

TORTURE: AN ENTRENCHED CRUEL, INHUMAN DEGRADING LEGAL Y STEMS

BASIL FERNANDO

TORTURE: AN ENTRENCHED PART OF CRUEL, INHUMAN & DEGRADING LEGAL SYSTEMS

A study on the use of torture as a routine part of criminal investigations in developing countries; lessons from the situation in Sri Lanka

Basil Fernando

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DEDICATION

This book is dedicated to the hope that a better understanding may emerge of the wrongs that people who live in countries with broken justice systems suffer, giving rise to a heightened level of concern and a drive to undo such wrongs through local and international strategies and actions, all to create environments where the life and liberties of people are protected.

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FOREWORD

By
Dr. Sunil Coorey

(Attorney at law)

Torture is a cancer that attacks the foundations of a democratic, just and orderly society. The prevalence of State-sponsored torture begets a fear psychosis in the general public. Freedom of thought and expression cannot exist if terror is instilled in the minds of the general public by State-sponsored terror. State-sponsored torture is a weapon to quash democracy and freedom in all its forms, and to usher in totalitarianism.

As far as criminal justice is concerned, justice is always rooted in truth, and truth will not prevail amidst the practice of torture. Everyone has a limit beyond which torture cannot be endured, and the most innocent of people will confess to any crime when that limit of endurance is reached. To tolerate torture is to subvert criminal justice.

The use of torture in criminal investigations is presently endemic in the Sri Lankan Police Force. Usually, it is the comparatively lower ranks in the police force who actually torture those who are suspected of crimes. However, if the higher ranks do not encourage it, at least they condone it.

Torture is always dehumanizing for both the victim as well as the perpetrator. Nevertheless, for several reasons, torture has become entrenched in the Sri Lankan criminal justice system.

¹ Dr Sunil F A Coorey is the author of the monumental work 'Principles of. Administrative Law in Sri Lanka', Vol I & II, and a leading lawyer in Sri Lanka.

When the British introduced the general principles of their law of evidence into their colonies (including Sri Lanka, then Ceylon), they were careful to provide that (unlike in their own country) a confession to a crime made to a police officer, or a confession to a crime made while in the custody of the Police, was inadmissible in evidence when the person who made the confession was put on trial for the crime he had confessed to. This shows that even over a century ago, when the Evidence Ordinance was enacted by the British in Sri Lanka, the Government of the day distrusted the methods used by the Police in obtaining such statements.

Police officers practice torture for different reasons. Sadism may not be a prominent cause. It often happens that a police officer whose duty it is to investigate a crime lacks proper training and knowledge of the correct and effective methods of detecting crime. He may lack the necessary equipment for his task. Nevertheless, he may be keen to "solve" the crime and to show his superiors that he is efficient and that he has found the "perpetrator" of the crime, so that he can be considered for promotion. In such situations, he will resort even to torture to impress his superiors and show them that he has successfully carried out his task, and that he has "solved" the crime (even though a confession from the "perpetrator" may not be admissible evidence in a court of law).

The biggest obstacle to the eradication of the practice of torture by the Police is the apathy with which the State machinery as a whole, and those in the higher strata of society (including judges, lawyers and the comparatively well to do), look upon it. Somehow, the idea lurking at the back of their minds is that, after all, if one becomes a victim of a crime, it is the Police that one turns to in order to have the matter investigated and the perpetrators brought to book, and if the Police accomplish that task, there is no harm in their using torture on those suspected of the crime as part of their investigation. This old idea, not articulated very much now, still prevails with some. There also used to be an idea that a police officer worth his salt must be a man who is prepared to resort even to torture if he cannot otherwise get hold of a culprit.

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The eradication of police torture must therefore begin with a change of attitude to it on the part of judges, lawyers and the intelligentsia in general. The evils of torture, how it will subvert criminal justice, and where it will lead us, must be something we all come to realize.

The endeavours made by Mr. Basil Fernando towards that end in Sri Lankan society during the last quarter of a century have no parallel. Almost single-handedly, he has waged an all out war on the practice of torture in Sri Lanka and in other Asian countries. His endeavours are writ large in his numerous publications, and have been well-articulated in the innumerable seminars, workshops and discussions he has organized or attended.

This book is yet another important publication of Mr. Basil Fernando, and everyone interested in upholding human rights and freedom will find it of value.

Introduction

This book consists of several essays written over a long period of time. They all converge on the problem of impunity and the impact it has on individuals and the legal system as a whole. The individual cases that are discussed and reflected on in this book illustrate things that routinely happen within the criminal justice framework of Sri Lanka. Through individual stories, it is possible to narrate what happens when people seek justice for perceived wrongs.

It is important to understand the gravity and nature of the wrongs people suffer under dysfunctional legal systems. For example, in one of the cases, a man went to the Supreme Court to complain about being tortured by the police. The court, having examined the facts, allowed him leave to proceed with the case. The alleged perpetrators were taken to court to answer the allegations. During this time, as the police had filed a fabricated case against him, the man was required to go to the police station on certain days to sign in as a bail requirement. As he was afraid to go, he asked his mother to accompany him. One day, they did not return from their visit to the police station. Having waited for many hours, his father, a vegetable seller, went to the police station looking for him. He did not return either.

All three are counted among the large number of people who suffered enforced disappearance during that period. The court noted these incidents when they made their final judgment on the original complaint of torture. The court also held that the police officers had in fact committed torture. Despite the court order, the police officers continued to work in their positions and, later, even received promotions. Despite the disappearances being noted by the Supreme Court itself, no action was taken to investigate them.

In narrating this incident, the point is not only to report the gruesomeness of the violations, but also to highlight the limitations of a legal system that is unable to deal with such gruesome violations of the rights of people.

The book is divided into four sections. The first section consists mostly of narratives of the sort mentioned above, showing how the system works in practice.

The second section contains reflections on Sri Lanka's constitutional crisis, which has contributed enormously to the crisis in the legal system. In 1972, a new constitution was introduced with the purported intention of bringing in the idea of autochthony as its organizing principle. Previously, the constitution had been the one adopted at the independence from the British, and was known as the Soulbury Constitution. It was drafted on the basis of the basic liberal democratic principles that should govern the structure of a modern state. What autochthony meant in 1972 was the displacement of this basic liberal democratic structure of constitutionalism and the introduction of what was thought to be a more suitable system for the country, on the assumption that the basic principles of liberal democracy were unsuitable to Sri Lanka.

One of the steps taken was to remove the judicial review powers of the courts. This same process was carried to its extreme by the constitution that was introduced in 1978, which virtually created a system based on the absolute power of the executive, under the control of the Executive President. These changes not only undermined the constitutional system, but also the criminal justice system and all other aspects of the legal system.

The third section of this book is on the impact that large-scale human rights violations and constitutional reforms that seriously undermined liberal democratic principles have had on Sri Lanka's legal and political systems. Both the legal and political systems of Sri Lanka were originally designed and developed on basic common law principles, which the British introduced to Sri Lanka. The massive human rights abuses, particularly the large-scale practice of enforced disappearances, as well as the constitutional changes giving absolute

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power to the executive, have had a profoundly negative impact on the political and legal systems of Sri Lanka.

The fourth section of the book is a study on the impact of all that is mentioned above on the implementation of human rights law in general, with a specific emphasis on the prevention of torture and other gross human rights abuses, including enforced disappearances. It is a detailed study of how the criminal justice system of Sri Lanka is functioning (or not functioning) at the present.

The ultimate test of whether human rights are respected is to see if those rights are enforceable through the legal and judicial systems. When this fails, human rights become a 'pie in the sky', regardless of the ratifications of UN conventions and whatever bills of rights and other legislation that are passed. Any serious discourse on human rights must be ultimately concerned with a way to resolve this problem. It is the only way for human rights to become a practical part of the lives, thoughts and aspirations of a people.

All these four sections are a result of a prolonged study, lasting for over 15 years, on the problems related to the prevention of torture in Sri Lanka. This initial project was later expanded into other countries in Asia. Overall, similar work has been undertaken in 11 Asian countries.

On the basis of these studies, and leaving room for a few possible exceptions, it is possible to say with confidence that in developing countries, the main obstacles to the implementation of human rights in general - including the prevention of gross human rights abuses like torture, other forms of ill treatment, and enforced disappearances – are similar to the problems illustrated in this study. We offer this study as a guide in dealing with the problems relating to the implementation of human rights in all such countries.

This study is also of the utmost importance to institutions in developed countries and their governments because of the extreme differences in the actual situations existing on the ground in developing countries. There is a vast difference between the issues related to human rights implementation in developed countries

and in developing countries. Those from developed countries often approach the problems of human rights in developing countries without having a serious grasp of the actual problems on the ground, which are highlighted in this study. This leads to a failure to develop practical ideas for the implementation of human rights. Thus, while general ideas about human rights, international norms and standards can be propagated, it is not possible to make these rights actually available to the people in developing countries without addressing the practical situation on the ground. The global challenge is how to transform general ideas about human rights into practical ideas. This requires a new discourse, one that enriches the existing discourse and turns it towards a more practical direction. This study is offered with the hope of contributing to this discourse.

The first and second appendices are recently released reports on Sri Lanka, the first from the UN Special Rapporteur on torture and other forms of cruel, inhuman and degrading treatment or punishment, and the second from the UN Special Rapporteur on the independence of judges and lawyers. Their preliminary observations (released last year) and the appended reports strongly affirm the findings of our present study.

The initial work that led to this publication was by the Asian Human Rights Commission and its partners, with the support and collaboration of Dignity (formerly RCT) and several other agencies.

Basil Fernando

PART ONE

THE DETERIORATION OF LEGAL INTELLECT IN SRI LANKA

1

QUELLING MASS PROTESTS WITH EXTRAJUDICIAL KILLINGS

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

The police spokesman, Ajith Rohana, told the media that a watchman had been arrested in connection with these murders and that, during investigations, this person had confessed to committing the murders. Rohana further stated that while three Criminal Investigation Department (CID) officers were escorting the suspect to the crime scene in order to recover the murder weapon - an axe - the suspect committed suicide by jumping into the Ma-Oya River.

It is strange that the three CID officers were unable to prevent the suspect, who was in their custody, from jumping into the river, and stranger still that they were not able to successfully rescue the suspect from the river. The three CID officers were legally obliged to take all precautions necessary to prevent the suspect from escaping or attempting suicide.

There has been a pattern in the way deaths of suspects in custody are reported, particularly in cases where the alleged crimes are of a very serious nature. Police officers claim that suspects in their custody have caused their own death, either by jumping into a river or by attempting to attack the officers, who were then forced to shoot them (encounter killings). These stories became very 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 become seriously undermined. 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.

Criminals were obviously utilizing the country's widespread instability and the very visible inaction on the part of law enforcement officers. Public disquiet was growing, particularly after the discovery of the family murdered in Wennapuwa.

The government wanted to demonstrate that the situation was still under its control. They announced that a team from the Special Task Force (STF) had been sent into the areas where the crimes had occurred and that this team was conducting serious investigations. Pictures of the officers in action were often exhibited in newspapers.

The next thing people would hear is that the culprits had been captured but, as they had tried to escape from custody, the officers had been compelled to shoot them to death. The idea of bringing such suspects before the courts after investigating their alleged crimes, which had been the practice in the country for a long time, was replaced by the type of drama described above.

This method of trying to quell people's protests was propagated by the Secretary to the Ministry of Defence, Gotabaya Rajapaksa. He would appear at news conferences and triumphantly claim that the government had intervened decisively and brought matters 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 investigation process was displaced. In its place, a group of paramilitary officers were assigned. The ultimate outcome was a summary execution, disguised as a killing in self-defence or a suicide. 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, the defence lawyers and the judge all became irrelevant factors when dealing with crime. The legal intellect was considered irrelevant. It was in the aftermath of the second Janatha Vimukthi Peramuna (JVP) massacre that the then-Deputy Defence Minister Ranjan Wijeratne claimed in Parliament that these things couldn't be dealt with by following the law. 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 in that deterioration.

2

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

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

In September 1990, the Supreme Court delivered a judgment confirming the arrest. 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, which was done 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 Articles 11, 13(1), 13(2) and 13(4) of the Constitution [Premalal De Silva v. Inspector Rodrigo and others, SC Application No 24 /89].

The Court held that the two police officers (the 2nd and 3rd Respondents) and the State were 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, De Silva was required to go to the police station to sign in as a bail requirement because of a fabricated case filed against him. As he was afraid, he asked his mother to accompany him. One day, neither of them returned. After several hours, De Silva's worried father went to Panadura Police

Station to look for them both. Thereafter, De Silva's father also disappeared.

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

The very same day that the three members of the family were subjected to this treatment, a group of police officers came looking for De Silva's younger brother. He managed to escape and then went into hiding. Today, De Silva's younger brother is the sole survivor from 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. Due to severe reprisals, complainants are intimidated and discouraged from making complaints against security officers.

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

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

"... [H]e was 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. 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, [the Petitioner] sustained injuries on his hands and legs..."

The Judicial Medical Officer's Report indicated 11 injuries, all consistent with the history given by the Petitioner. It was after the examination of all the 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 violated his rights under Article 13(1), that his detention was in violation 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 Respondents (two police officers) and the State are jointly and severally liable to compensate the Petitioner.

However, the police officers had the Petitioner and his two witnesses, his father and mother, killed. It was sheer luck that his younger brother was able to conceal his identity and escape the same fate. 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 that the two officers had violated the fundamental rights of the Petitioner, both officers continued to work and receive promotions in the police force. 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.

It would be assumed that in any country the cold-blooded and planned murders of a father, mother and son would shock the entire society and that the State would be 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. Today, there is hardly anyone left who would be moved by such things.

One fundamental element of a civilised legal system is that the state will do everything it can, with all necessary resources, to take legal action on 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 the executive presidential system remain superficial even as measures are being discussed to amend the most damaging clauses of that constitution. What no one wants to consider is that the 1978 Constitution was made with the goal of completely derailing 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, mother and son, carried out solely with the view of subverting the law, should be seen as 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, news reports emerged about an 8-year-old child (reported as a 10-year-old in some media coverage) from Ambathenna, Katugastota, who had gone missing. The case was reported by the child's mother to the Katugastota police. Initially, the police ignored the complaint and did nothing to search 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 who arrived at the scene were able to recover the Rs. 50,000 used to buy the child.

Further, according to reports, the child was the third in a family of four children. The father of the child was disabled and had been bed-

ridden for a long period of time, and the mother was unable to cater to the needs of the children.

Two people were arrested as suspects: the man who bought the child, and that man's sister. They were later released on bail. According to one report, the child's mother was also suspected of being involved in the sale of her child and was also arrested. She was not granted bail as no one came forward to stand as surety for her release.

Four years ago, in March 2010, another story made sensational news. A mother of five threw her youngest child into the Kalu Ganga (a 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 they could have food to eat, but had failed. It was only after the nationwide coverage of the youngest child being thrown into the river that the four elder children were admitted to an orphanage.

Now we have this story about a child being sold like a commodity. The news reports didn't reveal any shock on the part of the various authorities – such as the police and other bodies responsible for the welfare of children – 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 even the Magistrate did not treat the matter with due importance and simply granted bail to the two culprits.

The author first encountered a child sale in the early 1990s when a human rights organisation brought a boy who was about five-years-old to the United Nation's Human Rights Centre's offices in Cambodia. Some people from that organization had pretended to be buyers and offered the highest price for the child, in order to rescue him, and they sought the UN's assistance in protecting and finding a proper home for him.

I was shocked by this case. I had never heard of any such thing before. In the environment in which I grew up, everyone in the neighbourhood treated their neighbors' children like their own. When we made further inquiries about child sale in Cambodia, we learned that it was a significant problem 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 persecution or starvation. Among those who suffered most were the children, many taken away from their parents when they were just infants; according to Pol Pot's ideology, children would acquire reactionary habits if they were allowed to live with 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.

In present-day Sri lanka, looking at the casual way that this child sale was conducted in Katugastota, it appears that even such acts are not considered morally disgusting and socially outrageous. The country's legal system has become so dysfunctional that even an issue like child sale does not get alarm bells ringing. Despite enhanced communication facilities spreading in the country, there are no programs 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 youngest 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 to issues like 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 was once a healthy and literate man with no criminal record. He was a casual labourer, mostly engaged in tapping rubber and climbing trees to pluck coconuts.

His misfortunes began, ironically, when he won the lottery, receiving a little over 3 million rupees (then approximately USD \$25,000).

Through the lottery agent, the Moragahahena police learned about Sunil's winnings. The Officer-in-Charge of the Moragahahena Police Station sent a police officer with a message asking Sunil to come to the station, along with his lottery ticket, and stay there for his own safety. Sunil did not comply with this request. Instead, he went with his mother and aunt to cash his winning ticket and immediately deposited the money into his aunt's bank account. Thereafter, he bought a van for 1.2 million rupees and 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 asked his aunt whether Sunil had spent his lottery money. One of the police officers warned, "His [Sunil's] happiness will not last long." The police officers left a message telling Sunil to report to the Moragahahena Police Station.

On the same day, Sunil, accompanied by an acquaintance, Chanaka, and 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 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." They then beat him, landing blows all over his body, including his head. The police officers then arrested Sunil and Chanaka. They continued beating Sunil, both during his arrest and throughout the ride in the police jeep to the police station, where he continued to be hit on his head and 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. The 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 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.

On 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.

Much later in the day, Sunil was finally taken to the Horana Base-Hospital in a police vehicle. Sunil's aunt visited him and he told her 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. He was only able to give his name. However, the police officer wrote something on two sheets of paper. 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 had 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 (ASP) in Horana and informed them of Sunil's arrest and torture. However, her complaint was not recorded by the Horana ASP that day. The ASP only took her statement on the day that Sunil died, 26 July 2003, along with a statement from 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 the 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 until August 2008, when the NHRC stated that as a Fundamental rights case had been filed before the Supreme Court, the NHRC would not make any inquiry while the case was 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 there was a wound 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-mortem injuries, including 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 the 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 seemingly 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, claiming that 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 Sunil's aunt'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".

Some conclusions from 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

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 illegal and that the State party failed to inform him of the reason for his arrest.

UNHRC's recommendation was 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 during the term of its office. The question now is whether the new government headed by President Maithripala Sirisena – who has promised to discontinue the way the previous government conducted itself in relation to international affairs, including its relationship 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 recommendations 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 they did in Sunil's case.

One other important point 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 THE PERIODIC MASSACRES OF YOUTH SINCE 1971

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. Producer Upul Shantha Sannasgala, raised a question, which he said was of very great importance to him, about the

periodic massacres of young people that 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 about whether these cyclical massacres would go on, taking the lives of a large number of young people in the country.

The Prime Minister's reply was that each of those events had its own cause, saying that youth unemployment, for example, was the cause of the 1971 rebellion, and that, as another example, ethnic factors caused unrest both in the South and North of the country; these periods of unrest were the causes of large-scale violence.

In terms of a solution, the Prime Minister opined that improving economic conditions through development programmes could improve the well-being of all, including the youth, and that hopefully this would prevent the kinds 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 rather than development issues alone when trying to fathom the grotesque violence that the country has periodically experienced, as he could thereby develop a more comprehensive policy towards preventing 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 past occasions and to develop policies and strategies to avert the use of such disproportionate 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 the measures that are taken to ensure that the security forces will observe the basic rules of conduct, even when the situations they face are unusual or difficult.

Even in the midst of great world wars, certain armed forces and policing institutions continued to observe the required codes of conduct after a person was captured or had surrendered. However, in Sri Lanka, people were often picked up from their homes - their families were left with the police officer's promises of their safe return

within a short while – and then killed. Their bodies were often secretly disposed of.

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

We assume that the Prime Minister is well-aware of all that took place during each of these periods of mass killings.

Besides the fundamental rule that legal protection is guaranteed to people after their arrest, there is also the fundamental rule that the police and armed forces must maintain official records of what happens to each person who they take into their custody. The killings that took place in Sri Lanka are not mentioned in official records. Those responsible for the killings were unlikely to record them in any case, but there was also political support for this. In fact, it can be said without exaggeration that a tacit rule developed of disposing of human bodies without maintaining any form of records.

With the Prime Minister, it seems unlikely that we need to labour these points, as they are known to him. 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 the 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 arrested persons.

It is the duty of the Prime Minister and the government to take all possible measures to inculcate a tradition of obedience to rules within the police and the armed forces. To refuse or neglect to think about this matter seriously amounts to contributing to the recurrence of such situations in the future. So long as the leaders in the government do not care about the manner in which the police and the armed forces observe and respect rules, no amount of economic development could prevent the recurrence of such violence.

Therefore, it is quite appropriate to request the Prime Minister to once again reflect on the question of preventing such violence, and to place before the nation a more comprehensive response about how the Prime Minister and the government envision the carrying out of his duty to inculcate an attitudinal change into the armed forces and the police so that they start to observe the normal decencies that they are expected to observe in relation to people they take into their custody.

We hope that the producer of the programme 'Sathyagaraya' can give the Prime Minister another opportunity to provide a more comprehensive answer, in order to put the consciences of the producer and the listeners' to rest, with the assurance that the government has a policy and a strategy to end the heinous practice 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 the discovery on 28 July 2010, the case itself remained buried.

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 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, 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 exchanged greetings in Arabic. After talking to them for several minutes, Mr Razeek came 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 in 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 to the 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 outlets reported on this mysterious disappearance.

It was about five months after his disappearance that his body was discovered and exhumed from within a half-constructed building. 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. Several suspects were also arrested and produced before the Magistrate and later they were released on bail.

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

Suspicions emerged that the kidnapping and murder of Mr Razeek and the disposal of his body within the half-constructed private house was related to the Community Trust Fund and its finances. Minister Rishad Bathiudeen figured prominently in the media reports relating to the mystery surrounding the disappearance of Mr Razeek.

Regarding the handling of this case, the Lessons Learnt and Reconciliation Commission (LLRC) 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 maintaining a civilised society than a serious commitment on the part of the government to deal with any murder with the utmost seriousness. Where even investigations into murder and the prosecution of offenders cannot be guaranteed, there is hardly any reason to believe that the government is willing and able to enforce the law.

At a time like this, where 'good governance' is used a slogan by the government, the way investigations and prosecutions of murders are dealt with should be used as the primary test of the authenticity and credibility of such claims.

The uniqueness of Mr Pattini Razeek's case is that the body of the murder victim was discovered and that we can see the circumstances of his burial, both of which throw light on the deliberate intention of the perpetrators of this crime. The available evidence on the abduction, murder, and disposal of the body reveal a highly thought-out scheme.

The failure to prosecute in this case is, therefore, not due to the absence of evidence. It suggests a deliberate scheme to prevent prosecution. Schemes protecting criminals are themselves horrendous crimes.

The challenge now lies with the 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 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. On 14th July 2006, the UNHRC published their report. They found that the Sri Lankan Government had violated the rights of that young man by its failure to adjudicate on his case without undue delay. The man is over 30 years old now. 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"

Between 2004 and 2006, the case was called eight times, but hardly any progress was made towards completion. If the dates on which the case has since been postponed were to be added, 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 have been dealt with 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 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 that have been pending for a long time in the courts shows that postponements are not due, as some claim, to heavy workloads.

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, though it is clear all those cases cannot be heard on that day;
- The judge is absent for one reason or another;
- Administrative reasons, such as unavailability of stenographers or other logistical problems.

These grounds do not arise out of a heavy workload. Rather, all these are management issues. If properly managed, the majority of 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 introducing more efficient modes of management. For example, in many other jurisdictions, the modes of recording evidence have changed radically due to the advancement of communication technologies.

A pilot project for digitally recording proceedings was attempted at 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 the adjudication of cases. The technology needed for such work is fairly inexpensive. However, the decision to introduce such changes depends on the willingness of judges and court staff to properly manage such a system. It is the will and skills that are missing, and they have nothing to do with extra expenses.

In many functioning judicial systems, the time taken for hearing and disposing of 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 easily.

The appalling delays in adjudication have done more damage to the Sri Lankan legal system than any other single factor. They defy common sense and benefit no one, be it litigants, lawyers, judges, or the wider public. The result is a psychological rejection of the entire system, which runs deep in the psyche. However, due to the sheer absence of initiatives seeking to change such practices, though they are abhorrent to the people, delays continue to persist.

Delays in adjudication on the scale seen in Sri Lanka are incompatible with good governance. Delays in adjudication are, in fact, a manifestation of the absence of good governance. Therefore, President Maithripala Sirisena's government, particularly its Ministry of Justice, should take steps to address this problem as an urgent priority.

As in the case of investigations 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 desperately Sri Lanka needs this change.

8

INSTITUTIONS FOR THE 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 being 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 delays and to ensure that justice is done within a reasonable time. This promise by

the President is quite welcome. We hope that the investigations will be completed soon, that the Attorney General will also file the indictments soon, and that the trial will commence.

While this move is appreciated, it needs to be emphasized that trial without delay is the right of all rape victims, 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. The alleged rapists were two young boys from affluent families in the area. Within a short time after her complaint, the police were able to locate and arrest the two suspects.

The trial dragged on for more than 14 years after the event. The victim has regularly attended the court and has in no way contributed to the delays. However, as is often done in such cases, in this case too, the defence sought delays for all kinds of reasons, knowing that they had a weak case. [NB: The case was eventually resolved, after more than 14 years. Please see the next section for some of the dates and 'reasons' for postponements.]

The number of cases in which there has been scandalous delay has to be counted in the 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 to address this problem.

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

The President has declared that 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 a scandalous level of undue delay in the trials of serious crimes, good governance is not possible. The

greatest threat to good governance is crime. If they choose to address this problem of undue delays in adjudication, among many other problems, the President and his government need to take action to ensure the following:

The first and most important step is to restore the requirement to hear criminal trials on a day-to-day basis. This was the practice when jury trials were held. However, the virtual abandonment of jury trials has left the decisions about postponing trial dates purely to the discretion of judges. An 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 made are not rationally or morally justified. The 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. Adjusting court schedules for this purpose is purely about managing cases and setting schedules. If a court cannot hear a case on a particular date, there is no rational purpose for fixing the case for trial on that date. This is just a matter of common sense. It should not be a difficult task for the President of the country to set-up a proper system for this through the appropriate authorities and get the cooperation of the courts.

There are also other matters, such as delays in investigations and delays in the Attorney General's department, which are also, for the most part, a result of negligent management. Inadequately funding the relevant departments is certainly one of the major causes for that negligent 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 management and ensure fair trials.

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 between his political administration and that of the former President Mahinda Rajapaksa is the emphasis placed on the proper administration of justice. With the former government, neglecting the justice system was part of its political agenda. It is only by destabilizing the system of administration of justice that the large-scale corruption and abuse of power became possible.

It is understandable due to the political climate of the recent past that the military has acquired a prominent place in the country. It should be noted, however, that in maintaining peace and stability, institutions involved in the 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 a large part of the national budget is allocated to the military, especially when compared to the budget allocated for running the institutions for the administration of justice. Such lopsided allocations of the budget are an indication of the absence of a national policy for achieving peace and stability through a functioning system of justice. No amount of military intervention can address the problems of internal security and stability if the institutions meant to administer justice are neglected.

That is another reason why this case of the brutal rape and murder of a 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. The prevention of violent crimes is primarily the 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 and tragedy.

9

THE RAPE VICTIM WHO GOT ONE 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 the indictment. Some of the visits she made to the High Court thereafter, and reasons given for postponements, are 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 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.

<u>01 February 2008:</u> 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

26 March 2007:

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.

<u>09 May 2011:</u> 1st 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. 2nd witness Anthonimiuttu Annamary, 6th 05 Sep 2012: 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 Iesudasan for evidence. Summons issued to witness no. 1. Judge and State counsel were absent. 10 June 2013: 02 Sep 2013: Witness No. 4 Kadiravel Palanisami's evidence concluded. Witness No. 5 - Dr. S.A.K.A. Wijesundara 28 October 2013: 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. The Judge was absent. 28 May 2014: 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, at time of writing.

[NB: Rita's case was finally resolved after 14 years, at the end of December 2015] In such trials, if courts deliver verdicts convicting the accused, they will often appeal. That would mean a few more years of delay and many more visits to court. If the court orders a retrial (as has happened in some cases) the whole process will be repeated again. It is not wrong to condemn this way of conducting 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 them to commit more crimes.

A rape trial can easily be conducted and completed within a year, as 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

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

FOR our present purposes, the "justice system" refers to the police, the prosecutions department (Attorney General's Department), and the judicial institutions, both as separate entities and as a collective in their interactions with each other.

That these institutions suffered great setbacks due to the 1972 and 1978 Constitutions is unanimously acknowledged. Constitutional Amendment 19A attempts 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 19A Amendment cannot provide answers.

For example, take the most significant problem in Sri Lanka's justice system: extreme delays in the delivery of services by each of the

aforementioned institutions involved in the administration of justice. These delays result in the legal system delivering more problems than solutions. Thus, the system contributes to creating injustices rather than justice.

Without resolving the problem of undue delays, 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 be the unwritten rule underlying Sri Lanka's justice system. Mere verbal statements condemning delays, often made in response to public criticism over a case that gets media attention, are purely ritualistic in nature and are not meant to be taken seriously.

The justice system remains in the primitive colonial mode

In the outside world, ideas about policing, prosecutions, and judicial conduct, 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 the justice system.

The 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 age of bullock carts.

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, the then-Deputy Minister of Highways and Investment Promotion [NB: the current Deputy Minister of State Enterprise Development], made the following observations during an interview with AHRC TV [in 2015]:

"... 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 resort to means that police forces in poorly funded situations all over the world resort to: trying to solve crime by fabricating some charge—arresting 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, too. We need to address this problem. 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 using torture, even psychological torture, should come to a stop here. In a civilized society, every human being has dignity and every human being should be treated equally irrespective of their social background, irrespective of the educational status, irrespective their wealth, and irrespective of whether they have political power 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 traveling 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 judicial process."

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

Three critical steps towards creating a modern justice system:

- 1) Education and training of all stakeholders, police investigators, prosecutors and judges on modern scientific methods of evidence collection and the provision of technologies required for this purpose. This way, the 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 to be necessary. This will reduce costs by cutting delays and unnecessary labour at all levels. This can be made permanent by changing legal education in all law faculties and law colleges, as well as in the 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 heavy reliance on oral evidence; and
- 3) Day-to-day hearings in criminal trials. This way, a trial can usually be completed within a week. In some instances, it may take a few days more. It would not, as in a few recent cases, take a decade to reach a summary dismissal by a judge.

In short, what is needed is the introduction of the modern legal imagination and intellect to Sri Lanka by taking a few practical steps and allocating the necessary funds. Such an investment will pay back a thousand fold in the areas of economic development and social development, thus providing a solid base for sustainable democracy and the rule of law. Stability and equal protection under the law are key factors in economic growth. It will also remove the widespread day-to-day demoralization among the population 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.

The completion of a criminal trial within a year is within reach

In countries where modern justice systems are established, completing criminal trials within a year is now the rule. In Sri Lanka, when victims of crimes are strong enough to continue their participation, a trial can go on for more than a decade.

The tactic of criminals facing 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, who writes the judgment, 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; in fact, the Judicial Medical Officer'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 that the whole process begins once again more than a decade in.

If the few steps suggested in this article are followed, completing criminal trials 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 back to rationality and credibility.
- 2) Bringing a sense of meaning and social relevance to the work of all stakeholders: victims and other complainants, accused persons, 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 the widespread abusive practices arising out of delays in adjudication.
- 5) Ushering in 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

IT is clear that terrible situations can be caused by dysfunctional institutions of justice – in particular, the police, prosecutions department and judiciary – and the political and societal crisis plaguing the country is intricately linked with the sad state of justice institutions.

In learning how to remedy the situation, it is important to look at stories which stand in opposition to the Sri Lankan experience. I have been living in Hong Kong for nearly 25 years. Owing to their 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, indeed almost unbelievable, to the present generation of people living in Hong Kong. However, for the older people, who know what Hong Kong was like before the 1970s, the Sri Lankan stories would be a reminder of how things used to be like here.

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

The government has also ensured that the necessary financial arrangements are in place for a functional system of justice. All modern facilities are provided, down to the detail of tape recording all court proceedings. The result of these arrangements is obvious: Hong Kong has a fair system of adjudication without undue delays. Among the more expensive aspects of the justice system in Hong Kong is its effective and efficient system of controlling corruption, a major part of which is the prestigious Independent Commission Against Corruption (ICAC). This institution has proven its utility and necessity, and is subject to high expectations from the people.

The discipline brought about by corruption control has been felt in all state services, including the police. The police department also has the confidence of the people, who are not afraid to approach them for help.

People are also not afraid to complain against the police when injustices arise, and these complaints are quickly and fairly investigated, and corrective action is taken. All such matters are duly conveyed to the people. Over the years, the police have fought a credible battle against all kinds of crime, while at the same time respecting the rights of the people involved and being held to account for infractions.

The same can be said of the office of the public prosecutor, which functions under the Department of Justice. It functions under the principles of liberal jurisprudence and there is no political subservience in its functioning. As the legal adviser to the government, the Secretary for Justice and the Department as whole play a prominent role in maintaining the rule of law.

It has been solidly impressed on the population that the law is implemented strictly and fairly for everyone irrespective of socioeconomic status.

Lawyers in Hong Kong also abide by this ethos. The Law Society and Bar Association require their members to adhere to professional and ethical rules, 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 awarded the privilege of impunity. Impunity, in fact, is no longer a part of the system.

The justice system has made special arrangements for protecting minorities, such as through the Equal Opportunities Commission. Hong Kong is also remarkable for its attitude to gender equality.

The result of all this is a vibrant civil society. People are assertive and, using peaceful means, they make sure that they get the respect they deserve. There are many open and active protests, some big and some small. 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 an image of a paradise but to show that the problems that exist in the justice institutions in Sri Lanka can and should be resolved. One must concede that the present state of things is horrible. 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 on a death list just because I attempted to practice my profession with honour and without undue pressures. Even as I was coming to the airport to leave Sri Lanka with a protective ring of a few well wishers, we were pursued by a group of four people from security agencies, who were sent from the house of a cabinet minister living in the area. They failed only because a tyre on the vehicle they were following us with got punctured. Quite contrary to that experience, Hong Kong, the city state which has hosted me for all these years, has not given me a single occasion to complain of any harassment. The difference between the two places, in my view, lies in their respective justice institutions – the police, prosecutions department and judiciary.

12

TOWARDS AN EXPLANATION OF VIOLENCE, BASED ON THE FAILURES IN THE POLICING, PROSECUTORIAL, AND JUDICIAL INSTITUTIONS

Problem

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

Only one thing can explain this: the society, in general, is left with no hope that these institutions will ever perform any better. Blaming politicians for everything is almost everyone's favourite pastime. Though those criticisms are 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 show the way of life in contemporary Sri Lanka. These examples sum up the basic problems in 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 these articles: how deformities in the policing, prosecutions, 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 binds them. That unifying principle should have been that the rule of law is the 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 are run in ways that decision-makers think fit. There is no uniformity, not even through precedence; the way something is done today need not be the way it will be done tomorrow. The operators of this system can manipulate all processes and outcomes in whatever manner they choose. Details, discussed below, regarding each institution, are important; however, no solution is possible until the overarching problem— a lack of a unifying principle— is resolved.

Details

As for policing, the prominent problems may be summed up as follows: policing in Sri Lanka is still primitive, as it has failed to change and assimilate the principles and organizational structures of modern policing that now prevail in all successful democracies. Additionally, there are serious deficiencies in competence when it comes to 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). Another prominent problem is the widespread use of torture and ill-treatment, the custodial killings and the disappearances. And, as if these are not manifestations enough of a failed system, policing in Sri Lanka is also marred by widespread corruption, the abandonment of the principle of command responsibility, and,

consequently, the loss of disciplinary control. Subordination to political interference completes the picture. Under each of these categories, a long litany of many other defects can be listed.

As for the prosecutions, which are supposed to function under the Attorney General's Department, some of the defects that are publicly noted are: the loss of independence; the abuse of the Attorney General's power, as seen in their interventions to stop investigations into serious crimes; delays in filing indictments; their lack of contribution to the adjudication process; compromise regarding punishments for serious violations (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 delays in delivering its services have overshadowed everything and successfully alienated most of the population; political alliances made during the last 40 years in particular have undermined the idea of the separation of power and the judiciary as a separate branch of government; all higher legal remedies, including Habeas Corpus and other 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 after the constitutional changes under the 1972 and 1978 constitutions. In the lower courts, particularly the magistrates' courts, there is little room to unravel the many kinds of unscrupulous manipulations by the police, such as the fabrication of charges, tampering with evidence and the 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 creation 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 the 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.

PART TWO

THE TRAGICOMEDY OF CONSTITUTIONAL AUTOCHTHONY

Many of the essays in this booklet were initially published in several newspapers, such as the Ceylon Independent, The Nation, and the Colombo Telegraph. All these articles are linked to a common theme: the need to recognize that the legal system in Sri Lanka, particularly the criminal justice system, is alienated from the people to the extent that people are losing confidence in it altogether. This, in turn, threatens the moral and social fabric of Sri Lanka, as no nation can remain together if its foundational legal system is itself in serious peril.

Virtually everyone acknowledges that the legal system is facing such a crisis. However, despite this acceptance, there is very little conversation in Sri Lanka on how to face this challenge, and what the priority areas are that need attending to in order to turn the ship around.

These short essays, presented here with some of the other publications of mine from the last several years, germinated from the desire to get this problem to the attention of the whole nation because this is the most important problem facing the nation.

It is often argued that many problems exist and that, while the crisis in the legal system is acknowledged, the main priority at the moment should be economic development, and these other problems should wait until such developments take place in the economy. However, the premise on which the reflections contained in these essays are based is that there can be no significant economic development in Sri Lanka if it does not first address the crisis of its legal institutions.

My hunch, however, is that talking about prioritizing economic development is only a pretext. The actual reason for the unwillingness to address the legal system issue is because considerations about justice have lost significance in Sri Lanka. What seems to be written in large letters across the sky in Sri Lanka is that the poor and ordinary folks do not deserve justice, and that the affluent and the richer people do not need justice as they have other means for dealing with their disputes. The consequence of this perspective is that matters of justice and matters of law can be dismissed as unimportant.

With independence, when the local people became the rulers of their own destiny, they found that the legal system that was mainly built by the British was too cumbersome. What we saw with the introduction of the 1972 and 1978 constitutions was the claim that a new approach to constitutionalism was needed. Those attempts were described as the creation of an autochthonous constitution.

Now, looking at it in hindsight, what becomes clear is that what was meant by "autochthony" was the abandonment of the general principles and rules of a rational and democratic state, as enshrined in the Soulbury Constitution, paving the way to an ad hoc approach to the making of constitutions and laws that were not based on any general principles or rules.

When the 1972 Republican Constitution was introduced in Sri Lanka, the-then constitutional affairs minister made the following remark, which revealed the drastic nature of change intended by bringing this new constitution and the replacement of all the basic notions on which the Soulbury Constitution was based:

"This is not a matter of tinkering with some Constitution. Nor is it a matter of constructing a new superstructure on an existing foundation. We are engaged in the task of laying a new foundation for a new building which the people of this country will occupy." [Decisions of the Constitutional Court to Sri Lanka Vol. 1,1973, p.5]

When it came to the 1978 Constitution, the meaning of an "autochthonous constitution" was clearer; J.R. Jayawardene, who was elected as the Prime Minister, drafted and adopted a tailor-made constitution and made himself the Executive President. What was meant by "the executive presidency" in Sri Lanka was that the Sri Lankan President would not be bound by any general principles relating to democracy or the rule of law. He, in fact, would become the maker of the principles and the rules, without the hindrance of having to conform to what are known as the tried and tested rules of democracy and the rule of law.

While the Indian Supreme Court found a way to entrench these basic principles and rules as an unalterable part of their constitution, and named it the "basic structure" of the constitution, the Sri Lankan Supreme Court did not rise to the occasion. They did not protect constitutionalism by obstructing any attempt to displace the basic principles of democracy and the rule of law.

The direct consequence of this emerged soon: emergency laws became the law of the land, displacing the normal laws under which the country was governed. The very meaning of "emergency law" under international law is that these are laws that temporarily suspend some aspects of the ordinary laws of the land due to some exigencies. However, in Sri Lanka, what happened was not a temporary suspension but a permanent replacement.

Among the basic principles that were displaced was the most basic principle of a democracy and a rule of law system – that it is the duty of the State to protect the individual liberties of the citizens. The notion of individual liberties was relativized and trivialised, though there was a nominal section on fundamental rights in the Constitution. What the executive presidential power meant was absolute power, which is what democracies were created to prevent.

The consequences of this are well known, by way of the terror that was unleashed without any hindrance or constitutional obstruction. The most glaring example of what an executive president can do is the experience of large-scale enforced disappearances in Sri Lanka, which were made possible through emergency laws and regulations, and antiterrorism laws, which removed some of the basic safeguards for the right to life and liberty.

Aldous Huxley predicted that due to changes in technology and communication systems in the world, new kinds of dictatorships would emerge, using new modes of propaganda for adjusting people's minds to authoritarian rule. This prediction came true in Sri Lanka by the use of tongue twisting doublespeak words like autochthonous, and in the creation of a mental attitude among the people that Sri Lanka should reject what was categorized as colonial and Western ideas.

Through this, ideas of equality, liberty and fraternity, the rule of law, the independence of the judiciary, human rights, and the State's obligation to protect the liberties of the individual were treated as alien concepts. Not only were the substance of these ideas removed, but also procedural laws and rules that were considered integral to the practice of such ideas began to be treated as alien. A laxity began to be spread into all institutions, including institutions dealing with the administration of justice. Such laxity was not regarded as hostile to the very possibility of remaining as a nation, but instead was treated as part of our own ennobled way of doing things. What was, in fact, descent

to barbarism came to be regarded as quite an honourable way of doing things in our own style.

Rejecting notions labelled as 'Western' became an integral part of the nationalist ideology.

It was the people's revolt against that system that brought about the electoral changes that replaced the Mahinda Rajapaksha regime in 2015. The slogan under which the opposition rallied was that there would be an abolition of the executive presidential system. What has been proven over the last two years is that, while there has been some tinkering with the original notion of executive presidency through the passing of the 19th Amendment to the Constitution, it is not possible to replace the executive presidency, as envisaged in the 1978 Constitution, without reinstituting the general principles and rules that constitute the basic structure of a democratic form of government.

It is unfortunate that the new government has not even expressed, by way of policy, that it will completely replace the 1978 version of a constitution with a constitution that is based completely on the universally accepted norms and principles of democratic governance. What has happened so far can be compared to the clearing of muddy waters just to get a little bit of water to quench a dire thirst. There has not been any cleaning up of the water supply to ensure that it is pure water that will sustain the life of the nation. We are still drinking the muddy waters from the reservoirs created under the so-called "autochthonous approach" to the constitution.

In Sri Lanka, during the last 40 years or so, an "autochthonous constitution" came to mean a highly localised comedy. The overall ruling framework in the country became, and has remained, comic. The cynical way everything is done in every aspect of life reflects the comic nature of the country's constitutional structure. Unfortunately, neither the government, nor the country's civil society organisations, have awaken to realise that as long as this comical arrangement remains, there can be no return to good governance under a democratic framework of law.

Among the things that have become most comic are the institutions responsible for the administration of justice, namely the policing, Attorney General's Department, and judicial institutions. It is the claim of each of these institutions that they do not have adequate personnel and adequate resources to fulfil the aims for which they exist.

Through these short essays, together with the considerable amount of similar publications, we hope to ignite a conversation on our present predicament, with the aim of abandoning the comic ways of ruling ourselves in favour of wiser ways by creating a structure of governance within which universally well-established principles of democracy and the rule of law are integral. From the ashes of a period of self-destruction, we hope we would be able to re-kindle the fire so that the best practices of self-governance can be established within the short period as possible.

