnessed the sale of the child that the police intervened. According to the reports, the police officers that arrived at the scene were able to recover the Rs. 50,000 used to buy the child.

Further, according to reports, the child is the third, in the family of four children. The father of the child is said to be disabled and bed-ridden for a long period of time and the mother has been unable to cater to the needs of the children.

The man who bought the child, and his sister, were arrested as suspects and were later released on bail. According to one report, the mother is also suspected as being involved in the sale of her child and has also been arrested. She has not been granted baile as no one has come forward to stand as surety for her release.

Four years ago, in March 2010, another story made sensational news. That was, when a mother of five children threw her youngest child into the Kalu Ganga (River), as she was unable to provide for the child. Before doing this, she had attempted to get her children

admitted to an orphanage so that at least there, they could find some food to eat, but even that attempt had failed. It was only after this pathetic story of the mother throwing her youngest child into the river received nationwide news coverage that the four elder children were admitted to an orphanage.

Now we have this story about a child being sold in the manner commodities are being sold. The manner in which this story has been reported did not suggest any shock on the part of the various authorities – such as police authorities and childcare authorities – or even among the reporters themselves. No one seems to have noticed the heinousness of this crime and the level of moral degeneration that this country has reached for it to have become possible that one neighbour would conspire to sell a child of another neighbour's family and to make profit out of it. It appears that the Magistrate himself has not treated the matter with due importance and has simply allowed bail to the two culprits.

This author first encountered a child sale when a human rights organisation in Cambodia brought a male child who was about five-years-old to the United Nation's Human Rights Centre's office in Cambodia in the early 1990s. Some persons from the human rights organisation, having heard of a child sale, pretended to be buyers and offered a higher price than the other buyers, with a view to rescuing the child. The child was brought to the UN Human Rights Centre's office in order to facilitate the possibility of finding a secure place for the child to be taken care of.

Hearing this news of a child sale shocked me, as I had never heard of any such thing before. In the environment in which I grew up, everyone in the neighbourhood considered their neighbour's children as their own. When we made further inquiries about this child sale in Cambodia, we learned that it was a well-known affair in that country. Under Pol Pot's regime (1975-1979), the entire country was devastated and over 1/7th of the population died, either due to political prosecution or due to starvation. Among those who suffered most, were the children, taken away from their parents when they were just infants; according to Pol Pot's ideology, children acquired reactionary habits if they were allowed to live with their parents. To nurture them in revolutionary habits,

the children were taken away from their parents. Though Pol Pot's regime collapsed after four years, the terrible consequences of those catastrophic years were still manifesting in the early 1990s when the United Nations intervened with the agreement of all political factions in Cambodia in order to seek a political settlement by way of an election conducted under the supervision of the United Nation's Transitional Authority for Cambodia(UNTAC). Child sales were a part of the legacy of those terrible times.

Now, this child sale at Katugastota, conducted so casually, shows that even such acts are not being considered morally disgusting and socially outrageous. The country's legal system has become so dysfunctional that even an issue such as a child sale, does not lead to a ringing of alarm bells. Despite communication facilities being so enhanced and advanced in the country, there are no programmes or procedures established within the policing system to deal with a situation involving a missing child or a child sale.

Recall that the Kalu Ganga incident, when the destitute mother threw her child into the River, was soon forgotten. Even that incident did not lead to any political or a popular discourse on the ways to deal with such desperate situations. In comparison, however, the Katugastota child sale has not even received as much public notice as the Kalu Ganga tragedy.

When a legal system becomes so pathetically paralysed that the law enforcement authorities lose the capacity to react with empathy, even, on issues such as child sales, it is a clear indication of a society that has lost any humane sensibility.

What sense does it make to talk about "yahapalanaya" (good governance) in a social environment like that which exists in Sri Lanka today? When even the basic capacity for child-care ceases to be the concern of the State, how could it proclaim to be pursuing good governance?

4

UNHRC FINDS FAULT WITH THE POLICE, THE FORENSIC PATHOLOGIST, THE ATTORNEY GENERAL, AND THE SUPREME COURT

A DETERMINATION issued by the United Nation's Human Rights Committee on 1 April 2015, reveals extraordinary failures on the part of Sri Lankan State agencies – the police, the forensic pathologist, the Attorney General, and the Supreme Court – regarding a custodial death that took place at the Moragahahena Police Station on 26 July 2003. The following Committee Members participated in the examination of the case in question: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelic, Duncan Muhumuza Laki, Photini Pazartis, Mauro Politi, Sir Nigel Rodley, Victor Manuel Rodriguez-Rescia, Fabian Omar Salvioli, Dheerujlall B. Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili, and Margo Waterval.

The facts of the case are that Sunil Hemachandra (Sunil) was once a healthy and a literate man with no criminal record. He was a daily paid labourer, mostly engaged in tapping of rubber and climbing trees for plucking coconuts.

His misfortunes began, ironically, when he won a lottery ticket of a little over 3 million rupees (approximately USD $25,000).

Through the lottery agent, the Moragahahena police learned about Sunil having won the lottery; the Officer-in-Charge of the Moragahahena Police Station sent a police officer with the message that Sunil should arrive at the Station, along with his ticket, and stay there for his own safety. Sunil did not comply this request. Instead, he went with his mother and aunt, en-cashed his winning ticket, and immediately deposited it in his aunt's bank account. Thereafter, he bought a van for 1.2 million rupees, a three-wheeler for one of his nieces, and gave 5,000 rupees to his nephew as a gift.

A few weeks later, a team of police officers from the Moragahahena Police Station came looking for Sunil; they inquired from his aunt whether Sunil had spent his lottery money. One of the police officers warned, "his [Sunil's] happiness would not last long". The police officers left a message for Sunil to report to the Moragahahena Police Station.

On the same day, Sunil, accompanied by an acquaintance, Chanaka, and along with the son of the lottery agent, Lionel, went to the police station. At the Police Station, one of the police officers (a Sub Inspector) requested Sunil to pay money as "support". Sunil had replied that the money was not with him and declined to pay. The same police officer then insisted on the payment of 25,000 Rupees "to cover the expenses of a procession of the Vidyaratne Temple in Horana", to which Sunil agreed.

On 22 July 2003, five police officers from the same police station arrived in a vehicle at Sunil's aunt's house and, seeing him asleep in his room, identified him as being "the one who won the lottery" and then they proceeded to beat him, which included hitting him on his head. The police officers proceeded to arrest Sunil and Chanaka and continued beating Sunil at the time of the arrest and during the ride in the police jeep to the police station, when he was hit on his head and in his abdomen. Chanaka was hit in the face, several times, when he asked the officers to stop beating Sunil.

Sunil and Chanaka were taken to the Moragahahena Police Station and placed in a small cell with several other detainees. Next morning, Chanaka found that Sunil was visibly unwell and was

bleeding from his nose and his mouth, and was not able to stand. Chanaka alerted the police officers of Sunil's critical health condition. However, the officers merely asked Chanaka to take Sunil to the backyard and to wipe the blood off his face. The bleeding however, continued uninterrupted from his nose and mouth and Sunil began vomiting blood clots. One of the police officers directed Chanaka to give Sunil an iron rod to hold, which is done in the case of epileptic attacks.