In the 3rd Century B.C., when the Sri Lankan State was first established, Sri Lankans had the benefit of being guided by Dharmasoka's concept of statehood, in which social responsibility was integral and was seen as the cornerstone of the nation. For Asoka, the spread of Buddhism was equal to the building of a society on the basis of social responsibility. The eminent Indian historian Romila Thapar, in her book *Asoka and the Decline of the Mauryas* has succinctly expressed this in the following words:

"In the past, historians have generally interpreted Asoka's Dhamma almost as a synonym for Buddhism, suggesting thereby that Asoka was concerned with making Buddhism the state religion. We propose to show that this was not his intention, although he himself, as a firm believer in Buddhism, was convinced that it was the only way to salvation. The policy of Dhamma was a policy rather of social responsibility than merely of demanding that the entire population should favour Buddhism. It was the building up of an attitude of mind in which social behaviour, the behaviour of one person towards another, was considered of great importance. It was a plea for the recognition of the dignity of man, and for a humanistic spirit in the activities of society."

The Constitution and the laws of Sri Lanka must revive social responsibility as the foundation of the nation. When this is understood as Dhamma, in the manner it was understood by Dharmasoka, there would be no incompatibility at all with the general notions of democracy and human rights understood universally. One of the direct consequences of this would be tolerance and respect for everyone.

Dharmasoka wrote the following in one of his edicts: "... On each occasion one should honour the sect of the other, for by doing so one increases the influence of one's own sect and benefits that of the other; while by doing otherwise one diminishes the influence of one's own sect and harms the other. Again whosoever honours his own sect or disparages that of another, wholly out of devotion to his own, with a view to showing it in a favourable light, harms his own sect even more seriously.

Therefore, concord is to be commended, so that men may hear one another's principles and obey them ..." [From the Twelfth Major Rock Edict of the Mauryan Emperor Ashoka, inscribed in the third century B.C., as found in Somanatha the many voices of history, by Romila Thapar]

It is time we immediately consider and introduce the best practices of self- governance from our own history and from wherever in the world they may originate, in order to build the brightest future for all citizens. This time around, we must remain vigilant to those versed in doublespeak, who may use tricks to disguise ad hoc misrule.

1

THE GOVERNMENT'S DELAY IN DEALING WITH THE LAW'S DELAYS

The journalist Poddala Jayantha, in a moving article written in Sinhala, recalls his ordeal on 1st June 2009, an ordeal that shocked the entire nation. A threat made to him by the brother of the-then President Mahinda Rajapaksa, Gotabhaya Rajapaksa, was to be carried out on that fateful day. He was picked up at Embuludeniya junction by a group of people who had arrived in a white van, and was severely beaten up. He recalls being beaten about a hundred times, on his head, chest and lower abdomen, and then being put inside the van, which was in fact a mobile torture chamber.

He was blindfolded and his hands were tied behind his back. They shaved his beard and hair, and put his hair inside his mouth. They severely beat him up, broke the fingers of both his hands and then tried to break both his legs. They inserted a wooden pole under his legs and they broke his left leg over it, and also caused severe injuries to the other leg. Then, with the hair still inside his mouth, they gagged him further and then threw him out of the moving van into a ditch, leaving

him near the Angoda hospital road near a shrub jungle. It was a driver of a passing three wheeler who found him and then brought several other three wheeler drivers over, and they were kind enough to take him to a hospital. He recalls with gratitude those brave people who, despite the terror-ridden times, came to save his life.

This incident, which happened under a decade ago, is quite fresh in the minds of many people. It is a reminder of the terrible times people in Sri Lanka had to live through. Jayantha is recalling this incident at a time when he is again witnessing the leaders of the very regime who caused such terror now campaigning against media freedoms. Poddala Jayantha reminds us in the last paragraph of his article that the only way to stop such tyranny from raising its head again is to strengthen law enforcement mechanisms in the country. The justice system must be able to investigate into crimes and punish the perpetrators. The perpetrators of the terrible crime against Poddala Jayantha and, more importantly, those who masterminded such acts to spread terror, have never been brought to justice. That alone is a clear indication of how bad Sri Lanka's criminal justice system is, despite the defeat of the Mahinda Rajapaksa regime in 2015. Somehow, the new government has not been able to convince the Sri Lankan people that restoring the criminal justice framework is their priority.

16th National Law Conference

The 16th National Law Conference was held in September 2015 and the participants at that conference also noted that justice institutions in Sri Lanka do not inspire the confidence of the people. Thus, at the highest levels, the country's legal profession itself has loudly proclaimed that the justice institutions in Sri Lanka are in serious trouble.

According to reports on the 16th National Law Conference, participants' attention was drawn to the laws delays. Many people have already noted this for many years. It is known, for example, that the country does not have an adequate number of prosecutors. In fact, there are fewer than 50 State Counsels, each looking into large numbers of files. One State Counsel noted that the files, when piled up, stand higher than his own height. It is no surprise that it takes as many as five to seven years just to file an indictment and much more time passes before the end of the trial, which still leaves further time for the appeals.

What the Conference failed to say is that such delays ridicule the very idea of justice. While it was good of the participants at the Conference to have noted justice delays, it must, however, be said the Conference proceedings do not show that the participants used the occasion to express their outrage adequately. After all, justice delays reduce the lawyers' life into a comedy. The sheer wastage of their lives, and, even more so, the lives of their clients, should have been an impetus for using this occasion to get the message across to the Government that the Government's own delay in dealing with the delays in the justice system is inexcusable.

If the lawyers who participated were as sharp as their profession requires them to be, they should have pointed out that the root of the problem is in fact the Government's delays. The Government's primary duty is to enforce the law. What good can the legal profession do if law enforcement is not a high priority for the Government?

The reason why law enforcement is threatened is because the Government does not provide adequate financial and other resources to have an adequate number of judges, prosecutors and competent criminal investigators. Not having adequate budgetary allocations for this all-important function should have led to a collision between the lawyers and the Government, and that should have been better expressed at the National Law Conference. What that means is that it is not only the government that is failing but the organised legal profession itself. They are failing to defend the legal system and their profession.

Is Sri Lanka unable to afford a functional justice system?

Imagine if there weren't an adequate number of doctors to attend to the needs of the people in the country. The result would be that many patients would die or suffer in other ways. Various scams may emerge and people may pose as doctors to defraud patients, who seek out any doctor they can find when they are ill. These fake doctors may even give various things which may, at most, deliver a placebo effect by giving the appearance of being medicine.

Likewise, in the absence of adequate numbers of competent criminal investigators, prosecutors and judges, many terrible consequences follow. A distorted justice system is a source of grave suffering. Just as in the case of fake doctors, a dysfunctional justice system may give the appearance of meaningful activity, but no justice will be done. The Law Conference gives some examples of this. The investors may not want to come when they know that enforcing contracts in Sri Lanka takes a very long time. Sri Lanka is ranked 161 amongst 189 countries in a survey conducted by the World Bank on the efficiency of enforcing contracts. Those accused and charged with rape, child abuse and even murder and many other grave crimes may get away with a suspended prison term. Witnesses may not come to court as they get tired after many visits and endless postponements. As a result an unjust outcome may result. What is even more dangerous is that some people may seek the assistance of criminals to make wrongs right instead of resorting to institutions of justice. Anyone familiar with what is taking place in our courts and police stations can add a lot more to this list.

Why does the government fail to improve the system of justice?

It cannot be that the leaders of the government are unaware of what has become of our system of justice. The only possible conclusion to arrive at is that maintaining a functional system of justice is not a priority as far as the government is concerned.

The implication is that the Government is not concerned with the wrongs that the citizens suffer. How then can the government claim that it gives priority to good governance?

2

DOUBLING THE NUMBER OF HIGH COURTS WILL DRASTICALLY REDUCE CRIMES

This article is an attempt to demonstrate that doubling the number of High Courts could drastically reduce the occurrence of serious crimes in Sri Lanka. The High Courts have the jurisdiction to conduct trials for serious crimes. Prolonged delays in adjudication have undermined the effectiveness of these Courts. Addressing this problem would discourage criminals from committing crime as they would fear the capacity of the State to enforce effective punishments.

Increasing the number of High Courts is an essential measure for reducing serious crimes. It is suggested that the number of such courts should be doubled at the very least. This together with hearing of trials on a day-to-day basis could make a dramatic change to end delays of adjudication.

This measure aims to address the most difficult issue in the criminal justice field in Sri Lanka: the delay in adjudication. It is simply impossible to create a significant change in this situation without increasing the number of High Courts where the trials for serious crimes can take place.

There are 28 High Courts existing at present and increasing this number will not create a great burden on the government's finances.

By increasing of High Courts it is implied that the number of High Court judges and the Court staff and the necessary material and infrastructural resources as well as the premises need to be provided. And all this will not create an unbearable burden on the Government's finances.

However, the impact of implementing this proposal will be immense.

It will significantly resolve the problem of delays in the adjudication of criminal trials. Thus, while the change will immediately take place in the High Courts, it will set the tempo for change throughout the court system, as well as in the other institutions such as the Attorney General's Department and the police.

The most significant achievement that could take place through this change is a major reduction of serious crime in Sri Lanka. This is based on the view that delay in the adjudication in criminal trials is the major cause for the increase in crimes in Sri Lanka. It is also based on how the theory of deterrence works in terms of crimes.

Speedy adjudication ensures that there would be speedy punishment in cases where the accused are found guilty. It is a universally accepted norm in criminal justice that certainty of punishment is the greatest deterrence against crimes. Delays in criminal trials mean the absence of such certainty. And it also means creating the hope for criminals to escape from punishment due to various extraneous factors that may result from such delays.

In any event, even if a person is found guilty after such a delayed trial, the impact of the punishment will be much less than the impact of punishment meted out within a reasonable time. One reason for this is that by the time the accused is found guilty of committing a particular crime, the memory of that crime would have already been lost due to the prolonged delay. This is what invariably happens in Sri Lanka. The social impact of punishment depends much on the impression that such a punishment would make on the people who have heard about such crime and who would expect such crime not to go unpunished. However, the memory of the crime itself and even such expectations are forgotten as a result of prolonged delay.

Thus, by taking a significant step by way of increasing the number of High Courts, this long held curse of prolonged delays could be reduced to a great degree. As a result, people who hear about crimes will also hear within a reasonable time that the criminals have been found and have been punished.

Naturally, the greatest impact would be on the criminals themselves. The prolonged delays, as they exist in Sri Lanka now, have created an impression among criminals that they have a great likelihood of escaping punishment or at least have a long time to find ways of avoiding it.

Naturally, the knowledge of such delays bring quite a lot of joy, or at least ease, to the minds of criminals who are contemplating the commission of serious crimes. Creating the possibilities of speedy trials within Sri Lanka can dash such hopes.

The decrease in serious crimes will have enormous impact in terms of enhancing mental health in Sri Lanka. The ease with which crime takes place is one of the major causes for anxiety among the people. People fear the threats to their lives and that of their loved ones, as well as the threats to their property. Increasing the number of High Courts in Sri Lanka will significantly reduce this.

Among the beneficiaries of speedy trials are the vulnerable groups, including women and children. People complain daily that rape and sexual abuse have increased in great proportions in Sri Lanka. Delays in criminal trials have contributed to this insecurity. Due to this insecurity, in a great many instances, women and parents often do not even make complaints to lawful authorities about being victims of crime. The

people who suffer in silence are numerous. This culture of silence can be broken if Sri Lanka increases the number of High Courts, as this results in speedy trials.

Such a measure will also have a great impact on the Attorney General's Department and the Department of the Police Services.

Both these departments are held in low esteem, mainly due to the fact that they are unable to convince the people that they have the will and capacity to bring criminals to book. The result is a great demoralisation among the staff of these institutions. Speeding up trials into serious crimes will encourage the better elements of these institutions to emerge and thus create an attitudinal change among the staff of these institutions.

If a change is achieved in the performance of High Courts, it will have a definite impact on other courts. It will create an impetus to work with greater energy and to achieve better results. In fact, the entire engine of criminal justice may receive a great push towards improvement if this singular measure of increasing the number of High Courts were to take place soon.

Naturally, this will create a demand for better resources, from within the entire system itself. The age-old lethargy and apathy in all the institutions related to the justice sector could be significantly reduced.

The impact will also be felt in the political system. Today, the people look upon the political system with great cynicism. This system seems to be connected with crime, either through the direct involvement of politicians in crime or their indirect patronage. As speedy trials into serious cases will adversely affect the narcotics trade and other criminal activities such as money laundering, it will have a direct impact on the political system.

For example, had there been a possibility of speedy trials, serious crimes in Sri Lanka, such as the type of crimes that the Rajapaksa regime is accused of engaging in, may not have taken place at all or have only occurred to a limited extent. Those who are talking about ending the political culture represented by the Rajapaksa regime should seriously reflect upon the means by which those aims can be achieved.

One of these means is to increase the number of High Courts in Sri Lanka and thereby make the possibility of speedy trials into serious crimes into an actuality. Thus, the increase in the number of High Courts will have an impact on the overall criminal justice system in Sri Lanka, as well as on the entire social ethos of the country, including its political system.

Therefore, we hope that this measure of increasing the number of High Courts in Sri Lanka will receive the attention of the government leaders, its policy makers, as well as all the opinion makers in Sri Lanka, including the civil society and the mass media.

3

ATTORNEY GENERAL'S DEPARTMENT COMES UNDER SERIOUS PUBLIC SCRUTINY

The role of the Attorney General's Department, in terms of upholding the justice system in Sri Lanka and the rule of law, is being critically examined from many quarters. The UN Special Rapporteur on the independence of judges and lawyers Ms. Monica Pinto, severely critiqued the Attorney Generals' Department in her Preliminary Observations and recommendations following her visit to Sri Lanka on 7th May 2016. The Special Rapporteur against torture and ill-treatment Mr. Juan E Mendez also examined the role of the Attorney General in terms of impunity and lack of accountability regarding the violations relating to torture and ill-treatment as well as other human rights abuses.

The Anti-Corruption Fund (ACF) in a report bearing No. 177, further exposes how the cases that have been submitted by the Financial Crime Investigations Department (FCID) to the Attorney General's Department are laying dormant at the Department due to unnecessary delays. Meanwhile, the Asian Human Rights Commission in Hong Kong has enumerated a series of defects in the Attorney General's Department that obstruct the administration of justice and the achievement of the rule of law in Sri Lanka.

Speaking about strengthening the independence of the administration of justice, the UN Special Rapporteur for the independence of judges and lawyers, Ms. Monica Pinto, states:

"... The country needs to conduct a strict exercise of introspection, so as to improve the quality of its judiciary and of the Attorney- General's office. This includes reviewing and publicizing the criteria for the appointment of judges and the causes for removal through disciplinary proceedings, providing quality legal and technological training, including mandatory training in international human rights law. "The judiciary is a national asset", said one of my interlocutors. It is also a permanent institution, one of the three branches of the State, which has a fundamental role to play in a democratic society based on the rule of law; therefore it should be robust and efficient."

Speaking particularly of the need for a transparent, decentralised, and democratic approach to the administration of justice, the UN Special Rapporteur particularly points to the appointments of judges and officers to the Attorney General's Office.

She states, "... in the appointment of judges, counsels of the Attorney-General's office and judicial staff should publish the selection procedure, including the criteria and methods to be followed." In this regard, she points to the role that the Chief Justice needs to play in these matters: "...The Constitution provides for the Chief Justice to head many instances dealing with administrative matters in the field of justice and this restricts very much his abilities to manage such an important branch of government."

She points to the strict and rigorous recruitment process that is essential for justice systems of high quality. What she says with regard to judicial officers in this regard can also equally apply to the recruitment to the Attorney General's Office; legal officers should meet personal and technical requirements and be appointed after competitive examinations held at least partly anonymously. They should be trained in technical matters, including the administration of tribunals or the analysis of complex forensic evidence, as well as in human rights law, including gender and women's rights. The lack of known and established criteria regarding the appointment of judges will equally apply to the members of the Attorney General's Department.

She goes on to point to the need for independent impartial and transparent institutions, and the need for independence, impartiality, competence, due process, as well as the right to appeal a decision to a higher body, as essential requirements for proper disciplinary

proceedings. Mentioning that transparency is an essential prerequisite of the rule of law, she states that "institutions in Sri Lanka, including those that are crucial for rule of law regime, are generally opaque", meaning that they are neither transparent (allowing all light to pass through) nor translucent (allowing some light to pass through). Referring to the Constitutional Council, she states,

"The constitutional council should publish the rules of procedures it established for itself and applies in discharging its appointment functions as well as criteria used to evaluate candidates' suitability for a given position. Such publicity would contribute to dissipating possible accusations of deliberate opacity and arbitrariness."

Speaking about the appointments to the Constitutional Council, which as of present is seven politicians and the remaining three civil society representatives, she states,

"To avoid the politicization of the appointment processes under the purview of the Council and to increase its legitimacy, this current composition should be changed so as to include more civil society representatives, including possibly representation from the Bar Association and academia."

Specifically, on the Attorney General's role, Ms. Pinto goes on to state that

"...The Attorney-General is also de Chief Prosecutor, and, as such replaced the position of the Independent Prosecutor which existed in the past. In such a capacity, the Attorney-General should issue clear and proper guidelines for the investigation and prosecution of crimes, specific guidelines could be developed for the investigation and prosecution of serious human rights violations, including torture, and violations of international humanitarian law. He should also monitor how cases are substantiated so as to avoid the delays incurred by his office. Even in 'ordinary' nonconflict-related and non-political cases, the Attorney-General's office takes too much time to produce an indictment. This is but one of the reasons for the long judicial delays in the administration of justice in Sri Lanka and which court users have to endure [sic].

"The Attorney-General's office acts as the representative of the State, which by no means should be equivalent to defending the government. His office should also be able to make a neat separation between the State and the public interest they act on behalf of and the persons behind the institutions so as to avoid any possible conflict of interest. Such conflicts of interest have arisen for instance in cases where the Attorney- General's office appears in the defence of police officers or military officers in cases of habeas corpus applications, as if the court decides that the respondent are responsible for the crimes they are accused of, the same office would be called to prosecute them."

Comments by UN Special Rapporteur against torture and ill-treatment

Mr. Juan E. Mendez, the UN Special Rapporteur against torture, points out that a modern legal system begins with affording more guarantees for the defendant. He states, "In it, the public prosecutor is first and foremost the guardian of legality."

He goes on to state that " ... Prosecutors must enforce the law against criminals but should also actively prevent miscarriages of justice by way of torture and manipulation of evidence, and intervene early on in the process. The accusatory system is more conducive than the inquisitorial system for the respect for human rights; but in its modern form it gives a lot of power but also heightened responsibility to prosecutors."

Mr Mendez, points out the importance of judges and prosecutors carrying out their obligation to consider bail for lesser and nonviolent offences and to ensure medical examinations by forensic doctors properly trained by the "Manual on Effective investigation and documentation of torture and other cruel, inhuman, or degrading treatment or punishment", also known as the Istanbul Protocol, as soon as any suspicion of mistreatment arises. Then the Rapporteur points out the duty of the Attorney General to initiate prosecutions against whomsoever may be responsible for torture or mistreatment, including the superiors who may have tolerated and condoned those acts.

This reference to Superiors is quite important within the context of Sri Lanka, although literally thousands of cases have been received each year, little action has ever been taken against officers

above the rank of OICs – Officers in Charge - for their responsibility for condoning the practice of torture and ill-treatment. In this context, particularly the role of ASPs, who are required by the Police Departmental Orders to supervise the conduct of police stations, is important. The use of torture and ill-treatment at police stations will come to an end if the ASPs play their role of supervising the officers of these police stations and take action against those who violate the law or the police regulations. There is no recorded instance in recent times when any ASP has done his duty in this regard.

The Anti-Corruption Front Report

In the ACF Report bearing No. 177, dated 16th May 2016, there are detailed accounts of 38 cases in which, according to the Report, the criminal investigations department or the FCID have completed their investigations. All the cases mentioned involve allegations of serious corruption by senior figures, including Minsters of the previous Government.

Amounts involved vary from LKR 2 Million to 700 Million. In all these cases where the investigations have been completed, the status of the indictments is are one of the following: "not yet known," "status of charges or indictments unknown", "AGs advise is unknown", or "delay in the AGs Department".

The AHRCs listing of the defects of the AGs Department

The prosecutor's role is played in Sri Lanka by the Attorney General's Department. This Department has also seen a serious degeneration in quality due to the following factors.

1. Under the previous Mahinda Rajapaksa government, the entire department of the Attorney General was brought under the control of the Presidential Secretariat. This was a fundamental violation of the tradition of independence of the Attorney General's Office, as was maintained for a long period. Bringing the Department under the control of the Presidential Secretariat was a blow to this independence, and it also brought down the image of the institution in the minds of the public. It also brought severe demoralisation into the institution. Although the new government has acknowledged this problem, it has not done enough to correct the damage done and raise the status of this Department.

- 2. The Department is also perceived as having seriously suffered from politicisation, as mentioned in the above paragraph, which applies to the entirety of the public service.
- 3. During the previous government, the Department also abandoned its earlier position regarding non-appearance on behalf of public officers who are respondents in fundamental rights applications before the Supreme Court on cases relating to torture and ill-treatment. The department officers not only began to appear for the defence of these officers, but they also often prevented issuing of leave to proceed in fundamental rights applications by providing information which was biased.

The applicants in these cases had no way to contradict the information provided by some of the officers of the Department because such information was not given in a transparent manner. The following observation of the UN Special Rapporteur for the independence of judges and lawyers is relevant:

- "... The Attorney-General's office acts as the representative of the State, which by no means should be equivalent to defending the government. His office should also be able to make a neat separation between the State and the public interest they act on behalf of and the persons behind the institutions so as to avoid any possible conflict of interest. Such conflict of interest have arisen for instance in cases where the Attorney-General's office appears in the defence of police officers or military officers in cases of habeas corpus applications, as if the court decides that the respondent are responsible for the crimes they are accused of, the same office would be called to prosecute them."
- 4. It is acknowledged that the Department does not have adequate an number of State Counsels; it is often said that the number available is less than half of what is required. One of the results of the inadequate number of State Counsels is that it often causes the delay in criminal trials and also leads to rather unprincipled forms of settling cases purely for the sake of ending them. This has included, sometimes, agreements to grant suspended sentences for even serious crimes such as rape and murder.
- 5. Extraordinary delays in the filing of indictments in the High Court regarding serious crimes.

The UN Special Rapporteur on torture and ill-treatment states:

- "...We understand that the average delay for State Counsel to bring a criminal case before the High Court after remand ranges from 5 to 7 years. This is a serious violation of due process and the presumption of innocence, and results in what is commonly known as an 'anticipated penalty' without trial. It also violates the principle that provisional detention should be the exception and not the rule. I urge Sri Lanka to consider measures to make more non-violent offenses bailable and to experiment with alternatives to incarceration."
- 6. The Attorney General and his Department have failed to issue clear and proper guidelines for the investigation and prosecution of crimes and also to make specific guidelines for the investigation and the prosecution of serious human rights violations, including torture, and other violations of international human rights law.

For all appearances, on matters of public law, the Attorney General's Department acts not as if it has a role in the protection of the rights of the people, but as if its role is to represent the State, however repressive the State may be. The Attorney General's Department acts more like a defender of repression rather than a Department acting to protect individual rights.

The Attorney General has also failed to ensure that his department does not contribute to the delays in the courts and has failed to issue instructions to State Counsel to avoid delays.

7. As the Attorney General acts also as a legal advisor, this office should be exercised as it was in the earlier period, to advise purely on the basis of legal principles and not to justify illegal and unjust actions of the State. In the recent decades, there is nothing on record to show that the Attorney General opposed unjustifiable actions taken by the Executive, particularly in order to suppress dissent, limit media freedoms, and use the legal process to harass individuals. Cases against the former Army General Sarath Fonseka, immediately after the Presidential elections in which he was the common opposition candidate, spring to mind instantly. There are also other cases like that of Jayaprakash Sittampalam Tissainayagam.

It is time for the Government and the Attorney General's Department itself to seriously examine the nature of damage the institution has suffered during the previous decades and to take the necessary initiatives for reform to prevent the department becoming an obstacle to the achievement of rule of law in Sri Lanka.

4

TORTURE IS A COMMON PRACTICE IN SRI LANKA – UN SPECIAL RAPPORTEUR

The UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment Mr Juan E Mendez, published his preliminary findings on 7th May 2016 following an official visit to Sri Lanka. He has observed that torture is a common practice in Sri Lanka and that structural reforms are required to prevent it.

In his concluding remarks he states,

"...The current legal framework and the lack of reform within the structures of the armed forces, police, Attorney-General's Office and judiciary perpetuate the real risk that the practice of torture will continue. Sri Lanka needs urgent measures adopted in a comprehensive manner to ensure structural reform in the country's key institutions. A piecemeal approach will not be compatible with the soon-to-be-launched transitional justice process and could undermine it before it really begins."

Findings

In his findings he states that "... I am persuaded that torture is a common practice carried out in relation to regular criminal investigations in large majority by the Criminal Investigation Department (CID) of the police...." And, he goes on to state that "... Fewer cases are reported today than during the conflict period and perhaps the methods used by the police forces are at times less severe. But sadly the practice of interrogation under physical and mental coercion still exists and severe forms of torture, albeit probably in less

frequent instances, continues to be used...", and that "... Both old and new cases continue to be surrounded by total impunity."

Then he makes the following observations based on testimonies from victims and detainees whom he and his team of forensic experts met during his country visit:

"... I received many testimonies from victims and detainees who took the risk to speak out, despite concerns either for their own safety or their families. I was able to conduct thorough interviews and forensic examinations in a few cases, with the assistance of a forensic expert that accompanied me during my mission. I found the testimonies truthful and many were substantiated with physical evidence that is conclusive of torture. The forensic expert conducted a number of medical examinations that confirmed physical injuries consistent with the testimonies received. The forensic expert also analysed photographs taken shortly after the alleged torture and ill-treatment, and concluded they are diagnostic of severe physical torture.

The nature of the acts of torture consists mainly of transitory physical injuries caused by blunt instruments (essentially punches, slapping and, occasionally, blows with objects such as batons or cricket bats) which heal by themselves without medical treatment and leave no physical scars. There were also several accounts of brutal methods of torture, including beatings with sticks or wires on the soles of the feet (falanga); suspension for hours while being handcuffed, asphyxiation using plastic bags drenched in kerosene and hanging of the person upside down; application of chili powder to face and eyes; and sexual violations including mutilation of the genital area and rubbing of chili paste or onions on the genital area. While these methods of torture were in some cases of short duration, in other cases torture occurred over a period of days or even weeks during interrogation."

PTA and the failures of the Magistrates

The UN Special Rapporteur observes that under Section 15(a) of the Prevention of Terrorism Act, some detainees continue to be detained in TID facilities, as they are considered by the Defence Secretary as a threat to national security.

He observes the following regarding the hearings before the Magistrates:

"... The hearings held before a magistrate, for the purpose of judicial control of the detention, do not amount to meaningful safeguards against either arbitrariness or ill treatment. The magistrates essentially rubber-stamp detention orders made by the Executive Branch and do not inquire into either conditions of detention or potential ill-treatment in interrogation."

The Rapporteur has conducted random interviews of defendants held under the PTA, or under charges of ordinary offences for over ten years in remand detention and others sent to "rehabilitation" in lieu of prosecution, which is supposedly voluntary on their part. He goes on to state, that "... Obviously, if after many years of detention the State does not have sufficient evidence to charge a detainee, the latter should be released unconditionally."

The Rapporteur recommends that,

"... The Government should repeal the current PTA. In the context of any replacing legislation, if at all necessary, a robust and transparent national debate should take place that provides for full participation of civil society. We understand that the Government is contemplating statutes on National Security, surveillance and intelligence services. Under any circumstances, those pieces of legislation should include protections against arbitrary arrest, absolute prohibitions on torture or cruel, inhuman or degrading treatment, provisions for access to legal counsel from the moment of deprivation of liberty, strong judicial controls over law enforcement or security agencies, and protections for the privacy rights of citizens. The Special Rapporteur on Human Rights while Countering Terrorism has produced very useful guidelines to incorporate in legislation of this sort. ..."

The Rapporteur also expresses concerns about the allegations he has received recently of the so called "white van abductions", and about the absence of clear rules in the law that says arrests have to be authorised by a judge.

He further, observes,

"... In practice the decision to arrest a person is made by a police officer. For that reason, it is important that detentions are made transparent, with proper identification of the arresting officer, and offering reasons based on objective evidence. Otherwise, distrust of the authorities will persist."

The Rapporteur then goes on to make his observations on the reasons that may lead to the practice of torture and observes that the Sri Lankan criminal justice system and investigation practices may indirectly incentivise the use of torture.

He observes:

"... The first is the role of confessions of suspects in criminal investigations, which currently seems to be the primary tool of investigation for the police. The need to extract a confession in order to build a case is in itself a powerful incentive to use torture. A second aspect is the practice of conducting the investigation while the suspect is in custody, rather than determining the detention based on preliminary investigations. Authorities have on a regular basis justified prolonged detention on the ground that the investigation was complex, or evidence hard to find, ignoring the fact that, outside of detentions in flagrante delicto, the evidence should be procured before the arrest. This access to the detainee for continuous questioning can also be an incentive for torture, aside from other considerations regarding conditions and legality of detention..."

The Rapporteur states that the Attorney General told the UN delegation that the statements made to the police do not form part of the criminal record in ordinary crime cases, though he acknowledged that under the PTA, statements made to a Senior Police Officer, are fully admissible in Court. He states further that in both cases, police routinely extracts self- incriminatory statements so the admissibility or not of the statements does not protect the detainee from possible coercion. In any case, the PTA provision is in direct contradiction with the obligation under the Conventions against torture to exclude all declarations made under torture.

The Rapporteur then directs his observations regarding faultiness of the rules relating to the access to lawyers. The accused provides a statement to the police as routine practice and is never informed about the right to a lawyer. This according to the Rapporteur, amounts to an inadequate and meaningless legal protection, which fuels the widespread fear and mistrust of the police system among the population. He recommends "... It would be important to establish a clear rule that persons must have access to a lawyer from the moment of deprivation of liberty. A current proposal to amend the Criminal Procedure Code that includes access to counsel only after a statement is taken by the police in the initial 24 hours of detention is not appropriate to effective assistance of counsel and would, therefore, violate due process."

Judicial oversight of police action is superficial

The Rapporteur, in examining the role of the judiciary and the prosecutors, finds fault with the prevalent practices in Sri Lanka regarding their dual obligations of prevention and accountability.

He states

"... A modern accusatory system begins with affording more guarantees for the defendant. In it the public prosecutor is first and foremost the guardian of legality. Prosecutors must enforce the law against criminals but should also actively prevent miscarriages of justice by way of torture and manipulation of evidence, and intervene early on in the process. The accusatory system is more conducive than the inquisitorial system for the respect for human rights; but in its modern form it gives a lot of power but also heightened responsibility to prosecutors."

He points out that judges and prosecutors should take it upon themselves as a matter of legal obligation to consider bail for lesser and non-violent offences and that they should ensure medical examination of the suspects so as to exclude any suspicion of mistreatment while in custody. They should initiate prosecutions of whosoever might be responsible for torture and mistreatment including superiors who may have tolerated and condoned such acts, ensuring that investigations, detentions, interrogations, arrests and conditions of incarceration are within the framework of rule of law.

Deficient and pronounced overcrowding in places of detention

The Rapporteur goes on to observe that there are serious defects relating to detention which result in an acute lack of adequate sleeping

accommodation, extreme heat, and insufficient ventilation, and that there is limited access to medical treatment, recreational activities and educational opportunities. He states that "...These combined conditions constitute in themselves a form of cruel, inhuman and degrading treatment..."

Regarding over-crowding, he refers to his visits to prisons where he observed that the population exceeded capacity by well over 200-300 percent:

"... Vavuniya Remand Prison offered a striking example of such overcrowding. One of its halls hosted 170 prisoners in what my team and I estimated to measure less than 100 square meters, providing less than 0.6 metres per person. In the same building, other prisoners were forced to sleep on the staircase for lack of space in the detention areas. In addition, we saw cells designed for one person occupied by four or five inmates. The larger prisons in Colombo were built in the mid-19th century and walls, roofs and staircases are literally crumbling on the prisoners. The Government has indicated that Welikada prison will be closed and a new prison will be built in Tangalle, but we understand the latter is not even in the planning stages yet. While replacement of old prisons is a good idea, in the meantime it is urgent to conduct maintenance and repair the unsafe conditions that amount to cruel, inhuman and degrading treatment or punishment..."

Defects in torture prosecution and provisions for fundamental rights

Talking about the Torture Act that came into effect in 1994, he observes that there have been only a few prosecutions. In the prison system there is no formal complaint mechanism available to inmates to make complaints about torture and ill-treatment, or any other matters. The complaint mechanisms available against the police are also inadequate.

He makes the following comments on the fundamental rights provisions:

"... Fundamental rights applications involve complex litigation and are thus not accessible to all. They are subject also to a 30-day term to file from the occurrence of the violation. In addition,

even if successful, they result in compensation as the only remedy. The application is not available, for example, to vacate a court order that has been based on a forced confession, as it does not lie against judicial decisions."

Impunity and lack of accountability

Like the previous Rapporteurs, who have observed the prevailing practice of impunity in Sri Lanka, the present Rapporteur also finds that

"... Acts of torture that occurred in the past have been well documented. The Government has an obligation to investigate, prosecute and punish every incident of torture and ill-treatment, even if it happened in the past, because under international law prosecution of torture should not be time barred. The State also has the obligation to prevent such occurrences in the present, and the most obvious preventive measure is forceful prosecution of cases reliably reported.

Sri Lanka has a Victim and Witness Protection Act but potential beneficiaries complain that protection is ultimately entrusted to the police which, in most cases, is the agency that they distrust. The Government should consider amending the Act in order to make it more effective and trustworthy...."

A scathing critique

The findings of the UN Rapporteur on torture and other cruel and inhuman degrading treatment or punishment is a scathing critique of Sri Lanka's failure to carry out its obligation to prevent torture and ill- treatment. This Rapporteur's findings demonstrates that the Government of Sri Lanka, fails to honour the basic obligation to prevent torture and ill-treatment despite the many promises it has given to various UN bodies, including the Human Rights Council.

Sri Lanka seems to be trapped within an extremely defective criminal justice system that cannot do away with torture and ill-treatment. The investigators, prosecutors, and also the judiciary have not made an adequate attempt to overcome the defects of the criminal justice system. None of these institutions have shown a demonstrable will to end this universally condemned practice of torture and ill-

treatment. On the other hand, the Government has failed to provide the necessary resources to undo the defects of a backward system. Therefore, Sri Lanka will continue to be condemned in international forums for its lack of will to develop a criminal justice system to be in keeping with its international obligations.

5

THE ARREST OF FORMER DIG ANURA SENNANAYAKE AND THE PROBLEM OF COMMAND RESPONSIBILITY

The former Deputy Inspector General (DIG), Anura Senanayake, was arrested and produced before the Colombo Magistrates Court. The court ordered him to be remanded until 26 May 2016. According to reports, the allegations against him relate to the murder of rugby player Wasim Thajudeen. It is particularly alleged that he attempted to misdirect the inquiry into this case at the initial stages, trying to pass the murder off as an accident. The Officer in Charge (OIC) of crimes at the Narahenpita Police Station, now also under arrest, has confessed that the former DIG instructed and directed investigations to be carried out on the basis that it involved an accident despite the observed evidence making it obvious to the OIC that there were sufficient grounds to suspect murder. The purpose of this article is not to go into the case details as such but to focus on such high ranking police officers being suspected of serious crimes in Sri Lanka.

There are a number of criminal cases in which senior police officers of such rank as Deputy Inspector General of Police (DIGs), down to the Assistant Superintendents of Police (ASPs) and Officers in Charge (OICs), have been charged in courts; some have already been found guilty and sentenced on serious charges, such as murder. Some others are being investigated on charges of murder and related offences and of deliberate subversion of the judicial process by tampering with investigation processes and reports. Some recent cases relating to such senior officers are: the case of former DIG Vaas Gunawardana, who, with six others, was convicted and sentenced to death on charges of abducting and murdering a businessman; the case of ASP Cooray, who was found guilty and convicted for the murder of senior Minister Jeyeraj Fernandopulle; the case of Thajudeen's murder itself, wherein,

apart from former DIG Anura Senanayake, Traffic DIG Amarasiri Senaratne and former Director General of Military Intelligence (DGMI) Major General Kapila Hendawitharane have been questioned by the CID, and two Head Quarters Inspectors (HQIs) on duty in Narahenpita and Kirulapone have also been arrested along with Sumith Champika Perera, former Crime OIC of Narahenpita police; and the infamous murder case of Sumith Prasanna Jayawardena, wherein the Embilipitiya ASP W.D.C. Dharmaratne has been arrested and remanded. There have been others who have been charged for bribery and corruption.

A policing system is a monolithic system, which runs on the basis of control from the top to the bottom. It is a strict system of command and the control, and the actions of the officers of the lower ranks are entirely in the hands of the officers of higher ranks. The system works on the basis of command responsibility, which is a doctrine of accountability of superior officers regarding all others who act under their direction and command. This system can function only to the extent that the principle of command responsibility is respected and maintained within the organisation.

However, it is well known that there has been a serious crisis of command responsibility under the executive presidential system. The nature of the executive presidential system, as it evolved in Sri Lanka, was that the President could put his finger in and meddle anywhere without reference to officers holding superior positions in any public institutions, including those in the police. It meant that the President, or those acting under his name, could directly give orders and get things done through any officer they wanted, without needing to consult or even inform the superior officers. This created a chaotic situation within every public institution in Sri Lanka, including that of the policing system.

One of the earliest known instances of the President directly interfering with the policing system was when President J.R. Jayawardene kept then DIG Udugampola in the Presidential Palace itself; the DIG would give orders to other officers without any reference to the IGP or any other fellow DIG. Initially, when this arbitrary situation emerged, there were reports of conflicts among the ranking police officers. However, in time, the practice became common and the system became resigned to it.

The situation degenerated further when Gotabhaya Rajapakse, as the Secretary to the Ministry of Defence, also took virtual command of the policing service. As a "state within the state" gradually developed during those years, respect for the internal organisational structure came to be disregarded. The extent to which politicians interfered with the system came to be known as politicisation.

Although direct interferences with the system came to an end with the electoral changes in 2015, the impact of the disruptions within the system still remain unresolved.

In reconstructing the policing system on the basis of the principle that officers at the top will take responsibility for everything that happens within the organisation, it has to be ensured that officers at the top have and are seen to have integrity.

For the country's premier law enforcement agency to perform its function – of ensuring enforcement of the law within the entire country – it is essential that the police officers themselves begin to recognise their organisation as one within which the law is held with the utmost and ultimate respect. If the police officers themselves lose faith in their organisation and its leaders, it is not possible for this organisation to perform its primary function of upholding the rule of law.

That there is a crisis in relation to upholding the rule of law in Sri Lanka is something acknowledged by everyone. Often the blame for this is placed on the former regime, which was one that had no respect for the rule of law. However, the people's 2015 electoral interventions aimed to bring an end to that period. They had great expectations that the prevailing lawlessness would be brought to an end.

If this aspiration is to be fulfilled, there needs to be genuine and serious efforts on the part of superior police officers not only to be but also to appear to be persons who are credible, accountable and trustworthy. This means that the higher-ranking officers should offer themselves as examples of people with utmost respect for the rule of law. It is only then that these superior officers can be perceived in that light, and the rest of the officers can fall in line. Restoring of the rule of law within Sri Lanka implies, first of all, ensuring subservience to the rule of law by all officers who belong to the policing system.

It is from this point of view that the IGP and his deputies should seriously scrutinise the circumstances under which even some of its topmost officers have degenerated into being criminals. It should be a matter of intense soul searching, and the IGP himself should initiate such soul searching. It is his duty to inculcate a policy of zero tolerance to crime within the policing system. Such a policy cannot be implemented by words; it can only be taught by setting an impeccable example.

Though these promises can be easily made, everyone knows that doing it is not going to be easy, given tolerance for crime has spread to the very top of the organisation. The Inspector General of Police will need the cooperation of all high-ranking officers of the organisation if he wants to inculcate the spirit of zero tolerance to crime within the policing system.

Garnering such cooperation should begin with the initiation of a series of discussions within the top ranks of the police on the issue, coming to a common understanding of the history of the degeneration within the system that has led to this situation where topmost officers are engaging in the most serious crimes, including murder. It is only through a process of internal discussion that genuine contrition about past practices can be generated. Once there is a serious acknowledgement of the problem at the very top, and a genuine regret about the past, instructions can be given in detail to lower ranking officers about the need to get back to the fundamental ideas of policing.

If there is an obvious change of heart within the policing system on this issue, it will become an inspiration for the rest of the population in their pursuit of making Sri Lanka a country that seeks to establish and uphold the rule of law.

6

KONDAYA, RAISED TO THE STATUS OF MYSTERIOUS CRIMINAL

The name Kondaya became a household name following the tragic Seya Sadewmi case, involving the abduction, rape, and murder of a 4-year-old little girl. The discovery of the dead body led to an uproar, not only in her village and the neighbouring villages, but

throughout the country. There was a demand for immediate inquiries, for prosecution and also for vengeance.

As usual, the local police failed to make any arrests for some time and instead began to float stories that were reported in the media, and various people were named as possible suspects. The first were the girl's father and the grandfather, who happened to be the males in the house.

So, simply because they were male, the police developed a suspicion that they might have done this, and before any evidence was collected, their suspicions were transmitted to the media and the media spread those allegations across the whole nation. Indeed, these days it is not only the whole nation; because of social media and the internet, it was also discussed among the diaspora.

The arrests were made, and later the "suspects" were found to have nothing to do with the crimes relating to the little girl's abduction, rape, and murder, and they were released.

The next suspect was a young boy, who happened to have a computer and Internet facilities, and on that basis he was suspected as the possible culprit. Again, the police suspicions were taken as fact and proof, and the information was leaked to the media, and again the same kind of publicity greeted the local village, the country, and the Sri Lankan circles abroad.

In the case of Kondaya, the DNA results have proved and confirmed that he did not commit the crime. And so the boy was also released, after many days in custody, and after being tortured.

Later, someone else was charged. And now the trial is over, and he has been found guilty of the charges by a high court.

The story does not end there. In fact, at this point, a series of new stories begin to emerge. Kondaya and the boy both sought legal advice and they filed fundamental rights applications against the police officers who illegally arrested, detained and tortured them, and also used their identities in massive media coverage, tarnishing their names in the local community and beyond.

Next, we heard that there was a case filed against both persons. The police have filed criminal charges in order to try to intimidate

them, by using the powers of arrest, for the purpose of trying to obstruct the proceedings in the actions that they have filed against the police.

The charges that the police have come up with against Kondaya, according to media reports, are that somebody like Kondaya was seen committing an unnatural offence against an animal. Again, with this, Kondaya was portrayed as a person who will commit terrible offences.

But the worst was yet to come. The people in Gampaha Minuwangoda and other villages witnessed a completely new phenomenon. Two police officers were walking behind a carriage on which loudspeakers were tied, and someone was announcing to the villagers through those speakers that the police had received information that Kondaya has joined a gang of criminals who intend to abduct children, and to take precautions against children being kidnapped. So parents and adults were being warned that children must be kept inside the house at all times and that the doors and windows should be shut at all times. The police cautioned that, due to the heavy heat, families are likely to keep their windows and doors open. However, they should understand the danger and that, despite the heat, windows and doors must be kept closed.

Now, what evidence do the police have of this particular person being a part of a criminal gang, of them planning such criminal activities? Nothing has been revealed. Besides, even if there were any allegations of the sort, the duty of the police was to investigate and to act within the procedures prescribed by law and to bring the matters to court, and to act only in the manner that they are supposed to act within the rules that are well established. The suspects that are facing investigations have a right to protection, and this protection includes their reputation. In any case, there is no law that authorises the police to go around making such announcements through loudspeakers, labelling any accused as a serious criminal. The policemen that engaged in such activity, obviously with the knowledge of the senior officers of their police station, were clearly acting against basic rules of law and decency.

But what is more worrying is the possible consequences of such announcements. One of the following things could happen to Kondaya in the following days: Firstly, he could be attacked or even be killed by mobs because, naturally, people will be very angry with anybody who they've been told is part of an organized criminal enterprise seeking to abduct their children. Nothing offends parents – on indeed, all adults - more than such type of crime.

The second possibility is that it may be said that Kondaya was arrested, and then he tried to escape, and in the process the police had to use force and in that process he was injured and killed. Such stories have been commonly reported in the recent past.

The third possibility is that a group of criminals may be indirectly mobilized to go and attack this suspect, to either injure him or murder him.

The result of this announcement is that if any one of these things were to happen to Kondaya, nobody will care. They would think, 'At last, a menace to society has been removed.'

These are the anxieties created in people, using things like the security of their children, to adjust their minds to the elimination of such persons even through illegal means. This is the experience we have had, both in terms of the suppression of the JVP rebellions and in the conflict with the LTTE and other groups in the North and East. Mental conditions can be created within which otherwise normal and reasonable people can tell themselves that if some extraordinary action is taken, even if those actions violate some of the most basic laws, it is okay because of the dangers posed to them or to society at large.

The problem is that it makes no difference at all to complain about all these matters to the higher authorities or the police. The people have gotten used to the belief that it is futile to make such complaints, because unless there is heavy political pressure, there would not be any investigations. That is the impression that has been created throughout the country about how its justice institutions and law enforcement agencies work.

In a sense, there is nothing to be surprised about in such behaviour, because 29,000 of the people who work today as policemen were those who were recruited in 2006 for purely political reasons and mostly as reserve police officers, i.e. the lowest ranking police officers. Neither were such persons subject to any interviews, nor did they undergo the normal one- year programme of training given to other

police officers. Most of them do not have strong reading and writing abilities, and they are certainly devoid of basic critical faculties. Police work requires a high degree of critical faculties because of the very serious judgements that have to be made by these officers affecting the individual liberties of human beings.

The basic principles of arrest have long been established in common law. They were well described by one of the greatest authorities on British law, A.V. Dicey, who is also credited with coining the term rule of law, which has now become a common term used throughout the world.

Writing in the 19th century, he explained that in England it had been established that arrest is illegal per se. Arrest can be justified only if there have been investigations showing that there are reasonable grounds to believe that a person may have engaged in the commission of a crime. Only then could he or she be arrested.

The second ground that is allowed as an exception to the general rule, which is against arrest, is that a person can be arrested to carry out a sentence meted out by the judiciary.

A.V. Dicey goes further to state that it is established law in Britain, in the mid-19th century, for it being the duty of the magistrate, upon finding that a person has been arrested outside those two grounds, to criminally punish those who arrested the person.

Further, it is the duty of the magistrate to see that the victim who has been illegally arrested is compensated. And that is the basis of the law introduced to Sri Lanka through our penal codes, criminal procedure code, and our constitutional law.

The exact words of A.V. Dicey are as follows:

"The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification. That anybody should suffer physical restraint is in England prima facie illegal and can be justified (speaking in very general terms) on two grounds only, that is to say, either because the prisoner or person suffering restraint is

accused of some offence and must be brought before the Courts to stand his trial or because he has been duly convicted of some office and must suffer punishment for it. Now personal freedom in this sense of the term is secured in England by the strict maintenance of the principle that no man can be arrested or imprisoned except in due course of law i.e. (speaking again in very general terms indeed) under some legal warrant or authority and, what is of far more consequence, it is secured by the provisions of adequate legal means for the enforcement of this principle. These methods are twofold; namely, redress for unlawful arrest or imprisonment by means of a prosecution or an action, and deliverance from unlawful imprisonment by means of the writ of habeas corpus". [3. Introduction to the study of the law of the Constitution, 10th edition, London, Macmillan, 1959, with an introduction by E.C.S Wade Q.C., pp. 207-08]

However, today, this most important principle, on which the freedom and liberty of the individual rests, is being flouted in the most casual manner. How can good governance be established in a society like this? How can the officers win the confidence of the people when the situation is such?

The IGP has been put in an unenviable position. He has to take steps to correct the heavy load of problems inherited from the past. These problems include the 29,000 police officers - out of a total cadre of 80,000 police - who are basically not qualified to do their job.

Furthermore, the practices of flouting the law relating to arrests and detention, as well as the use of illegal killings, that have become entrenched in the system need to be eliminated. Will the new IGP be up to this task? The people will soon talk about this and his term of office will be judged partly on this basis, i.e. whether a significant reform was initiated during his term. (Naturally, such a process cannot be completed within a short time.)

Next, people will judge the progress made (or not made) on the basis of whether the IGP had the cooperation of the government to achieve this task, particularly in the allocation of necessary resources for engaging in significant reforms.

It is not only the IGP who will be judged on this issue, of course. The entire country's legal system will be judged on this issue. If the legal system does not prove that it is up to the task of making a fundamental change, then what is clear is that Sri Lankan society is heading towards an even worse form of peril than what it has witnessed in the years that followed the 1971 rebellion right up to the 9th of May 2009.

7

WHAT PODDALA JAYANTHA MEANS TO US

I do not know Poddala Jayantha personally. However, I have felt for several years and still strongly feel that I as a human being, and we as Sri Lankans, owe a serious obligation to him.

I remember the first day I heard about the cruel way he was dealt with some decade or so back. Though no stranger to the extreme forms of cruelties that have taken place in Sri Lanka in the recent decades, or perhaps because of the knowledge of these things, what I heard about this incident left a deep sense of disappointment within me.

Now, reading his own published statement about the incident in a Sinhala publication, seven years after the events, my sense of disappointment in the Sri Lankan State, and in us as a community, re-emerges, fresh, as it was when first felt.

The expertise with which the abduction into a mobile torture chamber was carried out, the speed with which the series of acts of cruelty were done, and the utterly emotionless and remorseless manner in which it was completed, are all reminders of a training that some persons have received to become torturers on sheer command. The torture industry in Sri Lanka has reached this advanced stage.

However, now, in this present moment, what I see in my mind's eye is the sheer horror and depravity of the one who gave the command to carry out this horrible act. That command came from a man who had by then become very smart about the use of cruelty to achieve his ends. Perhaps, on hearing that his commands had been carried out the same way as he wished, he would not only have been happy, but also thrilled. Such is the way of the human brain, particularly of those with mental perversions. The pleasure of power addiction is like the pleasure of drug addiction.

However, the greater disappointment is us. We have made it possible for these things to happen in the land that we call ours. What really surfaced in this incident, as it has in various ways in other similar incidents that can be counted in the thousands, is why and how we have become incapable of outrage against moral depravity and degredation.

This drama of cruelty was a spectacle created for all of us. We were all supposed to see this and be awed by the power of a cruel master who was telling all of us, "Beware, this is what I am capable of". This message was brought to us through a mobile torture team. To the producing mastermind, the whole nation was his theatre. This was that producer's way of teaching us all a lesson.

What is disappointing about ourselves is that we have all become humble learners of the traditional book of cruelties that has molded us all. The threat of breaking legs and bones are not uncommon in our parlance. There is an underlying fear in our minds about such threats, though we dismiss them as being, perhaps, bad humour. However, Poddala Jayantha was used as an example to demonstrate that such things can be done and all that is needed for such things to happen is for one of us who has become a monster to become capable of giving such a command.

A society that has become so timid it is now incapable of outrage in the face of such acts and words has no other option but to watch such horrible spectacles of inhuman cruelty.

If we are to become our own saviours, we have to discover the capacity for outrage against moral wrongs. Every moral wrong that happens in the public sphere, is an insult to the whole population. A population that puts up with such insults allows itself to be demeaned. Such a population will be visited by many such cruelties packaged and sent by its rulers, who would have learned that acts of extraordinary cruelty are a useful means of subduing the ruled.

Democracy only becomes possible when the people learn not to tolerate insults and when they become truly capable of expressing their outrage in a manner that makes the rulers aware that they, the people, are not willing to be treated like fools. A population becomes capable of moral outrage only when it sees social responsibility as the core value that keeps the society together. It is the sense of responsibility to each other that creates a strong society.

In the 3rd Century B.C. when under the influence of the Great Dharmasoka, Buddhism was bequeathed to Sri Lanka, it was envisioned as a great philosophy to unite people together by a sense of moral responsibility. Romila Thapar, one of the eminent historians India has produced, in one of her great books, "Asoka and the Decline of the Mauryas", makes this point sharply:

"In the past, historians have generally interpreted Asoka's Dhamma almost as a synonym for Buddhism, suggesting thereby that Asoka was concerned with making Buddhism the state religion. We propose to show that this was not his intention, although he himself, as a firm believer in Buddhism, was convinced that it was the only way to salvation. The policy of Dhamma was a policy rather of social responsibility than merely of demanding that the entire population should favour Buddhism. It was the building up of an attitude of mind in which social behaviour, the behaviour of one person towards another, was considered of great importance. It was a plea for the recognition of the dignity of man, and for a humanistic spirit in the activities of society."

What happened to Poddala Jayantha is something so serious that it should, even belatedly, lead to an adequate response from the society as a whole. This can be done only if the society willingly re-examines its own position in relation to the value attached to social responsibility. If we accept responsibility for each other and are willing to examine where we have failed, on that score alone, we could lay the foundation for a society that does not ask: "Am I my brother's keeper?"

8

LETTER TO THE HRC-SL; REQUEST FOR SPECIAL ACTION REGARDING MS. M. K. MALANI – TORTURED, SEXUALLY ABUSED AND INCARCERATED UNDER FABRICATED CHARGES BY NAWALAPITIYA POLICE

May 2016

Dr. Deepika Udagama Chairman, National Human Rights Commission Head Office, No. 165 Kynsey Road, Borella, Colombo 08 Sri Lanka

Dear Dr. Deepika Udagama,

Request for special action regarding Ms M K Malani, presently being held at the Dumbara-Bogambara Prison – she was tortured, sexually abused and incarcerated under fabricated charges by the Nawalapitiya Police

The Asian Human Rights Commission is bringing this case to your notice as it requires special attention given the grave violations of human rights involved and the continuing imprisonment of the victim on fabricated charges.

This case may have come to your notice already.

THE CASE NARRATIVE:

According to the detailed information received by the Asian Human Rights Commission (AHRC), Ms. M K Malani, 38-years-old, was a resident of a line-house (estate housing) at Dholosbage Estate in Nawalapitiya, Kandy District. She was married to Mr. R.P. Rengan Selvam. They had six children, the youngest being a son aged five-years-old. The family was poor to the point of destitution. The husband was a laborer and Malani worked on the tea estates. Rengan was addicted to liquor and Malani was subjected to domestic violence. When she was expecting their sixth child she was severely assaulted by her husband and was treated in hospital for several months.

Due to the abuse, Malini had started a relationship with Nadaraj Thambiraj Shivakumar, and left her husband to live with him, taking her youngest son with her. She has been living with Nadaraj for the past five years. In early January 2016, Rengan extended an invitation to Malini and her new husband to visit him and expressed eagerness to see his youngest son.

On January 5, Malani, Nadaraj and her youngest son visited Rengan. During the visit, Rengan started to hurl abuse at Malini. Later, at around 10 p.m., he assaulted Malini and pushed her to the ground. She and Nadaraj immediately took their son and left for Malini's parents' house.

On 7 January, Malini learned that Rengan had been killed. She immediately visited the Gampola Police Station to make a complaint, but the police refused to accept it since Rengan's residence is not situated within the Gampola Police Division. Instead, the police officers informed her that some police officers from the Nawalapitiya Police Station would be arriving and that she could go with them to the Nawalapitiya police station to lodge a complaint.

Several hours later, officers from the Nawalapitiya Police Station arrived and asked Malini to come with them in the police jeep.

At the Nawalapitiya Police Station, Malini again asked officers to record her complaint. However, the officers began to interrogate her about the incident and then accused her of killing Rengan, and they also implicated Nadaraj in the killing as well. She vehemently denied the allegations. Malini also observed that the police officers did not start any investigation regarding her complaint; nor did they ask about any details of the crime or the crime scene. The officers were only interested in harassing Malini to force her to admit to the commission of the crime.

After several hours of questioning, Malini was taken to an upper floor of the police station by Criminal Investigation Department (CID) officers, and her son was separated from her at that time. While she was being interrogated about the murder, which she did not know anything about, several police officers started kicking and punching her. She was then asked to put her hands on the floor and police officers trampled on them with their shoes. She was assaulted with a plank and her clothes were torn. Chili paste was rubbed on her face. Later she was

hung from the ceiling with both hands tied and she was verbally abused and severely beaten. When she asked for water, she was told to drink her own urine. Her clothes were then removed and the CID officers started to sexually abuse her. Once again she was hung from the ceiling and severely beaten. In the night, when she cried out in pain, she was given some balm. Her son was with her.

Several days later, on January 10, she was finally produced before the Magistrate of Nawalapitiya and remanded at the Dumbara-Bogambara remand prison in Kandy. She was once again produced before the Magistrate on April 1, and continues to be in detention.

Matters arising from the above narrated facts

- 1. The torture of Ms M K Malani, aggravated by the fact that the torture took place in front of her 6-year-old child.
- 2. Sexual abuse by policemen
- 3. Incarceration under fabricated charges

A short comment on each of these violations;

1. As pointed out by the UN Special Rapporteur on torture and other cruel inhuman and degrading treatment or punishment, Mr Juan E Mendez, torture and ill-treatment remain widespread in Sri Lanka and there are cases involving brutal forms of torture taking place. If the facts narrated by this torture victim are correct, then this is one such case.

The Special Rapporteur has also pointed out how torture remains the means by which information is collected in criminal investigations. This, again, is a case in point. According to the narrative from the victim, no credible investigation conducted before arresting her for the murder of her husband, whom she had left five years previously. She went to the police station on hearing of the death of her husband and, instead of being listened to, she was arrested and questioned on the allegation that she had murdered her husband. What was the basis of this allegation?

It is not difficult to figure out whether there was any credible basis to base any allegations against her: the relevant books which should be in the possession of Nawalapitiya Police. It is possible for the Human Rights Commission, either directly or through Superior Officers, to

examine these documents. In any event, the victim alleges that she was tortured. It is possible to verify her allegations on this matter through forensic examination. Though some time has lapsed, it is possible by forensic means to verify whether she has been subjected to torture.

In a situation such as this, we very respectfully submit that the Human Rights Commission of Sri Lanka has both the power and the duty to have the victim examined forensically, and thereby be in a position of verifying her allegations. We are sure that the Commission will share the concern that if the allegations are prima facie credible, allowing her to suffer further incarceration itself would constitute a violation of her basic human rights. A torture victim in her position deserves to be examined as fast as possible and, if there is any genuine intention to offer relief, it should begin with an intervention to end her incarceration.

Therefore, we would first of all respectfully request the Commission to arrange an examination by a forensic pathologist and thereby commence investigations into the allegations of torture at the earliest possible time.

In this case the allegations of torture and incarceration are linked. If the police had independent evidence of her being involved in the murder then why was there a need to torture her in the first place? The torture suggests that the police were attempting to extract information forcibly. Why was there such a need? Thus, if the allegations of torture are prima facie correct, then it also points to the fact of an illegal incarceration, and a falsified case. If the case is falsified, then the issue is, as to why the police needed to falsify a case. This again takes us to a serious matter relating to human rights in the present context of Sri Lanka. It is a well-established fact that a large section of police officers in Sri Lanka are incompetent and are not qualified to carry out criminal investigations, particularly into serious cases such as murder. It is also widely known that about 29,000 police officers were recruited as reserve officers in 2006 for political reasons and without any reference to any criteria or the verification of any qualifications. This means that almost one third of the police force in Sri Lanka can be said to be unqualified for any serious investigations into crimes by the very nature of their appointments. These reserve officers have now graduated into various higher ranks in the service, despite of their lack of qualifications. It imperative that all those who are concerned with human rights should take up this matter seriously, particularly when cases like the present one arise, where there is a clear indication that the process of arrest, detention and incarceration have all been done without following any legal or procedural rules.

2. The victim alleges sexual abuse. The Human Rights Commission is aware that sexual abuse while in custody, ranks among the gravest crimes and also amounts to torture.

An allegation of sexual abuse while in custody requires an immediate reaction on the part of everyone who has a legal obligation to investigate. We therefore urge that the Human Rights Commission presses for an inquiry into the matter immediately. If the allegations are found to be prima facie correct, then it should take the necessary actions to, on the one hand, assist the victim of sexual abuse, and, on the other, take action against the perpetrators. Again, the issue of incarceration on fabricated charges and the sexual abuse are deeply linked. Can the perpetrators of sexual abuse be left to act as accusers against this woman? There is an enormous incongruity when people are left to be accused and prosecuted on the basis of reports given by their abusers. We believe that the Human Rights Commission understands the grave miscarriage of justice involved in such a situation.

Therefore, instead of letting the victim suffer further incarceration, it is the duty of all those who are involved in the protection of her rights to stop this grave injustice of allowing perpetrators of sexual abuse pursuing criminal charges against their victim.

The torture through beatings and sexual abuse in custody also means that the victim needs both medical and psychological assistance immediately. As the UN Rapporteur against torture and ill treatment has raised this issue of psychological assistance and treatment, we would respectfully request the Human Rights Commission to take this case up as one of the first instances in which the Commission takes an active stance to provide such assistance to a victim and thereby recognizes her right to receive such assistance.

Continued incarceration

If the victim's allegations are true – and it would be absurd to dismiss them without investigation - then she has suffered torture, including sexual abuse, and is being incarcerated on the basis of a request by the same people responsible for the abovementioned

violations of her human rights. We strongly recommend the Human Rights Commission to begin to establish the principle that arrest is prima facie illegal, as is the most fundamental position in the common law, stated very clearly already in 1861 by A V Dicey. (The full quote for your easy reference is as follows)

"The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification. That anybody should suffer physical restraint is in England prima facie illegal and can be justified (speaking in very general terms) on two grounds only, that is to say, either because the prisoner or person suffering restraint is accused of some offence and must be brought before the Courts to stand his trial or because he has been duly convinced of some office and must suffer punishment for it. Now personal freedom in this sense of the term is secured in England by the strict maintenance of the principle that no man can be arrested or imprisoned except in due course of law i.e. (speaking again in very general terms indeed) under some legal warrant or authority and, what is of far more consequence, it is secured by the provisions of adequate legal means for the enforcement of this principle. These methods are twofold; namely, redress for unlawful arrest or imprisonment by means of a prosecution or an action, and deliverance from unlawful imprisonment by means of the writ of habeas corpus". [4. Introduction to the study of the law of the Constitution, 10h edition, London, Macmillan, 1959, with an introduction by E C S Wade Q.C., pp. 207-08]

It should be the duty of all who are concerned with law and human rights to resist the careless manner in which people are being sent to remand prisons in Sri Lanka based purely on police allegations. Particularly in instances like the present one where the conduct of the police is highly questionable there is ample justification to question the police version of the events in this case. It is not difficult to find out whether there was independent evidence on which to base a reasonable suspicion that this victim was in fact involved in this crime. If it is not so, it is the duty of all concerned to see that she be released. It is within the power of the Human Rights Commission to stand up against illegal detention when there are strong grounds to do so.

In raising the following issues what we are attempting to do is to take up the issues raised and recommendations made by the UN Special Rapporteur on torture, Juan E Mendez, preliminary observations following his visit to Sri Lanka in May 2016. We believe that the Human Rights Commission is competent and quite capable of providing a credible leadership in dealing with serious abuses of human rights as those alleged by the victim in this case.

We would also like to assist the Human Rights Commission by making the following suggestions in order that it may discharge its duties diligently and also without delay.

We would like to suggest that the Human Rights Commission requests the professional assistance of forensic doctors and psychologists on a voluntary basis to help them in their inquiries. We are aware that there are many conscientious pathologists, forensic experts and people qualified in the field of psychology who are available in Sri Lanka and are willing to assist in inquiries of this nature if they are requested to do so. Perhaps the Human Rights Commission should form groups of such persons whose assistance could be called upon whenever the Commission requires it. Given the peculiar circumstances of Sri Lanka and the constraints on budgets and other such unfortunate impediments to the protection of human rights, the Commission can develop suitable methodologies to enhance its work which are contextually justifiable.

We take this opportunity to also state that the Asian Human Rights Commission will be willing to assist in any manner possible. What we are concerned about is raising the levels of protection of persons with the efforts of the Human Rights Commission as well as community resources, so that debacles caused by particular political circumstances in the country could in some way be overcome when it comes to the protection of the rights of persons.

Thank you.

Yours Sincerely, [signed]

[signed] [signed] Bijo Francis Basil Fernando

Executive Director Director of Policy and Programmes

P.S. For the purpose of public education we will publish this letter

9

LETTER TO THE ATTORNEY GENERAL REGARDING ACCEPTING APOLOGIES FOR HUMAN RIGHTS VIOLATIONS

15th June 2016

Mr. Jayantha Jayasuriya, PC., The Attorney General The Attorney General's Department Hulftsdorp, Colombo 12, Sri Lanka

Dear Mr Attorney General,

Regarding a State Counsel's application to the Supreme Court to end a fundamental rights application relating to torture and fabrication of charges on a mere police apology

We have learnt through media reports that on 14th June 2016, when a fundamental rights application filed by Mr. Mohamed Amir came up before the Supreme Court, a State Counsel from the Attorney General's Department informed the court that the police were willing to apologise to the petitioner for torture and fabrication of charges for possession of illicit drugs.

The facts of the petition were that during the riots in 2014, caused by the intervention of the "Bodu Bala Sena", the petitioner was assaulted by a group of people and then taken to the Aluthgama police station, and the officers there proceeded to file charges against him for the possession of illicit drugs. The petitioner filed a fundamental rights application arguing that his rights had been violated by these acts.

On the basis of the information given by the State Counsel at the hearing on the 14th of June – that the police are willing to apologise to the petitioner – an apology was tendered by the Officer-in-Charge of the Aluthgama police, with the promise to the Supreme Court that the police officers will withdraw the charges filed against the petitioner.

The question that we wish to raise with you relates to the legitimacy and propriety of the State Counsel intervening on behalf of

the police in order to enable the tendering of an apology for the serious allegations of torture, as well as the serious allegation of fabricating charges about the possession of illicit drugs. Both allegations against the police are of a serious nature. Is it the policy of the Attorney General's Department that even such cases can be brought to an end by a mere apology and a promise to withdraw fabricated charges?

In our view there was no basis for the State Counsel to make an intervention for this purpose as the conclusion that the State Counsel, on behalf of the Attorney General's Department, should have drawn from the willingness of the police to make an apology is that they admit to the violation of the rights of the petitioner on both allegations. When the police admit having committed these violations, is it the policy of the Attorney General's Department that the police can escape the ramifications by tendering an apology to end the matter?

After the admission that the officers committed these serious violations, was it not the duty of the State Counsel to inform the Supreme Court that, as the police have admitted their culpability, they should be dealt with for violating fundamental rights and also separately prosecuted for their criminal actions? Both torture and the fabrication of charges are serious crimes.

Is it not the duty of those who represent the Attorney General's Department before the Supreme Court to inform the Court of the legal situation arising from the police admitting the truth of the allegations made by the petitioner and clearly put before the Supreme Court the legal consequences that should follow?

According to the available reports, the State Counsel who represented the Attorney General's Department did not discharge his duties by placing before the Supreme Court the actual law relating to the matters that have arisen during this case.

A fundamental rights violation is not merely a violation against an individual; it is a violation of the State's obligation to protect the rights of individuals. Therefore, even the willingness on the part of the petitioner to accept an apology does not in any way expiate or expunge the violation committed by the State in the failure to protect the rights of the individual. The very reason for the existence of the fundamental rights jurisdiction is to ensure that the State's duty to protect individual rights is not violated under any circumstances.

In any case, what was the need for the State Counsel to intervene on behalf of the police, particularly when the police admit that they have committed the violations as alleged by the petitioner? The police could have used their own lawyers to make whatever applications to the court that they wanted. The duty of the State Counsel is not to intervene on behalf of the police in this case, but to explain to the court the position of the law arising out of the factual situation admitted in court.

One cannot help but conclude that the State Counsel's intervention was for the purpose of indicating to the Supreme Court that the matter should be brought to an end by way of an apology. The stamp of approval of the Attorney General was thus given to this scheme. Through the State Counsel's application, the police have found an easy escape from liability.

The State Counsel has forgotten two more matters relating to fundamental rights: the illegal arrest and illegal detention of the petitioner. From the facts of the case, it is quite clear that there was no reason for the petitioner to be taken to the police station and for detaining him. The charges filed against him were admitted to be false and fabricated. It is quite clear that there was no reason to arrest or detain him. Whether this matter has been raised in the petition or not, on the plain reading of facts it is very clear that such illegal arrest and detention has taken place. That matter is itself of paramount importance. To reiterate the importance attached to preventing illegal arrest and detention in the common law tradition we quote here what the eminent British jurist AV Dicey wrote in 1885:

"The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification. That anybody should suffer physical restraint is in England prima facie illegal, and can be justified (speaking in very general terms) on two grounds only, that is to say, either because the prisoner or person suffering restraint is accused of some offence and must be brought before the Courts to stand his trial, or because he has been duly convicted of some offence and must suffer punishment for it. Now personal freedom in this sense of the term is secured in England by the strict maintenance of the principle that no man can be arrested or imprisoned except in due course of law, i.e. (speaking again

in very general terms indeed) under some legal warrant or authority, and, what is of far more consequence, it is secured by the provision of adequate legal means for the enforcement of this principle. These methods are twofold; namely, redress for unlawful arrest or imprisonment by means of a prosecution or an action, and deliverance from unlawful imprisonment by means of the writ of habeas corpus."

We have no way of knowing whether State Counsels are given a firm grounding on the principles of the common law, particularly relating to the personal freedoms and the protection of personal liberties. The particular conduct of the State Counsel in this case does not show that he has had the benefit of such an education.

We are writing to you to request you to inquire into this matter and to take whatever appropriate actions necessary to scrutinise the legalities of the issues involved. Besides this, apology or no apology, the police officers involved need to be criminally charged for fabricating possession of drugs charges against an innocent citizen. This is an enormously important matter. This terrible practice is being carried out at many different police stations. As the officer whose duty it is to advise the State on legal issues, we think that you are obligated to clarify these matters to your department, as well as to the public at large.

As we were writing this letter to you, we learned that the Special Narcotics Raid Unit, in collaboration with the STF, seized 91.3 kilos of cocaine valued at Rs 2 billion at the Rank Container Terminal Container Yard in Orugodawatte on the morning of 14th June 2016.

We wonder if this, too, will come to the same end: by the tendering of an apology at some future time when the public will have lost interest in the matter? What is at stake here is therefore is the very meaning and relevance of law in Sri Lanka. What is to become of a nation that has trivialised the law to this extent? We look forward to hearing about your actions in relation to this matter.

We want to explain to you why the Asian Human Rights Commission is raising these matters for your attention. I am sure that you would not consider it controversial if one were to state that the legal system in Sri Lanka has suffered profound disturbances, particularly during the last four decades. The following quote from the Honorable

Minister for Foreign Affairs, Mr. Mangala Samaraweera, made at the august assembly of the United Nations Human Rights Council, makes it very clear that the above statement is not of a controversial nature:

"Accountability is essential to uphold the rule of law and build confidence in the people of all communities of our country in the justice system. We also recognise fully the importance of judicial and administrative reform in -this process. These are essential factors that must be addressed for the culture of accountability and the rule of law which have been eroded through years of violence to once again be ingrained in our society."

The erosion of the legal system means the erosion of the foundation of our nation. This erosion has today gone to the extent of shaking the very moral and ethical foundation of our society. As a person learned in the law, you know what this means. Our very existence as a civilised society is deeply in peril. There are can only be one of the following outcomes: either this process will be stopped or we will face ever deepening collapse of every institution and aspect of our constitutional, legal, judicial, societal and moral fabric. That is where we stand today. It is from that perspective that we are alerting you of this. As the chief legal officer of the country, there lies a great responsibility on your shoulders if we are to take the alternative that we should take, towards rescuing all that is so fundamental to us.

If everyone who bears responsibility in the sphere of the administration of justice makes an excuse on the basis that his institution does not have adequate officers, adequate premises, adequate resources and the like, then who is to bear the responsibility for securing our survival? Where there are such resource limitations, it is the duty of those who are responsible for these institutions to explain matters plainly to the government and to obtain the necessary resources. On the issue of the administration of justice, the taxpayer will not begrudge national resources being allocated to the extent necessary to ensure functional institutions. Therefore, the moral backing of the society exists for the leaders of such institutions who are willing to take bold initiatives and to demand what they in fact need from the government, who bears the responsibility to supply them. If, instead, the limited resource allocation is used as the excuse for poor quality services in the area of law and justice, the contribution would be towards the impending doom.

Both as the chief of the main prosecuting agency in the country, and the chief legal advisor to the government, you and your department owe an obligation to this society to ensure that our prosecution system does not fail us and that the government receives the advice needed to ensure that the protection of the legal system becomes its most primary obligation.

Every day everyone everywhere in the country is crying foul about everything that is happening within the justice system of Sri Lanka. That cry is heard both within the country and in the wider world. The failure of every national ambition - including its inability to draw adequate investments to ensure economic growth, the failure to ensure a corruption- free bureaucracy that will galvanize every aspect of the country's life, the failure to maintain a proper healthcare system that is free from neglect, as well as the deterioration of the education system, and the failure to ensure that people receive drinking water that is not contaminated – all relates to the functioning of our justice system. It is our justice system that has the capacity to make us a socially responsible nation. All kinds of irresponsible actions, which have given rise to so many diverse forms of grievances, can be traced back to the dysfunctional nature of our institutions of justice.

The matters we have raised about this one case adequately explain all the aspects that are really wrong in our justice framework. We have lost the attachment to upholding norms and standards, which are the building blocks of a justice system. The examination of this one case will reveal to you what has gone wrong in the system as a whole. That is the rationale for our intervention.

Thank you.

Yours sincerely, [Signed]

Basil Fernando Right Livelihood Award Laureate, 2014 Director of Policy and Programmes Asian Human Rights Commission, Hong Kong.

Cc:

- 1. Ms. Mónica Pinto, UN Special Rapporteur on the independence of judges and lawyers.
- 2. Mr. Juan E. Mendez, UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment.

PART THREE

THE UNDERMINING OF POLITICAL AND LEGAL SYSTEMS

It is generally understood in Sri Lanka that over the last few decades the political system has greatly contributed to the destruction of the criminal justice system and that, so long as this situation continues, the possibility of obtaining justice and the protection of human rights is virtually a day-dream.

There is now also the criticism that the criminal justice system has suffered so many setbacks that it today undermines the functioning of the democratic system. For example, even when there is some political will to stop corruption through genuine criminal investigations and prosecutions, the system is so weak that it fails to produce any significant positive results. Furthermore, there are thousands of loopholes in the criminal justice system that could be utilised to undermine efforts at accountability.

There is thus deep distrust in both the political system and the criminal justice system, which have mutually contributed to generating cynicism against the possibility of any reforms.

Also, the prevalence of this view – that the possibility of change is low – encourages the negative elements within both systems to thrive.

Therefore, understanding the manner in which the problems within the political system undermine criminal justice and also the manner in which the wrongs of the criminal justice system contribute to the undermining of all attempts to reform the political system have become unavoidable necessities.

The series of articles produced in this publication explore this theme. For this exploration, we use Sri Lanka as an example. However, we believe that the theme is of wider interest to people in all countries that are usually termed 'developing nations'. In the present context, this theme may also be relevant to developed countries where the mutual undermining of the two systems has recently begun.

In terms of Sri Lanka, we have explored the possible ways in which the criminal justice system can be improved in order to support the attempts to strengthen all democratic institutions, which have suffered great setbacks in the past four decades. The presidential and parliamentary elections held in 2015 demonstrated a serious protest on the part of the people against this collapse and thus created an opportunity for change. While the new government's coming into

power created a greater space for freedom, the measures for genuine reform are still negligible. In the area of criminal justice reforms, there have been virtually no policy developments introducing the necessary changes to undo the damage done over the past few decades.

Independent opinion makers and civil society itself have not yet taken any efforts to articulate the depth of the crisis the country is facing due to weaknesses in both the political system and the criminal justice system. Civil society organisations have yet to show that they have grasped the mutual interdependence of both these systems, and that in a situation of a criminal justice vacuum it is not possible to achieve the political demands they have been making for rapid progress towards good governance. Criticisms often centre only on the weaknesses of the politicians, which, of course, are immense. However, in the development of a strategy to deal with bad politicians, it is also necessary to understand that as long as there is a bad criminal justice system, it is not possible to carry out an effective struggle against bad politicians. The work towards the greater democratisation of the political system and the return to the rule of law require a complex approach.

We trust that this publication will contribute towards generating a discourse on the all-pervading societal crisis that has been created by the undermining of both the political system and the criminal justice system.

1

CONSEQUENCES OF LETTING A CRIMINAL JUSTICE SYSTEM PERISH

1.1. The loss of deterrence

Strong deterrence is needed to control crime. This is the experience in all societies. The only effective method that human societies have found to lower the crime rate is by demonstrating that very serious consequences will necessarily follow criminal acts. That said, of course crimes continue to be committed despite the possibility of criminals facing very serious consequences. However, the global experience is that where there are strong criminal justices institutions, people are better protected and there is a lower crime rate.

1.2. The encouragement of "manipulative" behaviour in society

The human potential for manipulation is enormous. Human experiences in any society show the extent to which criminals use underhanded schemes to promote their limited interests rather than the greater good of the community. It takes a highly developed criminal justice system to deal with this problem and to convince such people and organizations that society is organised enough to defeat any manipulative scheme, however sophisticated it may be. The lack of an effective criminal justice system encourages manipulation, and society ends up facing all kinds of unimaginable schemes that stymic movement towards the greater good.

1.3. Arbitrary killings, arrests and detention as threats to liberty

A viable criminal justice system creates laws and rules to prevent illegal arrest, illegal detention, and arbitrary killings. The processes of arrest are circumscribed by many rules relating to the protection of persons. When there is a severely weakened criminal justice system, all these rules can be suspended and all the procedures based on such rules can also be suspended or ignored. This can be illustrated in detail by looking at Sri Lanka .

1.4. Distortion of the process of criminal investigations, prosecutions and trials

A well-functioning criminal justice system depends on competent and impartial investigations. This protects people from false allegations. This is also the case for prosecutions. When the criminal justice system functions, people have faith that prosecutions are only pursued on the basis of credible evidence. The same is applicable to fair trials and other actions that take place in court. If these institutions lose credibility, then the general populace will not take the idea of criminal justice through the state seriously. Investigators, prosecutors, and even the judicial system will be seen as predators rather than protectors.

1.5. The abuse of power by politicians and the State bureaucracy

For any organised society, one of its major challenges is to find a way to control the abuse of power by those who wield authority. This cannot be achieved merely by public criticism or moral exhortations. The whole process of exercising authority needs to be circumscribed through a criminal justice framework that is capable of punishing any and everyone who, in any manner, abuses their authority. This requires that those in authority do not have the power to undermine the functioning of a criminal justice system. No system of checks and balances can work without the aid of a criminal justice system that enforces the rules that everyone exercising authority is obligated to observe. In this regard, there are two simple rules. One is that everyone who exercises authority can only engage in actions that they are authorised to do under written law. The other rule is that everyone who is responsible for engaging in particular duties cannot refuse or neglect to carry out those obligations. Failures to carry out these two rules are known as acts of commission and acts of omission. A criminal justice system must be designed to make both sets of actions, the illegal actions and omissions, punishable without exception. In a dysfunctional system, abuse via actions and omissions abound.

1.6. Undermining the political system

All aspects of a political system from the formation and functioning of political parties down to all aspects of electoral systems need to be controlled through the mechanisms of the criminal justice system. Of particular importance is the control of finances relating to all political actions. Where this aspect is not controlled through a sophisticated criminal justice framework, the inevitable consequence is chaos within the political system itself. Naturally, such chaos in the political system spills over into all aspects of society and thus creates societal chaos and confusion. The basic ideals and values of a political system can be preserved only to the extent that all deviations from such ideals and values are subject to criminal sanctions.

1.7. Undermining corruption-control measures

It is an axiom that power corrupts and that absolute power corrupts absolutely. While the use of power is a necessary condition for achieving any societal goal, it is also an undeniable reality that power, when not subject to controls, can be an obstacle to the achievement of any such goal. The health of a society requires a fine balance between the use of power and the control of such power. While the achievement of such a balance requires many approaches, a core necessity is the ability to outline sanctions and enforce them. A weakened criminal justice system upends this balance by loosening controls – checks and balances - and, as a result, power and unfettered corruption become a

damaging daily reality for those unfortunate enough to be living under such a system.

1.8. Threatening the protection of vulnerable groups

The trampling of the weak by the more powerful is a universal experience. Within human society, the protection of the weak is one of the most difficult things to achieve. Mere moral exhortations and education are not adequate for dealing with this issue. There needs to be strict criminal sanctions against all such "trampling-downs" of the weaker and vulnerable sections of society. Such a regime of sanctions can only be designed and put into effect through a well-functioning criminal justice system. In this regard, the protection of women and children features prominently. The possibility of sexual abuse is an overwhelming human problem. While solving this problem requires manifold approaches and complex strategies, in the final analysis, a system of sanctions against every form of abuse is essential for the protection of all such vulnerable groups. The failure to develop criminal justice strategies to deal with this problem invariably leads to many forms of peril, not only for the vulnerable groups but also society at large.

1.9. Disrupting the psychological well-being of individuals and the community

People need to feel that solidly established frameworks and mechanisms exist for their protection. The knowledge and awareness that such a system exists and that the assistance of such a system can be relied upon contributes greatly to the sense of wellbeing of all persons. The absence of such a framework can create many forms of insecurities and people can feel under threat and can be overwhelmed by problems. Such insecurity can give rise to all kinds of psychological ailments and also lead to violence in many forms. Where there are serious problems arising from such insecurities, a place can become a veritable hell. A sophisticated criminal justice system is able assure everyone that in the event of any danger there are arrangements for obtaining security speedily.

1.10. Creating and maintaining mutual distrust among the people

Societies where disorder prevails are also places where mutual trust disintegrates.

A well-functioning criminal justice system – by building strong barriers against societal disorder and by creating limits within which conflicts can be managed without causing unnecessary harm – creates an environment within which people can live with greater mutual trust. The absence of such trust itself becomes a source of more conflict and friction. A well-functioning criminal justice system, by creating a healthy environment through limits created against illegal behaviour, contributes to enhancing mutual trust. Such mutual trust, in turn, creates greater cooperation between people, which itself strengthens social bonds and negates the more destructive and negative interactions between individuals.

1.11. Disrupting cooperation and the constructive spirit

Lawlessness and disorder disrupt cooperation among individuals and groups. The strength of human society lies in the capacity of human communities to act in a cooperative manner. This helps in enhancing individual wellbeing, whilst also enhancing the wellbeing of others. A well- functioning criminal justice system creates the environment for such cooperation and thereby enhances the capacity for constructive endeavours and diminishes the possibilities of more mutually destructive tendencies.

1.12. Disrupting the possibility of setting higher norms and standards for human behaviour

A functional criminal justice system creates an environment where there can be greater cooperation. It makes it possible to create and maintain higher norms and standards within a particular community. On the basis of such higher norms and standards, societies can improve expectations in all aspects of life. Societies where such criminal justice mechanisms do not exist cannot achieve those higher norms and standards.

1.13. Disrupting professionalism

Professionalism depends on the maintenance of sets of norms and standards, which become the guidelines for the activities and practices within a particular profession. In societies where the observance of such norms and standards is pursued by all professions, people have the possibility of obtaining proper services from all those professions. This way, the quality of life in such societies becomes better. To achieve this

status, it is essential to lay down the parameters that are essential for the observance of such norms and standards. When norms and standards

become only declaratory, and are not applied through strict rules that are enforced by a robust criminal justice system from which no one will deviate without proper consequences, a chasm manifests between the declared norms and standards and the actual performance. Under such circumstances, various modes of cheating and double dealing spread among the members of professions, thus bringing down the quality of services that they provide for the society. When professional misconduct becomes widespread, cynicism spreads throughout society. It brings down the quality of all the institutions in such societies. Professionals benefiting from human suffering is one of the ugliest spectacles in society. Naturally, indifference to the suffering of fellow human beings will become widespread. A sense of powerlessness and hopelessness will spread to every aspect of life. Thus, achieving a higher quality of life, through better services offered and maintained by professionals, will depend on the viability of the criminal justice institutions within a country.

1.14. Disrupting the development of intelligence

When disorder and lawlessness prevail within a society, the scope for human intelligence will degenerate. Crudeness and self-delusion, rather than intelligence, can lead to higher rewards within such a social context. Often, intelligence itself becomes so warped under such circumstances that it will be used more for manipulation - for instance, for profiting by cheating - rather than for creative engagements that contribute to the greater good. Societies that degenerate into lawlessness show how unscrupulously people can engage in the most despicable means and abhorrent forms of behaviour. For example, it can degenerate into the creation and maintenance of gas chambers, and other inhumane acts that we have witnessed in many societies in recent history. When this happens, many people become discouraged from the pursuit of greater goals through the use of their intelligence, and thereby the standards of cultural institutions can sink to their lowest depths. Thus, properly functioning criminal justice institutions, a product of greater human intelligence, create an environment within which human intelligence can find many modes for creative pursuits, which directly or indirectly contribute to the greater good.

1.15. Undermining the authority of all public institutions

The authority of public institutions rests on the possibility of enforcing their decisions. If the criminal justice system has become dysfunctional, it is unable to enforce any of the decisions of public institutions in a legitimate manner. This may lead people to use unlawful means even when they have decisions in their favour from public institutions, as ways of getting those decisions enforced. For example, even if a decision given by a court, or any other authority, requires a trespasser to leave a property and ensure the return of the property to the party that the public authority decides to be the lawful owner, the lawful owner may still have to resort to criminal elements to try and expel the trespasser. If there is a general view in a particular community or society that the decisions of a public authority are usually ignored by the law enforcement authorities, then a general tendency may develop for people not to resort to lawful authorities to resolve their disputes. They may directly resort to criminal elements or attempt to get the law enforcement authorities themselves to act illegally, by way of bribes and other corrupt influences. Conflict and dispute resolution may thus drift away from the law and towards criminal or other illegal agencies. People may try to misuse lawful authorities, including law enforcement authorities, through bribery or other corrupt means in order to get their demands met, as they no longer trust that they can achieve their aims by lawful means. The result could be widespread bribery and corruption in the offices of all public authorities and in the institutions themselves.

1.16. Displacing the rule of law

When the criminal justice system suffers serious setbacks, the very possibility of running society on the basis of the rule of law begins to be perceived as irrelevant and as a practically impossible task. The simple reason for such a situation is that the rule of law depends on the law as the foundation of society. The law becomes irrelevant when law enforcement cannot be guaranteed. Law enforcement can only be guaranteed through a functioning criminal justice system.

1.17. Making the distinction between legality and illegality unimportant and irrelevant

Calling something illegal only makes sense if sanctions against such acts or omissions can be enforced. Sanctions only become meaningful if the criminal justice system has the capacity to enforce its will. In a dysfunctional system, more and more and public activities begin taking place in grey areas, wiping out distinctions between legal and illegal behaviour.

1.18. Making the protection of human rights practically impossible

Human rights protection depends on the capacity of law enforcement agencies to ensure that the violations of rights will be prevented through the proper enforcement of the law. The enforcement of the law is possible only when the criminal justice system can ensure such enforcement. When a criminal justice system is allowed to become dysfunctional, the protection of human rights via law enforcement becomes an impossibility.

1.19. Making torture and ill-treatment an alternative to criminal justice

Law enforcement agencies that do not function within the parameters of criminal justice will, almost as a rule, resort to illegal means as their modus operandi. This is how torture and ill treatment become so widespread in places where the criminal justice system has suffered serious setbacks.