The same morning, Sunil's aunt came to the police station and found Sunil lying on the floor of the cell bleeding from his nose and mouth. She too alerted the police about Sunil's serious condition, but was chased away by the police.

It was only later during the day that Sunil was finally taken to the Horana Base-Hospital in a police vehicle. Sunil's aunt visited him at the Police Station and was told by Sunil that he had been brutally assaulted by the officers. She found him to be in severe pain and his face was red and swollen.

Later, on the same day, two police officers from the same station arrived at the hospital to record Sunil's statement. But he was only able to mention his name. However, the police officer wrote something on two lists of paper while talking to the other. The officers then obtained two impressions of Sunil's left thumb, in lieu of his signature, although Sunil was capable of signing his name.

The next day Sunil's family learned that he had been transferred to the National Hospital in Colombo, where he had undergone brain surgery. On 26 July 2003, staff at the National Hospital informed his aunt that Sunil passed away earlier that day.

Three days before his death, while Sunil was in hospital, Sunil's aunt went to the office of the Assistant Superintendent of Police in Horana, and attempted to complain of Sunil's arrest and torture. But her complaint was not recorded by the Superintendent of the Police. It was only on 26 July 2003, that the Assistant Superintendent of the police in Horana recorded a statement from the aunt and Chanaka, who was released from police custody.

Sunil's aunt also made a complaint to the National Human Rights Commission (NHRC), and with the help of a human rights organisation "Janasansadaya" lodged a Fundamental Rights Petition before the Supreme Court of Sri Lanka, in which a number of officials and institutions were cited as respondents.

The aunt's complaint to the NHRC remained unanswered till August 2008, when the NHRC stated that as a Fundamental rights case had been filed before the Supreme Court, the NHRC will not make any inquiry while the case is pending. Since then, Sunil's family has not heard from the NHRC.

The Additional Magistrate of the Colombo Chief Magistrate's Court opened an inquiry into Sunil Hemachandra's death and heard the statements of Sunil's aunt and Chanaka. The Additional Magistrate noted that in the police report from Moragahahena Police Station "there was no entry whatsoever, revealing the reason for which Sunil has been arrested by the police". The Magistrate also noted after observing the victim's body in the mortuary, that among other injuries he noted an injury of "about one inch slightly above the buttocks on the left side of the back".

A few days later, a Consultant Judicial Medical Officer (JMO) from Colombo conducted a post mortem examination. His report documented ten pre-mortal injuries, four contusions, four aberrations, one peri-orbital haematoma ("black eyes") around the left eye and one surgical incision. However, the JMO made no record of the injury on the left side of the back observed by the Additional Magistrate. The JMO identified the cause of Sunil's death as "acute subdural haemorrhage following a head injury caused by blunt trauma". The report identified four possible origins of fatal haemorrhage: a heavy blow on the back of the victim with a weapon or a kick with boots; a fall due to being pushed; accidental fall; or a fit due to alcohol withdrawal or epilepsy. Strangely, the report concluded that it was "possible that the cause of death was a fall following alcohol withdrawal, a finding seemly derived solely from the discovery of an "enlarged and fatigued liver" in the body of the deceased.

On 8 August 2003, the Magistrate of Horana directed the Senior Superintendent of the Panadura Police to investigate and produce the suspects before the court as the circumstances surrounding the victim's death seemed suspicious.

However, on 29 August 2004, the Attorney General decided that no charge could be filed in connection with Sunil Hemachandra's death as there was no evidence of any assault on the victim. On the basis of this reference by the Attorney General, the Magistrate removed the case from the roll.

Regarding the author's petition to the Supreme Court, which was made in September 2003, a decision was made on 6 August 2010. The Supreme Court dismissed the application based on the conclusion that "the fall being due to a fit following alcohol withdrawal was highly possible".

Concluding findings of the UNHRC

The UN Human Rights Committee considered Sunil's case on the basis of information placed before the Committee. It should be noted that Sri Lanka as a State party was under obligation to reply to complaints placed by the UNHRC under the Optional Protocol to the International Covenant on Civil and Political Rights. However, despite requests having been made to the state party, twice, by the UNHRC, the State party made no reply to the allegations made in this Communication.

The UNHRC arrived at the following findings:

Arbitrary deprivation of life

Regarding the author's claims under Article 6, in relation to arbitrary deprivation of Sunil Hemachandra's life, the Committee recalled its jurisprudence, in which it determined that by arresting and detaining individuals, the State party takes the responsibility to care for their life, and that a death of any type in custody, should be regarded as prima facie a summary and arbitrary execution. "Consequently there should be a thorough, prompt, and an impartial investigation to confirm or rebut this presumption,

especially when complaints by relatives or other reliable reports suggest unnatural death". Members of the Moragahahena Police Station arrested Sunil Hemachandra on 22nd July 2003 at his place of residence. Four days later, on 26th July 2003, he died in the National Hospital in Colombo, as a direct result of an "acute subdural hemorrhage following a head injury cause by blunt trauma". Although the victim was bleeding uninterruptedly, i.e. he was in a visibly critical medical condition the day after his arrest and placement in detention (23rd July 2003), the police failed to seek medical assistance for at least three hours.

State party's investigation into suspicious circumstances of the death of Sunil inadequate

The Committee has recalled that criminal investigation and consequential prosecution are necessary remedies for violations of human rights, such as those protected by Article 6 and 7 of the Covenant. In this case, the Committee has observed that all investigative steps undertaken by the State party were carried out by members of the Moragahahena Police Station, i.e. the same police officers which arrested and detained Sunil Hemachandra; that the investigation ordered on 8 August 2003 by the Magistrate of Horana was closed, further to the Attorney General's decision of 29th April 2004 not to pursue charges for assault; that it took the Supreme Court seven years to rule on the Fundamental Rights Petition filed by the author; that, in its decision on 6 August 2010, the Supreme Court discarded the possibility of the victim's custodial death as a result of torture, without ordering any independent investigation to ascertain the facts and identify possible perpetrators: no police officer was identified as a suspect and interrogated, let alone suspended or brought to justice. In the absence of any explanation by the State party, the Committee has concluded that the State party's investigations into the suspicious circumstances of the death of Sunil Hemachandra are inadequate. The Committee has concluded that the State party's authorities, either by action or omission, were responsible for not taking adequate measures to protect Sunil Hemachandra's life, and to properly investigate his death and take appropriate action against those found responsible, in breach of Article 6 paragraph 1, read alone, and in conjunction with Article 2 paragraph 3 of the

Covenant.

Torture and failure to provide immediate medical attention

The UNHRC has concluded that severe torture had been committed at the Moragahahena Police Station and that the State party has also failed to provide immediate medical attention even after the serious condition of the detainee was brought to their notice.

Illegal arrest

The UNHRC concluded that the arrest and detention of Sunil Hemachandra was also illegal and that the State party failed also to inform the reason for his arrest.

UNHRC Recommendation to be fulfilled by the Government of Sri Lanka within 180 days

The UNHRC has recommended that Sri Lanka as a State party should undertake a prompt, thorough, and independent investigation into the facts, ensuring that the perpetrators are brought to justice, and ensuring reparation, including payment of adequate compensation and public apology to the family. The State party should also take necessary measures to ensure that such violations should not recur in the future. The State party had been requested to provide information about measures taken to give effect to the Committee's views within 180 days. The State party is also requested to publish the Committee's views and to have them translated into the official language of the State party and be widely circulated.