2

WHY INVESTIGATIONS INTO MASS GRAVES HAVE FAILED SO FAR

"The victims of enforced disappearances have overall no faith in the justice system, prosecution services, the police or Armed Forces.

The chronic pattern of impunity still exists in cases of enforced disappearance and sufficient efforts now need to be made to determine the fate or whereabouts of persons who have disappeared, to punish those responsible and to guarantee the right to the truth and reparation."

[Preliminary Observations of the UN Working Group on Enforced or Involuntary Disappearances at the conclusion of its visit to Sri Lanka, November 2015] The existence of a mass grave may come to the notice of the public in many different ways: a statement by a witness made during a court hearing, as in the case of the Chemmani mass grave; the discovery of some scattered remains of bones by workers when digging a site for construction purposes, as in the case of the Matale mass grave; or by the surfacing of some remains of human bodies as a result of heavy rains, or due to other accidental reasons.

However, what happens after such a revelation depends on objective factors, such as the political will of the government in power to uncover the mystery behind the surfacing of a mass grave with the view to ensuring that the law is enforced irrespective of the political circumstances; the cooperation of law enforcement agencies in the investigation, looking into all the circumstances which led to the creation of such a mass grave with the view to prosecute the offenders; and the technical capacities that exists within a particular country to engage in a scientific inquiry into the discovery of the secrets contained in the materials that have been discovered from a mass grave, and many other factors.

Sri Lanka is a place where many mass graves have been discovered (AHRC has previous listed out 22, and more have been added since).

The Chemmani and the Matale mass graves are the only two instances where there have been judicial inquiries to uncover what happened. However, even in those two instances, after some initial steps were taken due to public opinion from local as well as international sources, the entire process stopped. Many technical excuses have been given for this.

Close scrutiny of these circumstances clearly indicates that there is a far more serious obstacle to inquiries into mass graves: political influence. Political considerations should not enter into decisions on inquiries into serious crimes involving the burial of many human bodies in a mass grave.

The failure to investigate into mass graves should be seen as a reflection of the nature of the criminal justice system. Therefore, probing into a mass grave inquiry is in fact scrutinizing the very nature of the criminal justice system that allowed for or created such mass graves in the first place, and then offered prolonged resistance to uncovering the truth.

When a criminal justice system allows for draconian measures to be imposed by a government and carried out by law enforcement agencies, the result is the creation of mass graves. Detailed micro studies are needed in order to uncover the political and legal measures that have gradually led to the disintegration of protections written into the criminal justice system, particularly in terms of arrest, interrogations and the carrying out of punishments of alleged offenders. Much remains to be discovered through studies of the *legal process* that enables the creation of mass graves, rather than the material remains of dead bodies discovered in a mass grave.

Close scrutiny is likely to reveal that the political influence on the criminal justice process that depletes the protections available to individuals later prevents proper inquiries into the mass graves.

What this implies is that the study of the mass graves must be considered only as a sub-branch of studies in enforced disappearances. Our research inquiry must be focused on what makes a government directly or indirectly approve the removal of measures for the protection of individuals contained in any legitimate criminal justice system, thus enabling the enforced disappearances of persons? This question is much wider than a study into a particular mass grave. The factors that enable the possibility of enforced disappearances need to be studied prior to studying what is in a mass grave in order to understand the reasons behind the serious obstacles hindering any real judicial and forensic inquiry into the material remains found in a mass grave. There were many occasions when large scale disappearances took place in Sri Lanka; a rough sketch of such disappearances is given below: for more details please see 'Phenomenon of disappearances in Sri Lanka by Mr M C M Iqbal.'

- **1971** In supressing the JVP, over 10,000 persons were made to disappear
- 1984 -1987 North and east, over 680 persons disappeared reported by Amnesty International
- 1987 1990 Indo Lanka Accord, the Indian Peace Keeping Force (IPKF) involvement, North and East disappearance of a large number of persons
- **1987-1991** Suppression of the 2nd JVP rebellion, approximately 30,000 persons disappeared

1990 - Hostilities between the LTTE and the Government, disappearance of around 3000 people reported by Amnesty International.

2004 - 2009 - After the breakdown of the ceasefire in the North and East, a large number of persons disappeared.

Under the law in Sri Lanka, there are protections for suspects of crime given by way of constitutional guarantees as well as provisions of criminal procedure law. Article 13(1) of the Constitution forbids illegal arrest; Article 13(2), illegal detention; and Article 11 absolutely prohibits torture. The law relating to arrests was the same as the law in Britain which was succinctly summarised by the great British jurist, A V Dicey, in the "Introduction to the study of the law of the constitution" (All Souls College, Oxford, 1885) as follows;

"The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification. That anybody should suffer physical restrain is in England prima facie illegal and can be justified (speaking in very general terms) on two grounds only, that is to say, either because the prisoner or person suffering restraint is accused of some offence and must be brought before the Courts to stand his trial or because he has been duly convinced of some office and must suffer punishment for it. Now personal freedom in this sense of the term is secured in England by the strict maintenance of the principle that no man can be arrested or imprisoned except in due course of law i.e. (speaking again in very general terms indeed) under some legal warrant or authority and, what is of far more consequence, it is secured by the provisions of adequate legal means for the enforcement of this principle. These methods are twofold; namely, redress for unlawful arrest or imprisonment by means of a prosecution or an action, and deliverance from unlawful imprisonment by means of the writ of habeas corpus." [1. Introduction to the study of the law of the Constitution, 10h edition, London, Macmillan, 1959, with an introduction by E C S Wade Q.C., pp. 207-08]

The entire substance of the legal provisions contained in the above quote was displaced in Sri Lanka in order to facilitate enforced disappearances.

The protection of personal liberty, an absolute principle, was relativized by putting personal liberty into the hands of security personnel. In order to do this, one of the first steps was to replace the need for arrest under legal provisions by allowing abductions instead. Thus, security officials acting on behalf of the state were granted the right to abduct. Abduction is a criminal offence in Sri Lanka. However, abductions by security officers under the pretext of the prevention of alleged terrorism were legalised.

A security officer who abducts a person had no duty to justify his actions. Thus, the burden of proving the legitimacy of an arrest by any person acting on behalf of the state was removed. There were no more legal means by which the state supervised the legality or illegality of an arrest.

By allowing abductions in the place of arrests, the practice of arbitrary arrests was legitimized. Once arrests are made outside the law, the doors to monitor the detention of persons so 'arrested' are shut. In normal circumstances, a person who is arrested needs to be produced before a court, within 24 hours, later extended to 48 hours. However, there is no possibility for ensuring the production of a person before a Magistrate when the arrest itself is denied. Thus in terms of arrests and detention, the abducted person becomes a legal non-entity.

Under normal law, arrest occurs after at least basic investigations into an alleged crime. However, the obligation for investigations is removed when the person is treated as a legal non-entity, and thus a person could be detained for whatever reason and no further investigations needed to be conducted.

When the security agencies that make these arrests have the obligation to investigate, they are also expected to keep records of such investigations. Therefore, when a statement is taken, it is put in writing and kept as an official record. Whatever questioning that is being conducted, and the answers that are given, are also put into writing and maintained as an official record. However, in instances when an 'arrest' is made with the view to cause an enforced disappearance, all the obligations for keeping official records are suspended. Thus, no record of what transpired since the 'arrest' is available. In that way, the possibility of any judicial inquiry as to the legitimacy of what has taken place is also removed.

Under normal law, deciding on the guilt of a person is entirely a judicial function. Only a judge has the power to declare a person guilty of an offence and to prescribe any punishment.

However, all such powers are given to security officers when the aim of the 'arrest' is to commit an enforced disappearance. The security officers are thereby given judicial functions and judicial powers. Moreover, such functions can be exercised without keeping any kind of official records.

Under normal law, even when a judicial officer exercises the right to judge the guilt or innocence of a person, he or she is obliged to conduct the inquiry into the guilt or the innocence of the person through a fair trial. One of the basic rules of fair trial is that it must take place in open court. Thus, the inquiry into the guilt or the innocence of the person is done with full transparency, with the public retaining the right to watch such a trial. This way, secrecy is denied even to the judicial officer conducting the inquiry into the guilt or the innocence of a person. However, when security officers are conducting the 'trial', they are permitted to do so in complete secrecy. Whatever transpires will be known only to the victim and the security officers involved. In this way, security officers can exercise judicial powers without having any obligation to observe the legal procedures that judicial officers are expected to follow.

Under normal law, the prescription of a punishment is a function of the judicial officer and must be conducted according to the limits laid down by the law. For example, a penal code or a particular statute creating a particular offence also describes the maximum punishment that could be given for such an offence. However, when security officers decide on the punishment, their powers are not limited by any law. They can decide on the punishment in any way they think fit.

Under normal law, the manner in which a punishment prescribed by a judicial officer is to be carried out is determined by written legal provisions. If the death sentence is prescribed by the judicial officer, the manner in which such an execution can be conducted is laid down by other laws and regulations. The prison authorities and the executioner merely follow those rules. Furthermore, every act that they conduct is also written into official records. Security officers who carry out a 'death sentence' which they themselves have prescribed are not under any obligation to follow any legal procedures or to maintain a record of what they do.

Under normal law, the state is obliged to provide for an appeal on any decision of guilt and prescription of punishment by a judicial officer. This appeal also has to be heard also by judicial officers with higher powers and authorities. The appeal court usually examines the legitimacy of the judgment and also the appropriateness of the punishment prescribed. Such an appeal court has power to declare the judgment wrong and to quash it if they come to the opinion that the judgment has violated the law or has prescribed punishments which are not proportionate to the particular crime alleged to have been committed. The appeal court also publishes their decision so that a public record of their reasoning is available for public scrutiny. However, when security officers make their 'judgments', there is no such obligation. Their 'judgment' cannot be appealed against; nor are they under obligation to keep any records.

When a death sentence is carried out by proper legal authorities, they are thereafter under obligation to follow the law and the rules regarding the disposal of the body. Under normal circumstances, the dead body is handed over to the family of the deceased so that they can carry out whatever rituals they think fit before the disposal of the body either by way of burial or cremation. Thus, the rights of the family members are respected even when the state has decided on capital punishment. However, when security officers dispose of bodies, they are under no obligation to respect the rights of the family members and to hand over the body to the family.

Under normal law, when arrests, interrogations and trials are being conducted, all who are involved are under an absolute obligation to prevent torture or ill-treatment of the suspects. It is an absolute prohibition guaranteed by the constitution. Further, constitutional and penal laws have prescribed serious punishments for those who violate the prohibition against torture and ill treatment. However, when security officers carry out 'the arrests, interrogations and punishments' themselves, they are not obliged to prevent the use of torture and ill treatment. In fact, the secrecy with which they conduct their activities permits them to use all kinds of torture and ill treatment.

This is just a short description of the extent to which the basic laws of criminal justice are completely violated when the state authorises enforced disappearances. In fact, at that point, criminal justice ceases to exist. The state has taken upon itself the right to deal with the life and the liberty of a person without any justice. Justice is in fact made into a completely irrelevant consideration when the state through its security officers engages in the activities of conducting enforced disappearances.

Thus, very clearly, enforced disappearances mean a complete absence of justice.

The question that arises is as to whether the state can permit itself such activities and refuse to subject itself to the requirements laws and procedures relating to justice. Can the state under any circumstances declare that it considers justice an irrelevant concept? The obvious answer is that the state is always under obligation to act justly.

Having considered how legal principles relating to criminal justice are completely displaced by way of enforced disappearances, we may ask ourselves what the principles are under which the states act when they authorise enforced disappearances.

Clearly, when security officers are given the functions of being accusers, investigators, judges, executioners and also disposers of dead bodies, they are acting on the same principles by which the Russian secret police - the Cheka - were authorised to act. Thus, during the periods when enforced disappearances were allowed, those who caused such enforced disappearances acted on the same principles as that of the Cheka. Investigations into enforced disappearances are nothing less than inquiries into similar activities by the Cheka.

We have two philosophical and jurisprudential positions. The first, as prescribed by A V Dicey above, considers the fundamental principle of criminal justice to be that every interference into the liberty of a person has to be legally justified by the state. This assumes that if no such legal justification is available, then the state is acting illegally. The opposite principle is that of the Cheka, where the state can authorise its agents to act without any reference to law. The issue of legality is completely irrelevant when looked at from the 'Cheka perspective'.

In Sri Lanka, the state, on occasions when it authorised enforced disappearances, opted to abandon its own criminal justice laws and instead, opted to act under the Cheka principles. It is this ominous transition that we are confronted with when studying the enforced disappearances in Sri Lanka.

It is from these considerations that one could expose the limitations of studying enforced disappearances from a technical perspective, which is the perspective from which even international agencies have looked into the phenomenon of disappearances in Sri Lanka. The recommendations which merely insist on the state following its laws and improving its technical capacities to investigate and prosecute enforced disappearances conveniently overlook the fundamental shift in principles on which the Sri Lankan state opted to act upon on occasions when it authorised enforced disappearances.

Implications of the above considerations on investigations into mass graves

A basic question that arises when a mass grave is discovered in Sri Lanka is as to whether it is possible to demand that the Sri Lankan state acts within the framework of criminal justice in dealing with such a mass grave when, in fact, such a mass grave is likely to be the manifestation of a state policy of causeing enforced disappearances. Is it possible for a state to act on the basis of the principles of the Cheka on the one hand and to investigate into the same incidents on the basis of criminal justice principles on the other?

The issue is one of a fundamental nature and each mass grave raises this fundamental issue. Neither Sri Lankans nor the international community have been able to face this fundamental issue squarely.

The result of refusing to come face to face with this fundamental issue is that enforced disappearances are considered as acts of individual officers who acted against the law and against the wishes of the governments in power during the time when such acts took place. Thus, the systemic circumstances under which such disappearances took place are being overlooked and another 'reality' is being created with the hope of rapidly forgetting these incidents.

However, such escape is not possible because a criminal justice system that was displaced in favour of following the principles similar to that of the Cheka cannot be restored to its former position without facing up to the fundamental transformation that has taken place, and without taking steps to abandon the Cheka approach and replacing it with a criminal justice approach once again.

No discussion has even been had on this fundamental issue. It is not possible to find a solution if the problem that is to be resolved is itself not acknowledged or understood. The result of delaying the restoration of the criminal justice system is an even more excruciating loss; the loss of the memory of a criminal justice system that existed once. Once the memory of the criminal justice system is lost, it becomes more difficult to take any real initiative to restore the principles of criminal justice again.

When mass graves are studied as a part of the overall problem of enforced disappearances, it is not difficult to understand why so many obstacles are placed against genuine investigations into a mass grave when it is discovered. The reactions to such discoveries is to find ways to suppress curiosity about the actual meaning of such a discovery and to sabotage all attempts at proper investigation into such mass graves. This is what happened in Chemmani and it was repeated when the Matale mass grave was discovered.

Similar sabotage will continue with any other discoveries in the future.

If such responses of denial and sabotage are to be displaced, the process must begin with the attempt to understand how the basic criminal justice system of Sri Lanka was displaced with a system that follows similar principles as that of the Russian Cheka. This is the first necessary step if we are to come out with any meaningful response which would ultimately have the result of restoring the lost criminal justice system of Sri Lanka.

Every mass grave is a symbol of the graveyard of criminal justice in Sri Lanka.

3

INABILITY TO MOURN - THE SRI LANKAN EXPERIENCE

IN a famous book entitled "Inability to Mourn", a husband and wife team, Alexander Mitscherlich and Margarete Mitscherlich, wrote about the experience of post-war Germany. Their patients complained of all kinds of illnesses, which the two authors traced to a common

phenomenon of the inability of the Germans to mourn for their past, particularly as the atrocities committed by the German soldiers across various warfronts were being revealed.

A somewhat similar experience can be seen in Sri Lanka after the extraordinary measures taken by the Sri Lankan security agencies in 1971 in order to crush what was in fact a relatively minor rebellion led by Janatha Vimukthi Peramuna (JVP). According to the statistics revealed by the Criminal Justice Commission, which was created to hear the case against the JVP, the number of deaths resulting from the JVP atrocities was 63 persons, with several hundred wounded. On the other hand, many sources have given the figure of over 10,000 deaths being caused by the security forces in retaliation. This 63:10,000 ratio demonstrates the disproportionality of the violence used.

It was this intense level of violence used in crushing the 1971 JVP rebellion that changed the contours of criminal justice in Sri Lanka. Ever since, all counter- insurgency operations, in the south as well as in the north and east, have demonstrated a similar pattern of enormous disproportionality in terms of the violence that was permitted to be used.

One of the strategies that was employed in crushing the JVP rebellion of 1971 was the large-scale practice of killing people after arresting them. The security forces were permitted to arrest any person suspected of having any kind of connection with the JVP and, irrespective of the nature of the connection, the suspect could be interrogated and killed, and their body disposed of.

A question that has not been the subject of any study so far is why the Sri Lankan security forces were allowed to kill suspects after securing their arrest. The procedure required by law when making arrests, as well as in dealing with those who had been arrested, was quite well-observed at the time. The criminal procedure code that prevailed in Sri Lanka at the time was based on the same principles that were adopted by the British colonial power in India, as well as in other South Asian nations. This criminal procedure law prescribed the rules relating to arrest, as well as investigations leading up to the filing of indictments, and the conduct of trials, as well as the manner in which the punishments could be meted out in courts.

Yet all such laws, rules and procedures were ignored when dealing with the alleged insurgents arrested in 1971. The question that needs to be asked is why the government of the time and the security authorities decided to ignore the law, which was well laid down, regarding the matters of arrest and dealing with those who had been arrested, and instead allowed the security forces themselves to be the investigators, prosecutors, judges, executioners and also disposers of the bodies of such persons? Why didn't the government and the security forces follow the normal law of the land regarding those who were arrested and comply with the procedures that were laid down about the conduct of investigations, prosecutions, trials and sentencing of prisoners?

In the absence of any explanation by the government at the time of these changes, the only possibility is to speculate on what may have been the reasoning of the government in allowing the security forces to act in the manner described above. The simplest explanation seems to be that the government did not think that merely securing the arrest of insurgents was an adequate counter-insurgency measure. The government appears to have acted on the basis that highly visible and immediate actions that communicated their decision to kill anyone connected with the insurgency was necessary for crushing the insurgency. We may speculate as to what might have happened if the government had kept arrested persons in detention and let the law take its own course about what punishment should be meted out against them. This would have put the security forces in a situation where they could only arrest those against whom there was adequate evidence to demonstrate a connection with the insurgency. It may have been the government's view that doing that would have limited the ability of the security forces to quickly retaliate in an effective manner to crush the insurgency. It may have been argued that such a process of arresting persons only where there were reasonable grounds would have required considerable resources on the part of the government when dealing with a situation of mass arrests, as it was assumed that a very large group of insurgents were involved in an attempt to overthrow the government.

When comparing this situation with the attempted coup of 1962, when some leading members of the security forces, including the army, navy and police, planned a coup to overthrow the government of Sirimavo Bandaranaike, we see that all the suspected leaders of the coup were arrested and thereafter detained in special premises, where there were better facilities than in the normal prisons, and then brought before the courts. The courts dealt with them within the normal

process of law. A trial was conducted and they were found guilty, with the opportunity to appeal to the Privy Council in the United Kingdom, which acquitted them on the technical grounds that they were tried under retrospective law. If the arrestees in the 1971 insurgency were given the same chance to utilise the law of the land and have the recourse to court for their defence, would it have made a difference to the counter-insurgency measures necessary to crush a rebellion? Safeguarding the rights of the arrested persons did not deprive the government of the right to kill persons in combat, such as in, for example, instances where attacks on some police stations were dealt with by direct confrontation by the security forces. What then were the disadvantages that could have been thought of as insurmountable difficulties in crushing an insurgency while dealing with the arrested under the normal process of law?

Perhaps a strategic reason may have been that if a large number of persons were being arrested throughout the country, and they were being kept alive, there may have been interventions by their relatives and others, who may have sought the arbitration of courts to safeguard their loved ones, which may have been thought of as a complication that the security forces would have found difficult to cope with. It may also be that that strategists for the government thought that, had such large numbers of persons been kept in prisons, this could have generated support from the public for the insurgency. One measure for crushing such public support would be to dispose of the arrested suspects as quickly as possible through expeditious killings.

Perhaps, if we are to speculate further, it may also have been that the government felt that adequate prison facilities did not exist for keeping large numbers of persons within the prison premises in Sri Lanka. The potential explosion in the number of prisoners could have disrupted the maintenance of the rest of the prison population. Sri Lankan prisons have always been overcrowded, with no space for more prisoners, rendering it possibly more convenient to dispose of all alleged insurgents rather than maintaining a large prison population.

It also appears that the strategists who were working on the government counter-insurgency plan did not have adequate information about the actual capacities of the JVP and the extent of the actual threat it posed. While attending a meeting after his retirement, quite a long time after the 1971 events, one of the senior police officers involved in the counter-insurgency remarked on the panic they felt at hearing of some of the incidents caused by the insurgents. The lack of adequate information may be attributed to the poor state of the intelligence services at the time. This was the first insurgency faced by post-independence Sri Lanka and the actual strength of all security forces at the time, including the intelligence services, was rather weak.

The JVP menace was portrayed as an imminent threat of a communist takeover. Taking place during the Cold War, this inevitably attracted foreign powers, which also played a role in determining the manner in which the government organised its counter-insurgency. It is well known that assistance was requested from India, Pakistan and other neighbouring countries, as well as the United States. In places like Bandaranayake airport, some foreign forces were deployed. In Sri Lanka, followers of all the major religions, particularly Buddhists and Christians, treated the issue of a possible communist takeover as a threat to their religions. This was partly a reaction to "Marxist" parties, including the Lanka Samasamaja Party and the Communist Party, which had for several decades played a major political role in the country. The threat of these parties becoming more powerful, even establishing a government through elections, had been the subject of serious propaganda attacks. Thus, in the popular imagination, the idea of a communist takeover of power had been nurtured for some years.

It may well have been that the JVP threat was taken as the fulfilment of this expectation, and therefore a massive effort deemed necessary to crush the imagined revolution. Insurgencies and counterinsurgencies give rise to massive propaganda campaigns. This is perhaps psychological warfare within a civil war context. The government's immediate reaction to the JVP threat was to unleash a massive propaganda attack against what the government termed terrorism. In fact, this was the first time that propaganda against terrorism was brought with such force in the country.

This propaganda itself would have played a role in determining the nature of retaliation against those suspected of being participants, or even sympathisers, of terrorism. In turn, this could have excused treating the arrested not as ordinary criminals, to be dealt with within the overall framework of criminal justice in Sri Lanka. As the threat was one of terrorism, such suspects were seen as belonging to a special class, and this may have also led to their special treatment outside the framework of the criminal law.

A further factor could have been the influences of various international schools of thought about counter-insurgencies, and these would naturally have influenced the officers of the higher ranks of the establishment in particular, being trained in such ideas themselves. All these anti-terrorism schools advocated that harsh measures should be adopted when faced with such situations. The idea of meeting terror with terror was quite a popular slogan, even repeated at the time by some prominent politicians.

In counter-insurgencies, the target is often not merely the insurgents, but also the general population of a country. The aim of the counter- insurgency is to prevent any kind of popular support for the insurgents. The way this is achieved is often by terrorising the population into submission. There is no better method of terror than to exhibit dead bodies on the roads, canals and other public places. Thus the persons arrested on suspicion of having connections to the JVP would have been regarded as useful fodder for such exhibitions. In fact, after certain JVP attacks on security personnel, there were immediate counter- attacks with many alleged JVP members killed and their bodies exhibited on the roads. Charred remains were left on display, the remnants of those burned to death with flaming tyres around their necks. Thus, dealing with the arrested persons at the time was a more complicated matter than dealing with criminals under the law of the land. In a sense, insurgencies and counter-insurgencies generate a kind of public theatre, where dead bodies become dramatised objects for achieving the ends of such insurgencies and counter-Insurgencies. Therefore, when we look into the 63:10,000 ratio – indeed, the total number of disappeared in Sri Lanka from 1987 to the early 1990s is over 60,000 - and see the disproportionate response of the government against the JVP, we see something which is far bigger than the issue of dealing with a crime. The whole episode of arrests, interrogations, killings and the disposal of bodies becomes the language of the politics of a counter-insurgency. In the heat created by the imaginary battle, reason plays a very small role. A new kind of logic emerges in which one-time neighbours, friends and fellow citizens begin to think of each other — or are made to think of each other — as enemies. People become imaginary warriors of a war that is in fact created by clever strategists. This short reflection on the 1971 counter- insurgency shows the difficulties involved in mourning about the tragedies that took place within a community. It becomes painful to probe into what actually happened. Long years of discourse on the subject have been conducted on imaginary terms. For example, if one were to probe into

the 63:10,000 ratio of killings by the JVP and the counter-insurgency against the JVP, which exposes the myths about the "insurgency" and the extent of the actual capacities of the parties involved, one would necessarily have to contradict popular imagination and long-entrenched discourse.

Deconstructing the mythologized versions of "the insurgency" and looking into actual facts exposes the folly that the Sri Lankan people have been caught up in. It is difficult for people who have been made to think of themselves as warriors to realise that they have instead all been fooled. To come to terms with the fact that those who were arrested should have been treated as any other suspects of crime, and dealt with within the normal framework of law, goes against the way Sri Lankan individuals and society have been thinking about these things for a long time. To understand that the killing of a person whose arrest has been secured is a horrendous crime, and that this horrendous crime has been committed within one's own society many times over, will naturally be a struggle.

It becomes disturbing to accept the truth in this kind of situation. The unwillingness to go through such disturbing experiences, and the desire to hold onto views that one has been encouraged to think of as the correct version of things, is at the root of the inability to mourn.

Mourning, even in normal circumstances, like in the case of the death of a loved one, is distressing. The disturbance is rooted in having to come to terms with a loss. The processes of grieving are the means by which people, individually and collectively, come to terms with such losses.

But in a political experience, such as the cruelties that people commit against each other under the pretext of various conflicts, this sense of loss comes also with a sense of guilt. One is somehow involved in the very process by which one lost something precious from his or her society. In conflicts, people who become partisan to one view or another begin to think of themselves as pure. They begin to perceive themselves as a selfless warrior fighting against those who would bring their society to ruin. It is this sense of being pure that becomes challenged when one begins to examine what has really happened and to recognise the collective responsibility for the damage wrought against one's own society.

Collective guilt is a hard thing to swallow. That is the problem involved in the inability to mourn. However, as long as this is faced collectively, the imaginary grievances, imaginary heroisms and imaginary villainy of others are necessarily reflected on by society and the process of mourning can finally commence.

4

PREVENTING THE IMPROPER USE OF FORCE & VIOLENCE

The human rights project is centered on eliminating the improper use of force and violence in the way the state deals with the individual.

In the context of industrialised western countries, the struggle to eliminate the improper use of force and violence has a long history. Michel Foucault illustrates how, before the 19th century, physical violence was used as part of a spectacle in the punishment of culprits. In the 19th century this approach was abandoned and replaced by imprisonment as the mode of punishment. Thus, for those who grew up in these western countries, the use of direct force on the body of a human being by an agent of the state has now become unfamiliar.

However, this is not the case in most of the countries in the world. Like elsewhere, in most Asian countries the direct use of force on the body of the alleged culprit is common. Thus, the improper use of force and violence by the agents of the state on alleged culprits follows the old model used in Europe, making the sufferings imposed on the body of a person a spectacle for all to see.

The answer as to why this remains so should be sought, not from officers of the security apparatus (police and military) as the agents of the state, but from the state itself. If not for the approval from the state, the police officers, military and others are unlikely to use such force and violence. In the event that any agent of the state on their own exercises such improper force on anyone, s/ he would incur disapproval and consequent punishments by the state. What is usually called 'impunity' following the improper use of force and violence is a demonstration of the state's approval of the use of such methods.

The mere fact that a particular state has ratified UN conventions forbidding such improper use of force and violence does not necessarily indicate actual disapproval of the use of such methods by its agents in dealing with alleged criminals. The same can be said of constitutional provisions outlawing torture and other improper uses of force and violence. The test as to whether the state disapproves of the improper use of force and violence is the practical means by which it ensures that such actions by its agents are prevented.

The prevalence of torture, ill-treatment, and other improper uses of force and violence in many Asian countries has been demonstrated through research and documentation. The following note from The Practice of Torture, published by the Asian Human Rights Commission in 2013, provides a literature review on torture and ill-treatment in Asia:

In recent years, there have been numerous attempts to document the practice of torture in many Asian countries. The agencies involved in such documentation include human rights organisations and some of the agencies of the United Nations (such as the Special Rapporteur against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Committee against Torture, and reports presented to the former Human Rights Commission and the present Human Rights Council). Besides these, there are also a few academic foundations.

The Asian Human Rights Commission (AHRC) based in Hong Kong has placed a high priority on the documentation of torture. Together with its sister organisation, the Asian Legal Resource Centre (ALRC), it has produced numerous reports and publications in which the problems relating to the implementation of the UN CAT have been very lengthily documented. The AHRC's Urgent Appeals system has concentrated on assisting victims of torture in many Asian countries. As a result, a large body of information has been gathered in the Urgent Appeals archives. These are reports of individual complaints, which give vivid details on the practice of torture, as well as the limitations on the possibilities of the victims obtaining redress.

The following are some of the reports published by the AHRC/ALRC.

ALRC has published the following reports of torture through its quarterly publication Article2; On SRI LANKA, Volume 1 no 4,i

Volume 3 No 1ii, Volume 4 No 4iii, Volume 4 No 5iv, Volume 6 No 2,v Volume 8 No 4, vi and Volume 10 No.4vii; INDIA Volume 1 No 3viii, Volume 2 No.1ix, Volume 2 No 4, x Volume 2 Volume 3 No 4xii, Volume 5 No 6xiii, Volume 7 No 2xiv, Volume 9 Nos 3 and 4xv, Volume 10 No 3xvi; BURMA, Volume 2 No 2xvii, Volume 2 No 6xviii, 5Volume 6 nos 5 and 6xix, Volume 7 No 3xx, Volume 11 No.1xxi; THAILAND, Volume 2 No 3xxii, Volume 4 No 2xxiii, Volume 4 No.3xxiv, Volume 5 No 3xxv, Volume 6 No 3xxvi; PHILIPINES Volume 5 No 5xxvii, Volume 6 No 4xxviii, CAMBODIA Volume 1 No 1xxix, Volume 1 No 2xxx, Volume 5 No 1xxxi, BANGLADESH Volume 5 No 4xxxii, Volume 10 No 2xxxiii, NEPAL Volume 3 No 2xxxiv, Volume 3 No 6xxxv, Volume 4 No 1xxxvi, Volume 7 No 1xxxvii; INDONESIA Volume 5 No 2xxxviii, Volume 9 No 1xxxix, PAKISTAN Volume 1 No 5xl, Volume 3 No 3xli, Volume 3 No 5xlii, Volume 8 no 2xliii and Volume 8 No 3xliv. All these volumes are available at www.alrc.asia/article.

The State of Human Rights in Ten Asian Countries, published annually since 2005, devotes a chapter to each of these countries.

Country	Torture and ill- treatme nt	Enforced disappearances	Illegal arrest and detention	Fabrication of charges	Threats of assassination and other forms of harm	Sexual violence by security officers	Discrimination on the basis of sex, race and caste, religion	Blackmail by state agents
Bangladesh	$\sqrt{}$	√	$\sqrt{}$	\checkmark	$\sqrt{}$	$\sqrt{}$	\checkmark	√
Burma	$\sqrt{}$		$\sqrt{}$	\checkmark			\checkmark	√
Hong Kong								
Cambodia	√		√	√	√		√	
China (PRC)	$\sqrt{}$		√	√	√		√	√
India	√	√	√	√	√	√	√	√
Indonesia	√	√	√	√	√	√	√	√
Nepal	√	√	√	√			√	√
Pakistan	√	√	√	√	√	√	√	√
Philippines	√		√	√	√			
South Korea	√		√	√		√	√	V
Sri Lanka	√	√	√	√	V	√	√	V
Thailand	√	√	√	√		√	√	$\sqrt{}$

References in this chart are to general practices and not to exceptional incidents

Approaches to the improper use of force and violence

The general approach to the improper use of force and violence is to attribute such abuse to the security agencies, such as the police, military and intelligence authorities. Some attribute such abusive practices to individual security officers and demand action against these individuals only. This approach has not proved adequate for the prevention of such improper use of force and violence. A more comprehensive approach is required in examining the root causes for the prevalence of such abuses, rather than merely attributing it either to the individual officers or even to the security apparatus as a whole.

The widespread practice of abuse that prevails indicates that the state, as the ultimate political authority in the country, bears the responsibility for its prevalence. Without the direct or overt approval of the state the individual officers of the security apparatus, or the security apparatus as a whole, cannot engage in such widespread abuses. State responsibility is two-fold: that is, a positive responsibility, through its approval for the improper use of force and violence; and a negative responsibility, when it fails to take the necessary steps to eliminate such practices.

The general approach is to attribute only responsibility in the negative sense to the state; the failure on the part of the state to take the necessary steps to punish the perpetrators of such abuses, and further the failure to take the necessary steps to ensure internal controls within the security apparatus in order to prevent the individual officers from committing such abuses.

However, this negative attribution is inadequate in explaining the widespread nature of such abuses, which are committed all the time. The positive attribution of responsibility to the political authorities is justified on the basis that it is the political authorities' ideas of discipline, or lack thereof, that create the space for such widespread abuses by individual officers and the security apparatus as a whole.

On that basis, it could justifiably be argued that in committing such abuses individual officers and the security apparatus as a whole are conforming to the expectations of the political authorities, which consider the improper use of force and violence as a legitimate means of imposing discipline within society.

The political authorities may consider that the widespread use of torture and ill-treatment is necessary in order to keep the citizens under its control. The use of torture and ill-treatment to create a culture of fear and intimidation is a political strategy of social control. In the same way, enforced disappearances are also approved under certain circumstances, such as in a situation of rebellion or insurgency, as a method of instilling fear and to intimidate anyone who dares to rebel against the state. In this sense the example given by Michel Foucault in his book, 'Discipline and Punish – the Birth of the Prison' of the case of Damiens the regicide is quite relevant to the Asian context.

The improper use of force and violence is used by the political authorities in most Asian countries as a mode of social control, so as to achieve obedience by way of instilling fear and intimidation.

The political authorities in these Asian countries have failed to achieve rule by consent. Although in some of these countries processes may exist for the election of governments, this does not imply that the form of governance is democratic; it is not governance by consent. In fact, in many of these countries even the electoral process is manipulated through violence used on political opponents. In any case, day-to-day ruling does not take place in a democratic manner; improper use of force and violence is used to control the population.

A particular group within the population more exposed to the improper use of force and violence by the state is the lower income group; that is, the poor. In these countries, they are the overwhelming majority. The affluent middle classes and the rich constitute only a minority. The majority is controlled through the widespread use of force and violence. Thus, such improper use of force and violence is the mode of politics that is prevalent in these societies.

Thus, the following table is more representative of the sources of the improper use of force and violence in Asia.

The need for a fresh approach to understand the improper use of force and violence in Asia (and, in general, for countries other than developed democracies)

The approach that has become quite common in the human rights field in particular, and in the discourse on state violence generally, is to

attribute it either to individual officers or to some of the defects of the security apparatuses in particular countries.

However, in terms of the analysis made above, what is required is a more comprehensive approach that takes into account the ultimate responsibility of the political authorities for the widespread use of force and violence. This approach requires an attempt to understand the nature of the political system in a particular country as a means of comprehending why torture and ill-treatment, enforced disappearances and other forms of the improper use of force and violence remain widespread within a particular context.

The approach needed for prevention

Interventions aimed at the prevention of torture, ill-treatment, and other forms of the improper use of force and violence require a more comprehensive approach than the mere condemnation of individual officers who engage in such abusive practices, and also a much wider approach than a mere call for reforms of the institutions that are part of the security apparatus, such as the police, the military and the intelligence agencies. It even requires going beyond reforms of the institutions of the administration of justice, such as the judiciary, prosecution, investigating agencies and prison services.

The most important aspect that needs to be addressed is the responsibility of the political authorities in their overall approach to social control. It is these political authorities that finally condition the behaviour of the individual security officers, the nature of the security apparatus and the independence enjoyed by the institutions of the administration of justice (such as the judiciary, prosecution department, investigating authorities and the prison authorities). It is not within the power of any of these agencies to transgress the parameters set up by the political authorities, directly or covertly. The prevention of torture, ill-treatment and other forms of the improper use of force and violence cannot be left purely to the integrity or heroism of the officers who are managing these activities.

The mere recommendations to investigate abuses and to prosecute them, as often demanded by human rights groups when violations are reported, do not go far enough to address the root causes of these problems. The capacity for investigations requires the freedom and independence to conduct such investigations. They also require the necessary resources, such as professional training, forensic facilities and other material resources for effective transport, communications and the like. Granting such independence and freedom, as well as providing the necessary resources, is in the hands of the political authorities. When the political authorities lay down, directly or indirectly, the parameters within which the person working in these institutions should operate, these parameters ultimately control the manner in which the work of these institutions takes place. In any case, the political authorities can determine what these other institutions may be able to achieve by the control of resources. The political authorities can also decide who to recruit or dismiss.

Thus, the concept of change from inside, meaning the change from within the institutional framework of the security apparatus, may not be a realistic possibility within a context where political authorities create limitations on what the security apparatus is allowed to do. Thus, the change from inside concept must start with the change from within the political authorities themselves. It is only when the political authorities internalize the norms and standards of justice that the rules which could operate within a particular society, including the rules governing the security agencies, could come into being. When the internalised conception of the political authorities on modes of social control involves suppressing the freedoms of individuals, the rules which are formulated by such political authorities will necessarily create a culture of repression. When the political authorities create a culture of repression, it is not within the capacity of the security apparatus to ignore or go against such rules.

The rule-making function of the political authorities

It is the political authorities that finally decide and shape the rules which operate in a particular society, including the rules under which the institutions of the security apparatus function. What is meant by 'rules' may be described through the following words of John Rawls:

In saying that an institution, and therefore the basic structure of society, is a public system of rules, I mean that everyone engaged in it knows that he would know if these rules and his participation in the activity they define were the result of an agreement. A person taking part in an institution knows what the rules demand of him and of the others. He also knows that the others know this and that they know that he knows this and so on.[iv]

It is these rules which, among other things, create the nature and functions of a criminal justice system within a particular country.

Political authorities as the shapers of criminal justice

When the widespread use of improper force and violence is followed by impunity, it implies that this situation is an integral part of the criminal justice system within that country. Thus, the improper use of force and violence coupled with impunity is not the antithesis of a criminal justice system, as it is often presupposed in popular discussions. In fact, such abusive practices coupled with impunity are an integral part of the criminal justice system in that particular context.

Political authorities create the kind of criminal justice that safeguards the type of political system that they have created. For illustration: under the regime of Joseph Stalin, a criminal justice system was created in order to safeguard the absolute power of Stalin himself as the ultimate political authority in the country. This system was based on what was understood to be socialist principles. The state was understood to be the representative of the people and therefore the idea of protecting people's freedoms and rights against intrusion from the state was quite contrary to these principles. Within that setup, the criminal justice system operated to protect the political authorities and the socialist property system. This is in contrast to a liberal democratic political system and a criminal justice system within the liberal democratic framework, which is based on the idea of the protection of the rights of individuals as the duty of the state.

Thus, in understanding a particular criminal justice system in a given country, it is necessary to comprehend the nature of the political system that exists in that country. However, in doing that it would be quite misleading to only go by the constitutions, statutes and other declarations only. What is essential is to understand the political system that actually exists within a particular country. The constitutions and other statutes may or may not be in conformity with the actual political system. The political system may use the constitution and other statutes merely as ornaments or as things with limited purposes. What the system really is can be found in the actual operative principles that exist within a particular context. This can only be understood by proper observation of the way a system works in practice.

This difference between the system as it is expressed through the constitution and the statutes and the system as it practically operates is essential to understanding the Asian context. Some countries have constitutions which, in fact, have very little possibility of practical implementation. Cambodia is a case in point. There are countries where what is expressed through the constitutions and what actually happens is vastly different, for example in Thailand, the Philippines and the like. There are yet other countries which use democratic jargon so ambiguously in the constitution and other laws that it is possible for a practically authoritarian system to exist while the constitution may look like a democratic one. Sri Lanka is a case in point. Thus, what is important in understanding a system is to be able to judge the nature of the system by the manner in which it actually and practically works.

A criminal justice system is related to the political system. Though a particular criminal law or procedure may be expressed in liberal democratic jargon, the actual nature of the criminal justice system can only be measured by the manner in which the political system allows it to function. When the system allows the widespread use of force and violence with impunity, such practices become an inherent part of the criminal justice within that particular context. Thus, the practice of torture and ill-treatment, enforced disappearances and other improper uses of force and violence become entrenched. This simply means that the liberal democratic norms relating to criminal justice are modified and distorted within those particular circumstances.

Caution should be exercised in reading international literature about the prevention of the improper use of force and violence

Particular histories create particular institutions and practices. The literature that is produced from each society is a product that arises from those particular historical circumstances. When applying lessons learned from a particular historical circumstance, it is necessary to examine whether the historical circumstances in the country where these lessons are to be implemented are similar.

This is particularly important in applying systems and rules which emerge in what may be called the developed democracies. Over several centuries, vast political changes have taken place in those countries. Particular types of political control have been uprooted and different forms of control have developed. Both the political system and the criminal justice system have assimilated these principles and the

principles are held in common in both the political sphere and the legal sphere. And the people, including those who are functionaries in the security apparatus, have internalised these principles. Thus, a person who is subjected to interrogation expects that he will be treated according to the rules that are commonly held within his society.

This situation does not exist in countries where the norms within the political system are different. What the actual norms are can be understood only by direct observation of the system at work. Before the norms that have been developed in developed democracies can be applied, there needs to be vast changes brought about within the political system, and the legal system needs to be brought in conformity to these changed political norms.

A review of some human rights strategies used in the fight against the improper use of force and violence in its many different forms

In light of the root causes of the improper use of force and violence in countries outside developed democracies, some strategies need to be critically examined from the point of view of how effective they have been, and can be, in dealing with those root causes.

Demanding investigations and the prosecution of perpetrators for the improper use of force and violence, with the view to punish individual perpetrators as deterrence to further abuse

This is the most commonly used strategy to fight violations of human rights. Usually, after reporting on individual cases of human rights violations or even on patterns of such violations, human rights organisations and UN agencies dealing with human rights will demand from the relevant government action to be taken to investigate and bring the perpetrators to justice.

The problem with this approach is that the perpetrators who are required to be investigated act on the basis of the policies and overal strategies designed by the political authorities represented by the government. The investigating authorities are also bound by the same policies and strategies that are authorised by the political authorities regarding the use of force and violence. Besides this, the same political authorities control both the perpetrators and those who are supposed to investigate such abuses.

It is beside the point that, often, the perpetrators and the investigators happen to be more or less the same person or authority. What is important is that, ultimately, the supposed improper use of force and abuse and the

responsibility for the investigations into the same emanate from the same source of authority. The constant complaint by the human rights organisations is that, despite much demand for action against the abuses, impunity continues to prevail. This is no surprise as the violations are committed on the basis of direct or indirect assurances of impunity. The source of the violations, as well as the subsequent impunity, is politically conditioned. Mere repetition of the demand for investigations and prosecutions is unable to break the political wall that protects the improper use of force and violence. Much of the frustration within the human rights movement is due to the unwillingness to recognise this political reality; that the ultimate source of the matters that they complain of are not merely the perpetrators, meaning the officers of the security apparatus, but the political authorities themselves.

Efforts to educate the police and military on human rights norms and standards as a way to eradicate the improper use of force and violence

Many human rights education projects are undertaken by different parties, including the governments of developed countries, UN agencies, universities and human rights NGOs. Large sums of money have been allocated for such projects. At the same time there is a general complaint that, despite many such projects being carried out, no tangible improvements have been made as a result of such education. The reason for such failures and the resulting frustration is not difficult to identify. While this or that individual perpetrator may undergo some conversion as a result of such education, there will be many to take their place; the main reasons for the violations are the policies and strategies that are imbedded in such societies.