Will the new government act differently from the Mahinda Rajapaksa government?

The Mahinda Rajapaksa government completely ignored all the views and recommendations of the UNHRC delivered during the term of its office. The question now is whether the new government headed by President Maithripala Sirisena – who has promised to discontinue with the way the previous government

conducted itself in relation to international affairs including relationships with the United Nations – will act differently with regard to the findings and recommendations of the UNHRC in Sunil Hemachandra's case.

President Maithripala Sirisena has made good governance the major slogan of his government. The UNHRC observations and recommendation in this case expose the extreme deficiencies relating to good governance in Sri Lanka; of particular importance are the failures mentioned by the UNHRC regarding the failure to conduct impartial inquiries into custodial deaths. Also of importance is the UNHRC criticism of the Attorney General's interventions into criminal cases in order to stop the investigations, as it happened in Sunil's case.

What is also unique in this case, is that the UNHRC has made observations regarding the failures of the Supreme Court of Sri Lanka to call for a fresh inquiry, whereby the Court could have intervened to defeat the police scheme to deny justice by subverting inquiries into a custodial death.

5
A CONVERSATION WITH THE PRIME MINISTER ON PERIODIC MASSACRES OF YOUTH SINCE 1971

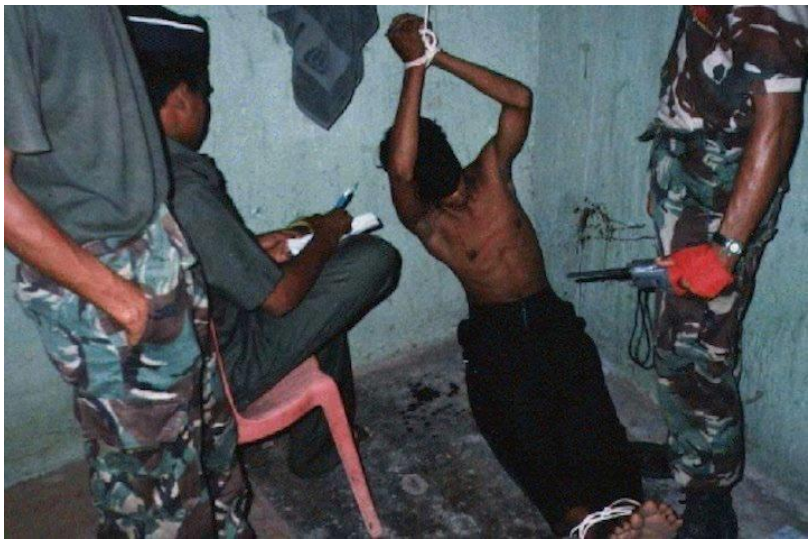

Photo Credit: Colombo Telegraph

ON 23 April 2015, the television programme'Sathyagaraya' - a Sinhala language programme telecast by the Independent Television Network (ITN) and produced by Upul Shantha

Sannasagala - broadcast a long conversation with Prime Minister Ranil Wickramasignhe. Our concern in this article, is about one particular question raised by the producer, Mr Sannasgala and the reply given by the Prime Minister, to the same. Producer Upul Shantha Sannasgala, raised a question, which he said, is of very great importance to him, about the periodic massacres of youth which had taken place, repeatedly, every 10 to 15 years in Sri Lanka, beginning with the suppression of youth in the 1971 JVP uprising. His question was as to whether these cyclical massacres would go on, from time to time causing the sacrifice of lives of a large number of youth in the country?

The Prime Minister's reply was that each of such events had its own causes, like for example youth unemployment was the cause for the 1971 rebellion and ethnic factors caused unrest both in the South and North of the country; both unrests causing large scale violence.

Speaking about the solutions, the Prime Minister opined that the improvement of the economic conditions by way of development programmes can improve the well-being of all, including the youth and that hopefully that would remove the kind of situations that arose in the past.

It would be quite useful for the Prime Minister to also look into the other causes of such unrest and not purely into the development issues alone – in trying to fathom the grotesque violence that the country has been experiencing periodically – in order to develop a more comprehensive policy towards the elimination of such occurrences.

The use of disproportionate force to control a difficult security situation is not an isolated issue that can be resolved through economic factors alone. It is essential to try to understand what caused the hugely disproportionate use of violence by the police and the military in each of those occasions in the past and to develop policies and strategies to avert such disproportionate use of force in the future.

To put it more bluntly, killing a person after arrest, is not an

issue that arises out of economics. Such an issue relates to the type of discipline that is inculcated into the security agencies and to the type of measures that are taken, in order to ensure that the security forces will not fail to observe the basic rules of conduct, even when the situations they face may be unusual and difficult ones.

Even in the midst of great world wars, armed forces as well as the police forces have observed the required codes of conduct after a person is captured or surrenders. However, in Sri Lanka even after persons have been picked up from their homes, and not infrequently, even with promises of their return within a short while; they were in fact, killed and very often their bodies secretly disposed.

The stories of such occurrences can be counted in thousands or in tens of thousands. To give one example, the several Commissions appointed by the Chandrika Bandaranayake government to investigate into involuntary disappearances have given vivid descriptions of how persons were kidnapped in place of arrest, were interrogated at secret places and tortured, and were finally killed and their bodies disposed of.

As this article is a commentary on a conversation with the Prime Minister, we assume that the Prime Minister is well-aware of all that has taken place during each of these periodic episodes, those to which the producer of the programme, Mr. Sannasagala was making reference to.

Besides the protection granted to persons after their arrest there is also a fundamental rule that is binding on the police and armed forces alike to maintain an official record of what has happened to each of the prisoners who come under their custody. Again, the killings that took place in Sri Lanka, found no mention in the records of those who were engaged in such acts. In fact, it can be without exaggeration said that a tacit rule has developed to dispose of such persons without maintaining any form of records.

We do not believe that with the Prime Minister, we need to labour much to demonstrate or to prove these incidents. Instead, a more serious approach is to request the Prime Minister to ponder

about the questions raised by the producer of the programme, not purely in terms of economic roots of the conflict but also from the point of view of the ease with which the police and the security forces dispensed with the need to adhere to basic rules of law and of civilization in dealing with the arrestees.

It is the duty of the Prime Minister and the government to take all the possible measures to inculcate a tradition of obedience to rules within the police and the armed forces. Not to think about this matter seriously, will amount to contributing to a recurrence of such a situation in the future. So long as the leadership of a government does not care about the manner in which the police and the armed forces observe and respect rules, no amount of economic development would prevent the recurrence of such violence.

Therefore, it is quite appropriate to request the Prime Minister to once again reflect on this question which was posed by the producer of this programme, and to place before the nation a more comprehensive response, as to how the Prime and the government envisions carrying out of his duty to inculcate an attitudinal change into the armed forces and the police, where they would observe the normal decencies that they are expected to observe in relation to persons they have taken into their custody.

We hope that the producer of the programme 'Sathyagaraya', could give another opportunity to the Prime Minister to provide a more comprehensive answer to put the conscience of the producer, as well as of the listeners' to rest, with the assurance that the government has a policy and a strategy to bring to an end, the heinous offence of harming persons who have been arrested.

6
PATTINI RAZEEK'S BODY BURIED WITHIN A HALF BUILT PRIVATE HOUSE

THE DISCOVERY of the body of Pattini Razeek buried under a half-built private house, in a remote village on Uddamaveli, in Valaichchenai, would have flared up the imagination of any detective. However, despite of the discovery on 28 July 2010, the case itself, remained buried till to date.

Mr Pattini Razeek who was quite a well-known community leader at the time, disappeared on 11 February 2010. He was last seen near the Jumma Mosque in Kaduruwela, Polonnaruwa at around 3.30 p.m. on 11 of February 2010. According to an eye witness account, Mr Razeek was travelling in a van together with some of his staff members at the Community Trust Fund (CTF), when their van was intercepted by a 'white' van. Mr Rafeek stepped out of his vehicle and approached the men in the 'white' van and had exchanged greetings in Arabic. After talking to them for several minutes, Mr Razeek had come back to his colleagues and told them that he will be joining the group in the 'white' van, which according to him was heading to the Eastern Provincial town of Valaichchenai.

Following this incident, nothing was heard from him and his family filed a complaint relating to his disappearance with the

police in Polonnaruwa where the incident took place, and also at the police station of Mundalama. The Community Trust Fund, of which Mr Razeek was the Head, also made a complaint to the police in Puttalam. Complaints were also made to the Human Rights Commission of Sri Lanka, the then President of Sri Lanka, the then Secretary of Ministry of Defence , to the Attorney General, and to the Inspector General of Police. Further complaints were made to the UN Special Rapporteur on Human Rights Defenders and to the UN Working Group on Enforced and Involuntary Disappearances. Besides these, several media reports also appeared reporting on his mysterious disappearance.

It was about five months after his disappearance, that the body was discovered and exhumed from within a half constructed building and the discovery was made on a lead obtained from a suspect. By then, it was reported that the case has been handed over for further investigations to the Criminal Investigations Division (CID). Several suspects were also arrested and produced before the Magistrate and later they were released on bail.

Mr. Razeek was the Head of the Community Trust Fund (CTF), which was established for the purpose of assisting displaced persons in the area. As displacement due to LTTE attacks in the area, particularly on the Muslim community was quite a significant issue at the time, the CTF played an important role in relief work.

Suspicion emerged that the kidnapping and the later murder and the disposal of Mr Razeek's body within a half-constructed private house was related to disposal of monies relating to the CTF. The name of Minister Rishad Bathiudeen, figured prominently in the reports relating to the mystery surrounding the disappearance of Mr Razeek.

Regarding the handling of this case, the Lessons Learnt and Reconciliation Commission (LLRC), has made the following comment in their final report.

> "...(Paragraph) 5.31 "Among the many disturbing allegations concerning missing persons submitted to the Commission by the general public, especially during its visits

> to conflict-affected areas, the case of Mr. Razik Pattini in Puttalam, is referred to here on account of the Commission's own disappointing experience concerning that case. It highlights the deplorable absence of conclusive law enforcement action, despite the Commission itself bringing this case to the attention of the concerned authorities of the area. Mr. Razeek's body was reportedly discovered while the Commission was writing its report. Timely action could probably have saved this life."
>
> (Paragraph) 5. 32 "Mr. Razik who had been an official of an NGO providing assistance to the IDPs in Puttalam was abducted allegedly due to the fact that he had questioned the manner in which some of the expenditures have been incurred by the NGO as well as the purchase of some properties under the names of some of its directors. When inquires were made from the relevant Deputy Inspector-General of Police in the area as to why there was a delay in arresting the alleged abductor following a court order, he has reportedly said that the Police was not aware of the suspect's whereabouts and if the people know where he was, let the police know so that they could arrest him. It was alleged in this regard that the suspect evaded arrest due to his 'political connections'. If this is established, it must be mentioned that such an attitude would completely erode the public confidence, in particular in the Police, and make the maintenance of law and order much more difficult. The Commission is equally concerned that undue political interference has also contributed to the lapses on the part of the Police...."

Nothing is more important for the maintenance of a civilised society, than a serious commitment on the part of a government and the community to deal with any murder, with the utmost seriousness. Where even investigations into murder and prosecution of offenders cannot be guaranteed, there is hardly any reason to believe in a government's will and capacity to enforce the law.

At a time like this, where good governance is being sloganized as the programme that the government will pursue with utmost

seriousness, the question of the way investigations and prosecution of murder is dealt with should be used as a primary test of the authenticity and credibility of such a claim.

The uniqueness of Mr Pattini Razeek's case is that the body of the murdered victim was discovered and the circumstances of his burial itself threw light on the deliberate intention of the perpetrators of this crime to ensure that their crime would not be discovered. The available evidence on the abduction, the murder, and the disposal of the body reveals a highly thought-out scheme, in carrying out this crime.

The failure to prosecute this case therefore, is not due to the absence of evidence. It suggests a deliberate scheme for preventing a due prosecution. Such a scheme for protecting a criminal/s is itself a horrendous crime.

The challenge now lies with the police investigating authorities, and the Attorney General. The Minister of Justice should intervene to ensure that the law is duly enforced. If, even that, is not possible, even at this stage, there is hardly any reason to trust the system of law enforcement in Sri Lanka.

7

DELAYS IN ADJUDICATION AS A MANIFESTATION OF LEARNED HELPLESSNESS

A YOUNG MAN, then 18 years old, filed a communication with the United Nation's Human Rights Committee (UNHRC) on 28 January 2003, about an incident that took place on 18 April 2002. The UNHRC came to a finding on 14th July 2006. The UNHRC found that the Sri Lankan Government has violated the rights of the man by its failure to adjudicate the case without undue delay. The man is over 30 years old today. Sri Lanka has witnessed 4 governments since 2002. However, his case is still pending before the Sri Lankan courts.

In his communication to the UNHRC, the young man recorded the following, in order to illustrate how delays take place.

"13.10.04 - Case called for trial but no evidence taken.
02.02.05 - A trial date but no evidence is heard.
26.05.05 - The evidence of the author commences: evidence taken for about 45-50 minutes.
12.07.05 - The author's examination in chief continues: evidence taken for about 25 minutes.
23.08.05- The author's cross-examination begins: evidence recorded for about 45 minutes.
28.11.05 - The case is called and postponed without recording any

evidence.
04.05.06 - The next scheduled date."

Between 2004 and 2006 the case had been called eight times and hardly any progress had been made towards completion. If the dates on which the case has been postponed since then were also to be listed out, it would be a long and ludicrous list indeed.

What is appalling about this kind of postponement is the trivial manner in which serious criminal trials are being treated in Sri Lanka in recent decades, ever since the practice of hearing a case from the start to the end on consecutive dates came to an end with the abandonment of jury trials.

The general excuse for the delays is that the courts have a heavy workload.