Whatever education that the personnel of the security forces may receive, they are duty-bound to carry out the policies and strategies that come from the political authorities who stand above them. When the same political authorities who have conditioned their behaviour also allow human rights agencies to carry out such educational programmes, it only creates cynicism. People from human rights agencies who have

worked to impart such education have often heard remarks from security agency participants about how naive such efforts are in light of 'the real situation' in which they have to work.

Efforts to improve legislation without reference to the problems of enforcing legislation

One of the primary areas of human rights work is to lobby for the imrovement of legislation to incorporate remedies for violations of human rights. Thus, the campaigns for the criminalisation of torture and enforced disappearances, for example, receive top priority. The same applies to every other aspect of the UN conventions. However, where there has been some success in bringing about such legislation, the problem that has surfaced thereafter is that the law remains in the books and is hardly ever implemented. Any search for reasons for the government's failure to implement the legislation would reveal that if such law is implemented there would be serious political repercussions, including serious conflicts between the security agencies and the government.

The relevant legislation may be passed due to pressure from the international community and local human rights groups. A government which passes such laws expects that the international community will give them credit for doing so. However, if there is also insistence that the law should be implemented, there is likely to be serious friction. Perhaps the international community is also aware of this. Therefore it does not emphasise implementation. However, the net result is that, despite the law being passed, the victims of violations do not get redress. If the human rights community is to go beyond convenient thinking in trying to resolve problems, it has to address the overarching hazards that exist in the context of a particular country. This requires a much more comprehensive approach, one which takes into consideration the political causes of human rights violations. When these are ignored, the ultimate result, even after the passing of the relevant law, is general cynicism and frustration.

Working for judicial remedies for violations of rights without addressing the fundamental problems affecting the justice system itself, which is unable to deliver justice in any case.

Human rights groups work hard and assign considerable resources to assist victims in order to bring their cases to courts. However, once the cases are brought to court, the course of justice is subverted in many ways by various problems, such as extraordinary delays in the adjudication process, insecurity caused by insufficient/ineffective victim protection laws and programmes, bribery at all levels of the adjudication process, and all sorts of manipulations which are allowed to take place to subvert justice. Thus, despite enormous efforts made by the victims and the human rights organisations, the results are limited to some very rare and occasional successes, and an overwhelming amount of failures and losses. With regard to the improper use of force and violence, where this is widespread, it is not only the security forces that are responsible; it is the judicial branch as well.

The judicial branch also works within the overarching scheme of policies and strategies of a particular state. They are not in a position to ignore these strategies and schemes without causing serious disturbances to the usual management of the state. Often the human rights community works on the assumption that the separation of powers is a part of the state structure. Superficial observations of the external aspects of the courts are used to try to buttress the idea of the existence of the separation of powers. However, what often exists is well-entrenched unification of power in the hands of the executive, and the executive also manipulates the judiciary. One of the most common forms of manipulation is directly selecting judicial officers that act in compliance with the executive. To ensure compliance, any judge who even slightly deviates from the expectations of the executive is subjected to punishment. On the other hand, those who comply are given many forms of rewards by various corrupt means. Human rights victims who reach the court in search of remedies for the violations of their rights also get caught up in this web of manipulation.

The strategy of using judicial remedies as a solution to human rights violations, while not taking into consideration the actual situation of the separation of powers within the country and the obstacles to justice, can cause even more problems to the victims and also to human rights defenders, and the net result is always negative.

A further strategy, which has been resorted to recently, is to demand international remedies, such as tribunals, for all violations of human rights.

This approach arises from realisations about the impossibility of achieving justice through domestic legal systems. That realisation is

again a direct or indirect recognition of the wider web of causes that make such human rights violations possible and impunity inevitable. However, this demand for international remedies for all violations of human rights is not practically realisable. By their very nature these international remedies for human rights violations are possible only for extremely extraordinary circumstances where the nature of the violations is one of the primary considerations. The day-to-day violations of human rights by way of the abuse of force and violence does not fall within the requirements for such interventions.

Further, the international remedies can come about only through an international process and obtaining the consensus for such actions is extraordinarily difficult. Besides, such international actions are also extremely costly. What all this means is that although the demand for international remedies can be made easily, the actual possibility of practically realising such demands is quite limited. This implies that beyond creating some protests no practical outcome could be expected from such demands.

The problems in the domestic system need to be addressed and resolved if the protests against violations of human rights are to lead to practical outcomes. The essential sphere within which most human rights violations need to be remedied is the domestic legal system. The obstacles to such a system cannot be ignored. Direct and indirect attempts to ignore the problems that exist within the domestic sphere lead only to peril for all rights of the people subject to such a system.

Academic courses on human rights with the view to encourage the protection and promotion of human rights

There are several graduate and post-graduate courses being introduced in an attempt to create a greater understanding on human rights. However, many of these courses conducted outside developed democracies still tend to follow the same syllabus as those followed in the developed democracies. Addressing the specific problems which exist within the framework of a specific context has not been a priority in designing these syllabuses. The result is that the domestic obstructions to the implementation of human rights do not receive any attention. Often the education is more concentrated on international remedies for human rights, such as the International Criminal Court and other international tribunals, and matters such as transitional justice receive top priority in these syllabuses.

The result is that those who are educated in these courses have hardly any opportunity to address their minds to the specificities of their legal systems, which deny the population of their country the possibility of remedies for the abuse of force and violence by the state. Thus, these courses as they are designed at present do not equip students with the capacity to analyse their own domestic systems and thereby to become capable of contributing to much needed changes in their countries and make human rights enforcement a practicably achievable goal. Perhaps the reason for the limited perspective within which the syllabuses are made is due to mere limitations relating to study modules from developed countries, or a lack of awareness on the part of those who design such syllabuses of the ground realities of the specific countries from which their students come.

A further comment on the strategies mentioned above

All these and similar strategies have a limited value as forms of protest against injustice. Also, all these actions are expressions of solidarity for the victims of violations of human rights, particularly for those who have become victims of the abusive use of force and violence by the state. All acts of injustice demand immediate reactions and protest. What has been pointed out above is that, given the overall context within which these violations take place, there is no valid reason to expect the achievement of the particular objectives of these strategies. Therefore, in all protests relating to such injustice it is necessary also to bring in a perspective on the basic causes that generate the injustice and make impunity the ultimate outcome. Thus, by making efforts to link all protests to the root causes that makes such injustice possible, the victims and all those who take part in the protests can be educated and empowered through the motivation to see the meaning of their protests in terms of addressing root causes.

Where no such overall perspective is present the initial protests against injustice may generate greater frustrations about the impossibility of finding redress, and thereby cause demoralisation among the victims, as well as among those who come to their support. In fact, such a state of demoralisation exists due to the limited perspectives within which these objectives are pursued. Such demoralisation itself contributes to the strengthening of the repressive systems and makes the political control of dissent easier. The suppression of all protests is also a part of the overall political system, which limits the freedom of their populations by permitting the improper use of force and violence.

A theory of change

When studying the improper use of force and violence with the view to work towards the elimination of such abuses, it is necessary to develop a theory of change which is comprehensive enough to take all relevant factors into consideration. A theory of change which takes only individual security officers or the security apparatus into consideration, and leaves out the overarching political system, is unlikely to produce any positive change.

The mere insistence on international norms and their application, without taking into consideration the nature of the political and criminal justice systems, is so superficial that it will not be taken seriously by people who are undergoing serious repression in their countries. A theory of change should look comprehensively into a combination of factors, giving serious consideration to the political system and those who bear political responsibility within the country, if such a theory is to express the reality of a given society. The project for the implementation of international norms relating to human rights, if it is to become capable of eliminating the improper use of force and violence, should be developed by taking into consideration all the complexities that have made such widespread abuses possible.

In developing such a theory of change for human rights violations in countries outside those of the developed democracies, extensive studies about the ground realities of the specific countries is an unavoidable step. A discourse on the historical circumstances of the nature of the state in particular countries and the nature of political control of each country from the point of view of recognition or the lack of recognition of human rights in the practical sphere needs to be brought to the surface and be made a subject of discourse both academically and also in terms of popular discourse. The emphasis on the practical sphere is meant to signify that a mere study of the ratification of UN conventions, constitutional bills of rights, and other statutes needs to be distinguished from the way such provisions are made practically implementable within each country. The practical scheme of implementation needs to be based on an understanding of the overall political control of all agencies in the legal system, and an attempt to measure the extent to which such institutions enjoy the independence to carry out their functions. Of particular importance is to research the manner in which the functionality or the dysfunctionality of these institutions have been viewed and assessed from the point of view of the actual possibility of the practical realisation of human rights. Due importance needs to be given to eliminating the improper use of force and violence within each of the countries.

The basic concept behind the theory of change could be formulated within the framework of Article 2 of the International Covenant on Civil and Political Rights (ICCPR). Article 2 obliges the state parties to ensure an effective remedy for violations of human rights. For this purpose, it obliges the governments to take legislative, judicial and administrative measures to ensure an effective remedy. Most commentators on Article 2 concentrate on legislative changes, such as, for example, the criminalization of acts which amount to improper use of force and violence - the criminalization of torture, forced disappearances, sexual abuse, and the like. However, what is often ignored is the obligation of the state to take judicial and administrative measures to ensure an effective remedy. A holistic view of change from the law and order approach to the rule of law approach for the elimination of improper use of force and violence requires legislative, judicial and administrative measures. In short, the legislation must fit in terms of the normative framework of the rule of law. The judicial system should also be within such a normative framework, and the government should also ensure that administrative measures, such as budgetary provisions that enable the proper functioning of the judicial process by ensuring the necessary resources, both by way of personnel and other technical resources, are also within such a framework. The whole approach must conform to the normative framework of the rule of law. Issues such as the training of the security officers and their internal discipline could be satisfactorily addressed only within a legal system which is constructed on the basis of such a normative framework.[1]

^[1] Please see Basil Fernando, "Reflection on article 2 of the ICCPR: The role of human rights activists in diagnosing the lack of effective remedies", Article 2 (Vol 9, 2010) http://www.article2.org/mainfile.php/0902/376/

[[]i] Michel Foucault, Discipline & Punish: The Birth of the Prison

[[]ii] The Practice of Torture – the Threat to the Rule of Law and Democratisation. AHRC 2103 (A report on Indonesia, Bangladesh, Burma, Sri Lanka, the Philippines, India, Pakistan, Nepal and Thailand).

[[]iii] http://journals.cambridge.org/ORL

[[]iv] A Theory of Justice, John Rawls, Harvard University Press, revised edition 1971, Page 48.4. Please see Basil Fernando, "Reflection on article 2 of the ICCPR: The role of human rights activists in diagnosing the lack of effective remedies", Article 2 (Vol 9, 2010) http://www.article2.org/mainfile. php/0902/376/

5

ABSURDITIES ARISING OUT OF DELAYS IN LITIGATION

A group of people at a workshop identified the following as the basic adverse consequences of delays in litigation:

- It changes the way litigation is conducted and encourages exchanging favors, as well as lying.
- It encourages using criminals and other third parties to settle disputes.
- Many judges preside over the same trial before its completion.
- It has caused the development of serious political and social tensions.
- The parties to the litigation suffer considerable financial losses.
- It increases the possibility of destroying evidence and harassment, and even the assassination of witnesses.
- It causes people to lose faith in the judiciary and the law.
- Women encounter particular pressures, including sexual harassment from various agents involved in the process.
- Serious criminals are allowed to move freely among the people.
- The witnesses gradually become discouraged and fail to be present at trials.
- There are ever-increasing loads of files, which gradually worsens the situation of delay.
- The inability to form reasonable expectations about when decisions will be made about matters in dispute.
- The corruption of the legal profession.
- The spread of corruption among all the staff at the courts, and even the creation of opportunities for corruption by some judges.
- The spread of cynical attitudes regarding courts and the litigation process among the people, thus creating demoralization.
- The undermining of democracy and the rule of law.
- A significant loss of time for experts and government employees who are called upon to give evidence only to have the case repeatedly postponed.
- Good governance principles being undermined as a result of the loss of expectation of justice.
- The failure to deter crimes through effective punishment of criminals.
- A greater possibility of witnesses dying and thereby the loss of important evidence.

- The family disputes arising out of prolonged litigation.
- The serious undermining of institutional integrity.
- The devaluation of the very idea of justice.

Many of the issues listed above are self-explanatory. However, it is worth commenting on a few salient points from the list.

Prolonged litigation creates a culture that encourages lying. The long years between the commission of a crime and the disposal of the case provides immense opportunities for unscrupulous litigants and lawyers to engage in many forms of manipulation, which in turn favor those who engage in falsehoods rather than who are honest and state only the truth—of what they know. The types of manipulations and tricks used are varied. For example: a particular party that is aware that it has a weak case will want to delay the trial as much as possible, with the expectation that, at some point or the other, the opposing party will get tired and will not appear in court. The victims of crime, who already suffered from serious emotional distress, particularly in the cases of rape, murder, and similar crimes, may often find it difficult to repeatedly come to the courts for many years. As a result, criminals can slowly get to being acquitted due to discouragement among the complainants or other witnesses.

After an aggrieved party becomes tired out due to delays, they often arrive at settlements, even in very serious crimes. For example, rape victims can be offered money in exchange for abandoning their rights. In some instances, the prosecutors may offer trivial punishments if the accused is willing to plead for a lesser crime than the one with which they are charged. An example of this is the granting of suspended sentences for very serious crimes, including rape.

There are many other more shocking forms of manipulation, such as the alleged loss of files, and the loss of other important documents and material which would work adversely against a particular party. For example, in cases of fatal accidents, an insurance company may claim that the files relating to the particular vehicle involved in the crime no longer exist and, on that basis, claim that there is no proof of the existence of the an insurance contract relating to the relevant claim, or that there was no insurance cover during a particular time.

Another issue worth noting is that when the same case is heard by several judges, the judgement is written by the last judge, who, on

some occasions, has not heard any of the evidence. One of the basic principles relating to assessing the credibility of witnesses and the weight of evidence is completely set aside. Often, a single case can be heard sequentially by five judges or more before the completion of a trial. Besides the inability to view the demeanor of the witnesses, there are other problems: the final judge, who writes the judgement, is unable to appreciate vital aspects of the trial or can even be misled by some unscrupulous lawyers who, in their submissions, give a version of events which are not at all supported by the actual evidence led in court. For example, in a case where there was clear medical evidence of about particular injuries, supporting the claim of the complainant, the defence lawyer in his written submissions stated that there was no such medical evidence. The trial judge wrote the judgment based on the defence lawyers submission and, on that basis, acquitted the accused. The case has now been pending before the appeal court for several years.

The most serious criticism that can be made against prolonged trials is that they fail to realize the very purpose of litigation. In fact, by creating a situation where lies prevail, the whole exercise reduces itself to an absurdity. When most serious crimes, such as murder, rape and many other forms of violations of life and liberty, are reduced to this absurd situation, it reveals the very tragic plight of human beings living in such a society.

6

A BASIC PROPOSAL TO STOP THE COLLAPSE OF THE CRIMINAL JUSTICE SYSTEM OF SRI LANKA

This proposal has been made under two heads. The measure that needs to be implemented urgently is listed as a 'short term measure' and the other ones are listed as 'long term measures'.

Short Term Measure

Increase the number of High Courts, as these courts have the jurisdiction to hear and determine serious criminal trials. It is suggested that the number of such courts should be doubled at the very least. This, together with hearing of trials on a day to day basis could make a dramatic change to end delays of adjudication.

This measure aims to address the most difficult issue in the criminal justice field in Sri Lanka: the delay in adjudication. It is simply impossible to create a significant change in this situation without increasing the number of High Courts where the trials for serious crimes take place. For a detailed discussion, see 'Doubling the number of High Courts will drastically reduce crimes', in Part Two, above.

Long Term Measures

The Asian Human Rights Commission (AHRC) has, in previous publications and over a period of time, advocated various measures for criminal justice reforms in Sri Lanka.

Some of the more significant ones are reiterated as follows:

- Increase the funding for all institutions relating to the administration of justice, such as the courts, the policing system, the Attorney General's Department, institutions for the control of corruption, and penal institutions. All these institutions are poorly funded, as examination of any annual budget allocations would easily demonstrate. The result of poor funding is the poor performance of all these institutions, which, in turn, has created the kind of crisis that everyone is well aware of today.
- Reform the police, prosecutions department and judiciary in order to make them viable institutions that can make a useful contribution in contemporary circumstances. Again, there is consensus on this issue: how backward and irrelevant these institutions are and how negative their impact is on all the aspects of life in Sri Lanka.
- Improve the legal education for all involved in the institutions of justice: judges, policemen, prosecutors, and the lawyers. Special measures for education are required in order to raise the standards of performance of all concerned and move towards realising a modern system of justice in Sri Lanka.

What is required is none other than a radical change in all legal education institutions, such as the faculties of law in the universities and at the Law College. The quality of teaching in all these institutions has been adversely influenced by the present state of the justice system and therefore is likely to contribute to the spread of bad practices even

in the future. A radical discourse on legal education is desperately needed.

- Improve the quality of mass media so that media institutions can contribute positively towards creating a better discourse on the improvement of the institutions of justice. It is unfortunate that despite the calamitous situation of justice institutions, the public discourse remains so poor. The editors of newspapers and other publications should take measures to improve the quality of the services they provide by the recruitment of competent staff who could contribute constructively towards the creative development of justice and political institutions in Sri Lanka.
- The quality of the civil society contribution towards the improvement of the institutions of justice needs to be better. In fact, it can be said that the contribution from the civil society towards the reform of the justice institutions has been quite negligible. The civil society seems not to have understood how much human liberty depends on properly functioning systems of justice. While the civil society makes a critique of the political institutions, it has failed to see the link between the political institutions and the institutions of justice. It is not possible to improve the performance of the political institutions when the contribution of the justice institutions has not improved. Civil society organisations should see the challenge that lies in this direction, and face up to it.

PART FOUR

CRISIS OF THE JUSTICE SYSTEM IN SRI LANK

1

SRI LANKA'S DYSFUNCTIONAL CRIMINAL JUSTICE SYSTEM AND THE CAUSES THEREOF

For the purposes of this study, we will discuss the meaning of a dysfunctional system of justice in general, and the meaning of a dysfunctional policing system in particular.

A dysfunctional justice system can be defined in the following manner: when the three basic components of a system of justice in modern times – that is, the policing, prosecutorial and judicial institutions – suffer from extreme defects to the point that each of these institutions cannot any longer function in a manner that protects the basic values on which they were created, and when the interactions among the institutions fail to be coordinated to such an extent that the interests of justice cannot be served, such a situation can be called dysfunctional.

The normal definition of the word dysfunctional, applied generally, is as follows:

- 1) Not performing normally as an organ or structure of the body; malfunctioning.
- 2) Having a malfunctioning part or element;
- 3) Behaving or acting outside the social norms.

A dysfunctional justice system can have the same characteristics as those mentioned in the definition above.

A distinction must be made here between defects that may occur in one or more institutions in a justice system, which are curable by ordinary and normal means, and extraordinary forms of defects that affect final outcomes in a negative manner and which cannot be cured except by way of fundamental reforms and a fundamental redesigning of the institutions so as to make it possible for the justice system to function in a manner which can deliver the expected results. Thus, the reference here is not to the normal difference between ideals and reality.

It is quite normal for reality to not fully correlate with the expected ideal. That is not a situation that can be described as dysfunctional.

It becomes dysfunctional only when the actual performance and ideal performance are mutually contradictory. That is when what the system delivers becomes the opposite of the expected results. A dysfunctional justice system is one in which policing, prosecuting and judicial institutions ultimately perform in a manner that is contrary to the manner in which they are expected to function and thereby produce the opposite of the expected results.

The term 'dysfunctional system' is relative. It is based on the assumption that a functional system is based on the rule of law. For the purposes of this discussion, we will use the definition of rule of law given by Tom Bingham: "The core of the existing principle of the rule of law is... that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefits of the law publicly made, taking effect (generally) in the future and publicly administered in the courts."

This implies that, while a legal system may be characterized as dysfunctional from a rule of law point of view, this does not mean that there isn't a functioning based on principles that are different from, even contrary to, the basic principles of the rule of law. Perhaps it can be argued that what exists in Sri Lanka today is a 'legal system' based on such contrary principles, which have evolved as a consequence of the transformations in the bases of the constitutions, as well as other principles, which have evolved as a result of practices by courts, the prosecutors (based in the Attorney Generals Department) and also the practices of the police relating to the investigations of cases.

A few examples may be useful in explaining this change: one of the basic principles of the rule of law is that a person should be arrested only on the basis of evidence adequate to warrant such an arrest for the purpose of investigations into crime; however, in Sri Lanka, arrests without such basis have become quite common – people are often arrested without any serious grounds and, thereafter, they are tortured or otherwise ill-treated in attempts to find some evidence through their admissions. A well-known example of this is the case of Gerald Mervin Perera, who was arrested purely because he had the name Gerald, and was severely tortured to find out if he knew anything about a triple murder the police were inquiring into. It is a universal principle that torture and ill treatment should not be used for investigating crimes, as reaffirmed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, in Sri Lanka, the practice of torturing suspects is routine, except in the cases where the suspects are powerful individuals.

A criminal trial should take place without delay, as stated under article 14 of the ICCPR. This is an internationally accepted norm relating to fair trial. In Sri Lanka, the average time before a final judgment in criminal trial is over 10 years, and, in some cases, it has even gone on for 14 years. In the Lalith Rajapaksha Communication before the United Nations Human Rights Committee, it was found that the delays in the Supreme Court and in the criminal trial were in violation of article 5, paragraph 2 (b), of the Optional Protocol. In the High Court, the trial had lasted more than 3 years at the time the UNHRC expressed this view. However, it took over 4 more years before the High Court pronounced its judgment. The judgment was challenged at the appeals court, which overturned the judgment and fixed it for retrial. The retrial judgement has not yet been given.

One of the principles of a rule of law system is that law should dominate over the exercise of discretion. However, in Sri Lanka, during the last four decades, the area of discretion has been enlarged to an extent that many practices followed by the police, prosecutors and judiciary are at variance with the provisions of law stated in the relevant statutes.

Procedural laws have now been discarded on a large scale in Sri Lanka. This drastically worsened during the period in which Sarath Nanda Silva was the Chief Justice (1999 to 2009). Arbitrary procedures were adopted to suit the convenience of the Chief Justice and, in the course of time, many other judges also adopted similarly lax attitudes towards procedural laws.

The independence of the judiciary is the most important component of a functional system of justice. In fact, it is the position held by the judges as the final arbiters on all matters of justice that make the existence of criteria measuring justice meaningful.

The constitutional changes of 1972 and 1978 have seriously attacked judicial independence. Both constitutions limited judicial review, a chance for the courts to examine the proposed legislation, to a short period before a bill is passed. Even in that limited space,

there is a contradiction in that the constitution itself allowed certain forms of illegalities to be recognized as legal. For example, in 1982, the President wanted to prevent a parliamentary election from being held, as he wanted to keep his nearly 80% majority in Parliament, which his party had due to the 1977 elections. When the bill proposing the extension of the parliamentary term was brought before the Supreme Court, it held in a majority judgment that, as the constitution provides for an Amendment to the constitution by way of a 2/3 majority in Parliament and a referendum, the proposed bill was constitutional.

The constitution had provisions limiting the time for submitting amendments for review by the Supreme Court to three days when the President thought that the proposed legislation needed to be passed on an emergency basis. This virtually prevented the public from canvassing before the Supreme Court about the legality of the proposed legislation. In fact, the constitution gave the Executive President complete immunity from prosecution, including in his personal capacity.

As I discussed in Gyges' Ring: The 1978 Constitution of Sri Lanka,

'The 1978 Constitution maintains the jargon of recognising the independence of the judiciary. However, this constitution changed the structure of power so much that the words of separation means very little. This was demonstrated within just a few years of the constitution being passed when a serious conflict developed between the Chief Justice (CJ), Neville Samarakoon, who was in fact brought in as Chief Justice from the unofficial bar by the Executive President himself. Chief Justice Samarakoon, who was known to be a lawyer with a very wide practice, probably took the words of the constitution at face value and did not understand the change in the structure of power contained in the constitution. However, after President Jayawardena consolidated his power he wanted Neville Samarakoon to kneel down and accept the changed version of the relationship between the judiciary and the Executive President. This devastated Chief Justice Samarakoon and he devoted the last years of his office trying to fight back. Obviously there was no unanimous defence of the Chief Justice from the Supreme Court. When the most crucial decision on the constitutionality of the 1982 Referendum Bill came before the Supreme Court, it was divided five to four, and the CJ is known to have been among the minority of four who held against the Bill's constitutionality.

The scale has begun to change within the Supreme Court itself, tilting in favour of the Executive President. Chief Justice Neville Samarakoon, who retired some time later, died within a few years of his retirement. Those who were close to him report on their conversations with him and how much he was deeply disturbed and wounded by the transformation that was taking place.

There are records of the long series of harassments by both the first and second presidents to bring the Supreme Court to understand the change of the power relationship in favour of the Executive President.

This situation continued under other Chief Justices and Supreme Court judges, but the remnants of the older tradition of independence were still there, despite quite visible forms of adjustment to the new reality. It was in the period of the fourth Executive President, who was elected as a protest against the first and second presidents, that the relationship of the judiciary to the Executive President took an even more fundamental turn against the judiciary itself. With S.M. De Silva being brought to the Supreme Court by the fourth president, open collaboration between the Executive President and the Chief Justice developed.

This went so far as to the Chief Justice imprisoning a minister who was a former colleague of the fourth Executive President, one who politically shifted his alliance by moving to the opposition party. When this minister made a comment in a public meeting about the courts, it a case was filed before the Supreme Court and he was convicted of contempt of court and sentenced to two years of rigorous imprisonment. This, as well as many other forms of open allegiance to the fourth Executive President, are quite visible, and left a deep impression on the legal profession. While there were divisions on this issue in the Supreme Court itself, there were no open conflicts, and the Chief Justice S.M. De Silva was able to keep the majority of judges on his side.

The two remarkable exceptions who were in fact sidelined by the Chief Justice were Mark Fernando, the senior-most Supreme Court Justice at the time, and C. Wignesharan. Both retired, and the latter expressed his disagreements in the strongest possible terms. Later, when the fourth president was about to end her term, the Chief Justice changed his allegiance to the next Executive President and paved the

way for his ascendancy into power by openly betraying the fourth Executive President. Thereafter, the Chief Justice's political involvement with the incumbent Executive President was made blatantly visible. Again, the majority of the judges in the Supreme Court went along with the Chief Justice.

However, two senior judges resigned from the Judicial Services Commission, which has the powers of appointment, transfers, promotions and disciplinary control of judges below the Supreme Court and the Court of Appeal. In their resignations from the three member body, of which the third member was the CJ, they stated that they were resigning over a matter of conscience. This indicated that they had reached a point where they could no longer work in the commission together with the CJ. A very strong and visible partnership had developed between the incumbent Executive President and the Chief Justice.'

Emergency regulations were used for a prolonged period, along with anti-terrorism laws and national security laws, created great limitations to the remedies people could receive for their protection. Even a writ like habeas corpus ceased to be an effective remedy that people could rely on. In a study that looked at around 1,000 applications for habeas corpus, the researchers found that hardly any had succeeded after the 1980s. Prolonged delays in adjudication and other technical difficulties have also made the recourse to writ jurisdiction in Sri Lanka quite difficult.

Politically, the main strategy carried out through the 1978 Constitution was to establish a collaboration between the Executive and the higher judiciary so that there would be judicial obstruction to what the Executive proposed to do. The peak point of this collaboration took place during the presidency of Chandrika Bandaranayake when she appointed Sarah Nanda Silva as the Chief Justice. His tenure in office saw direct collaboration between the Executive and the court under his administration.

The most glaring act to diminish the authority of the Supreme Court of Sri Lanka was the arbitrary dismissal of Chief Justice Dr Shirani Bandaranayake. This dismissal, which was not done according to any of the universally accepted norms, came under serious criticism locally as well as internationally.

Dysfunctionality does not imply irreparability

Alien elements entering a rule of law system implies that it is possible to use deliberately-designed reforms to remove those alien elements and to re- establish the legal system on the basis of the rule of law. However, mere ad hoc measures do not result in a complete elimination of factors that have caused the dysfunctionality.

In 2001, an attempt was made to restore the system by adopting a constitutional amendment, which came to be known as the 17th Amendment to the Constitution. The Amendment was designed to place limitations on the Executive President regarding appointments, promotions, transfers and dismissals of officers in the higher positions of a number of public institutions. In this way, it was thought, the politicization of these institutions could be eliminated and, thereby, a path could be found towards the regeneration of these institutions so that they could function in the manner they are required to in a democracy.

However, the subsequent Executive Presidents found that the 17th Amendment to the Constitution to be an obstruction to the exercise of their power. Thus, under the presidency of Mahinda Rajapaksha, the operation of this Amendment was sabotaged through the delay in appointing the commissioners to the constitutional council, which was the apex body for implementing the Amendment. Later, the whole Amendment was neglected in practice.

Finally, the 18th Amendment was adopted, restoring all the real power to the President, and thereby virtually nullifying the effect of the 17th Amendment.

After President Mahinda Rajapaksha's government was defeated in the 2015 election, a further Amendment to the Constitution was adopted, known as the 19th Amendment to the Constitution. This Amendment partially restores the substance of the 17th Amendment. On the basis of this Amendment, a new Constitutional Council has been created, and a number of commissions have also been created.

However, the 19th Amendment does not go far enough to remove all the alien elements that obstruct the functioning of Sri Lanka's system of government. Discussions are now underway about a new constitution and many proposals have been made for that purpose. The basic challenge now is to restore the basic structure of democracy and rule of law so that all institutions could function within that framework

However, the creation of functional, democratic institutions that follow the rule of law cannot be done solely by the change of laws. The most basic requirement is that there should be an allocation of funds to make the legal system function. However, on this area, there have not been any policy changes to indicate that resources will be made available in order to make the judiciary, prosecutions system and the policing system function effectively. Details of the problems in these institutions caused by inadequate financial and human resources have been discussed in detail by the public.

Whether the system will be repaired or not will depend on both legislative changes and the allocation of resources for the implementation of effective reforms.

PART I: Background and overview of the criminal justice sector and its (non-)functioning

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The next attempt to undermine the liberal democratic setup was in 1972, when the coalition government withdrew the judicial review powers of the Supreme Court of Sri Lanka. This was the first successful attack on the separation of powers concept in Sri Lanka.

The next and more thorough attack was in 1978, when a government with more than 80% control of parliament introduced a new constitution giving extraordinary powers to a new institution, the Executive President. The Executive Presidential system undermined both the parliament and the judiciary, and the president virtually stood above the law. A great transformation took place in the entire structure of governance, and this naturally affected Sri Lanka's justice system too. This period lasted until January 2015, and within that long period a serious undermining of the democratic structure took place. This period is important in understanding the political rules creating the dysfunctional justice system in the country. This aspect will also be explored in the study.

Finally, at the moment there are attempts at reforms, and the discussions on reforms and the limitations of those discussions will also be scrutinized in this study.

2. Police system

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

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

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

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

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

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

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

Historically, also, the issue of a system introduced under colonialism poses some very basic questions in relation to policing. The idea of the justice system as a whole, in particular the policing system, being the protector of the rights of citizens, was problematic because, in a colony, one of the fundamental principles is that the citizens are not regarded as citizens. They are regarded as the subjects of the British monarch, and thus the very idea of self-determination, which goes into informing the nature of our rights, suffered a serious setback from the very beginning. Above all, a system of rights can only be built on the recognition of the principles of liberty and equality. In a colony, the interpretation of the idea of liberty is very limited. Liberty is limited to the extent that the citizen has no right to challenge the government and

its right to govern. That, of course, is an enormously serious limitation to the idea of the development of rights.

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

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

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

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

Also, while there have been some attempts to develop a more sophisticated group of criminal investigators through the creation of the Criminal Investigation Division (CID), for the officers that are in the general policing system run through police stations throughout the country, criminal investigation training is poor. Thus, the use

of torture and ill treatment has remained a key way of investigating crimes, not merely due to the inclination of police officers to that practice, but mostly due to the authorities neglecting to develop a more sophisticated and modern system that develops practical methodologies with a deep respect for the rights of the individual and the dignity of human beings. In this study, we will explore these historical aspects of the development of the policing system in Sri Lanka.

2.4. Recruitment and promotion procedures

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

In the first two to three decades after independence, similar procedures continued to be used. However, very serious changes began to happen, including the institution of the constitutional changes in 1972 and, with a greater impact, in 1978. After 1978 in particular there has been a tendency to cultivate and develop persons in the policing system who are particularly loyal to the politicians in power. This process of absorbing the police into the political ideology of the ruling party is known in Sri Lanka as the politicization of the police. The policing system underwent a very serious transformation in the period from 1978 to 2000, when there were some attempts made to control the situation. However, those attempts failed, and the system of recruitment is still under the thrall of those very serious and negative changes. The period after 2005 has seen large-scale recruitment – 1/3 of the existing force - and included some who did not even meet the basic requirements of literacy and elementary education. The overall emphasis was to take in people who were loyal to politicians. Though they were recruited into the lowest ranks of the police, over the years they have been absorbed into the police cadres and have risen into positions higher than reserve constables. Some have become sergeants, subinspectors and inspectors, and some have proceeded to even higher ranks. The problems in the recruitment process remain one of the major issues to deal with in terms of reforms in Sri Lanka. When, out of a police cadre of 86,000, around 26,000 are persons selected in this

manner, there is clearly a serious problem in recruitment. There is a considerable body of literature on the subject of police recruitment and we will explore this theme as a very important part of this study.

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

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

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

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

2.6. Oversight mechanisms for the police

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

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

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

3. Separation of Powers

- 3.1. Does the constitution provide explicitly for separation of powers amongst the executive, judiciary and legislative branches of government? Does the separation of powers exist in practice?
- 3.2. If not, what are the possible reasons for the lack of separation of powers? What are the ways in which the lack of separation of powers impacts on the functioning of the criminal justice institutions?

The original constitution, known as the Soulbury Constitution, adopted at the time of independence in 1948, was clearly structured on

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

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

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

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

Though this constitution was initially accepted without protest from the courts, perhaps due to the overwhelming power that the government had in Parliament (over 80% of seats were held by the ruling party), a conflict soon developed between the Chief Justice

and the Executive President. In fact, the conflict was provoked by the Executive President in order to get the message across that things had changed and that, under the new constitution, he controlled everything. This conflict continued for a few years and the Executive President even attempted to impeach the Chief Justice, starting parliamentary proceedings for that purpose. However, the official period for which the Chief Justice held office came to an end during this time, before the impeachment proceedings were completed.

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

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

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

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

In January 2015 there was a change of government, and it adopted the 19th Amendment to the Constitution as a step towards reestablishing the equilibrium of power between the three branches of government. While this has been seen as an important first step, it has

not been perceived as an adequate measure for restoring the operation of the separation of powers principle into Sri Lankan governance.

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

4. Judiciary

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

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

the policing system to stop investigations into many very serious and scandalous crimes. A large list of such uninvestigated crimes became part of the opposition's accusations against the government.

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

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

This whole issue of how political changes that undermine the separation of powers interfere with and undermine the whole judicial process is at the heart of this study, which concentrates on how this makes the justice system dysfunctional. Political interference can virtually change the character of a justice system by fundamentally shifting its task from being the protection of the rights of parties involved in adjudication to being a protector of the state.

PART II: Reform Programmes

1. Justice sector reform programmes

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

The period of direct and very explicit authoritarian tendencies lasted from 1972 to January 2015. Therefore, talk about any kind of reforms for the better occurred outside this historical context. What we have is not reforms but deformities, in terms of the criminal justice system and the constitutional system. The most intense forms of undermining took place after 2005, and one of the circumstances that provided the ethos for undermining the rule of law and democracy

was the heightening of the conflict between the militant Tamil groups, such as the LTTE, and the military. The conflict developed into the proportions of what is called a war. It is an extreme case of anti-terrorism without limits. It must also be said that it was the kind of terrorism that also knew no limits to the undermining of all rules of decent engagement, including respect for the rights of civilians.

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

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

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

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

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

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

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

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

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

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

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

It is impossible to expect that there will be a sizable population in Sri Lanka who are able to read texts in English in the near future. Therefore, a reform program should emphasise the creation of a body of literature based on substantial texts from the international community on democracy, human rights and the rule of law in the Sinhala and Tamil languages, so that the basic notions around which the whole discourse on democracy and rule of law take place will be understood by a larger section of the population. The parliamentarians come from the population and their level of education in recent times has reached its lowest levels because of the repressive system discussed earlier. This state of affairs has virtually disheartened those with better

education from being involved in public affairs. There were also enormous personal risks during repressive periods. There has also been an enormous withdrawal of those with greater integrity because people have seen that the opportunities for actual action towards a better future don't exist. Added to that has been the brain drain, where nearly everyone who is able to secure employment outside prefers to leave Sri Lanka rather than to stay within its borders.

All this imposes a very serious obligation on those interested in reforms to engage in a very substantive form of education, not the ordinary types of training in civil society education, but a more substantive education with texts being prepared and more educational facilities for the population at large. Particular focus should be on the sectors whose work relates to the administration of justice, so that the quality of education on the basic concepts, notions and practices of democracy, rule of law and human rights can be better understood in these populations.

PART III: How the Criminal Justice System functions (or not) in practice

1. Arrest, detention and interrogation: in law and in practice

1.1. The right to be informed of the reasons for arrest

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

Some cases have come up on the right to be informed of the reasons for arrest, and the Supreme Court has held that this right has not been made available to those victims. However, a large section of the victims don't come to complain because of poverty, illiteracy and the lack of support available from the state and civil society in providing support for everyone to pursue their constitutional rights. Thus, it is an inbuilt practice in the policing system to arrest persons without any substantive evidence; arrest can be made purely on the basis of gossip or trivial suspicion with police officers having a free hand in to

engage in the torture of these victims. The very fact of torture itself prevents any kind of information about arrest from being obtained. Furthermore, the basic goal is to secure arrest without having to give any reasons. It has been demonstrated by large-scale documentation of such arrests, including the documentation done by the Asian Human Rights Commission, that the arresting officers are often not clear as to why people are being arrested. It is a matter of testing and guesses, and an expectation that by way of torture they can get some information about crimes and be able to begin investigations thereafter. Thus, a deep study into these practices – for which a large amount of empirical data is available - shows that this right, while it exists in legislation, is not practiced except on rare occasions.

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

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

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

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

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

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

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

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

The legal profession was considered to be for the privileged and the people recruited in the distant past were people from elite groups, who kept a very great distance from ordinary people, and who normally wanted to keep the status quo, part of which was to support the police in whatever the police may do. There are now more lawyers from poorer backgrounds, but they often don't have the morale or psychological strength to challenge authority and the police in particular, as the police are more able to interfere with the rights of the lawyers themselves. The

whole area of the role of the lawyers and what has happened to the legal profession in these countries in the long period of their development, and the retarding factors from the past and the ways to overcome this to create a more liberally-minded, strong legal profession, need to be examined for sake of the victims of human rights abuses.

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

1.4. Access to an independent medical examination upon arrest

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

1.5. Right to writ of habeas corpus

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

2. Guarantees of fair trial, legal assistance, judgment, appeal and imprisonment

2.1. Overview of the trial process

This includes issues relating to delays, access to information necessary for fair trials, knowledge of international human rights standards among members of the judiciary, independence of judges, thoroughness of trials, and whether trials are in other ways in line with international standards.

Regarding legislation relating to trials, as far as criminal procedure is concerned, all basic features required by international standards are included. However, in practice, the whole process is seriously flawed.

According to estimates from the government itself, an average criminal trial can take around ten years. The experience of the Asian Human Rights Commission, which has supported a large number of cases on behalf of torture victims, is that there have been cases that have gone on for even 14 years. The delay simply destroys the incentive to pursue complaints and also causes many problems in the trial process itself. For a person who suffers violence, or their family members or others close to them, the very fact of having to go through the trial for such a long period becomes a discouragement. The advantage of such delays goes mostly to the accused. Accused persons who are aware of the evidence against them know that if the trial is held they would have to go to jail or suffer some other form of punishment. Naturally, one way out of this is to delay the judgment as much as possible. It has also become the habit among some criminal lawyers, upon becoming aware of the weaknesses in their case, to find as many ways as possible to delay the trial.

Until about the late 1960s, jury trials were compulsory for the adjudication of serious crimes. However, this practice has now been abandoned for the most part, and the accused is given the option to have a jury trial or trial by the presiding judge. The accused often opts to have the judge because they are aware that it makes it easier to delay the case.

The United Nations Human Rights Committee considered this problem in the case of Lalith Rajapakse v. State of Sri Lanka. In this case, the Human Rights Committee found evidence that cases were being postponed after the hearing of part of the evidence of one witness, and that the next date would often be given about six months or so later. This process of hearing parts of a witness's evidence can go on for a very long time as the courts have many cases to deal with. The idea of this practice was to create the impression that a case was being heard. When such impressions are being created by each court for many cases, delays are inevitable.

In the case of Lalith Rajapaksa, the Human Rights Committee held that a delay of three years was a violation of the rights of the parties, particularly the victim, to justice without undue delay. Although the Committee recommended that measures be taken in order to avoid undue delays, no measures have been taken in that direction, partly because that would require a number of reforms. As mentioned above, the period from 1978 to 2015 was not a period in which governments were concerned with improving the rights of the people; rather, it was a continuous period of repression. During this time, ideas about facilitating speedy trials did not receive much attention from the government.

One of the disadvantages of a prolonged trial is that a single case may be heard by several judges. There are several cases now on appeal purely on this issue: in some cases there have been six or seven judges hearing parts of evidence, and therefore not being able to be aware of the entirety of the evidence except by way of reading the file. However, a judge is supposed to view the demeanor of the witnesses and assess their credibility. The judge who actually writes the judgment would have only seen a very small part of the case or, like in the case of Palitha Fernando, no part of evidence. In that case, the final judge came after all the evidence had been heard; the trial judge was transferred before the judgment was written. Objections about the final judge writing the judgment without at least calling for some of the material witnesses was ignored and the final judgment showed many errors in terms of the material facts involved. There were serious contradictions between what was in the evidence and what the judge had found to be the established facts. This is a quite a common occurrence in criminal trials at the moment.

There are many other disadvantages of delayed justice, particularly in terms of the memory of witnesses. When a witness is called upon to give evidence about an event ten years or so after it happened, he or she can make many mistakes. These contradictions are useful for the defence lawyers.

The delay also allows for the accused to interfere with the prosecution witnesses through intimidation or by way of bribes. There are many instances in which witnesses do not appear in court, and it is often due to the pressures brought about by, or favours received from, the accused. There are also frequent problems with witnesses going back on the evidence they gave to the police.

There are many problems relating to delays and they will be discussed in the course of this study in the light of many case references. The practice of paying attention to international standards has not become a matter of importance for trial judges, as they don't usually look beyond local laws.

However, it must be said that much of the basic features of the trial process in the local law, abstractly speaking, conforms to international norms. The problems are in terms of practice, due to many extraneous circumstances, such as delays and, during certain periods, certain external pressures.

However, except in the periods of extreme repression, there has been relatively less direct interference with higher court judges than in some other countries. That said, there have been cases where judges have been dismissed for taking bribes and also cases where there have been suspicions about pressures being put on judges.

2.2. Prohibition of evidence obtained through torture

In practice, judges and prosecutors play little to no role in investigations. The police do investigations on their own and then submit their final reports to the Attorney General's Department. The Attorney General's Department, through the state counsels, studies these files and determines whether there have been any crimes established. If so, they file an indictment before the relevant court against the accused.

Judges do not play a direct role in investigations. This matter has come under criticism recently from the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Professor Juan Mendez, in his preliminary findings after a visit to Sri Lanka in 2016, where he pointed out that the prosecutors and judges should play a direct role in ensuring that proper procedure is observed by the police.