The UNHRC, however, rejected this excuse stating that

> "... Under article 2, paragraph 3, [of the International Covenant on Civil and Political Rights] the State party has an obligation to ensure that remedies are effective. Expedition and effectiveness are particularly important in the adjudication of cases involving torture. The general information provided by the State party on the workload of the domestic courts would appear to indicate that the High Court proceedings and, thus, the author's Supreme Court fundamental rights case will not be determined for some time. The Committee considers that the State party may not avoid its responsibilities under the Covenant with the argument that the domestic courts are dealing with the matter, when it is clear that the remedies relied upon by the State party have been prolonged and would appear to be ineffective. For these reasons, the Committee finds that the State party has violated article 2, paragraph 3, in connection with 7 of the Covenant...."

A close examination of any of the cases pending for long periods of time in the courts would expose the argument that postponements are done due to heavy workload as not well founded.

Generally, the grounds on which postponements are made can be listed as follows:

- Lawyers ask for postponements on personal grounds and courts allow these applications;
- Many cases are fixed for trial on the same day and all such cases cannot be heard on that day;
- The judge is absent for one reason or the other;
- Administrative reasons, such as unavailability of stenographers or other technical problems.

These grounds do not arise out of a heavy workload. Rather, all these are management issues. If properly managed, most such postponements can be avoided. However, there have been no initiatives to train judges and other court staff on management skills and there is no enthusiasm for introduction of more efficient modes of management. For example, in many other jurisdictions, the modes of recording of evidence have changed radically due to the advancement of communication technologies.

A pilot project for digital recording of proceedings was experimented with in the Commercial High Court of Colombo and in eight other District Courts in Colombo and Kandy in 2007. However, this project was abandoned thereafter.

If proper technical arrangements are made for making court records through digital recordings, dramatic changes can ensue, reducing the time taken for adjudication of cases. The technologies needed for such work is fairly inexpensive. However, the deciding aspect for introducing such changes is the willingness of judges and court staff to properly manage such a system. It is the will and the skills that are missing and they have nothing to do with extra expenses.

In many functioning judicial systems, the time now taken for hearing and disposing most criminal trials is about one year. In less serious trials, relating to less serious offences, the time taken is even shorter. The habit of granting dates to suit the convenience of lawyers is now an obsolete habit in many such jurisdictions. It is even considered an unethical practice, to seek postponements on

that basis. In any case, the judges do not accede to such requests.

The appalling nature of delays in adjudication has done more damage to the Sri Lankan legal system than any other single factor. Going through such a process goes against the common sense of everyone, be it litigants, lawyers, judges, or the wider public. The result is a psychological rejection of the entire system, which runs rather deep in the psyche. However, due to sheer absence of initiative seeking to change such practices that are abhorrent to the people, delays continue to persist.

Delays in adjudication, as they exist in Sri Lanka today, and good governance are incompatible. Delays in adjudication are, in fact, a manifestation of the absence of good governance. Therefore, President Maithripala Sirisena's government, and, particularly, its Ministry of Justice, should take steps to address this problem within a short period.

As in the case of investigation into financial crimes, where the incumbent government has sought the assistance of experts from other jurisdictions, the issue of dealing with delays in the legal process is also one where such experts can help. Such experts can simply be asked how such delays were eliminated in their jurisdictions. Incorporating these solutions will alone be sufficient to help Sri Lanka overcome the societal crisis caused by undue delays.

A list of dates and postponements of virtually any of the thousands of cases proceeding at a snail's pace through the system would demonstrate the comic and trivial reasons for most postponements. This tragicomic situation can be easily done away with. The benefits of such an overhaul would go far beyond what one can describe. One has to only observe how a proper functioning system of adjudication contributes to the elimination of crime and the creation of social harmony to begin comprehending how sorely Sri Lanka needs this change.

8

INSTITUTIONS FOR ADMINISTRATION OF JUSTICE ARE FAR MORE IMPORTANT THAN THE MILITARY

THE RAPE and murder of a 17-year-old schoolgirl in May 2015, gave rise to the biggest protest seen in North in recent times. The police have announced that 9 persons have been arrested and are been investigated. DNA samples have been taken and sent for examination.

Meanwhile, the President of Sri Lanka publicly stated that the case would be tried in a special court to avoid the usual delay and to ensure justice speedily. This promise by the President is quite welcome. We hope that the investigations will be completed soon and the Attorney General will also file the indictments soon and the trial will commence.

While this move is being appreciated, it needs to be emphasized that a speedy trial in cases of rape is a right of all victims of rape and, in fact, of the community in general.

The delays that now prevail are scandalous.

Let's take the case of Rita who was 14-years-old when she was raped on 12 August 2001. She was a schoolgirl from an underprivileged background. Her parents were working in the tea

plantations. Alleged rapists in her case were two young boys from affluent families in the area. Within a short time following her complaint, the police were able to locate and arrest the two suspects.

However, now, 14 years after the event, the trial is still dragging on. The victim has regularly attended the court and has in no way contributed to the delays. However, as is done often in such cases, in this case too, the defence sought delays for all kinds of reasons knowing that it has a weak case. Unfortunately, the relevant courts in which the case has been taken up have taken no serious efforts to ensure a fair trial without undue delay.

The numbers of cases in which there are scandalous delay has to be counted in thousands. The task before the President and his government is to find a solution to this terrible problem. As for the President, he has a full term of office before him, as he has been elected only on the 8 January 2015.

The President's task should be to, first of all, request appropriate authorities, particularly the Minister of Justice, to provide for him a thorough report on the state of delays in adjudication of criminal cases in Sri Lanka, with emphasis on the trials in most serious crimes, such as rape, murder, and the like.

The President has declared the primary goal of his government is to ensure good governance. It should not be difficult for him to grasp that as long as there is scandalous level of undue delay in the trial into serious crimes, good governance is not possible. The greatest threat to good governance is crime. Addressing this problem about undue delays in adjudication, among many other problems, the President and his government needs to take action to ensure the following:

> The first, most important, step is to restore the hearing of criminal trials on a day-to-day basis. This was a practice when jury trials were in practice. However, the virtual abandonment of jury trials has left the decision of postponing the dates of trial to the discretion of the judges. Examination of any of the case records of the trials that have been going on for some

time would clearly indicate that the grounds on which the postponements have been given are not rationally or morally justified. Hearing of the cases on a day-to-day basis should not be left to the discretion of the judges; such hearings should be made compulsory. The adjusting of the court schedules for this purpose is purely a task of managing cases. If a court cannot hear a case on a particular date, there is no rational purpose of fixing the case on trial on that date. This is just a matter of common sense. This should not be a difficult task for the President of the country to set-up through appropriate authorities and also to get the cooperation of the courts for that purpose.

There are other matters, such as delays in investigations and delays at the Attorney General's department, which are also, for the most part, a result of neglected management. Inadequate funding of relevant departments is certainly one of the major causes for negligence in management. It is the duty of the President and his government to make the necessary funding allocations to the relevant departments so that they can resolve the internal problem of time in relation to fair trial.

In taking these steps, the primary policy issue involved is the important place that should be given to the administration of justice. As the President is eager to highlight the difference of his political administration from that of the former President Mahinda Rajapaksa, emphasis being placed on proper administration of justice would be one of the most important areas of distinction. With the former government, neglect of the justice system was part of its political agenda. It is only by destabilizing the system of administration of justice that large-scale corruption and abuse of power became possible.