Regarding the admissibility of confessions, the law in Sri Lanka, like in India, is very clear in disallowing any statement made to a police officer by the accused being admitted as evidence. This was a rule that was made during colonial times due to the peculiar cultural circumstances in South Asia, where the use of torture was very common. In order to discourage the police from obtaining confessions, this rule excluded the possibility of leading evidence relating to confessions during trials. This prohibition is much more complete than what is available at present in many of the developed countries, where confessions are admissible in evidence and can only be excluded when the use of torture is at issue.

However, although a confession does not have evidentiary value, that does not prevent torture from being practiced. Most of the investigations rely on torture to even gather information about other possible witnesses.

Section 26 (1) of the Evidence Ordinance reads as follows:

"No confession made by any person whilst he is in the custody of a police officer, unless it is made in the immediate presence of a Magistrate, shall be proved as against such person."

The situation is very different when a case is filed under the antiterrorism laws. Under the antiterrorism laws, a confession is admissible. However, if the accused claims that the confession was obtained by torture, there would be a separate inquiry within the trial itself in order to inquire into the allegation of torture by the accused. In such circumstances, the accused has the opportunity to call any witnesses who may give evidence in his favour or to call for any documents or other material evidence which may be in his favour, including the reports of forensic doctors who may have acted as Judicial Medical Officers and examined the accused earlier.

The problem, however, is that when a person is accused of an offence under the terrorism laws, these persons are kept in custody for long periods of time. During these periods, they are usually not taken to any medical officers. The only possibility of that happening is if there is a public outcry and a demand for an inquiry, which usually does not happen in cases relating to terrorism. Thus, while the safeguards against confessions do exist, actual practices and the antiterrorism laws virtually nullify the possibilities of making use of these provisions.

2.3. Legal assistance and the right to an interpreter

These rights are available in law and are also usually observed in trials, and if they are not observed then these can be grounds for appeal. In a trial at the high court, which is for serious offences, if the accused is unable to afford a lawyer of his own the court will assign a counsel. When a person speaks in a language that is different to the language of the court, they are given an interpreter at the cost of the state. In this area, the basic rights required under international law are mostly observed.

2.4. Public hearings (including for cases involving police or other agents of the state)

All trials are held in public. The idea of the open trial is quite well established.

3. State practice with regard to investigating and punishing acts of torture, including:

3.1. Complaints or detection of torture

A victim can make a complaint of a torture through a lawyer or even through a human rights organisation that may act on his behalf. If the statement by the victim is not recorded by a particular police station, it is possible for the victim or his relatives to make their statement to a higher officer in the area, such as an ASP or even to an SSP or the like. If everything fails, there is also a procedure for complaints to be made at the police headquarters itself.

Complaints can also be made through a lawyer to the Magistrate who is hearing the case. This right is available. However, it has been generally difficult for victims of torture to motivate their lawyers to make such complaints in courts. Many lawyers would not want to undertake such cases for various reasons, a problem that was also discussed above. Some magistrates also discourage such complaints being made in open court. However, in general, if lawyers do make such a complaint in open court, the magistrate records the complaint and usually orders the prison authorities to produce the person before a Judicial Medical Officer for examination. There are cases where this doesn't happen, however, such as in the custodial death of Sadun Malinga, a 17-year-old boy who died in custody after the Magistrate

ignored the submissions of the boy's lawyers and the boy himself on the need for urgent medical attention after the beatings he had suffered.

If other ways of making a complaint fail, there is still the possibility of making a written complaint to the Inspector General of Police. This could be done either by the victim themselves or on their behalf by a human rights organization. Unfortunately, however, the use of this method has not yet been widely established, and only a few victims come across human rights organizations who are engaged in such work and who make use of this opportunity.

Sri Lanka does not have special services for victims of torture. There are a few organizations that provide some assistance, mostly due to the influence of the Asian Human Rights Commission, and if these organizations come to know of such incidents, they will make the complaints directly by themselves and through the press and the public, and thereby bring about pressure in order to ensure that an investigation is carried out. Making this a general habit among all the victims throughout the country is one of the challenges, along with convincing all human rights, community and private organisations to help victims to make a written complaint. This could ensure that some examination of their injuries would take place.

If the accused is taken to a hospital, the officers there will take a statement from the accused and the matter will also be referred to a Judicial Medical Officer, who will examine them and make a report and submit it back to the police, who are obliged to submit the same as part of evidence. The accused has the right to obtain such medical records. Basically, there are provisions for making complaints. However, due to this right not being used by a large section of the population, who are either poor or afraid of the police, the practice of making use of complaint mechanisms has not yet been adequately established.

Further, there is fear of the repercussions: there have been many instances in the past when the person who makes complaints has been exposed to serious threats, arrests and the filing of fabricated cases against them. The police, in retaliation for making such complaints, can be severe. There have been several cases in which victims of torture have been murdered by the police before they could give evidence in the higher courts against the accused police officers. Sri Lanka has criminalised torture by Act No 22 1994, and there is a prescribed sentence of seven years for the commission of torture.

Although there is a possibility of complaining about torture, the problem is really about what happens to the complaints: as a general rule, complaints against torture are not inquired into. The CAT Act No 22 of 1994 is not implemented any longer due to a protest on the part of the police, and also due to a general attitude that is conducive to the promotion of impunity. From about 2002 to 2006, due to the pressure brought by local activists, particularly by the AHRC and its partners, supported by the then Rapporteur on torture and cruel, inhuman or degrading treatment or punishment Professor Theo Van Boven, the government assigned a special unit of the CID to investigate into the allegations of torture which were referred to them. References were usually made by the Attorney General or the Inspector General of Police. During this period, a large number of complaints were in fact adequately investigated, and about 60 indictments were filed. This was a period when there was a ceasefire between the LTTE and the military and it was relatively peaceful. The government was also keen to create some impression for the international community that something was being done on the complaints relating to torture.

However, the ceasefire came to an end in 2005 and thereafter there was a protest from the military in particular that if they were going to be investigated for human rights violations, including the practice of torture, they would not be able to be engaged in the war against the LTTE, as that would create legal problems for the military, the paramilitaries and the police. Therefore, when the intense involvement of the military against the LTTE in the North and East started again, the practice of investigating into torture was brought to an end. The Attorney General at the time played an active role. One Attorney General declared that they were not going to start investigations based on what some non-governmental organizations wanted. Thus, the chapter in which there were investigations by a credible group of persons from a special unit of the CID ended.

In some instances where there was pressure, the method adopted by the high-ranking police officers was to charge the relevant police officers on lesser charges under the penal code, such as committing simple hurt. This is a very minor offence that carries a small punishment, and this could easily lead to all kinds of settlements. The position at the moment is that there are no investigations into the allegations of torture and therefore there are no prosecutions under the CAT Act. Lobbyists for the implementation of the Act have constantly brought it to the government's notice but this has not been heeded to.

3.2. Investigation of complaints of torture and CIDTP

This has been dealt with above. There is no authority that is in charge of complaints into allegations of torture or CIDTP. The policy of impunity is a result of the government's compromise with the police and the military, and the fear that there will be retaliation if they strictly enforce the CAT Act. Between 2002 and 2006, when the Act was implemented, the Inspectors Union openly protested against the practice. They even threatened to go on strike and not to engage in criminal investigations if the Act was put into effect. Thus, due to a very deep political compromise between the law enforcement agencies and the government, there is a tacit policy of the non-implementation of the law against torture, and therefore of conducting no investigations into this issue.

3.3. Prosecution and punishment of perpetrators of torture and CIDTP

Punishment is prescribed by law but, due to the reasons mentioned above, cases are not being prosecuted because there are no investigations.

In the period between 2002 and 2005, when some cases were investigated, they were brought to the high court and went on for quite some time. During that time, the courts evolved a method of dealing with these cases without adhering to the statutory requirement that the punishment for torture is a minimum sentence of seven years imprisonment. The Supreme Court has made an interpretation that the judiciary is not bound by prescribed sentences. In sentencing, they can use their discretion. However, the result of this is that the most minimal forms of sentences, such as the payment of some small sums in compensation and/or suspended sentences, can be given to culprits. This is the kind of practice that the courts have adopted in order to deal with torture cases that were filed earlier. However, from around 2000-2006 there were a few cases where the minimum required sentence of 7 years was given, and these cases have been appealed. Once again, what is behind the whole issue of sentencing is the same as in the issue relating to investigations and prosecutions: a severe protest on these matters from the police, leading to a compromise by the government and a decision not to pursue these cases with any kind of seriousness.

The government, in addressing the UN Human Rights Council, promised to ensure investigations into torture. Despite such promises, the policy is not to investigate and not to punish for the crime of torture in any serious manner.

3.4. Redress, compensation and rehabilitation to torture victims

There is a further remedy against torture under Sri Lankan law, which is through fundamental rights applications under Article 126 of the Constitution, going directly to the Supreme Court. When these cases are filed, the Supreme Court investigates and the court has the power to declare whether a right under Article 11, which is from of the Article 7 of the ICCPR, has been violated, and also to award symbolic compensation.

In many cases there have been declarations made by the Supreme Court that torture or cruel, inhuman or degrading treatment or punishment has taken place, caused by particular officers, and some degree of compensation has been ordered. However, the declaration by the Supreme Court does not lead to any consequences. The officers against whom such cases have been made out have even been promoted to higher ranks without even taking into consideration such declarations made by the Supreme Court. Thus, it is almost an empty declaration with very little practical use.

As for rehabilitation, the Sri Lankan government has made nothing available. It is an area that has been completely ignored and there is neither provision under the public health laws nor under any other laws for the rehabilitation of victims.

Some measures for rehabilitation are being taken by civil society groups who are dealing with the torture victims. These are of a voluntary nature and the possibilities available to these groups are quite limited.

The core of the problem that informs all the aspects mentioned above The law has been relegated to an unimportant factor within "the justice system".

The cumulative effect of the constitutional changes and other tampering with the system is the relegation of law itself into being an unimportant factor, enlarging the area of arbitrariness.

One major issue will make all the difference to a discussion on all of the matters which have been mentioned above, and that is the issue of what law means in Sri Lanka. The term 'law' means the same thing in, for example, the United Kingdom, United States, France, and Denmark or in any other country that may be called a developed democracy based on the rule of law. However, this study will demonstrate that it does not mean the same thing in Sri Lanka and that the change of meaning makes a world of difference to understanding of all the issues that are discussed about democracy, rule of law and human rights.

'Law' as it is generally understood is binding. In Sri Lanka, is the law in fact binding on the state? Then the second question is whether the law is even always binding on the citizenry.

Within the Sri Lankan context, also has to be traced back to the political developments that we have mentioned earlier. There was the period of the colonial rule of the British and the following two to three decades wherein more or less the same traditions prevailed. During that time, the law had the meaning that it generally has; that is, it was binding on the state. This meant that it was binding on anyone who acted on behalf of the state, and it was of course binding on the citizens.

We have mentioned that there was a shift towards semiauthoritarianism from about 1972. In Sri Lanka, the shift did not take place through any military coup or any direct takeover of power by a person outside the electoral process. All governments in Sri Lanka so far have been ones that have been elected. Adult franchise was introduced to Sri Lanka in 1931 and it was universal for everyone who was above 21 years old. That has been changed to 18 years of age now.

The shift into authoritarianism took place mainly by way of constitutional changes. This it has rather important and subtle implications for understanding what the law has come to mean.

A government comes into power under the normal law of the land. Thereafter, this same government decides on their own to change the general law of the land without going through some of the processes required for constitutional change, which includes having genuine consultations with the people so that people can participate and be a party to the formulation of their constitution. In fact, the principle

that was followed both in 1972 and 1978 was to limit such possibilities as much as possible. In 1972, some forms of consultations were held and there was a body called a constitutional assembly. However, the government had 2/3 majority in parliament and therefore it had all the votes necessary to ensure that whatever they thought should be the law would be made into law. This very fact of the government having a 2/3 majority already discouraged the opposition from being seriously engaged in contesting the various provisions that were proposed by the government as they were aware that it would be futile because the government had the required majority to push for the changes.

In 1978, this process was even more limited; the president and a small group of people close him were involved in redrafting the constitution and that constitution came to be known as the tailor-made constitution, suiting the president in every way. It was a move by a president to change the constitution in order to make laws to increase his own power at the cost of violating the basic principles of the separation of powers and the principles of the rule of law.

As mentioned above, these amendments caused a constitutional disequilibrium between the three branches of government. The overall goal of this new constitution was to diminish the power of law so that the power of the president would stand above the law. Not only was he above the law - that is, he declared himself absolute impunity through the constitution itself - but the law would be interpreted and applied in the manner desired by the President.

For this to be possible, the ways of amending the constitution itself were changed, so as to allow speedy amendments to the constitutions. Amendments could be even be made in three days by limiting the time for reference to the courts if the president thought that the matter that was legislated upon was a matter of urgency.

This way, many things that would have been considered illegal in the past were virtually included into the law itself. For example, the national security laws: there was a long debate in Sri Lanka about whether and to what extent the head of state should have certain powers to suspend the basic rights of the people in a situation of emergency. The practice that prevailed prior to 1978 was to limit these powers as much as possible and the limitations were written into the law. By including the public security law within the constitution itself, all such limitations were taken away and the president could make whatever amendments to the law at his own whims and fancies.

One of the methods of doing that was by declaring a state of emergency. Antiterrorism law was added later. Although, by definition, these laws would apply in special circumstances, what in fact happened was that the country began to be ruled by these emergency regulations.

Thus, certainty about the law, which is one the characteristics of the law, and the predictability of the law, which is also universally recognized as one of the characteristics of the law, were lost. Anything could be made into law and it could be done at any time, and thereby certainty and predictability were lost.

With this, many things were made legal, either through law or practice, that were in fact very serious crimes under the normal law of any land that respects the rule of law and international law. For example, provisions were made within the emergency and antiterrorism laws to facilitate enforced disappearances. Major illegalities were made into legalities, either through law or practice, as part of this process of making enforced disappearances possible. Briefly, some are as follows:

Illegality 1: Under the normal law of Sri Lanka, an arrest must be done according to the due process of law. Making any arrest in violation of the due process of law is prohibited by the constitution itself, under Article 13(1). Illegal arrest is also a crime. However, in most instances of enforced disappearance, the perpetrators make a deliberate attempt to secure arrests without following any of the steps required by the due process of law. The rationale is that, if the due process of law is to be followed, the result would be to leave traces of evidence about the arrest as well as those who did the arrest; when we look at how disappearances have been carried out in the past, we see that the officers who came to make arrests did not come in their uniforms. Often they even wore hoods or other disguises to ensure that they would not be identified.

Illegality 2: The law requires that a person who has been arrested should be told the reason for his arrest. This is also a right guaranteed under Article 13(1) of the Constitution: "...Any person arrested shall be informed of the reason for his arrest." However, when a person is taken in the course of an enforced disappearance, no such reason is given; if the actual reason was to be given, the officers would have to say that the person is being taken for the purpose of making him or her disappear.

Illegality 3: The lawful bases for securing an arrest are "on two grounds only, that is to say, either because the prisoner or person suffering restraint is accused of some offence and must be brought before the Courts to stand his trial, or because he has been duly convicted of some offence and must suffer punishment for it." The purpose of arresting a person for an enforced disappearance is to make him or her disappear, which, going by the past experiences in Sri Lanka, means to kill someone and to dispose of their body in secret. Thus, the very arrest is illegal as the purpose for which it is done is illegal.

Illegality 4: The law requires that officers engaged in the arrest of a person should keep notes of every event relating to the arrest in as minute detail as possible. The purpose of such a provision is to protect the arresting officers in the case of any inquiry into a complaint by demonstrating that the officers have acted in the proper manner under the given circumstances as revealed by the notes taken by them at the time of the arrest. When a person is being arrested for the purpose of causing an enforced disappearance, the relevant officers are exempted from maintaining any records about the arrest. In fact, keeping any records may amount to an admission of the arrest. By such admission the officers become answerable for the subsequent disappearance. The purpose of not keeping any records is a precautionary measure to avoid liability by denying the arrest itself. Thus the officers who engage in such activities are aware that they will be under an obligation to deny the very acts that they are now engaged in. In this manner these officers get entrapped in a pit of deception and thus behave very much like criminals, who also take precautions so as to be able to deny that they engage in any act connected to any crime that they may be charged with.

Illegality 5: Under the law, arrested persons can only be detained in places that are authorised to be used for detention. Such places of detention are gazetted and known to the public. Keeping a person in detention in a place which is not thus authorised is illegal. However, in the case of arrests made for the purpose of causing an enforced disappearance, they are not usually kept in authorised places of detention. Even when they are taken to an authorised place of detention, they will be kept there secretly and they will not be registered in the usual forms on which all the names of persons who are detained are supposed to be recorded. Thus, again, the officers who engage in such activities are well aware that they are detaining the person in an illegal manner and in an illegal place.

Illegality 6: Officers engaged in arrests are under an obligation to inform the families of persons they have arrested of the arrests and also to inform them of the places of detention.

This information allows the relatives of arrested persons to attend to their needs by way of visits and to prove them with whatever they need. It also provides an opportunity for relatives to be aware of what is happening to the particular prisoners. However, in the detentions of persons who are to be forcibly disappeared, no such information is provided to the relatives. In fact, every measure is taken to deny these relatives knowledge about where the detainee will be kept. The officers engaged in the activity are aware that if the place of detention is revealed to the relatives of the prisoner, they will become aware of the detention itself (as relatives may not know what has happened, only that someone is missing) and also about those who are responsible for the detention. One of the main preoccupations of the arresting officers is concealing any such information from relatives. Thus, not only the rights of the prisoner, but also the rights of everyone else who may have a reason to be concerned about the prisoner, are denied.

Illegality 7: The law stipulates that interrogations should be conducted according to the procedures prescribed by the law. It specifically prohibits the use of torture and ill treatment during the course of interrogations. This is guaranteed under Article 11 of the Constitution. However, when a person is arrested for the purpose of causing an enforced disappearance, the interrogations are not conducted according to any legal procedure. From the evidence recorded by the Commissions appointed to inquire into involuntary disappearances and through the many other sources that are available, mountains of evidence exist to demonstrate that all kinds of humiliations and the cruellest forms of torture and ill treatment take place under these circumstances. The officers, who are well aware of the ultimate outcome of what they are doing, know for certain that the victim will not be alive to tell tales about what happened to them. Assured of this, they engage in whatever brutality they feel like. The main purpose of such interrogations and torture is to have the names of any others who may be linked to the suspect. Naturally, most persons subjected to such torture divulge any name that comes to their minds, often with the hope that divulging names, real or fictitious, may bring an end to their suffering.

Illegality 8: The law strictly lays down the principle that it is only an official member of the judiciary who can pronounce a verdict of guilty on any accused, and even judges can only do so after a fair trial of the suspect. This principle goes to the very heart of the idea of separation of powers even the President or the Parliament cannot declare a death sentence on anyone. This is strictly a judicial function. Centuries of development of jurisprudence are there, to back this principle. However, in the case of enforced disappearances such a decision may be made by police officers, military officers, even paramilitary or purely hired criminals. Such delegation of power is the lowest depth that any legal system can descend to.

Illegality 9: If there is a suspicious death – such as a death of someone in the custody of the police – the law requires magistrates to conduct an inquiry and record all relevant evidence before the body is given for interment. In the case of a suspicious death, a magistrate would usually order an autopsy to be conducted. However, in the case of enforced disappearances, this most fundamental legal requirement is ignored. Where emergency regulations are drafted in a manner that allows for enforced disappearances, provisions are made to empower a police officer of some rank to make orders to dispose of bodies. Where no such emergency regulations are operative, those who engage in enforced disappearances give themselves the right to dispose of the body.

Illegality 10: Even when death sentences were carried out according to the law (though in fact the practice of carrying out death sentences has been suspended now for a long period) there were procedures to be followed after the person was killed. The family of the deceased had the right to conduct funeral rites according to their religious or other customs. However, when enforced disappearances take place, even this basic final act of human decency is done away with. Secret burials are allowed, and either not keeping details or keeping the details secret is also part of the package. Even many years after such deaths, one of the great lamentations of the family members of the disappeared is that they are unable to pay their last respects to their loved ones.

Illegality 11: The law invented the principle that a case should be established beyond reasonable doubt before a court can pronounce a guilty verdict. The evolution of this principle shows that the jurors wanted to be absolutely certain that they pronounced a verdict only when they were absolutely certain of what they were deciding on. This was a matter of conscience to each of the jurors or, in cases where no juries are engaged, for the presiding judge. This issue of conscience is completely overlooked in the case of enforced disappearances. The issue of guilt or innocence is a matter that is lightly disposed of. Sometimes, according to narratives which are now being published, the sole evidence against many who were disposed of was some verbal information given by some anonymous person.

Decisions not to implement the law as a matter of policy

When decisions are taken from the top to not investigate into certain crimes and non-prosecution follows, this reduces (or even negates) the law itself into being a series of mere non-binding declarations. Decisions not to investigate torture or cruel, inhuman or degrading treatment or punishment are one example. There are also decisions not to investigate enforced disappearances and other forms of extrajudicial killings.

Not to investigate certain forms of corruption is another such area. In the period between 1978 and 2015 in general, 2005-2015 in particular, there was a very direct decision to discourage the functioning of the Commission against Bribery and Corruption. Only some selected cases were allowed to be investigated and anything that had to do with the government or senior politicians and all those who were involved with the government were not investigated. The policy behind this was to encourage certain forms of corruption as a way of keeping the executive presidential system unchallenged. For example, when Members of Parliament voted for any legislation that the president wanted to push through, the president would ignore the corrupt practices of these members. The policy, therefore, was to allow them to find their wealth and power by way of corruption as payment for supporting the president unconditionally.

Similarly, there is a large area of law which was not implemented because there was a direct or indirect policy line that discouraged implementation. This was even extended to issues like the drug trade at a certain time. The persons who were close to the government or persons who were paying bribes to powerful persons were allowed to engage in this trade and, as a consequence, for example, the customs services were directly or indirectly instructed not to arrest persons who are bringing these drugs illegally into Sri Lanka. If any officer were to

mistakenly arrest such a person, often such officers got into trouble rather than the offender. What was allowed for the drug trade was also allowed for other things and other forms of smuggling were carried out by persons who had links to powerful people in Sri Lanka.

One way of pushing for non-implementation was through various kinds of punishments or transfers for those who were bent on following the rules. When this happens, quite often the message gets through that it is dangerous to be involved in the enforcement of laws in a genuine manner, and thus a tacit policy line develops of being very cautious in dealing with offences in general. It may apply to the police and also other services, such as to forest officers and others who are engaged in the detection of various forms of crime.

Extraordinary powers were given to the local Members of Parliament belonging to the government party, such as, for example, allowing them to have a large section of security officers - police or military officers - to do whatever they wished to do. This often meant taking various types of punitive action against those who were involved in opposition political parties. Such actions could go even to the extent of fabricating charges or causing disappearances.

What this overview attempts to pin point is that, while there can be an overarching system of law as well a system of administration of justice, conditions can be created in order to ensure the nonimplementation of laws and thereby completely change the very meaning of law itself.

Once such actions are allowed by political authorities, another form of illegality begins to develop. Even without such authorization, officers take advantage of the situation and begin to violate the law in order to gain personal benefits. Politicians, who benefit by encouraging law enforcement officers to engage in illegalities, are not in a position to stop these officers from being engaged in illegalities for their own purposes. Thus, the area for illegality begins to expand.

There is abuse of power and corruption, along with the development of a very threatening atmosphere within the government services themselves and in society in general, wherein people are no longer sure what the law is or what might happen even when they engage in lawful activities.

Misuse of discretion to undermine the law

Tom Bingham, in explaining the basic aspects of the rule of law, states that "questions of legal right and liability should be ordinarily, resolved by application of the law and not the exercise of discretion."

Sri Lanka, within the last 40 years or so, has seen the everincreasing use of discretion by everyone: the head of state, the Prime Ministers and Ministers, civil servants, judges, prosecutors and the police, and, in fact, almost everyone who exercises power on behalf of the state. The use of discretion has simply come to mean doing or not doing things in the way that the particular person thinks fit, irrespective of whether there are clear provisions of law granting such a person authority to do what they propose to do.

When discretion is exercised so freely, new habits are formed, and a general belief is created that these state practices are valid. For example, when the Supreme Court recently held that the new enactments relating to VAT are illegal, the Prime Minister's response in Parliament was that such things had previously been done.

The direct result of the use of discretion, without any reference to a clear law, is to violate the foremost basic principle of the rule of law, which, as Tom Bingham points out, is that "the law must be accessible and so far as possible intelligible, clear, and predictable. When things are left to unfettered discretion, no outcome is predictable or certain."

For example, a woman who has been raped and who seeks justice may be told by the investigating police officer, a prosecutor or even by a court to accept some compensation and settle the matter. Such settlements, whether they be about rape or any other serious crime, or even about violations of fundamental rights, have become very common. What is lost, as a result, is the distinction between what used to be called serious crimes —which the State was obliged to pursue proportionately, so as to protect society and create deterrence against crime — and other crimes, which were called minor or trivial offences.

By dealing with serious crimes by the use of discretionary powers, the ultimate impression created is that no crime is really serious enough to be dealt with by way of serious punishment. When this happens, the very meaning of criminal law is lost and the criminal law begins to be treated similarly to the civil law.

Devaluing the idea of criminal justice and virtually replacing it with civil standards means a serious threat to the very existence of a civilised society. The development of criminal justice was a product of centuries of human endeavours to find a solution to the human propensity to crime. Crime is a reality and cannot be wished away. It is in the struggle to find authentic solutions to this fundamental problem of the human capacity for and propensity to crime that the philosophy and normative framework of criminal justice were developed.

Criminal justice requires that crimes and ways of handling them should be clearly written down into law. Such matters cannot be left to discretion. To leave the matters of criminal liability to discretion is to expose the people to enormous and unpredictable dangers.

These examples given from Sri Lanka today apply to very many countries in the developing world, and certainly to several countries in Asia. Even at this moment, widespread extrajudicial killings are taking place in the Philippines on the instructions of the president himself, who has

declared within the parliament itself that he would suppress the drugs trade by various extrajudicial means, including assassinations. According to reports, the estimated numbers of persons who have been killed are close to 1,000 now, and the president has said that it may go up to 6,000.

Behind these processes is a kind of disturbance within the state structure, which occurs when the place assigned to law is removed. The law and legal structures can then be used for anything: the ruling political party could use it to suppress their opponents and, for this purpose, various pretexts can be used - for example, the suppression of terrorism. The crises taking place in Pakistan and Bangladesh are examples of this.

This brings us to the point made in this study: when studying issues related to the protection of human rights and matters of criminal justice, the context of a developing country should be very seriously studied. They are distinct from those countries that have already established their legal and justice systems on solid foundations. This does not mean that developed countries have perfect institutions, but the ones they have are based on various kinds of checks and balances and levels of development and supervision that guarantee, to a great

extent, that laws are implemented. This situation is not what we have in developing countries, and that changes the whole picture when it comes to studying these matters. This study will try to illustrate this point.

International human rights forums and even the United Nations' human right mechanisms should develop an understanding of these differences so that policy developments could be made at the international level in order to deal with this matter. These differences in context and the challenge that is being posed now to the notion of law itself are at the heart of the crises relating to the rule of law.

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How this situation affects the practice of torture

We are including a report submitted to the CAT Committee by the Asian Human Rights Commission, in order to explain how the issues relating to the torture prevention are inseparably linked to the justice system crisis. 2

ALTERNATIVE REPORT TO THE COMMITTEE AGAINST TORTURE IN CONNECTION WITH THE 5TH PERIODIC REPORT ON SRI LANKA

This report is submitted by the Asian Legal Resource Centre, Hong Kong; Janasansadaya, Sri Lanka; Human Rights Office, Sri Lanka; Right to Life, Sri Lanka; Gampaha Citizen's Committee, Sri Lanka; and Rule of Law Forum, Sri Lanka.

Question:

How to investigate without investigative capabilities? How to prosecute without prosecuting capabilities?

Answer:

Torture the prisoner.
When tortured, almost everyone admits guilt!

Hong Kong/Sri Lanka June 2016

Introduction

The 5th Periodic Report by Sri Lanka as a state party was due in 2012. It has been submitted on 16th October 2015.

The Report of the GOSL shows that it is in denial mode. It rejects all the allegations about Sri Lanka being a country where there is widespread use of torture and ill-treatment.

The fact is that, for cases of torture and ill-treatment, no credible complaint mechanisms exist. Though there is a law criminalising torture, by way of the CAT Act, No. 22 of 1994, no one was prosecuted under this Act during the period relevant to this Report and thus impunity prevails. The remedy under the fundamental rights provisions of the Constitution cannot be said to be effective in terms of Article 2 of the ICCPR, in that the declarations made by the Supreme Court under these provisions have no impact at all, and the process of

litigation takes an enormously long time. Even after such inordinate periods of litigation, compensation, if at all offered, is just modicum in most cases.

Further, under this constitutional provision, the Supreme Court has no power to release a person from illegal custody. Additionally, a large section of Sri Lankan police officers lack educational and professional qualifications to be policemen, and to conduct investigations into serious crimes. Such incompetence often leads to torture and ill-treatment as a method of investigating into crime. The judicial process is beset with prolonged delays, which frustrate all attempts to seek an effective remedy. There is no effective legal aid system to assist victims. Despite there being a law on witness protection, such protection is supposed to be carried out through the police themselves, and they are often the ones accused of engaging in acts of torture. The prisons are overwhelmingly overcrowded and the conditions of prisons themselves have created a situation of cruel and inhuman punishment on victims. Due to the incompetence of the police and the lack of command responsibility, illegal arrests take place all the time, and the Magistrates tend to remand anyone on the request of the police.

In short, structurally, the police, the prosecutions department, the judiciary and the armed forces suffer very serious defects and without correcting them the eradication of torture is impossible. And yet this list of defects is flatly denied by the GOSL in their Report.

The UN Special Rapporteurs – Mr Juan E. Mendez, Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, and Ms Monica Pinto, Special Rapporteur on the independence of judges and lawyers – have visited Sri Lanka recently and have made their preliminary findings public, on 7th May 2016.

In the preliminary report of the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, (dated 7th May 2016), Mr. Mendez categorically states that

"... I am persuaded that torture is a common practice carried out in relation to regular criminal investigations in large majority by the Criminal Investigation Department (CID) of the police...." In fact, the Rapporteur met many victims during his visit and some of them were examined by forensic experts, who confirmed the fact that these persons were tortured. The UN Rapporteur also visited places of detention and prisons and was able to see that these were places that are highly overcrowded and which do not provide basic ventilation and health facilities. He has arrived at the finding that conditions in these places amounts to cruel and inhuman treatment for those detained here. He has also observed the judicial process, which is beset with long years of delays, causing enormous inconveniences to the victims. Additionally, he has come to the finding that no case has been filed under the CAT Act No. 22 of 1994 in recent times and that the constitution's fundamental rights provisions provide inadequate and ineffective remedies. Impunity prevails. These and many other findings completely contradict the denials by the GOSL.

The findings of the UN Rapporteur for the independence of judges and lawyers confirms that the judicial system, including the prosecutorial and the investigative systems, are all seriously flawed. She is also in agreement with the findings by the UN Rapporteur on torture and ill-treatment that judicial oversight over police actions is superficial and that:

- "... The current legal framework and the lack of reform within the structures of the armed forces, police, Attorney-General's Office and judiciary perpetuate the real risk that the practice of torture will continue. Sri Lanka needs urgent measures adopted in a comprehensive manner to ensure structural reform in the country's key institutions...
- ... A piecemeal approach will not be compatible with the soon-tobe- launched transitional justice process and could undermine it before it really begins."

If this exercise before the CAT Committee is to be of any meaning and use, the GOSL must abandon its false position, of being in a state of denial about serious violations regarding torture and ill-treatment and the related matters mentioned above. The present Government that was elected through a Presidential election held on 8th January 2015 and a Parliamentary Election held on 17th August 2015 should have no difficulty at all in abandoning this mode of denial, as their election promises were completely based on the allegation that, under the previous regime, Sri Lanka had reached a state of lawlessness. The

collapse of the policing, prosecutions and judicial system were all matters that were made a prominent part of the discourse prior to the elections. The GOSL would not seriously submit or expect the country or world to believe that it has changed all that within the last one and half years. The government has not claimed that in Parliament or elsewhere. Therefore, the GOSL does not have any basis to maintain the denials on which it has based its Report. Instead, the wiser course of action for the GOSL is to admit the obvious and to begin a genuine dialogue with the CAT Committee on what corrective measures can be taken before the next periodic report in order that the abysmal lawlessness that prevails in the country can begin to be addressed and the defects in the policing, prosecutions and judicial systems, and issues with the armed forces, could be dealt with, to avoid the practice of torture in Sri Lanka.

If the GOSL would agree to begin this dialogue with the CAT Committee in that open and genuine spirit, this exercise could improve the situation within Sri Lanka. However, if the GOSL is unwilling and incapable of working outside its denial mode, then the discourse during this Session will bear as little result as the previous discourses in the earlier Periodic Review Sessions.

The Asian Human Rights Commission's submissions are made on the basis of the completely justifiable findings of the two UN Special Rapporteurs mentioned above, and we suggest that these findings should be treated as the common basis on which an effective discourse could be carried out for making improvements for the prevention of torture and ill-treatment, which would also contribute to the resurrection of the fallen legal system and rule of law.

Methodology followed in this submission

The Asian Human Rights Commission uses the following methodology in order to place before the CAT Committee the responsibilities of the GOSL in implementing the CAT in Sri Lanka, in terms of the findings that the two UN Special Rapporteurs (mentioned above) have arrived at after their recent visit to Sri Lanka in May 2016.

Findings

Torture is a common practice in regular criminal investigations [from the preliminary report of the UN SR, on torture]

Implication

Torture is a common part of criminal investigations. This suggests that, without undertaking basic reforms in the justice processes in Sri Lanka, this practice will continue.

The said UN SR on torture and ill-treatment states as follows,

"...The current legal framework and the lack of reform within the structures of the armed forces, police, Attorney-General's Office and judiciary perpetuate the real risk that the practice of torture will continue. Sri Lanka needs urgent measures adopted in a comprehensive manner to ensure structural reform in the country's key institutions. A piecemeal approach will not be compatible with the soon-to-be-launched transitional justice process and could undermine it before it really begins...." [p. 12]

From the observations of the Asian Human Rights Commission, the following facts emerge about the overall legal framework:

The policing system

1.1 Most of the police officers are incompetent and lack the educational and professional qualifications necessary to engage in criminal investigations in a responsible manner. The total number of police officers of various ranks is around 84,000. Of this, 29,000 were recruited as reserve police officers in 2006 by the former government of Mr. Mahinda Rajapaksa, purely for the political purpose of providing employment to its supporters. The regular recruitment process was not followed in the recruitment of these 29,000 persons; even basic educational qualifications were not checked. They did not go through the normal one-year training programme after recruitment. Though in 2006 they were recruited into the lowest rank, now they have been assimilated into various higher ranks, such as Sub-Inspectors, Inspectors, and even Officers-in-Charge of police stations, and some may have even reached higher positions. Lacking any kind of prior experience and knowledge required to face the responsibilities of criminal investigations, these officers are now conducting arrests, preparing criminal investigations, engaging as interrogators, and submitting reports for prosecutions. As they are incompetent in carrying out their duties, they naturally resort to the use of force, using torture and ill-treatment to gather information. So long as these officers

- are allowed to engage in criminal investigations, torture and ill-treatment will be the only method used in investigations.
- Even the rest of the police force, outside this 29,000, 1.2 was subjected to what is popularly known in Sri Lanka as politicisation. Most of these recruitments were made on the basis of political requirements, particularly of local politicians in the different electorates, and conducted under the directions given by politicians. Such politicisation has been the subject of severe criticism inside the country and even the present government, when in the opposition, made this allegation about politicisation of the police against the former government. The politicisation is not recent. It goes back decades. There is no controversy about immense degeneration of quality within the police force due to direct political interference into the police organisation by various governments in power over nearly 40 years. While the present government has acknowledged this position, it has not taken any serious steps so far to ensure that the problems caused by such degeneration of the police force are addressed. Thus, the legal system suffers from not having a law enforcement agency that can meet the quality required for performing functions of law enforcement responsibly.
- 1.3 Due to the same process of politicisation, the system of command responsibility within the police force has suffered greatly. There is common public consensus about this serious lapse in command responsibility. This was aggravated by the fact that serious levels of corruption also spread during the period of politicisation of the police. As a result, the capacity to command the lower ranks rapidly deteriorated. Many of the duties of higher ranking officers regarding the control of the lower ranks at the level of police stations, which are envisaged in the "Ceylon Police Departmental Orders", are now being virtually ignored.

The direct result of ignoring police departmental orders is the breakdown of the disciplinary processes within the police system. Disciplinary processes exist in name alone. In actuality no significant disciplinary measures are being taken for violations of the departmental orders. This is particularly so regarding the use of torture and ill-treatment by police officers. Even the Supreme Court of Sri Lanka has commented on the lack of police response to the increasing numbers of complaints of torture and ill-treatment.

1.4 The severe lack of discipline at the top level of the police ranks is reflected by a number of criminal cases in which senior police officers of high rank, such as Deputy Inspector General of Police (DIGs) down to Assistant Superintendents of Police (ASPs), and Officers in Charge (OICs), have been charged in the courts, and some have already been found guilty and sentenced, on serious charges, even extortion and murder. Some others are being investigated on charges of murder and deliberate subversion of the judicial process by tampering with investigation reports. Besides such senior officers, many officers of other ranks have been charged on other serious crimes.

All these factors point to an serious problem of degeneration in the quality of the police force in Sri Lanka.

The Attorney General's Department

The Attorney General's Department plays the prosecutor's role in Sri Lanka. This Department has also seen serious degeneration of quality, due the following factors:

- 1.5 Under the previous Mahinda Rajapaksa government, the entire department of the Attorney General was brought under the control of the Presidential Secretariat. This was a fundamental violation of the tradition of independence of the Attorney General's Office, as was maintained for a long period. Bringing the Department under the control of the Presidential Secretariat was a blow to this independence, and it also brought down the image of the institution in the minds of the public. It also brought severe demoralisation into the institution. Although the new government has acknowledged this problem, it has not done enough to correct the damage done and raise the status of this Department.
- 1.6 The Department is also perceived as having seriously suffered from politicisation, as mentioned in the above paragraph, which applies to the entirety of the public service.
- 1.7 During the previous government, the Department also abandoned its earlier position regarding non-appearance on behalf of public officers who are respondents in fundamental rights applications before the Supreme Court on cases relating to torture and ill-treatment. The department officers not only began to appear

for the defence of these officers, but they also often prevented issuing of leave to proceed in fundamental rights applications by providing information which was biased.

The applicants in these cases had no way to contradict the information provided by some of the officers of the Department because such information was not given in a transparent manner. The following observation of the UN Special Rapporteur for the independence of judges and lawyers is relevant:

- "...The Attorney-General's office acts as the representative of the State, which by now should be equivalent to defending the government. His office should also be able to make a neat separation between the State and the public interest they act on behalf of and the persons behind the institutions so as to avoid any possible conflict of interest. Such conflict of interest have arisen for instance in cases where the Attorney-General's office appears in the defence of police officers or military officers in cases of habeas corpus applications, as if the court decides that the respondent are responsible for the crimes they are accused of, the same office would be called to prosecute them."
- 1.8 It is acknowledged that the Department does not have adequate number of State Counsel, and it is often said that the number available is less than half of the required number. One of the results of inadequate number of State Counsel is that it often causes the delay in criminal trials and also leads to rather unprincipled forms of settlement of cases, purely for the sake of speedy ending of cases. This has included sometimes agreements to grant suspended sentences, even for serious crimes such as rape, and sometimes even murder.
- 1.9 There are extraordinary delays in filing indictments to the High Court regarding serious crimes. The UN SR on torture and ill-treatment states that
 - "...We understand that the average delay for State Counsel to bring a criminal case before the High Court after remand ranges from 5 to 7 years. This is a serious violation of due process and the presumption of innocence, and results in what is commonly known as an "anticipated penalty" without trial. It also violates the principle that provisional detention should be the

exception and not the rule. I urge Sri Lanka to consider measures to make more non-violent offenses bail able and to experiment with alternatives to incarceration."

1.11 The Attorney General and his Department have failed to issue clear and proper guidelines for the investigation and prosecution of crimes and also to make specific guidelines for the investigation and the prosecution of serious human rights violations, including torture, and other violations of international human rights law.

For all appearances, on matters of public law, the Attorney General's Department acts not as if it has a role in the protection of the rights of the people, but as if its role is to represent the State, however repressive the State may be. The Attorney General's Department acts more like a defender of repression rather than a Department acting to protect individual rights.

The Attorney-General is also the Chief Prosecutor, and, as such, has replaced the position of the Independent Prosecutor that existed in the past. In such a capacity, the Attorney-General should issue clear and proper guidelines for the investigation and prosecution of crimes. He should also monitor how cases are substantiated so as to avoid the delays incurred by his office. Even in 'ordinary' non-conflict-related and non-political cases, the Attorney-General's office takes too much time to produce an indictment. This is but one of the reasons for the long judicial delays in the administration of justice in Sri Lanka and which court users of to endure.

The Attorney General has also failed to ensure that his department does not contribute to the delays in the courts and has failed to issue instructions to State Counsel to avoid delays.

1.12 The Attorney General acts also as a legal advisor, this office should be exercised as it was done in the earlier period, to advise purely on the basis of legal principles and not to justify illegal and unjust actions of the State. In recent decades, there is nothing on record to show that the Attorney General opposed any unjustifiable actions taken by the Executive, particularly in order to suppress dissent, limit media freedoms, and use the legal process to harass individuals. This was so particularly in the cases against the former Army General Sarath Fonseka, immediately after the Presidential elections in which he was the common opposition candidate.

There are also other cases like the case of journalist Jayaprakash Sittampalam Tissainayagam .

Judicial Oversight of Police Action

1.13 The UN SR against torture and ill-treatment states that in Sri Lanka, "judicial oversight of police action is superficial"; [p. 8]

This situation is due partly to the diminishing of judicial protections of individuals as a result of predominance given to antiterrorism actions. Since 1971, Sri Lanka has undergone a prolonged period of struggle against what the State terms as terrorism, both in the South as well as in the North and East of the country. During this time, the whole focus of the State was devoted to the suppression of terrorism through repressive legislation as well as through direct military actions. As defending military actions was portrayed through heavy state propaganda as the primary patriotic duty, the idea of defending individual rights suffered greatly in Sri Lanka. This also affected judicial oversight over arrests and detentions, and even the way of dealing with suspects who complained about torture and ill-treatment. Even with the writ of Habeas Corpus, the pursuit of an application became more and more difficult and recent research shows that from about 1,000 applications filed in the latter part of the conflict with the LTTE, hardly any application was accepted. Many of such applications were dismissed purely on technical grounds. All applications took many years before the courts. This indirectly contributed to impunity in Sri Lanka.

1.14 The oversight of the magistrates on arrests and detentions has suffered greatly in the recent decades. Magistrates tend to accept the reports filed by the police and almost automatically grant their applications for remanding suspects. The result has been the detention of persons who have been implicated in cases purely by way of fabrication of charges. The higher courts have even noticed this practice of Magistrates uncritically agreeing with the the police. In the SC Application No. 488/98, Maximus Danny vs. IP Sirimal and others the Supreme Court noted that "Unfortunately, the Magistrate has almost mechanically made an order of remand because the police wanted them to be remanded."

Further, in the case of Mahanama Tillakaratne Vs. Bandula Wickramasinghe, 1999 1 Sri L.R 372, the Supreme Court again noted

that Magistrates should not issue remand orders "to satisfy the sardonic pleasure of an opinionated investigator or a prosecutor (at pg. 382). Remanding person is a judicial act and as such a Magistrate should bring his judicial mind to bear on that matter before depriving a person of his liberty."