It is understandable that due to the political climate of the recent past, the Military has acquired a prominent place in the country. It should be noted that in maintaining peace and stability, institutions of administration of justice, play a far more important role than the Military. However, this peacetime perspective has been completely missing during the

last regime. This is one area that the President needs to take a critical look at, if the goals he has set to achieve are to be realized.

It is quite well known that quite a large part of the national budget is allocated to the Military, as compared to the budget allocated for running the institutions of the administration of justice. Such lopsided allocations of the budget are an indication of the absence of a national policy for realising peace and stability through the means of a functioning system of administration of justice. No amount of military intervention could address problems of internal security and stability if the institutions meant to administer justice are neglected.

Thus this issue of brutal rape and murder of the 17-year-old girl should require a more profound response than the mere promise of a speedy trial only for this case. In the first place, if the country's civilian policing system and the courts were functioning properly in the area where this crime took place it is quite likely that the crime itself could have been prevented. Prevention of violent crimes is primarily a task of the institutions of the administration of justice. Therefore, civilian policing and the courts need to be strengthened in these areas, as well as in the rest of the country, to prevent further chaos.

9
THE RAPE VICTIM WHO GOT HELL OF A JUSTICE

RITA, a rape victim visited the Magistrates Court 24 times between 2001 and 2004. Then, the case was referred to the Attorney General for the filing of indictment. The visits she made to the High Court thereafter, and reasons for postponements, are catalogued as follows:

Case No: HC 57/2007
High Court - Kandy

Case Dates:

23 October 2006: Indictment filed by the Attorney General

23 February 2007: Indictment received by the Kandy High Court. Summons issued to the two accused

26 March 2007: The two accused were granted bail.

27 April 2007: 1st and 2nd witnesses summoned as prosecution witnesses.

18 October 2007: Productions were not presented in court.

01 February 2008: The Judge was absent.

30 May 2008: The State Counsel was absent.

30 January 2009: The State Counsel reported that there are two indictments with the same charges. Therefore, the matter was referred to the Attorney General. The Judge was absent.

15 May 2009: The matter was pending for Attorney General's advice.

23 June 2009: HC 260/2008 Case was dismissed.

19 October 2009: The matter was transferred to Nuwara Eliya

High Court.
Case No: HC NE 48/2010
High Court - Nuwara Eliya

Case Dates:

03 March 2010: Summons issued for the 1st to 8th prosecution witnesses.

12 July 2010: State Counsel has not received the file.

05 October 2010: 1st accused was absent and a warrant was issued to him.

26 October 2010: The matter was fixed for trial.

20 April 2011: Matter was postponed due to an application of the defence counsel.

09 May 2011: 01st witness (J. Rita) was called for evidence.
Evidence in chief was commenced.

Productions were not presented to the Court.

Therefore, another date was given.

14 June 2011: Productions presented in Court and 1st witness's evidence in chief concluded.
Cross-examination commenced.

19 July 2011: Further cross-examination.

22 Nov 2011: Matter was called twice in the absence of the defence counsel and postponed due to misconduct of the defence counsel. The two accused were remanded.

22 March 2012: Cross-examination and re-examination of witness no. 1 concluded.

05 Sep 2012: 2nd witness Anthonimiuttu Annamary, 6th witness 23851 Alahakoon, 7th witness 22517 Selvanayagam, 9th witness Priyanka, 11th witness 28674 Samayamanthry, and 12th witness 29339 Gunadasa gave evidence. Warrants issued to witness no. 4 and 5.

18 March 2013: State Counsel was not ready for the trial. Defence counsel made an application to recall the 1st witness Rita Jesudasan for evidence. Summons issued to witness no. 1.

10 June 2013: Judge and State counsel were absent.

02 Sep 2013: Witness No. 4 Kadiravel Palanisami's evidence concluded.

28 October 2013: Witness No. 5 – Dr. S.A.K.A. Wijesundara was called for evidence. But due to the vague nature of his evidence judge adjourned the case. When the case was taken up in the afternoon the defence lawyer was not present.

29 October 2013: Witness No. 5 – Dr. S.A.K.A. Wijesundara was not present in Court.

16 January 2014: The Judge was absent.

24 March 2014: Witness No. 5 – Dr. S.A.K.A. Wijesundara was

absent.

28 May 2014: The Judge was absent.

03 July 2014: Witness No. 5 – Dr. S.A.K.A. Wijesundara (DMO) was absent. Therefore, J. Rita was re-called for evidence. However, defence lawyer was not ready for the trial and due to this the case was postponed.

25 September 2014: Witness No. 05 – Dr. S.A.K.A. Wijesundara was present in court. Yet, the defence counsel moved a date on personal grounds.

15 December 2014: The Judge was absent.

23 March 2015: Witness No. 5 - Dr. S.A.K.A Wijesundara's evidence was concluded and Witness No. 1 J. Rita was re-cross-examined until 5.30 p.m.

26 March 2015: Re-cross-examination and re-examination of J. Rita concluded. A date was given to the State Counsel to conclude the prosecution's case.

03 June 2015: Next Date

How long this will go on further, no one knows.

Some day trial court will give its verdict. Then, if the accused are convicted, they will appeal. That would mean a few more years of delay and many more visits to court. By any chance, if the court orders a retrial, (as it had happened in some cases) the whole process will be repeated again. It is not wrong to condemn this kind of conduct of trials as absurd and stupid.

Above all, this kind of conduct is a conspiracy against the rape victim. It only helps the rapists and encourages the repetition of the crime.

A rape trial can easily be conducted and completed within a year, as it is done in many other countries.

It is shocking how judges and prosecutors adjust to this system. If they refuse to cooperate with this maddening scheme, reforms can happen very soon

10
"JUSTICE SYSTEM" AS A THREAT TO DEMOCRACY AND RULE OF LAW

IN THIS ARTICLE, the "justice system" refers to the police, the prosecution (Attorney General's Department), and the judicial institutions, as separate entities and as a collective in their interactions with each other.

That these institutions suffered a great set back due to the operation of 1972 and 1978 Constitutions is unanimously acknowledged. The latest Constitutional Amendment, 19 A, is an attempt to address some aspects of this impasse by trying to depoliticise the appointments, promotions, transfers, and dismissals of officers in these institutions. However, there are many other matters that are ailing the justice system, for which the 19 A Amendment cannot provide answers.

For example, take the most important problem of Sri Lanka's justice system: extreme delays in the delivery of services by each of these institutions. These delays result in the delivering of negative services instead of positive ones. Thus, the system contributes to creating injustices rather than justice.

Without resolving the problem of undue delay, no other efforts can remove the negative impact of the justice system. However, everyone seems to consider this as a problem that is impossible to

undo. "Delays will always be there", seems to the unwritten rule underlying Sri Lanka's justice system. Mere verbal statements condemning delays, often made in response to public criticism, are purely ritualistic in nature and are not meant to be taken seriously.

Justice System remains within the primitive colonial mode

In the outside world, ideas of policing, prosecution, and judicial interventions, particularly in terms of criminal justice, have undergone enormous changes. The driving force of change has been the absorption of modern science and technology into justice functions.

A most significant change has been the manner in which evidence is gathered by the use of science and technology. From this point of view, the Sri Lankan system still remains in the bullock cart age.

The manner in which untrained policemen beat up suspects, day in day out, in all police station in Sri Lanka, with the view to collect oral evidence, and the way prosecutors and judges turn a blind eye to this obsolete and inhumane practice, is an adequate demonstration of the primitive nature of our entire system of criminal justice.

The result is the increase in crime across society and the spread of vigilante justice. The justice system has thus become a major cause for the demoralization of the people. Murderers, rapists, money swindlers, and other criminals, are quite happy and grateful to the justice system. The system is also good for the bad politicians.

The bad aspects of the system could constitute a litany. There is no need to reiterate the list, as everyone, including officials in the three branches of justice are fully aware of them. In fact, there is no one who says anything good about this system any more. Someone wrote recently that this is a "jack ass system".

Mr. Eran Wickramaratne, currently Deputy Minister of High Ways and Investment Promotion, made the following observations

last month during an interview with AHRC TV:

> "… Going to the broader issue of the average person who goes into police station, the police then have to resolve some issues. And, historically, the police have been underfunded, and have not been properly remunerated. That's true of public service generally, including the police. And the investigators are even less motivated. There is the whole issue of lack of training, because there is a lack of investment in training, a lack of investment in technology, in solving crimes and so forth. They would then resolve to means, which police forces in poorly funded situations all over to world resort to: try to solve crime by fabricating some charge—arresting the people who may or may not to be connected to the crime—and often using physical force and torture to get confessions. Now this has been documented for a period of time in Sri Lanka as a problem. It has been documented in the rest of the region, and this is something we need to change. While the immediate focus is on big issues of corruption, I think that this problem needs to be sorted once and for all.
>
> This culture of treating people using torture or even psychological torture should come to a stop here. In a civilized society, every human being has dignity, every human being should be treated equally irrespective of their social background, irrespective of the educational status, irrespective their wealth, irrespective of whether they have political powers or not. Every individual must be that equal before the law. That's the idea. That's the goal, the direction that we should be travelling in. To do that, I don't think there is one method or one solution. The law is one area, the budget and funding another major area. Earlier, I could give it as a suggestion; now I am part of government. Therefore I will certainly keep pressing for investment not just only for the police, but also for the judiciary process."

Now, let us consider the way forward for the Sri Lankan justice system.

Three critical steps to create a modern justice system:

1) Education and training of all stakeholders, police investigators, prosecutors, and judges on modern scientific methods of evidence collection and provision of technologies required for this purpose. This way, modern scientific outlook can be engraved into everyone's minds. This can be done in quite a short time, with the assistance of a few foreign experts if they are thought necessary. This will reduce costs, by cutting down heavy costs spent on unskilled labour at all levels. This can be made a permanent factor by changing legal education in all law faculties and law colleges, as well as in police and judicial training institutes.

2) Some legal and procedural changes to remove existing practices that are primitive and obsolete, such as the use of torture and the reliance entirely on oral evidence.

3) Basis day to hearings in criminal trials. This way a trial can usually be completed within a week. On some instances it may take a few days more.

In short, what is needed is to introduce the modern legal imagination and the intellect to Sri Lanka by taking a few practical steps and allocating the necessary funds. Such an investment will pay back a thousand fold, both in the areas of economic development and social development, thus providing a solid base for sustainable democracy and the rule of law. It will also remove the widespread basis day to day demoralization among populations and instead implant pride about their functioning institutions of justice. Above all, women will benefit; they will finally be able to move about freely and without fear.

Completion of a criminal trial within a year within reach

In countries where modern justice systems are established, completion of a criminal trial within a year is now the rule. In Sri Lanka, when victims of crimes are strong enough not to discontinue their participation, a trial can go on even after 14 years.

The tactic of criminals that face victims who refuse to abandon

participation is to get as many postponements as possible. Often, they do this on legal advice. When examining reasons for postponements, we find many instances where the lawyer for the accused is absent or is seeking a date on personal grounds. There are also references to judges being absent.

One of the terrible consequences of a delayed trial is that several judges hear parts of the same case, and the last one that writes the judgement hears only very little of the evidence or nothing at all. As a result, judges make errors about factual matters. In one case, the judge wrote that although the complainant says that the accused policemen hit him on the chin with his pistol, there is no evidence of any such injury, when, in fact, the JMO's report clearly mentions the injury. Sometimes retrials are ordered by the court of appeal due to such errors by the trial judge, which means the whole process begins once again after 12 to 14 or more years.

If the few steps suggested in this article are followed, completion of a criminal trial within a year will be a reality in Sri Lanka soon.

Advantages of completing a criminal trial into serious crimes within a year

Some of the advantages of completing a criminal trial within a year are as follows:

1) Bringing criminal justice from the arena of the absurd — where it operates presently — to the area of the rational.

2) Bringing a sense of meaning and social relevance to the work of all stakeholders: complainants, accused, police investigators, judges, and the community at large.

3) Creating the strongest deterrence against crime by providing sure and speedy punishment — a far superior deterrent in comparison to harsh punishment.

4) Ending abusive practices arising out of delay in adjudication, currently widespread.

5) Ushering radical limitations to corruption.

6) Restoring and enhancing faith in the justice process and in reason.

7) Creating greater social stability and social mobility.

11
SMALL MIRACLES THAT CAN BE ACHIEVED THROUGH JUSTICE

IN THIS SERIES of short essays I have attempted to demonstrate the terrible situation of institutions of justice- police, prosecutors and the judiciary- through some samples. I have also tried to show how intricately linked are the political and societal crisis plaguing the country and the sad state of justice institutions.

In this essay, I will try to go through the same exercise by narrating stories which stand in opposition to the Sri Lankan experiences. I have been living in Hong Kong for nearly 25 years. Owing to the shared colonial past, the basic structure of the justice institutions here are almost the same as they are in Sri Lanka. However, the stories that I have told in this article series would be shocking, in fact almost unbelievable, to the present generation of people living in Hong Kong. For the older generation which has lived here before 1970s, however, the Sri Lankan stories would be a reminder of how things were here as well.

The situation here has changed a lot from the 1970s and judiciary enjoys highest level of confidence from all sections of the society. The judiciary, in fact, is respected as the chief protector of rule of law and stability of the dynamic metropolis. There is broad consensus that rule of law is the foundation of society. Everyone agrees that it protects individual rights and also creates an enabling environment for the security of investments and thus contributes to economic development. The prestige the judges have here, would make any person proud to be member of judiciary.

The government has also ensured that necessary financial arrangements required for providing a functional system of justice are made. All modern facilities are provided, down to the detail of tape recording of all court proceedings. The result of these arrangements is obvious- Hong Kong has a fair system of adjudication without delay. Among the more expensive aspects of justice system in Hong Kong is running a truly efficient system of control of corruption, through the prestigious Independent Commission Against Corruption (ICAC). This institution has proven its metal and enjoys the confidence of the people.

The discipline brought about by corruption control has been felt in all state services including the police. It also enjoys the confidence of the people. People are not afraid to complain against the police, whenever there are reasons to do and these complaints are quickly and fairly investigated and corrective action is taken speedily. All such matters are duly conveyed to the people. Over the years, police have fought a credible battle against all kinds of crime, while at the same time respecting the rights of the people involved.