However, despite such instructions by the Supreme Court, the general practice in Sri Lankan Magistrates' Courts is to accept the version given by the police in their initial report and remand persons at the request of the police. This takes place even when the suspect through their lawyers point out that the charges are fabricated and have been filed without good faith. It is almost impossible to get a hearing - at the initial stage when the person is brought before the Magistrate itself – into the complaints of the victim of arrest that the charges are completely fabricated and that there is not the slightest evidence against a victim for remanding or arresting him. The usual practice is to postpone the hearing of such applications on behalf of the victims of arrest and to make orders for remand. This is one of the reasons for overcrowding in the remand prisons. The common law position is that arrest "is prima facie illegal." However, the practice in Sri Lankan courts has come to be that all arrests are prima facie legal and that the Magistrates consider it their obligation to remand every person brought before the Court if the police make an application for detention.

This almost automatic remanding of arrested persons has undermined the position of the Magistrates as protectors of individual liberties. The impression that has now emerged is that there is a tacit collusion between the police and the Magistrates.

The result is that the lawyers are reluctant to even make applications for the release of a suspect at the initial stage itself, even though their clients press them to make such applications on the basis that there is no evidence of any sort to implicate them in any crime. At the Magistrates' courts, the legal profession quite often becomes too timid to defend the liberties of the individual.

1.15 There needs to be a re-education of the magistrates to re-orient them on their role and on establishing the legitimacy of an arrest at the initial stage itself. If there is such a re-orientation, the very atmosphere of the Magistrates' courts will undergo a considerable change and the people will feel free to approach the magistrates to make applications for release on the basis that arrests have

been made without adequate examination of evidence, and, not infrequently, even without good faith.

- 1.16 Where Magistrates find that persons have been arrested without a justifiable reason for arrest, punitive action should be taken against the officers who have conducted such arrests, and compensation should be paid for the victims of such arrests. That was clearly the position of the common law. As A V Dicey noted:
 - "... personal freedom in this sense of the term is secured in England by the strict maintenance of the principle that no man can be arrested or imprisoned except in due course of law i.e. (speaking again in very general terms indeed) under some legal warrant or authority and, what is of far more consequence, it is secured by the provisions of adequate legal means for the enforcement of this principle. These methods are twofold; namely, redress for unlawful arrest or imprisonment by means of a prosecution or an action, and deliverance from unlawful imprisonment by means of the writ of habeas corpus".
- 1.17 Another factor that has affected the lowering of standards regarding illegal arrests is confusion about the degree of evidence that is needed to justify an arrest. Prior to 1971, the idea of a reasonable suspicion of someone being linked to a crime was interpreted differently to the way the same phrase is interpreted now. In the past, 'reasonable suspicion' of being linked to a crime meant some plausible evidence that created a prima facie suspicion that the person was likely to have a committed a particular crime. Now, no such plausible evidence is required. Hundreds of documented cases show that a person can be arrested without any reasonable grounds whatsoever. For example, in one of the famous cases, i.e. the case of Gerald Perera, it was discovered when the Supreme Court inquired into the matter that he was arrested solely because his name was Gerald, as it has transpired that a person by the name of Gerald may have known something about a triple murder. Gerald Perera was arrested without even being asked a single question. He was then taken to a police station, hung up and severely beaten. It was only after a serious beating that the police officers began to ask him about the alleged crime. The Supreme Court noted that, had a few questions been asked after the arrest about his whereabouts during the time of the alleged crime, he could have been released a short while after the arrest.

The habit of first arresting and then beating up a person to find out whether he may know something about a crime is a common practice in Sri Lanka. A large number of cases where this has taken place has been reported in a book, entitled "Narrative of Justice in Sri Lanka told through stories of torture victims", which analyses 402 cases of torture and ill-treatment.

1.18 Often, the police submit reports to court stating that the source of the initial information implicating a particular suspect was given by a "source that cannot be revealed". Often, no such source exists, and the police merely create a fiction about the first information given to them. While persons who give information to the police need to be protected, this should not go to the extent of being able to create a fiction about an informant who does not really exist. The Magistrate should be able to verify the facts even if some details must be withheld from outsiders for security reasons. At least part of the reason for such a loose interpretation given to the idea of 'reasonable suspicion' was the threat of some organisations deemed as terrorists by the State. Investigations into terrorism are always difficult and also pose some security problems to the investigators. However, the frequency of such a practices over a long period created a situation where the same standards are used even regarding crimes that are unrelated to terrorism, and the same excuses are being utilized. Even higher courts have given a rather loose interpretation to the idea of reasonable suspicion. All this has created an easy excuse for unscrupulous security officers to make arrests without any prior investigations and without really having adequate grounds to suspect a person of having committed a crime.

Impunity

The UN SR against torture and ill-treatment comments on the impunity and the lack of accountability prevailing in Sri Lanka in his report. [p.10]

The observations and recommendations by the CAT Committee to the GOSL, in their previous reports, have repeatedly raised the issue of impunity prevailing in Sri Lanka. However there has been no improvement relating to this. The following can instead be noted:

1.19 There have been no prosecutions under the CAT Act No 22 of 1994 despite a large body of complaints of torture and ill-treatment and despite the existence of substantive evidence, as reported in the investigation reports of judicial medical officers.

Around 2003–2006, CID's Special Unit of Inquiry (SIU) was mobilised to investigate allegations of torture, but this practice has ceased since then and the decision not to prosecute under CAT Act No. 22 of 1994 was taken as a matter of policy. At the time, it was thought that undertaking prosecutions under the CAT Act would be detrimental to the war effort of the GOSL against the LTTE. Even after the termination of the military conflict with the LTTE, the same policy continues.

Unless there is a deliberate policy change on the part of the GOSL, the CAT Act is unlikely to be implemented in Sri Lanka. Thus, despite the theoretical existence of a legal remedy against acts of torture and ill-treatment, there is no implementation of this law for victims in Sri Lanka.

1.20 Another remedy that is available against torture and ill-treatment is under Article 126 of Sri Lanka's Constitution. However, this is also not an effective remedy, as a declaration by the Supreme Court on the basis of finding that an act of torture and ill-treatment has been committed does not lead to any practical result against the officers who have perpetrated such acts. The Supreme Court finding does not even lead to any disciplinary action being taken against such officers. It does not even affect their promotions.

The award of compensation in cases taken under Article 126 is – except in very rare cases – are of symbolic value only and the awards of compensation are paltry. Though there is a possibility of pursuing a civil remedy under the civil law and procedure in Sri Lanka, practically speaking that remedy is also frustrated by enormous delays in adjudication that prevail in Sri Lanka. The UN SR for the independence of judges and lawyers has commented on this matter of delays in adjudication in her report.

The Constitutional remedy under Article 126 is also further frustrated by very long delays in adjudication even in fundamental rights cases. As an effective legal aid scheme does not exist, the cost of

litigation is too much for the victims of torture and ill-treatment to afford, as most victims come from poorer backgrounds.

A further factor that militates against an effective remedy is the harassment that often follows attempts made by victims to complain about violations they have suffered and to pursue the matter before courts. There have been instances when such victims have even been murdered. Although a witness protection law now exists, even this law is of little practical use. The UN SR against torture and ill treatment has noted:

- "...Sri Lanka has a Victim and Witness Protection Act but potential beneficiaries complain that protection is ultimately entrusted to the police which, in most cases, is the agency that they distrust. The Government should consider amending the Act in order to make it more effective and trustworthy."
- 1.21 In her Report, the UN SR for the independence of judges and lawyers comments on the need for the justice system to reflect the diversity of society, to strengthen the independent administration of justice, to have independent, impartial and transparent institutions and to ensure judicial efficacy. She encourages the calls for a review of the constitution and sees it as an opportunity to strengthen independence and implementation of international human rights law. Serious defects that exist in all these areas have created a breakdown of confidence of the people in the administration of justice.

This problem was recognised by the present government when campaigning against the previous government, prior to the elections in the year 2015. However, after the new government came to power, it has not yet demonstrated any interest in the matter, and it has not even evolved a policy outline, for dealing with these issues.

Above all, the administration of justice suffers in Sri Lanka due to inadequate funding allocated to the institutions responsible for the administration of justice, i.e. the court system, Attorney General's Department, the policing system, and the prisons. Until adequate funds are provided for the proper functioning of these institutions, it will not be possible for the GOSL to guarantee an effective remedy for human rights violations, including violations relating to torture and ill-treatment in terms of Article 2 of the ICCPR.

Thus, it is respectfully submitted that the Committee against Torture needs to inquire into the institutional capacity of the GOSL to implement their obligations under the CAT.

While, there are obvious incapacities in the basic institutions of justice for the reasons stated above, which are also stated in the findings of the two UN Special Rapporteurs, what is more disheartening is the fact that there is a complete absence of willingness to take the necessary steps to overcome these incapacities.

3

A SUBMISSION FOLLOWING THE EXPERT CONSULTATION HELD IN WASHINGTON, 7-8 JULY 2016, ON INTERROGATIONS, INVESTIGATIONS, AND CUSTODIAL PRACTICES.

By Basil Fernando

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Hong Kong 21 July 2016

My purpose in making this submission is to emphasize the actual and practical problems relating to the elimination of torture and ill-treatment in the interrogation, investigation, and custodial practices in countries usually described as the Global South, meaning those countries where legal and judicial systems based on liberal democratic principles have not developed to the extent that they have in traditional democracies, where the rule of law is accepted as the basic normative framework.

Why should these issues about the Global South be addressed specifically in the proposed report of the UN Rapporteur on torture, and other cruel, inhuman and degrading treatment or punishment suggesting the development of a new Protocol relating to interrogations, investigations and custodial practices?

The simple reason for taking these matters separately is that, without addressing them, the other suggestions made may not have a direct practical and implementable value in the specific context of these countries. Thus, with the view to causing a change in the existing practices, some attempts must be made to understand the differences in the legal systems in the Global South and to address these issues to the best extent possible.

Observations on the Global South in relation to the implementation of the absolute prohibition against torture and ill-treatment are made on the basis of over 20 years of regular studies on torture-related issues in 11 countries in Asia, as well as comparative studies.

The assumption that interrogations, investigations and custodial practices are directly related to prosecutions should be questioned

Here are a few random examples:

1.1. A victim of a crime, i.e. of rape, maybe subjected to physical or mental torture for the purpose of getting that victim to make a statement that exonerates their attacker. The victim may be told to name Y as the culprit when, in fact, the victim has named X as the actual culprit. Why would the victim be asked to do this by a law enforcement officer? Corruption. It comes in various forms. They may just wish to do a favour for someone in return for some benefit. What is important to note is that there is no interrogation and no interview about the crime. What in fact takes place is the very opposite of an investigation; trying to exonerate a suspect by forcing the victim to lie. Here, the law enforcement officer is directly involved in the sabotage of justice. The purpose of using coercive methods against the victim is to sabotage the process of justice.

What could be a remedy to prevent such practices?

A few suggestions are:

1.2. That law enforcement officers are criminally charged for manipulating the process of interrogation or interview to sabotage justice.

- 1.3. Ensuring that when a complaint of that sort is made by a victim, a superior law enforcement officer immediately investigates into the matter and takes corrective actions to ensure that a proper investigation is carried out.
- 1.4. Where superior officers fail to take such corrective action, there should be ways to take criminal and disciplinary action against such superior officers. There should be avenues of access for the prosecutors and the judiciary on such occasions so that the victim, the prosecutions department and the judiciary could take appropriate actions to ensure that the situation is corrected and that, thereby, the victim has recourse to justice. A situation of this sort may not take place at all within the jurisdiction of a more developed legal system, or, even if it were to happen on a rare instance, it may be easy to correct such a wrongdoing. However, this is not the case in other jurisdictions where such things happen frequently and avenues to take corrective action hardly exist at all.

The purpose of an interrogation or interview may be to achieve some other end than prosecution

This second situation may happen for many reasons. Some examples are as follows:

- 1.5. The very purpose of interrogation or interview may be not to lead to a prosecution and a trial but to encourage a settlement of some sort. Due to various reasons, complaints of crimes may not necessarily create corresponding obligations to prosecute. Instead, practices may have developed of using the criminal investigation process purely to bring about settlements, even relating to very serious crimes, such as rape, sexual abuse, molestation of children, and almost every other area of crime. Torture or ill-treatment can be used in order to coerce the person to agree to such a settlement.
- 1.6. The purpose of the use of coercive methods may simply be to obtain bribes from the suspects as well as the victims. Thus, the suspects and the victims can both be subjected to coercive methods.
- 1.7. In a situation where there is an overload of work for law enforcement officers, prosecutors and judges, arriving at some sort of early settlement may be the preferred mode of operation within

that particular context. In situations like that, the criminal justice process is seriously undermined by various practices that aim to reduce the workload of responsible parties by abandoning justice for the victims. Coercive methods can be used in such instances, not only by law enforcement officers but also by prosecutors and judges. Judges may also encourage suspects to plead guilty by offering various forms of relief, including lighter sentences than the law allows.

Interrogations that begin with torture before any questions are asked

This is a very frequent practice in many developing countries. Some of the reasons for this are as follows:

- 1.8. Fishing for information: In these instances the interrogators have few ideas about the crime or about any suspects. They try to fish out some information by beating up people who are brought to their attention. The expectation is that, as a way of avoiding torture, they may say something which may help the investigators. An unfortunate aspect of this is that people who have no connection to the crime, and therefore have nothing they can say, get beaten up more severely because the interrogators assume that they are more stubborn and are withholding information. Extremely tragic consequences can follow such beatings. There are instances when suspects have suffered kidney failure due to such interrogations because they were unable to divulge anything.
- 1.9. There is also an assumption on the part of the interrogators that suspects will never tell the truth. Therefore, it is considered a waste of time to question suspects in a humane manner. The belief is that the fear of further torture may propel victims to divulge some information.
- 1.10. In many instances, interrogators are aware of the innocence of the person they have arrested. However, they still want to implicate that person on a fabricated charge. There are many reasons why they do this. One is that the interrogators are under pressure to solve a certain number of cases and they are unable to find genuine suspects, so they arrest persons at random. However, in order to produce them before the courts, it is necessary to have

some evidence. Interrogators try to get this evidence by way of forced confessions. As most innocent persons would not want to confess to a crime they have never committed, torture is used to force them into making a confession. Then the confession is produced as the evidence of the involvement of the person in the crime.

1.11. In cases where persons are produced for terrorism-related crimes, interrogators often have no information about suspects, i.e. about what they may have done relating to terrorism. The selection of suspects is very often done on a random basis. The only way to elicit information is the use of force with the hope that, as a result, some information may be divulged. In periods of instability, the number of suspects treated in this manner is large. That itself becomes a reason for the use of force in order to obtain some information or some incriminating evidence.

The use of coercive methods by investigators, prosecutors and even the judiciary may be conditioned by the fact that judicial institutions do not receive adequate funding to be able to function efficiently

The result of inadequate funding may often be the selection of interrogators, prosecutors and even judges who are not qualified to do their jobs. These under-qualified persons may far more readily resort to torture, as they may not know any other way of investigating. They often do not have an adequate understanding of what they should be doing. Those who survive in such jobs rarely abhor coercive methods.

Perhaps most of the torture that happens during interrogations is due to this factor of having unqualified and poorly trained persons in charge. When interrogators, prosecutors, and judges who are poorly qualified for their jobs deal with cases, they may not critically review their own role or the roles of the others involved in the process. They develop a psychology of collaboration and are aware of each other's limited knowledge, capacity and experience.

It is not only about poorly qualified personnel but also the inadequacy of resources in every aspect of investigations, prosecutions, and adjudication that leads to the use of coercive methods.

When there are no facilities for forensic and physical evidence, reliance may be entirely on oral evidence and much of the use of coercive methods is due to reliance on oral testimonies.

When people who are not really capable of conducting such criminal inquiries are in charge, oral testimonies are also gathered in a hurry, and that, too, leads to the use of coercive methods.

Failures in the supervision of interrogations

In many countries, there is a distinct lack of adequate supervision by senior officers. Higher-ranking officers are aware of the defective nature of information gathering by the lower ranks. They do not want to interfere with such interrogations and instead they connive in accepting poor quality investigations as an inevitable result of the kind of situation they are in. Therefore, the superior officers directly or indirectly, openly or tacitly, accept the use of torture and ill-treatment by the interrogators. If asked, they may even reply, "... this is what we can afford in our condition". Thus, one might even say that there is an inbuilt conspiracy to accept defective and poor quality investigations throughout the entire justice process.

The ineffectiveness of disciplinary processes against interrogators, prosecutors and judges

As a result of the low funding for justice institutions and the awareness of the resulting defects in the process, no attempts are made to develop credible investigations into complaints against interrogators, prosecutors, and judges. In effect, they enjoy functional impunity.

The fear on the part of the State to take any action against wrongdoings that directly or indirectly result in the use of coercive methods during interrogations is due to possible retaliations, not only by the officers directly involved, but also collective action by law enforcement agencies

1. **Studying** instances where governments have tried to take some action to prevent the use of coercive methods during interrogations show that such attempts have provoked serious retaliations through collective action on the part of the officers.

For example, there are instances where the State has been threatened by a particular union of officers, e.g. Association of Inspectors, who threaten that if all attempted prosecutions are not abandoned they will go on strike or indulge in some other acts of non-cooperation.

Similar situations also occur when the State has tried to enforce a particular law that has criminalised torture. The officers then threaten "if this law is put into effect there will be collective acts of non-cooperation, including the end of investigations into crime".

Under the pressure of such threats, the governments usually abandon planned actions. In such instances, the argument from the officers is usually that they have been using coercive methods with the direct or tacit approval of the State and that the State cannot later punish them for taking such actions. The officers may take the argument even further by stating that in poor conditions of service, in terms of personnel, training, and other facilities, they are, in fact, doing a favour to the State by attempting to curb crime through the use of coercive methods, and that the responsibility for whatever they do lies with the State, as it has failed to develop the kind of investigative mechanisms available in developed countries.

Thus, even where the State may want to take some action against the use of coercive methods, they are often not in a position to take such actions. That said, there have been successes, such as in many developed countries, including Hong Kong. Such a change is, of course, the goal.

2. The prosecutors and the judiciary may be willing to overlook the use of coercive methods by the interrogators because they are aware of the serious limitations within which the officers are carrying out their duties. They would fear to take any actions even when such coercive actions are being pointed out to them due to the fear that the interrogating officers and the law enforcement agencies could seriously sabotage the functioning of the courts or the prosecutor's office, by directly or indirectly withdrawing their cooperation.

Conclusion

What all this points to is that any suggestions for improvement must take into consideration the improvement of the overall system. For this, there is provision under Article 2 of the ICCPR. Under this Article, the state parties, who are signatories, are under obligation to provide, legislative, judicial, administrative, and other measures to ensure that the people in their countries enjoy the rights that the Convention gives rise to.

What is implied is that the state is under obligation to maintain the interrogation, prosecution, and judicial services in an adequately functional manner. Thus, the state's obligation to provide justice and to maintain an organisational framework for that purpose is a fundamental obligation. The protocol can make suggestions on the manner in which UN agencies like the Rapporteur's office, the CAT Committee, and other treaty bodies like the Human Rights Committee may develop ways to scrutinise whether an adequately functional system does in fact exist. After all, this is the precondition for implementation of any of the recommendations for the protection of rights including the right against torture and ill-treatment.

If there is no provision for these UN agencies to intervene in order to ensure the availability of such a justice system, then virtually none of the recommendations that may be made would be implemented.

In dealing with the overall justice system, the Protocol may particularly recommend ways by which the above mentioned UN agencies could scrutinise adequacy of the budgetary allocations made, to ensure the availability of a functional justice system.

Again, if such budgetary allocations are not available, no improvement will ever take place. Whatever other recommendations are made will be redundant.

What this short note advocates is that issues related to torture and ill- treatment in developing countries require very specific attention because the gap between the legal systems of the developed democracies and those of developing countries is vast. It is this huge gap that makes the use of torture and ill-treatment quite a normal affair in developing countries. It is not an exaggeration to say that in such countries, interrogation, in fact, means the use of torture.

For a very long time, UN agencies have dealt with this issue in the same manner as they do in developed countries, virtually allowing the habitual use of torture and ill-treatment to continue unabated in developing countries. It is to be hoped that some serious attempts will be made to at least suggest an approach that begins to deal with this issue in the future.

APPENDIX 1

REPORT OF THE SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT ON HIS MISSION TO SRI LANKA

United Nations

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to development

Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka from 29 April to 7 May 2016, which he conducted jointly with the Special Rapporteur on the independence of judges and lawyers. In his report, the Special Rapporteur sets out his main findings and puts forward recommendations to strengthen legal safeguards against torture and ill-treatment and uphold them in practice, and to improve the conditions of those deprived of their liberty.

^{*} This statement should be read in conjunction with the observations and recommendations of the Special Rapporteur on the independence of judges and lawyers (Appendix 2)

Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka*

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^{*} Circulated in the language of submission only.

I. Introduction

1. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, conducted a visit to Sri Lanka from 29 April to 7 May 2016, at the invitation of the Government, jointly with the Special Rapporteur on the independence of judges and lawyers, to assess recent developments and identify challenges faced in the eradication of torture and other cruel, inhuman or degrading treatment, while promoting accountability and fulfilling victims' right to reparations.

- 2. The Special Rapporteur expresses his appreciation to the Government for its willingness to undergo an independent and objective scrutiny of its human rights situation, in particular in relation to a number of critical issues pertaining to its counter-terrorism legislation and criminal justice system. He wishes to reiterate his appreciation to the Government for its full cooperation before and during the visit, in particular the efforts by the Ministry of Foreign Affairs to facilitate the programme. He would also like to thank the United Nations Resident Coordinator and the United Nations in Sri Lanka for supporting the visit, and all those who shared their expertise, opinions and experiences, despite concerns either for their own safety or for that of their families.
- 3. During his visit, the Special Rapporteur met with representatives of the Ministry of Foreign Affairs; the Ministry of Defence; the Ministry of Law and Order; the Ministry of Prison Reforms, Rehabilitation, Resettlement and Hindu Religious Affairs; the Ministry of Women and Child Affairs; the Ministry of Health; the Office of the Attorney-General; the National Police Commission; the National Human Rights Commission; the United Nations; the diplomatic community; international organizations; and civil society. He also met the Governor of Eastern Province, and torture survivors and their families.
- 4. The Special Rapporteur also conducted visits to numerous police stations, detention facilities and military camps throughout the country. In Southern Province, he visited Boossa prison, the

¹ The mission report of the Special Rapporteur on the independence of judges and lawyers will be submitted to the Human Rights Council at its thirty-fifth session.

Boossa Terrorism Investigation Division detention facility and Galle Fort military camp; in Western Province, the Kalutara South Senior Superintendent's Office and Panadura police station; in North Western Province, Puttalam and Kalpitiya police stations; in Northern Province, Joint Operational Security Force headquarters ("Joseph camp"), Vavuniya remand prison, Vavuniya police station, the Vavuniya Terrorism Investigation Division office and Poonthotam rehabilitation centre; and in Eastern Province, Trincomalee Naval Base. In Colombo, he visited the Criminal Investigation Department and Terrorism Investigation Division facilities (commonly known as the fourth and sixth floors), the Welikada prison complex and Borella police station.

- 5. Unrestricted access to these detention facilities was granted to the Special Rapporteur and his team, in accordance with the terms of reference for fact-finding missions by special rapporteurs (E/CN.4/1998/45, appendix V). However, the Special Rapporteur notes with concern that a number of detainees reported that they had been warned not to speak to the delegation about their treatment in detention, and were reluctant to do so as a result.
- 6. The Special Rapporteur shared his preliminary findings with the Government of Sri Lanka at the conclusion of his visit, on 7 May 2016.²

II. Historical and political context

- 7. Sri Lanka has a long and complex history of ethnic tensions between the Sinhalese majority and Tamil minority that resulted in a prolonged armed conflict between the Liberation Tigers of Tamil Eelam (LTTE), which sought the establishment of an independent Tamil State in the northern part of the island, and government forces.³ The remnants of this conflict, which ended in 2009, are still visible within Sri Lankan society, which remains deeply divided.
- 8. The issue of torture and other cruel, inhuman or degrading treatment or punishment is part of the legacy of the country's armed

² See www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID= 19943&LangID=E.

³ For background information on the conflict in Sri Lanka, see the comprehensive investigation of the Office of the United Nations High Commissioner for Human Rights (OHCHR) (A/HRC/30/61).

conflict, and one of the reasons why the citizens of Sri Lanka continue to live without minimal guarantees of protection against the power of the State, in particular its security forces. Further contributing to this continuing lack of balance of power between the citizens and the State is the real or perceived threat of international terrorism and organized crime, seen by officials as the main threat to the country. However, such circumstances do not justify the continuation of repressive practices or legislation that contributes to human rights violations.

- 9. Since the change in Government in 2015, Sri Lanka has been increasingly open to engagement with the international community and civil society in the advancement of human rights, including by supporting Human Rights Council resolution 30/1 on promoting reconciliation, accountability and human rights in Sri Lanka. Together with the Government's "100-day programme" of constitutional reforms, this has resulted in some promising developments, such as the May 2016 report *Public Representations on Constitutional Reform*, 4 the reinstatement of the Constitutional Council and the publication of the bill establishing the Office of Missing Persons. 5
- 10. The reform process is, however, still fragile, and the country stands at a crucial moment in its history in terms of setting up the necessary mechanisms to remedy its past large-scale human rights violations and prevent their recurrence. The momentum created by the 2015 elections must be used to create the democratic space and genuine political will needed for Sri Lanka to continue on its path of positive change, including the establishment of a comprehensive legal framework and sound democratic institutions that together will give effect to the human rights embodied in the Constitution and in international human rights law.

III. Legal framework

A. International level

⁴ See http://bit.ly/1UC1kCb.

⁵ In a communication dated 2 August 2016 sent by the Working Group on Enforced or Involuntary Disappearances to the Government of Sri Lanka, the Working Group, while welcoming the establishment of the Office of Missing Persons, also raised a number of concerns (see A/HRC/34/75, case LKA 2/2016).

- 11. Sri Lanka is a party to the main United Nations human rights treaties that prohibit torture and ill-treatment, including the International Covenant on Civil and Political Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of Persons with Disabilities; and, most recently, the International Convention for the Protection of all Persons from Enforced Disappearance (see also A/HRC/33/51/Add.2, para. 12).
- 12. Sri Lanka has not ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. While the Special Rapporteur appreciates the declaration made by the Government on 16 August 2016 under article 22 of the Convention recognizing the competence of the Committee against Torture to receive and consider individual complaints, he encourages the Government to promptly ratify the Optional Protocol, thereby recognizing the competence of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and committing to the establishment of a "national preventive mechanism", as called for in article 3 of the Optional Protocol.
- 13. Sri Lanka is a party to the Geneva Conventions of 12 August 1949 but has not ratified the Additional Protocols thereto, nor signed the Rome Statute of the International Criminal Court.

B. National level

Prohibition of torture

14. Chapter III of the Constitution covers fundamental rights and freedoms. The prohibition of torture is contained in article 11, which provides that "no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". This prohibition is made absolute by article 15, which prohibits any limitation on article 11 under any circumstance, even for reasons of national security and public order.

Criminalization of torture

15. To give effect to the country's obligations under CAT, due to its dualist legal system, the Government enacted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994. Under article 2, acts of torture, as well as participation, complicity, aiding and abetting, incitement and attempt to torture are criminal offences punishable with 7-10 years in prison and a fine of 10,000-50,000 rupees (approximately \$70-\$350). However, while the Act is generally in conformity with the definition of torture in the Convention, it does not include "suffering" but only "severe pain, whether physical or mental" (art. 12) (see also A/HRC/7/3/Add.6, para. 25).

- 16. Articles 321 and 322 of the Penal Code (ordinance No. 11 of 1887 and subsequent amendments) also criminalize acts within the scope of the Convention, such as intentionally causing harm or grievous harm with the aim of extorting confessions or information leading to the detection of an offence or misconduct. The sentence for a person convicted of these offences is a maximum of 10 years' imprisonment and a fine.
- 17. Procedures relating to arrest, detention, investigation and prosecution of a suspect are addressed in the Code of Criminal Procedure Act No. 15 of 1979.

Prevention of Terrorism Act

- 18. The Public Security Ordinance of 1947 allows for the establishment of emergency regulations in the interest of, inter alia, public security and the preservation of public order. Article 155 (2) and (3) further provides that "the power to make emergency regulations ... shall include the power to make regulations having the legal effect of overriding, amending or suspending the operation of the provisions of any law, except the provisions of the Constitution".
- 19. The Prevention of Terrorism Act, No. 48 of 1979, was enacted by Parliament under the Public Security Ordinance of 1947 to deal with "elements or groups of persons or associations that advocate the use of force or the commission of crime as a means of, or as an aid in, accomplishing governmental change within Sri Lanka" (preamble). While the Act was suspended in 2002 in relation to the ceasefire

agreement between government forces and LTTE, its suspension was lifted in 2008 together with the abrogation of the agreement and it continues to apply to investigations into national security-related offences.

IV. Assessment of the situation

A. Torture and ill-treatment

- 20. During his visit, the Special Rapporteur conducted numerous interviews with both male and female torture survivors, including former and current detainees, from various periods during and after the conflict, as well as recent cases (2015-2016). The forensic expert accompanying the Special Rapporteur conducted medical examinations in a number of these cases, which confirmed physical injuries consistent with the testimonies received. He also spoke with relatives of torture survivors.
- 21. Following his visit, the Special Rapporteur analysed some 40 additional cases, most of them recent ones, that were extensively documented with testimonies, photographs and forensic medical evidence. The physical injuries documented in those cases were also consistent with the victims' testimonies.
- 22. While the practice of torture is less prevalent today than during the conflict and the methods used are at times less severe, the Special Rapporteur concludes that a "culture of torture" persists; physical and mental coercion is used against suspects being interviewed, by both the Criminal Investigations Department in regular criminal investigations and by the Terrorism Investigation Division in investigations under the Prevention of Terrorism Act. In the latter case, a causal link seems to exist between the level of real or perceived threat to national security and the severity of the physical suffering inflicted by agents of the Division during detention and interrogation.

1. Torture and ill-treatment during arrest and detention

23. Authorities claimed that all arrests, without exception, are made by police officers in uniform using officially marked vehicles. However, the Special Rapporteur received credible reports of recent (up to April 2016) "white van abductions" by officers in plain clothes believed to belong to the Criminal Investigations Department or the Terrorism Investigation Division. While white van abductions (often leading to enforced disappearances) were more numerous during

the conflict and post-conflict periods, recent cases have included incommunicado detention of the suspect with the purpose of obtaining a confession before transfer to official Department or Division facilities.

- 24. During his visit, the Special Rapporteur received credible reports that suspects, particularly detainees under the Prevention of Terrorism Act, are often first detained for interrogation without being registered during the initial hours, days or sometimes weeks of investigation and not brought before a judge. This practice facilitates the use of torture and other ill-treatment and can in itself constitute such treatment.
- 25. While severe physical torture seems to be inflicted on detainees mainly during interrogations for more serious crimes, lesser forms of physical force are also used for ordinary crimes in all parts of the country. The nature of the acts of torture consists mainly of transitory physical injuries caused by blunt force (punches, slaps and, occasionally, blows with objects such as batons or cricket bats to the head, shoulders, back and legs), which heal without medical treatment and leave no physical scars. Insults and threats were also reported.
- 26. The Special Rapporteur interviewed current and former suspects detained under the Prevention of Terrorism Act and received well-documented accounts of extremely brutal methods of torture, including burns; beatings with sticks or wires on the soles of the feet (*falanga*); stress positions, including suspension for hours while handcuffed; asphyxiation using plastic bags drenched in kerosene and hanging of the person upside down; application of chili powder to the face and eyes; and sexual torture, including rape and sexual molestation, and mutilation of the genital area and rubbing of chili paste or onions on the genital area. In some cases, these practices occurred over a period of days or even weeks, starting upon arrest and continuing throughout the investigation.
- 27. Most torture survivors indicated that the acts of torture ceased after they confessed, which sometimes included signing blank papers or documents in a language they could not read. However, in the case of arrests made under the Prevention of Terrorism Act, torture and ill-treatment often continued after the confession, although they were often less severe and/or less frequent. In both cases, torture ceased with the transfer from Criminal Investigations Department or Terrorism Investigation Division detention to a remand prison.

2. Threats against national security and terrorism investigations

- 28. While the state of emergency was lifted in 2011, the Prevention of Terrorism Act, together with five regulations that were enacted under it, remains in force and constitutes a de facto state of emergency suspending fundamental rights and guarantees, including constitutional and international safeguards against acts of torture or ill-treatment.
- 29. A suspect arrested under the Act, with or without a warrant, may be kept in custody for a maximum of 72 hours before being brought before a magistrate, during which time the police may transfer the detainee for the purpose of the investigation without judicial authorization (sect. 7 (1) and (3)). However, if a detention order is issued by the Minister of Defence, a person may, be detained for up to 18 months with periodic judicial supervision, without the possibility of challenging its legality (sects. 9 (1) and 10). In such cases, detainees may "be kept in the custody of any authority, in such place and under such conditions" as determined by the Minister in the interest of national security or public order (sect. 15A (1)).
- 30. The Prevention of Terrorism Act further allows for any statement made by the suspect at any time in custody in the presence of a police officer or during an investigation to be admissible in court, whether or not it amounts to a confession. It places the burden of proof that such statement was extracted under duress, and therefore inadmissible, on the accused (sects. 16 and 17).
- 31. The Special Rapporteur received credible testimonies that torture and ill-treatment are inflicted on almost all suspects held under the Prevention of Terrorism Act during detention by the Criminal Investigations Department and the Terrorism Investigation Division, as well as sometimes by the armed forces. The Special Rapporteur also observed that officers of the Department and the Division and members of the armed forces acting as arresting officers were often in plain clothes and did not identify themselves. Furthermore, Division offices are sometimes located on military bases and several former detainees under the Act reported, even in recent cases, being taken to, or next to, a military facility for interrogation. Most of those detainees also confirmed that they had signed a confession under duress. This leads the Special Rapporteur to conclude that the use of torture and ill treatment to obtain a confession from detainees under the Prevention of Terrorism Act is a routine practice.

32. Moreover, the Special Rapporteur found that periodic hearings before a magistrate as per the Prevention of Terrorism Act do not amount to meaningful safeguards against either arbitrariness of detention or ill-treatment. Section 2 (1) of Prevention of Terrorism Act Regulation No. 4 of 2011 seems to eliminate entirely the judicial review of a detention order by providing that "Any person who has been detained in terms of the provisions of any emergency regulation ... shall ... be produced before the relevant Magistrate, who shall take steps to detain such person" Magistrates essentially rubber-stamp detention orders made by the executive branch and, as confirmed by many testimonies, do not inquire into conditions of detention or potential ill-treatment.

- 33. Persons detained under the Prevention of Terrorism Act are prosecuted before the High Court for security-related offences. Lengthy court proceedings leave defendants in remand detention for years. The Special Rapporteur interviewed detainees who had spent 10 years in remand detention under the Act. The Legal Aid Commission informed the Special Rapporteur that one High Court judge had been appointed by the Vice-President to deal with the backlog of cases under the Act.
- 34. The Special Rapporteur was further informed by the Ministry of Law and Order at the time of his visit that, with respect to the 95 cases under the Prevention of Terrorism Act that were pending before the High Court, 43 suspects remained in custody; 16 had been released on bail, 8 of whom were undergoing rehabilitation while the other 8 were awaiting a decision, to be made in July 2016, on whether they would be sent for rehabilitation or prosecuted; and 9 cases were outstanding. In addition, at the time of the visit, a total of 25 suspects detained under the Act remained in the custody of the Terrorism Investigation Division and 21 were in a remand prison in connection with more recent cases.
- 35. The Ministry of Law and Order informed the Special Rapporteur that the Government had initiated the drafting of new security laws, consisting of a national security act, a State intelligence services act and a prevention of organized crimes act, to replace the Prevention of Terrorism Act and the Public Security Ordinance. Shortly after the visit, in June 2016, the President reportedly issued new directives to the police and armed forces on arrests and detentions under the Prevention of Terrorism Act, which included the prohibition of torture and respect for fundamental rights as enshrined in the

Constitution, and reiterating the mandate of the National Human Rights Commission to be informed of all arrests made under the Prevention of Terrorism Act and that the Commission had unrestricted access to places of detention.

- 36. While the Special Rapporteur regards these steps as positive developments, he maintains that the Government should immediately repeal the Prevention of Terrorism Act. He notes that the Act violates article 155 (2) of the Constitution, which does not allow for derogation from constitutional rights, except for the restrictions foreseen in article 15. All counter-terrorism legislation needs to be in full compliance with the country's international human rights obligations.
- 37. Moreover, the Special Rapporteur was informed of a proposed amendment to the Code of Criminal Procedure Act, as published in the Sri Lanka Gazette of 12 August 2016, that would deprive a suspect of access to a lawyer until his or her initial statement had been recorded. Serious concerns have been expressed by the National Human Rights Commission and several civil society organizations, which are shared by the Special Rapporteur.

3. Rehabilitation of detainees under the Prevention of Terrorism Act

- 38. In lieu of prosecution, some detainees under the Prevention of Terrorism Act are sent for "rehabilitation", often after having spent several years in remand detention. Rehabilitation is supposedly voluntary, but there appears to be an arbitrary selection process for entering the programme. Only 1 out of 24 rehabilitation facilities established by the Government shortly after the end of the conflict remains in operation, namely Poonthotam rehabilitation centre in Vavuniya. The programme comprises six months of rehabilitation and six months of re-education, which can be extended to up to 15 months. Upon completion, the individual is deemed "rehabilitated" and released.
- 39. During his visit, the Special Rapporteur was informed that 12,146 persons had been released after completing rehabilitation since 2010. Forty persons (39 male, 1 female) were still held at Poonthotam, some of whom had been deprived of their liberty since 2009 and were due to be released.

40. The Special Rapporteur is concerned that rehabilitated persons continue to be kept under surveillance by government agents years after their release, and are frequently harassed and threatened. They are often still forced to report to a police station or military post at regular intervals, where they are frequently threatened and ill-treated and, in some instances, arbitrarily detained and subjected to torture, including sexual torture. Harassment sometimes extends to civil society organizations that provide counselling and other services to rehabilitated persons.

41. While rehabilitated persons should not be immune from investigation of possible new crimes, authorities must clearly disclose the grounds for renewed detention. Recent arrests of rehabilitated persons have raised fear and distrust between communities.

4. Surveillance and intimidation

42. Owing to the heavy militarization that still exists in the North and East of the country, surveillance continues to be used as a tool of control and intimidation. In addition to rehabilitated persons, many former detainees under the Prevention of Terrorism Act and their families, anyone deemed to have had any link to LTTE during the conflict and political and human rights activists remain subject to extensive surveillance and intimidation by the military, intelligence and police forces. While the extent and level of this practice have dropped compared to the early post-conflict period, systematic surveillance and intimidation continues, sometimes constituting ill-treatment.

5. Sexual and gender-based violence

43. The Special Rapporteur received credible testimonies from men, women and juveniles of torture of a sexual nature in custody, many of them supported by medical forensic evaluations. These abuses are not investigated or prosecuted, and may remain underreported owing to stigma. An example of a tragic testimony received by the Special Rapporteur was that of a young woman who spoke credibly of having spent 3 1/2 years in sexual slavery at various military camps.

6. Violence against women

44. The Special Rapporteur was informed that women's and children's desks have been established in most police stations, staffed

by female officers. This is a welcome initiative, but statistics on their impact are lacking.

45. The Ministry of Women and Child Affairs was at the time of the visit leading the process of developing a national action plan to address gender-based violence.

7. Juveniles

- 46. The Special Rapporteur is deeply concerned that the age of criminal responsibility remains very low, at 8 years (art. 175 of the Penal Code). While a draft law would raise the age to 10 years, this is still well below international standards.⁶
- 47. Corporal punishment is prohibited as a penal sentence by the Corporal Punishment (Repeal) Act No. 23 of 2005. However, it is reportedly still practised as a disciplinary measure in other settings, including juvenile centres, schools and the home.⁷
- 48. Because of time constraints the Special Rapporteur was unable to visit a juvenile facility. He was informed, however, that about 1,700 juveniles were being held in detention and expressed concern that youth offenders were not separated from children in need of care.
- 49. During his visits to some remand sections of adult facilities, he encountered juveniles being held together with adults and was concerned to learn that upon conviction children starting from the age of 17 are moved to regular detention facilities. The Special Rapporteur was informed that a new draft law would provide for the separation of children from adults.

8. Death penalty

50. The death penalty is embodied in article 53 of the Penal Code for the crime of murder. The Special Rapporteur welcomes the de facto

⁶ Committee on the Rights of the Child, general comment No. 10 (2007) on children's rights in juvenile justice.

⁷ Global Initiative to End All Corporal Punishment of Children, submission to the review by the Committee against Torture of the report of Sri Lanka in November 2016.

moratorium, in effect since 1977, but regrets that Sri Lanka has not abolished the death penalty and continues to impose it.

51. At the time of the visit, 462 prisoners were reported to be on death row in Sri Lanka, held in Welikada and Bogambara prisons in separate wings. Their indefinite detention under strict conditions, uncertainty about possible execution and, in some cases, drastically reduced human contact or isolation render the punishment tantamount to ill-treatment or even torture.

B. Conditions of detention

- 52. The Prisons Department, under the Ministry of Prison, Rehabilitation, Resettlement and Hindu Religious Affairs, reported that Sri Lanka has a prison population of approximately 16,990 (7,496 convicted prisoners, 8,351 prisoners on remand and 1,143 prisoners whose cases were under appeal). Unfortunately, figures for the actual capacity of detention facilities have not been provided to the Special Rapporteur, despite requests. Prisons and detention centres are visited on an ad hoc basis by the International Committee of the Red Cross, a visiting committee, the National Human Rights Commission and non¬governmental organizations; however, no robust monitoring system is in place.
- 53. Although the Special Rapporteur did not receive any reports of ill-treatment by corrections staff, he found prison conditions to be inhumane, characterized by very deficient infrastructure and pronounced overcrowding. There was an acute lack of adequate sleeping accommodation, extreme heat and insufficient ventilation. Overpopulation also results in limited access to medical treatment, recreational activities and educational opportunities. These conditions combined constitute in themselves a form of cruel, inhuman and degrading treatment.
- 54. Terrorism Investigation Division detainees also suffer from inhumane detention conditions, including excessive heat, lack of ventilation, limited access to daylight and exercise, prolonged or indefinite isolation and lack of electricity, so that some of them spend about 12 hours a day in the dark.
- 55. The Special Rapporteur visited underground detention cells in the Trincomalee Naval Base, which were discovered in 2015. These

cells would have held detainees (who are now counted among the disappeared) in horrific conditions (see A/HRC/33/51/Add.2, paras. 17 and 49). The Special Rapporteur looks forward to receiving the results of the Criminal Investigations Department investigation on the fate of these individuals.

1. Inhumane detention conditions

- 56. The Special Rapporteur observed extreme levels of overcrowding, with populations exceeding capacity by 200 or 300 per cent, such as in Vavuniya remand prison. Detainees are forced to sleep back-to-back on concrete floors and staircases for lack of space.
- 57. The crumbling infrastructure of the larger prisons in Colombo, built in the nineteenth century, results in conditions that amount to cruel, inhuman and degrading treatment or punishment. The Government reported that Welikada prison, one of the worst, will be closed and a new prison, in Tangalle, is planned to be operational by the end of 2016.
- 58. Congestion is largely the result of lengthy sentences for non-violent and drug-related offences and lengthy remand periods, sometimes up to 15 years. The average delay for State counsel to bring criminal cases before the High Court after remand ranges from 5 to 7 years. This is a serious violation of due process and presumption of innocence, and violates the principle of provisional detention as the exception and not the rule.
- 59. In some detention centres, yards are accessible to inmates throughout the day. In others, detainees have or insufficient or no access to open areas or sunlight (i.e., 15 minutes per day).
- 60. The Special Rapporteur observed unsanitary and unhygienic conditions in cells, lavatories and yards; at several smaller detention centres there was a total lack of toilet or shower facilities or makeshift lavatories (bottles in the cells).
- 61. Nutrition in all detention centres visited appeared sufficient, both in terms of quantity and quality. However, in police stations detainees rely on their families to supplement the meagre diet.