Same can be said of the office of the public prosecutor which functions under the department of justice. Its functions by the principles of jurisprudence and there is no political subservience in its functioning. Attorney General Department is the legal adviser to the government and in this capacity it plays a prominent role in maintaining rule of law.

All this machinery has solidly impressed on the population that law is observed strictly and fairly for everyone irrespective of

socioeconomic status.

Lawyers in Hong Kong also abide by this ethos. The Bar Association provides for a strict control of discipline and all complaints against lawyers are credibly and thoroughly investigated and acted upon.

That is the framework within which, politicians also function. No one is privileged with impunity. Impunity, in fact, is no more a part of the system.

The justice system has made special arrangements for protecting minorities, through the Equal Opportunities Commission for instance. One of the remarkable aspects of the Hong Kong life is the way, women have been able to assert their rights and have made their presence felt everywhere. Rule of law is upheld in all matters relating to sexual offences as well.

The result of all this is a vibrant civil society. People are assertive and they make sure that they get the respect they deserve. There are many open and active protests and small and big demonstrations. Recent protests of the umbrella movement demonstrates how strong these protests can be. All these activities are carried out within a rule of law framework and justice institutions ensure that conflicting claims are settled in a just manner.

My idea here is not to create the impression of a paradise but to argue that the problems that exist in justice institutions in Sri Lanka can be resolved. One must concede that the present state of things is horrible. That is more the reason why we need to focus and strive for solutions.

I came to live in Hong Kong only because, I was not allowed to live in peace and practice my profession with honour back in Sri Lanka. My name was included in a death list just because I attempted to practice my profession with honour and without fear of undue pressures. Even as I was coming to the airport to leave Sri Lanka with a protective ring of few well wishers, we were pursued by a group of four persons security agencies, sent from the

house of a cabinet minister living in the area. They failed only because a tire of the vehicle they were following us with got punctured. Quite contrary to that experience, Hong Kong, the city state which came to host me for all these years did not give me a single occasion to complain of any harassment. The difference of two places in my view lies with their respective justice institutions- police, prosecution and the judiciary.

I wrote this essay as a response to a comment made by a reader of my past article (part 10 of the series), who in good humour has said, "the writer must be dreaming". I want to assure him that my reflections are product of my life experiences. I have had opportunity to see both- the harms justice systems can cause and also, the good they can do to the society.

12
TOWARDS AN EXPLANATION ABOUT VIOLENCE, BASED ON FAILURES OF POLICING, PROSECUTION, AND JUDICIAL INSTITUTIONS

Problem

THERE has been much discussion on violence as a result of cultural, ethnic, religious, social, and economic factors, but hardly any on violence caused by failures of the justice sector. Why there is such an absence is hard to grasp. Everyone knows that competent and efficient functioning of policing, prosecution, and judicial institutions curbs violence. The corollary to this, i.e. the absence or failures of such institutions increases violence, should also be obvious. However, in public discussions, there is hardly any reference to these institutions.

Only one thing can explain this: the society, in general, is left with no hope that these institutions will perform any better. Blaming politicians for everything is the favourite pastime of almost everyone. Though the criticism is justified, something more is needed if solutions are to be found to the problems that everyone is worried about.

In this series we have examined many events as examples that constitute the way of life in contemporary Sri Lanka. These examples sum up the basic problems of the nation's institutions of justice. Or, to put it in another way, the manner in which these institutions function create the injustices that people routinely suffer from.

A summary of these problems will bring us to the core issue raised by the articles: how deformities of policing, prosecution, and judicial systems contribute to widespread violence in Sri Lanka. The general problem that affects all three institutions is that there is no unifying principle that binding them. That unifying principle should have been the agreement on the rule of law, as a thread that binds them.

Though it is claimed in Sri Lanka that the rule of law is the overarching organizational principle in the country's legal system, there is, in fact, no truth to this claim. The result is that the three institutions run in ways they think fit. There is no uniformity, not even of precedence; the way something is done today need not be the way it will be done tomorrow. The operators can manipulate all operations in whatever manner they choose. Details, discussed below, regarding each institution, are important; however, no solution is possible till the overarching problem— a lack of a unifying principle— is resolved.

Details

As for policing, the prominent problems may be summed up thusly. Policing in Sri Lanka is still primitive, as it has failed to change and assimilate principles and organizational structures of modern policing, which now prevails in all successful democracies. Another significant problem is the serious deficiencies in competence in the use of sophisticated methods of information gathering. This deficiency is so glaring that it is justifiable to characterise the system, as a MODA system (a foolish system); Widespread use of torture and ill-treatment and resorting to custodial killings and causing of disappearances is another prominent problem. And, as if these are not manifestations enough of a failed system, policing in Sri Lanka is also marred by

widespread corruption, the loss of management of the system under the principle of command responsibility, and, consequently, the loss of disciplinary control. Subordination to political interference completes the picture. (Under each of these categories long litany of many other defects can be listed.)

As for the prosecution functioning under the Attorney General's Department, some of the defects publicly noted are: loss of independence, abuse of Attorney General's power by interventions to stop investigations into serious crimes, delay in filing indictments, lack of resistance to the adjudication process, compromise regarding punishments violative of basic principles of criminology (often purely for reasons of convenience), subservience to clearly illegal orders and to demands of those in power, and all manner of internal problems that have seriously demoralized the Department.

As for the judicial system, it has, at all levels, glaring defects of its own. These are defects everyone knows about: Scandalous slowness to deliver its services has overshadowed all performances and successfully alienated most of the population. Political alliances made, during the last 40 years in particular, have undermined the idea of separation of power and the judiciary as a separate branch of government. All higher legal remedies, such a Habeas Corpus and writs, have been undermined due to the overall political changes that have taken place in the country. The judiciary's place in the basic structure of governance has become quite ambiguous in terms of the constitutional changes under 1972 and 1978 constitutions. In the lower courts, particularly the magistrate courts, there is little room to unravel all kinds of unscrupulous manipulations done by the police, such as fabrication of charges, tampering of evidence, submission of false reports even on serious issues like arrests, detentions, torture, custodial deaths, and objections to bail.

Implications

It is in the light of all these details that the role played by the justice institutions in the generation and spread of violence must be judged. A simple way to assess this is to ask: how would a criminal,

aware of these defects, think. Criminals do assess their chances of avoiding legal consequences of illegal actions. When they know that the net woven to catch them is full of big holes, the conclusions they would arrive at are obvious.

ABOUT THE AUTHOR

Basil Fernando is a Sri Lankan born jurist, author, poet, human rights activist, editor of Article 2 and Ethics in Action, and a prolific writer. He became a legal adviser to Vietnamese refugees in a UNHCR-sponsored project in Hong Kong. He joined the United Nations Transitional Authority (UNTAC) in 1992 as a senior human rights officer and later also served as the Chief of Legal Assistance to Cambodia of the UN Centre of Human Rights (now the UN High Commissioner of Human Rights office). He is associated with Asian Human Rights Commission and Asian Legal Resource Centre, based in Hong Kong since 1994. He was awarded the Kwangju (South Korea) Human Rights Prize in 2001 and the Right Livelihood Award (*also known as the Alternative Nobel Prize*) in 2014.