62. In comparison to the conditions of detention for men, conditions at the female wards of Welikada and Vavuniya remand prisons were more humane.

63. In the Poonthotam rehabilitation centre, living conditions and other benefits, such as vocational training and home leave, were adequate.

2. Lack of adequate medical care

- 64. In principle, medical care is provided free of charge to all inmates. Some larger or newer facilities have infirmaries, with medical staff on duty or visiting regularly. Other detention centres do not have infirmaries, but doctors or nurses pay weekly visits or can be called in. If needed, inmates can be transported to hospital for care. In reality, however, all penitentiaries visited lacked adequate health care, with no dental or psychiatric support. The Special Rapporteur saw detainees with suspected infectious and contagious diseases who did not receive medical attention and continued to live among the general prison population despite the risk of contagion.
- 65. Where they are present, doctors lack specialized training in penitentiary care or medical forensic expertise. Infirmaries, where they exist, are primitive and lack basic medical equipment and sufficient medicines, so detainees rely on their families for the provision of drugs. Transport to a hospital is at the discretion of guards, who are not trained to assess the need for medical care.
- 66. The Special Rapporteur observed that no medical examinations were conducted upon admission or transfer to a detention centre, nor is there regular screening of all detainees.

3. Inadequate family visits

67. Family visits take place once a month for convicted prisoners and once a week for remand detainees, but many relatives live far away and visit infrequently. In practice, especially in cases prosecuted under the Prevention of Terrorism Act, visiting time is severely restricted to a few minutes because the processing of visitors (including invasive body searches, security screening, documentation and registry) count as part of the allocated time.

68. The Ministry of Prison Reforms, Rehabilitation, Resettlement and Hindu Religious Affairs informed the Special Rapporteur that it would purchase body and parcel scanners to avoid invasive body searches.

C. Safeguards and prevention

1. Right not to be arbitrarily detained and to be free from torture

- 69. Article 13 (1) and (2) of the Constitution guarantees freedom from arbitrary arrest, detention and punishment. The article includes the right of every person held in custody, detained or otherwise deprived of personal liberty to be brought before the judge of the nearest competent court in accordance with the procedure established by law and to not be further held in custody, detained or deprived of liberty except upon, and in terms of, the order of a judge made in accordance with the procedure established by law.
- 70. The Code of Criminal Procedure Act contains procedural safeguards to protect the integrity of a person arrested or detained, including the right to be informed of the nature of the charge or allegation upon which he or she is arrested (art. 23) and to be presented to a magistrate without undue delay and within 24 hours (arts. 36 and 37 and art. 65 of Police Ordinance No. 16 of 1865). Officers in charge of police stations are further required to report to the relevant magistrates all cases of persons arrested without a warrant (art. 38). If an investigation cannot be completed within 24 hours, only the magistrate may decide to detain a suspect in custody pending investigation and for a maximum of 15 days (art. 115 (1) and (2)).
- 71. The Special Rapporteur notes with concern, however, that neither the Penal Code nor the Code of Criminal Procedure Act specifies that an arrest warrant must be authorized by a judge, giving the police extraordinary powers of arrest and increasing the risk of arbitrary detention and of torture and ill-treatment. Moreover, the Special Rapporteur received credible testimonies that suspects are often first detained for interrogation at official or unofficial places of detention without being registered during the initial hours or days and not brought before a judge, especially detainees under the Prevention of Terrorism Act who are held incommunicado. This facilitates the perpetration of torture and other ill-treatment and can in itself constitute such treatment.

72. Custody hearings provide a safeguard against arbitrary detention and mistreatment. In practice, however, judicial oversight in Sri Lanka remains superficial: judges do not take an active role in determining conditions of detention and, according to testimonies, do not ask detainees about their treatment during arrest and detention.

National Human Rights Commission

- 73. The National Human Rights Commission Act No. 21 of 1996 provides safeguards against arbitrary detention and torture or ill-treatment of detainees under the Prevention of Terrorism Act. Under section 28 of the Act, detention authorities must inform the Commission within 48 hours of any arrest made under the Prevention of Terrorism Act and the location of the detainee, as well as of any transfer or change of the prisoner's location. It further provides that all officials authorized by the Commission should have access to all places of detention at any time and be able to make inquiries of detainees.
- 74. While most arrests and detentions under the Prevention of Terrorism Act are communicated to the National Human Rights Commission once they are registered, the Special Rapporteur concludes from testimonies and reports that this is not the case with respect to transfers and changes of location.

2. Access to legal counsel

- 75. Access to counsel at all stages of the investigation is a fundamental safeguard against torture and ill-treatment. However, most interviewed detainees did not have access to a lawyer at any stage of their detention, either owing to a lack of financial means or insufficient information on legal aid. While the Government-funded Legal Aid Commission takes pro bono cases, it is in critical need of resources for taking additional cases and increasing awareness on its services.
- 76. Another factor contributing to the lack of access to counsel is normative gaps in the rights of criminal defendants, as the Code of Criminal Procedure Act, worryingly, does not stipulate the right of a defendant to legal representation. However, in 2012, the Police Appearances of Attorneys-at-Law at Police Stations Rules came into effect, which recognize the right of a suspect to legal representation at a police station starting immediately after arrest and during detention. The Special Rapporteur regards this as a positive development that should be implemented more widely in practice.

77. The Special Rapporteur shares the concern of the National Human Rights Commission over the recently proposed amendment to the Code of Criminal Procedure Act, which, contrary to international human rights standards, denies a suspect access to a lawyer until his or her statement has been recorded, thereby eliminating any safeguard against torture and ill-treatment and defeating the Code's very purpose, and also impinging on the fundamental right to a fair trial as guaranteed in article 13 (3) of the Constitution. The Special Rapporteur joins the Commission and civil society in calling on the Government to withdraw the proposed amendment.⁸

3. Role of the judiciary and prosecutors

78. An independent and impartial judiciary is essential for the fulfilment of international law obligations regarding torture and cruel, inhuman or degrading treatment or punishment, including to order ex officio inquiries into allegations of torture or coercion and to ensure that all safeguards are upheld. Both the judiciary and the Office of the Attorney-General have a dual obligation of prevention and accountability. In practice, in Sri Lanka, judges are overly passive and do not seek exculpatory evidence. In criminal cases, that means they rule almost exclusively on the basis of evidence gathered by police.

79. A modern system begins with affording more guarantees for the defendant. The public prosecutors are first and foremost the guardians of legality, which gives them a heightened responsibility. They must enforce the law against criminals but also actively prevent miscarriages of justice by way of torture and manipulation of evidence.

4. Forced confessions: evidence obtained under torture

80. Statements made by any person to a police officer in the course of any investigation may not be used as evidence in the case but only to aid the court in its inquiry or trial (art. 110 (3) and (4) of the Code of Criminal Procedure Act). More importantly, articles 24-27 of the Evidence Ordinance No. 14 of 1895 (and subsequent amendments) provide that confessions extracted through torture are inadmissible in court. However, suspects are at high risk of ill-treatment or torture

⁸ The letter dated 21 September 2016 from the National Human Rights Commission addressed to the Prime Minister is available from http://hrcsl.lk/english/.

when they are held incommunicado with the purpose of obtaining a confession. The heavy reliance of the criminal justice system on confession as the primary tool of investigation is a major incentive for torture. On the basis of detainee interviews, the Special Rapporteur is concerned that it is routine practice for the police to extract confessions under duress.

- 81. The Special Rapporteur is moreover very concerned at judges' willingness to admit confessions in criminal proceedings without corroboration by other evidence, creating conditions that further encourage torture and ill-treatment.
- 82. Another important incentive to ill-treatment is the practice of conducting the investigation while the suspect is in custody, rather than determining the need for detention based on preliminary investigations. Authorities have on a regular basis justified prolonged detention by citing the complexity of the investigation, ignoring the stipulation that, with the exception of detentions in cases of flagrante delicto, evidence should be procured before the arrest.
- 83. The Attorney-General advised the Special Rapporteur that, in line with the Code of Criminal Procedure Act, statements made to the police do not form part of the criminal record in ordinary criminal cases, although he acknowledged that, under the Prevention of Terrorism Act, statements made to a senior police officer are fully admissible in court. However, police routinely forcefully extract self-incriminatory statements in both cases, which seems to negate the preventive impact of their non-admissibility. In addition, this provision of the Act is in direct contradiction to the obligation under the Convention against Torture to exclude all statements made under torture.

Voir dire procedure

84. In principle, a confession that is recanted as having been coerced gives rise to a procedure called *voir dire*, which is best described as a "trial within a trial" to determine whether coercion was used. This procedure correctly places the burden on the State to prove that the statement was not coerced. However, the *voir dire* procedure is cumbersome and rarely used. In practice, therefore, it does not guarantee the application of the exclusionary rule, and therefore does not reduce the likelihood of torture being used as a means to obtain confessions.

- 85. Judicial discretion to admit evidence tainted by torture is a violation of the exclusionary rule in international law, including the Convention against Torture. International standards require completely banning the admission of self-incriminating statements not made before a judge following advice of counsel and a warning regarding the right to remain silent without adverse consequences to the defendant or, at the very least, excluding extrajudicial statements that are recanted by the defendant when he or she appears before a magistrate.
- 86. While the Special Rapporteur was assured by the authorities that confessions alone are not sufficient for a conviction, various sources reported that, in practice, most convictions are based on a confession alone or as the main evidence.

5. Complaints procedure

- 87. The Supreme Court has sole jurisdiction over complaints relating to the infringement of fundamental rights (arts. 17 and 126 of the Constitution). Such "fundamental rights applications" must be filed in writing directly to the Court within one month from the occurrence of the violation and, if successful, the only remedy available is the awarding of compensation to the complainant (art. 126 (2)). As the Supreme Court is the highest and final court of Sri Lanka (art. 118), there is no possibility to appeal its decisions. Fundamental rights complaints may also be addressed to the National Human Rights Commission, whose function is to investigate and provide for resolution by conciliation and mediation (sect. 10 of the Human Rights Commission of Sri Lanka Act).
- 88. Jurisdiction over cases filed under the Convention against Torture Act lies with the High Court (arts. 2 (4) and 4). Complaints must be addressed to the Attorney-General, who instructs the Special Investigation Unit, under the supervision of the Inspector General of Police, to investigate the alleged use of torture. The Attorney-General has discretionary power and decides whether to indict. Negative decisions may be challenged by written application to the Appeals Court. This discretionary power represents a significant weakness of the system: while a number of indictments have been filed by the Attorney-General under the Act, there have been few convictions.
- 89. In practice, the only effective avenues for complaints are filing a "fundamental rights" case before the Supreme Court or

submitting the case to the National Human Rights Commission. However, fundamental rights applications involve costly, complex litigation and are therefore not accessible to all victims. In addition, the application is not available to vacate a court order that has been based on a forced confession, as it does not lie against judicial decisions. Moreover, according to the Chief Justice, there is a worrying backlog of approximately 3,000 fundamental rights cases before the Supreme Court.

- 90. The National Human Rights Commission was resurrected with a credible composition of members in 2015, but needs to be further strengthened and funded. Proceedings before the Commission hold some promise for the victims, but it does not seem capable of remedying impunity for past and present serious human rights violations, which require effective prosecution. In addition, at least one victim has received threats of retaliation for filing a complaint with the Commission.
- 91. No formal complaint mechanism is available to detainees in the prison system.

National Police Commission

- 92. Having been dissolved in 2006, the National Police Commission was re-established in October 2015 by constitutional amendment (art. 115). It is mandated to investigate complaints of police misconduct, and has the power to suspend and dismiss police officers.
- 93. The Commission advised the Special Rapporteur that it had received 455 complaints in the first quarter of 2016 concerning allegations of police inaction, partiality, abuse of power, unlawful arrest, false charges, assault, torture or ill-treatment and violence against women; 400 of those complaints were still pending investigation, and the Commission reported resource constraints. The Special Rapporteur is concerned that the Commission relies on investigations conducted by police officers, which does not guarantee independence.

6. Lack of effective investigations of torture allegations

94. The Special Rapporteur is extremely alarmed that investigations into allegations of torture and ill-treatment are not

investigated. He discerned a worrying lack of will within the Office of the Attorney-General and the judiciary to investigate and prosecute allegations. He was informed repeatedly by various interlocutors that there had been no complaints of torture or ill-treatment and, consequently, no investigations.

- 95. There are a vast number of documented cases, and the failure to prosecute them clearly indicates a lack of will on the part of the judiciary. Impunity is directly attributable to the entire criminal justice system, and particularly to the judiciary.
- 96. Under the State's international obligation to prevent torture, it is the responsibility of prosecutors and judges to establish whether anyone has been mistreated, even in the absence of a complaint. The State must actively prosecute officials who, in abuse of their authority, order, condone or cover up torture, including in situations where they knew or ought to have known that torture was about to be, was being, or had been committed.

7. Forensic and medical examinations

- 97. The Code of Criminal Procedure Act provides that, if an officer in charge of a police station deems it necessary for an investigation, police may order a medical examination of a detainee by a government medical officer (art. 122). In addition, detainees can complain directly to the magistrate about their treatment and request such an examination (art. 137).
- 98. The Special Rapporteur was informed by the Ministry of Health that the Police Ordinance requires all persons in police detention to be examined by a judicial medical officer, a specially trained medical doctor belonging to the Department of Forensic Medicine, before they are brought before a magistrate and prior to their release. However, this only occurs in about 20 per cent of cases.
- 99. Forensic procedures and forensic medical expertise seem adequate regarding deaths in custody and autopsies, but clinical forensic examination of victims of torture are seriously lacking. A specific medical report model for the forensic examination of survivors of torture and ill-treatment has been put in place by the forensic services, but still leaves a large margin for improvement. Specific training in

forensic medical investigation and documentation of torture and illtreatment is needed, as well as training for judges, prosecutors, lawyers and the police on how to interpret reports.

- 100. Medical examinations need to be done in a timely manner to be meaningful; the current practice results in the loss of important evidence of physical and psychological trauma.
- 101. The Special Rapporteur is concerned about the procedure followed for the medical examinations of detainees. It is worrying that the detainee is often accompanied to the judicial medical officer by the same police officer accused of abuse and that the judicial medical officer reports the results to the same officer. There is therefore a need to reform the legal framework to guarantee the independence of judicial medical officers.
- 102. Legal professionals and detainees who were interviewed indicated that it is very difficult for a victim to obtain a copy of the judicial medical officer's report, as it must be requested through the courts, in violation of the Istanbul Protocol. Reports should be directly and unconditionally available to the accused.
- 103. Authorities informed the Special Rapporteur that the situation would be solved by the Protection of Victims and Witnesses Act No. 4 of 2015. However, while the Act includes the right of a victim to obtain copies of medico-legal reports, this right is neither absolute nor exercised directly: the victim needs to apply to the magistrate, who can refuse the application if it might prejudice the ongoing investigation (sect. 3 (i)).
- 104. Stakeholders further indicated a great need for more female judicial medical officers.

8. Lack of monitoring of places of detention by a national preventive mechanism

105. The International Committee of the Red Cross, a visiting committee and the National Human Rights Commission, as well as some non-governmental organizations, monitor places of detention. Monitoring by the Commission is severely limited owing to insufficient resources.

106. There is an urgent need for robust, independent and regular monitoring of places of detention by a national preventive mechanism, which should be given unrestricted, unannounced access to all places of detention and the right to conduct confidential interviews with any detainee.

9. Transitional justice

- 107. By supporting the adoption of Human Rights Council resolution 30/1, the Government of Sri Lanka committed itself to address the legacy of serious and widespread human rights violations that occurred during and immediately after the lengthy armed conflict. If implemented in good faith, a transitional justice mechanism can fulfil the country's obligations under the Convention against Torture, specifically those relating to investigation, prosecution and punishment of torture, to provide reparations and to prevent torture in the future.
- 108. However, progress has been slow and differing opinions on the type of mechanism and the extent of its powers seemingly have paralyzed the process. Impunity for past crimes continues to be an obstacle to reconciliation and sustains mistrust between the communities, especially in the North and East, breeding impunity for present instances of abuse. It is therefore essential that any transitional justice mechanism provide for effective remedies to victims of torture and other serious violations that occurred during or in connection with the armed conflict.

V. Conclusions and recommendations

A. Conclusions

- 109. The issue of torture and other cruel, inhuman or degrading treatment or punishment is part of the legacy of the country's armed conflict, and one of the reasons why the citizens of Sri Lanka continue to live without minimal guarantees of protection against the power of the State, in particular its security forces.
- 110. Torture and ill-treatment, including of a sexual nature, still occur, in particular in the early stages of arrest and interrogation, often for the purpose of eliciting confessions. The gravity of the mistreatment inflicted increases for those who are perceived to be involved in terrorism or offences against national security. The police resort to

forceful extraction of information or coerced confessions rather than carrying out thorough investigations using scientific methods.

- 111. Procedural norms that entrust the police with full investigative powers over all criminal cases and, in the case of the Prevention of Terrorism Act, allow for prolonged arbitrary detention without trial are firmly in place. This enables an "open door policy" for police investigators to use torture and ill-treatment as a routine method of work. The result is that cases, old and new, continue to be surrounded by total impunity.
- 112. Conditions of detention amount to cruel, inhuman or degrading treatment owing to severe overcrowding, insufficient ventilation, excessive heat and humidity, and the denial of adequate access to health care, education, vocational training and recreational activities.
- 113. The current legal framework and the lack of reform within the structures of the armed forces, the police, the Office of the Attorney-General and the judiciary perpetuate the risk of torture. Sri Lanka needs urgent and comprehensive measures to ensure structural reform in these institutions to eliminate torture and ensure that all authorities comply with international standards. A piecemeal approach is incompatible with the soon-to-be-launched transitional justice process and could undermine it before it really begins.
- 114. The establishment of a transitional justice mechanism is an important aspect of the reform process in Sri Lanka and may contribute to the elimination of torture and provide for reparations. To be effective, it must be implemented in good faith and trusted by victims and other stakeholders. Without this, there will be lack of confidence in the transitional justice system.

B. Recommendations

- 115. In a spirit of cooperation and partnership, the Special Rapporteur recommends that the Government, with appropriate assistance from the international community, take decisive steps to implement the recommendations outlined below.
- 116. Regarding the legal framework, the Special Rapporteur recommends that the Government:

- (a) Immediately repeal the Prevention of Terrorism Act;
- (b) Review any draft legislation to replace the Prevention of Terrorism Act (national security act, state intelligence services act and prevention of organized crimes act) to ensure safeguards against arbitrary arrest and torture or cruel, inhuman or degrading treatment; provisions for access to legal counsel from the moment of deprivation of liberty, strong judicial overview of law enforcement and security agencies and protections for the privacy rights of citizens; and that there is a timely, robust and transparent national debate on the bills that is inclusive of all civil society;
- (c) Study and incorporate the recommendations made by the National Human Rights Commission in relation to the drafting of new national security legislation, which are based on recommendations outlined by the Special Rapporteur on the promotion and protection of human rights while countering terrorism in his various reports (for example, A/HRC/16/51 and A/HRC/22/52 and Corr.1) regarding procedural safeguards when adopting or amending legislation on national security; 10
- (d) Enact new legislation to provide for command or superior responsibility as a basis for criminal liability;¹¹
- (e) Urgently ratify and implement the Optional Protocol to the Convention against Torture, thereby recognizing the competence of the Subcommittee on Prevention of Torture and enable it and other international and national monitoring mechanisms to conduct regular unannounced inspections of all places of detention;
- (f) Immediately withdraw the proposed amendment to the Code of Criminal Procedure Act that would deprive a suspect of access to a lawyer until his or her statement has been recorded, and enact legislation that strengthens the right of suspects to prompt and regular access to lawyers from the

⁹ See the public statement made by the Human Rights Committee of Sri Lanka on 22 June 2016, available from http://hrcsl.lk/english/2016/06/23/public-statement-by-the-human-rights-commission¬of-sri-lanka/.

¹⁰ See also Counter-Terrorism Implementation Task Force, Basic Human Rights Reference Guide: Conformity of National Counter-Terrorism Legislation with International Human Rights Law (New York, United Nations, 2014).

¹¹ See Freedom from Torture, "What does success look like? Why Sri Lankan torture survivors want an internationalised justice process", February 2016.

- moment of arrest;
- (g) Abolish capital punishment or, as a minimum, commute all death sentences to prison sentences;
- (h) Review and amend the Assistance to and Protection of Victims of Crime and Witnesses Act (No. 4 of 2015) to make the National Authority set up under the Act more independent and more accountable and subject to judicial oversight and to ensure that its jurisdiction extends to the protection of all victims, including those who are trafficked (see CRC/C/SLK/5, para. 116) or subjected to torture or sexual violence, owing to the real risk of reprisals;
- (i) Amend the Police Act to make the police more accountable, effective and trustworthy;
- (j) Implement the National Plan of Action to Address Gender-based Violence in line with its international obligations and with the international protocol on the documentation and investigation of sexual violence in conflict, to tackle impunity for sexual torture and to ensure redress to survivors;
- (k) Repeal all relevant legislation so that corporal punishment is explicitly prohibited in all settings;
- (l) Ratify the Protocols Additional to the Geneva Conventions of 12 August 1949 and sign, and ratify, the Rome Statute of the International Criminal Court;
- (m) Enact implementing legislation for all international treaties Sri Lanka has ratified, including the International Covenant on Civil and Political Rights.

117. Regarding conditions of detention, the Special Rapporteur recommends that the Government:

- (a) Urgently repair and upgrade or close old prisons to address the unsafe and inhumane conditions of detention;
- (b) Ensure minimum standards of conditions of detention in accordance with the Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), and ensure that current practices and conditions do not give rise to cruel, inhuman or degrading treatment or punishment, or torture;
- (c) Adopt and implement measures to significantly reduce overcrowding, including:
- (i) Overhauling the prison system to reduce the number of detainees and increasing prison capacities in more modern prison facilities;

- (ii) Accelerating the judicial process and reviewing sentencing policies by introducing alternatives to incarceration (bail and electronic surveillance for pretrial defendants; non-custodial sentences for non-violent offenders and juveniles; parole and early release for the convicted);
- (d) Design a criminal justice system that aims at rehabilitating and reintegrating offenders, including by creating work and education opportunities;
- (e) Allocate sufficient budgetary resources to provide adequate health care by employing a sufficient number of qualified professionals and providing infirmaries in detention centres with adequate equipment and medicines;
- (f) Ensure the daily presence of truly independent and qualified medical health staff, including psychiatric and dental specialists, in all places of deprivation of liberty, in cooperation with the public health services, to perform a medical entrance examination for all detainees, conduct regular check-ups and provide medical assistance as necessary;
- (g) Monitor the quantity and quality of food and water and ensure adequate sanitary and hygienic conditions, satisfactory ventilation and adequate access to exercise, sunlight and recreational activities;
- (h) Authorize more frequent family visits and facilitate them by providing transportation and other support for indigent families;
- (i) Purchase and use body and parcel scanners, as promised by the Ministry of Prison Reforms, Rehabilitation, Resettlement and Hindu Religious Affairs, to address the indignity of invasive body searches of family members visiting detainees;
- (j) Install telephones or computers for inmates so that they are able to communicate with their families.

118. Regarding safeguards and prevention, the Special Rapporteur recommends that the Government:

- (a) Immediately shut down any unofficial detention facilities that may still be in existence;
- (b) Ensure prompt and official registration of all persons deprived of their liberty and periodically inspect records at police and prison facilities to ensure that they are maintained in accordance with the established procedures; failure to do so would entail investigating senior officers and holding them accountable;

(c) Digitize all registrations and records of all persons deprived of their liberty and make them accessible to the National Human Rights Commission;

- (d) Guarantee that access to lawyers through the Legal Aid Commission or bar association or other service is granted, in law and in practice, from the moment of deprivation of liberty and throughout all stages of criminal proceedings;
- (e) End the practice of incommunicado detention during the initial hours at unofficial detention locations;
- (f) Ensure that statements or confessions made by a person deprived of liberty other than those made in the presence of a judge and with the assistance of legal counsel have no probative value in proceedings against that person;
- (g) Ensure that all arrests are transparent, with the arresting officer showing proper identification, and based on objective evidence;
- (h) Ensure that all detainees can challenge the lawfulness of detention before an independent court, i.e., through habeas corpus proceedings;
- (i) Ensure that security sector officials (military, intelligence and police) undergo a rigorous reform programme that includes human rights education and training in effective interrogation techniques and proper use of force;
- (j) Ensure that national security and policing procedures are compliant with international standards and that the Tamil population is adequately represented in the police corps at all ranks in the North and East so that law enforcement forces are able to communicate with and serve the population residing there (see CERD/C/LKA/10-17, para. 24);
- (k) Introduce independent, effective and accessible complaint mechanisms at all places of deprivation of liberty by installing emergency telephone hotlines or confidential complaint boxes that are operational, and ensure that complainants are not subject to reprisals;
- (l) Provide more specialized training in forensic medical investigation and documentation of torture and ill-treatment in accordance with the Istanbul and Minnesota Protocols;
- (m) Authorize and facilitate regular, effective and independent monitoring of places of deprivation of liberty by international and national bodies, including the National Human Rights Commission and civil society organizations;
- (n) Raise the age for criminal responsibility of juveniles to one that is internationally acceptable;

- (o) Ensure the separation of juvenile and adult detainees and that children are held in detention only as a last resort and for as short a time as possible.
- 119. Regarding institutional reform, the Special Rapporteur recommends that the Government:
 - (a) Establish an effective torture prevention programme by undertaking comprehensive institutional reforms and a vetting process at the higher and lower ranks in the security sector the army, the intelligence agency and the police to overhaul these institutions, which continue to function with impunity;
 - (b) Rebuild the national institutions of the security sector so they are trustworthy and effective in protecting citizens without violating human rights, and establish independent oversight authorities to monitor the national security agencies;
 - (c) Provide directives to the security sector to ensure that all officers are informed and given clear and unequivocal instructions that all acts of torture, including rape and other forms of sexual violence, and ill-treatment are prohibited and that those responsible, either directly or as commander or superior, will be investigated, prosecuted and punished (see CAT/C/LKA/5, paras. 10-11);
 - (d) Support the National Human Rights Commission so that it complies with the principles on the status of national institutions for the promotion and protection of human rights (the Paris Principles) and can be designated as the national preventive mechanism, as contemplated by the Optional Protocol to the Convention against Torture, to undertake scheduled and unannounced prison visits to effectively monitor the legal status of detainees and conditions of detention of all detainees at all locations where persons are deprived of their liberty;
 - (e) Strengthen the powers of the National Human Rights Commission to ensure its independence and impartiality, and provide it with a robust mandate and sufficient financial resources to serve as an additional channel for complaints of torture and ill-treatment (while not replacing the responsibilities of prosecutors and judges);
 - (f) Implement the detailed recommendations of the Working Group on Enforced or Involuntary Disappearances regarding

- the functioning of the Office on Missing Persons (see A/HRC/33/51/Add.2, paras. 79-80);
- (g) Shut down the Poonthotam rehabilitation centre programme and release unconditionally those who remain in the centre or any other rehabilitation centre;
- (h) Charge detainees whose cases remain pending under the Prevention of Terrorism Act or, in the absence of sufficient evidence, release them immediately;
- (i) Prioritize demilitarization and dismantle the structures that are still in place to conduct surveillance, and build up trust in the community as a step towards reconciliation;
- (j) Strengthen the Assistance to and Protection of Victims of Crime and Witnesses Act No. 4 of 2015 to make the National Authority set up under the Act an independent and accountable agency not managed only by the police but subject to judicial oversight, and ensure that its jurisdiction extends to the protection of victims of trafficking who, like victims of torture and sexual violence, also have a real fear of reprisals.

120. Regarding the judiciary, the Special Rapporteur recommends that the Government:

- (a) Reform the judiciary by referring to the mission report of the Special Rapporteur on the independence of judges and lawyers¹² to address deficient procedures that continue to undermine any effective monitoring and documentation of and accountability for torture and ill-treatment through prompt, thorough and impartial investigations;
- (b) Uphold its obligation to genuinely investigate, prosecute and punish the numerous acts of torture that occurred in the past that are well documented, as there is no statute of limitations for such crimes under international law;
- (c) Ensure that investigations into recent cases are launched ex officio without any need for formal complaints by prosecutors whenever there are reasonable grounds to suspect torture or ill-treatment;
- (d) Ensure that allegations of torture and ill-treatment are admitted at all stages of judicial proceedings;

¹² See footnote 1.

- (e) Hold perpetrators, including superiors who may have tolerated or condoned the act, criminally responsible for torture or other ill-treatment and impose adequate disciplinary measures;
- (f) Ensure that the exclusionary rule with regard to evidence obtained under torture is fully implemented by the courts and that confessions in criminal proceedings are not admitted in the absence of any corroborating evidence;
- (g) Ensure that victims of torture and ill-treatment receive adequate compensation, including their full rehabilitation, and that they are not subject to reprisals;
- (h) Order independent medical examinations by forensic doctors properly trained on the Istanbul Protocol as soon as any suspicion of mistreatment arises;
- (i) Ensure that all aspects of the chain of criminal justice (investigation, detention, interrogation, arrest and conditions of incarceration) comply with the rule of law.
- 121. Regarding accountability and transitional justice, the Special Rapporteur recommends that the Government:
 - (a) Implement Human Rights Council resolution 30/1 and build a consensus to regain the confidence of all citizens and, in particular, torture survivors;
 - (b) Refer to international standards that require that societies approach national reconciliation by conducting truth-seeking and disclosure, justice through criminal prosecutions of perpetrators of serious crimes, reparation to victims and meaningful reform of institutions. The mechanisms by which these four steps are accomplished should be decided following extensive consultations with all stakeholders in a transparent and broadly participatory exercise that is just and earns the trust of all Sri Lankans, including those who live outside the country;
 - (c) Implement the recommendations made by OHCHR following its comprehensive investigation on Sri Lanka (A/ HRC/30/61), in particular those related to torture and accountability;
 - (d) Establish an office to investigate and prosecute allegations of torture independent of the Office of the Attorney-General to ensure a break from the past culture of impunity, and make operational an effective and safe witness protection

- programme that excludes authorities who were part of the national security forces;
- (e) Refer to the work of the Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence, who has stressed the need for a comprehensive transitional justice strategy that takes into account the links between these different mechanisms;¹³
- (f) Implement the recommendations contained in the report of the Working Group on Enforced or Involuntary Disappearances;
- (g) Implement the recommendations of the mission report of the Special Rapporteur on the independence of judges and lawyers.
- 122. The Special Rapporteur recommends that the international community:
 - (a) Support the timely implementation of the various recommendations made by United Nations mechanisms;
 - (b) Ensure that the principle of non-refoulement is upheld by not returning to Sri Lanka persons, in particular Tamils, who may be at risk of torture or ill-treatment, in accordance with article 3 of the Convention against Torture.

¹³ See "Observations by the Special Rapporteur on the conclusion of his second advisory visit to Sri Lanka (26 January to 1 February 2016)", available from www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=17029& LangID=E.

APPENDIX 2

REPORT OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS ON HER MISSION TO SRI LANKA

United Nations

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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka from 29 April to 7 May 2016, which she conducted jointly with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

The Special Rapporteur expresses her appreciation to the Government for its willingness to undergo an independent and objective scrutiny of its human rights situation relating to the independence of judges, prosecutors, lawyers and legal officers.

^{*} This statement should be read in conjunction with the observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (Appendix 1)

The report, which presents the Special Rapporteur's observations and recommendations, should be read in conjunction with the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka.

Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka*

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^{*} Circulated in the language of submission only.

I. Introduction

- 1. The Special Rapporteur on the independence of judges and lawyers, Mónica Pinto, visited Sri Lanka from 29 April to 7 May 2016, at the invitation of the Government, to assess the situation and remaining challenges concerning the independence of judges, prosecutors and lawyers and the proper administration of justice. The visit was conducted jointly with the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Juan E. Méndez (see A/HRC/34/54/Add.2).
- 2. In addition to visiting Colombo, the Special Rapporteur travelled to Anuradhapura, Jaffna and Kandy. She met with the Minister for Foreign Affairs, the Minister for Justice, the Minister for Law and Order and the Minister for Prison Reforms, Rehabilitation, Resettlement and Hindu Religious Affairs; the Governors of the Central, North Central and Northern Provinces; and representatives of the Judicial Service Commission, the Human Rights Commission, the Legal Aid Commission, the National Police Commission and the Judges' Institute. She also held meetings with the Chief Justice and judges from all tiers, the Attorney-General and State counsels, representatives of the Sri Lanka Bar Association, lawyers, academics, representatives of civil society and members of the diplomatic community.
- 3. The Special Rapporteur wishes to reiterate her gratitude to the authorities of Sri Lanka, in particular the Minister for Foreign Affairs, for their invitation, the efforts displayed to facilitate the organization of the meetings and their cooperation during the visit. She also warmly thanks the United Nations Resident Coordinator, the Senior Human Rights Adviser and the United Nations country office in Sri Lanka for their committed support in organizing the visit, as well as all those who took the time to share their expertise and opinions with her.

II. Recent political context

4. The presidential and parliamentary elections of January and August 2015 changed the political scenario in the country and brought an opening in the democratic space. That opening was welcomed by many stakeholders, including in the international community. The new Government presented a 100-day programme of constitutional reform and other measures that sought political transformation, including by

engaging with the United Nations and its human rights mechanisms to address accountability for human rights violations. The programme culminated in April 2015 with the adoption of the nineteenth amendment to the Constitution, which decreased executive power.

- 5. One of the promising reforms brought about by the nineteenth amendment was the re-establishment of the Constitutional Council. The Council is the body in charge of recommending to the President the appointment of the members of a number of independent commissions, including the Human Rights Commission, the Public Service Commission and the National Police Commission, and of approving the appointments by the President of a number of high-ranking officials, such as the Chief Justice and the judges of the Supreme Court, the President and the judges of the Court of Appeal, the members of the Judicial Service Commission, the Attorney-General and the Inspector-General of Police.²
- 6. In October 2015, the Government confirmed its engagement with the Human Rights Council by supporting the adoption of resolution 30/1, in paragraph 6 of which the Council, inter alia, noted the proposal of the Government of Sri Lanka to establish a judicial mechanism with a special counsel to investigate allegations of violations and abuses of human rights and violations of international humanitarian law and affirmed that a credible justice process should include independent judicial and prosecutorial institutions led by individuals known for their integrity and impartiality. The Council also affirmed, in that regard, the importance of participation in a Sri Lankan judicial mechanism, including the special counsel's office, of Commonwealth and other foreign judges, defence lawyers and authorized prosecutors and investigators.
- 7. In March 2016, Parliament launched the process to start drafting a new Constitution. A Steering Committee and six subcommittees were created, including the Subcommittee on the Judiciary, which submitted its report to the Steering Committee on 19 November 2016. The report focuses on issues related to the independence of the judiciary, the structure of the courts, the

¹ The Constitutional Council was first established by the seventeenth amendment to the Constitution in 2001 and then abolished by the eighteenth amendment, in 2010.

² See chapter VII.A of the Constitution.

jurisdiction of the courts, including in terms of judicial review, and the establishment of the Constitutional Court and its jurisdiction.³

III. Justice system

A. Constitutional provisions

- 8. The current Constitution of Sri Lanka was adopted by the National State Assembly in 1978 and has been amended 19 times. While its preamble assures the independence of the judiciary, it contains no provision that expressly spells out and guarantees the principle of the separation of powers or the importance of judicial independence in a democratic society abiding by the rule of law.
- 9. Chapter XV of the Constitution, entitled "The judiciary", establishes, inter alia, the general court structure, the procedures for the appointment and removal of the judges of the Supreme Court and the Court of Appeal, those judges' mandatory age of retirement and their salaries, and the procedures for the appointment, disciplining and removal of the judges of the High Court. Chapter XVI, entitled "The superior courts", sets out the respective composition, jurisdiction and powers of the Supreme Court and the Court of Appeal.
- 10. Chapter XV.A establishes the Judicial Service Commission, which is responsible for appointing, promoting, transferring and disciplining, including through dismissal, judicial officers (with the exclusion of judges of the superior courts and the High Court); transferring judges of the High Court; setting up rules concerning recruitment and training processes, the appointment, promotion and transfer of judicial officers and the training of judges of the High Court; and authorizing the inspection of any court of first instance. The Commission consists of the Chief Justice and the two most senior judges of the Supreme Court, all of whom are appointed by the President subject to the approval of the Constitutional Council.
- 11. Chapter VII.A establishes the Constitutional Council, a 10-member body comprising the Prime Minister, the speaker of Parliament, the leader of the opposition in Parliament, one member of

³ The report of the Subcommittee on the Judiciary is available at http://english.constitutionalassembly.lk/interim-report/126-interim-report.

Parliament appointed by the President, five persons appointed by the President upon nomination by both the Prime Minister and the leader of the opposition, of whom two must be members of Parliament, and one member of Parliament nominated by agreement of the majority of the members of Parliament who do not belong to the party of the Prime Minister or of the leader of the opposition. The Council recommends the appointment of the members of a number of independent commissions to the President and approves the appointment by the President of a number of high-ranking officials in the judiciary and the executive (see paragraph 5 above).

12. Chapter III, entitled "Fundamental rights", guarantees a limited set of civil and political rights, including the right to equality before the law and equal protection of the law (art. 12) and freedom from arbitrary arrest, detention and punishment and prohibition of retrospective penal legislation (art. 13). Articles 17 and 126 establish a right to seek remedy for the infringement of any fundamental rights enshrined in the Constitution by executive or administrative action before the Supreme Court.

B. Legal framework

- 13. Since Sri Lanka declared independence in 1948, its legal system has developed into a complex system comprising a mixture of Roman-Dutch law, English common law and "personal laws" (Muslim, Kandyan and Thesavalamai) (see HRI/CORE/LKA/2008, para. 74).
- 14. The lower judiciary and courts are governed by the following main instruments, in addition to the relevant constitutional provisions: (a) the Judicature Act (No. 2 of 1978), as most recently amended by the Judicature (Amendment) Act (No. 10 of 2010); (b) the High Court of the Provinces (Special Provisions) Act (No. 19 of 1990) as most recently amended by the High Court of the Provinces (Special Provisions) (Amendment) Act (No. 54 of 2006); (c) the High Court of the Provinces (Special Provisions) Act (No. 10 of 1996); and (d) the Public and Judicial Officers (Retirement) Ordinance. This legal framework is further complemented by the Penal Code, the Code of Criminal Procedure Act and the Civil Procedure Code.
- 15. At the international level, Sri Lanka is a party to most international human rights treaties, including the International Covenant on Civil and Political Rights and its First Optional

Protocol, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention for the Protection of All Persons from Enforced Disappearance.

C. Court structure

16. The court structure is set out in article 105 (1) of the Constitution and is further detailed in section 3 of the Judicature Act.

1. Superior courts Supreme Court

17. The Supreme Court is the highest court of the country and the final appellate jurisdiction; it was established and is regulated by the Constitution. The Court also exercises jurisdiction in respect of constitutional matters, the protection of fundamental rights, election petitions and any breach of the privileges of Parliament, and it has a consultative jurisdiction. The Chief Justice with any three judges of the Supreme Court nominated by him or her have the power to adopt rules regulating generally the practice and procedure of the Court; these include rules on the enrolment, suspension and removal of attorneys-at-law and the rules of conduct and etiquette for such attorneys-at-law.

18. The Court is composed of the Chief Justice and between 6 and 10 other judges. All serve terms that last until a set retirement age and are appointed by the President upon authorization of the Constitutional Council, and can only be removed from office by order of the President after a parliamentary impeachment process on the ground of proved misbehaviour or incapacity.

Court of Appeal

19. The Court of Appeal too was established and is regulated by the Constitution. The Court exercises, inter alia, appellate jurisdiction over cases of the High Court and other lower courts and tribunals or institutions. Its powers include that of issuing writs of habeas corpus

⁴ See, in particular, articles 105-111.C and 118-136.

⁵ See, in particular, articles 105-111.C and 137-147.

and of inspecting and examining, upon application, any record of any court of first instance.

20. The Court consists of the President of the Court and between 6 and 11 other judges. The judges serve terms that last until a fixed retirement age and are appointed by the President upon authorization of the Constitutional Council; they can only be removed from office by order of the President after a parliamentary impeachment process on the ground of proved misbehaviour or incapacity.

2. Courts of first instance High courts

- 21. The High Court of Sri Lanka was established and is regulated by the Constitution, together with the Judicature Act. The High Court is composed of no fewer than 10 and no more than 75 judges. The judges are appointed by the President upon recommendation of the Judicial Service Commission and after consultation with the Attorney-General. They are tenured until a set retirement age, unless they are removed from office by the President on the recommendation of the Judicial Service Commission. The High Court has both original and appellate civil and criminal jurisdiction.
- 22. Article 154P of the Constitution provides for the creation of provincial high courts in each province of the country. The Chief Justice nominates, from among the judges of the High Court of Sri Lanka, such number of judges as may be necessary to staff each such court; the Chief Justice can also transfer judges. Provincial high courts exercise, inter alia, original criminal jurisdiction; appellate and revisionary jurisdiction in respect of convictions, sentences and orders pronounced by magistrates or small claims courts and judgments, decrees and orders delivered by district courts or family courts within the province; and jurisdiction to issue writs of habeas corpus.⁷
- 23. The Commercial High Court was established in Colombo under the High Court of the Provinces Act (No. 10 of 1996) to hear in first instance certain civil actions involving commercial transactions, as well as matters of company law, intellectual property disputes

⁶ See, in particular, articles 105, 106, 111 and 111.A of the Constitution and chapters II and III of the Judicature Act.

⁷ See article 154.P of the Constitution, the High Court of the Provinces (Special Provisions) Act, as amended, and the High Court of the Provinces Act.

and admiralty issues. In January 2016, a specialized high court was established in Colombo to expedite action on all cases pending under the Prevention of Terrorism Act. Another specialized high court charged with addressing cases brought forward under the Act operates in Anuradhapura.

District courts

24. District courts are courts of first instance and have original jurisdiction over all civil matters, including revenue, trust, matrimonial, insolvency and testamentary cases, when these are not expressly assigned to another court or authority. They are established in every judicial district and regulated by the Judicature Act. District court judges are appointed by the Judicial Service Commission and their retirement age is set out in the Public and Judicial Officers (Retirement) Ordinance.

Small claims courts

25. Small claims courts are set out in the Judicature Act for each judicial division. They have exclusive original jurisdiction to hear and determine civil actions in which the value of the debt, damage or demand, inter alia, does not exceed a sum specified by an order of the Minister for Justice. Judges are appointed by the Judicial Service Commission and their retirement age is determined in the Public and Judicial Officers (Retirement) Ordinance. It is unclear to the Special Rapporteur if the small claims courts have become operational.

Magistrate courts

26. The Judicature Act also establishes magistrate courts for each judicial division. Magistrate courts have original jurisdiction over criminal offences as stipulated in the Code of Criminal Procedure Act and the Penal Code, which also define their powers and duties. Magistrates are appointed by the Judicial Service Commission and their retirement age is determined in the Public and Judicial Officers (Retirement) Ordinance.

Other courts and tribunals

27. There are a number of administrative tribunals, such as agricultural tribunals and labour tribunals, that perform functions of a quasi-judicial nature as defined in the law.

IV. Challenges to a competent, independent and impartial justice system

A. 3Implementation of human rights treaties

- 28. Sri Lanka is a party to the great majority of international human rights treaties and has accepted the competence of certain treaty bodies to receive individual complaints. However, these instruments and their related jurisprudence are not enforceable before national courts until their content has been enacted in domestic legislation. This has given rise to a highly problematic situation, as many of the rights guaranteed in the treaties have not yet been enshrined in the Constitution or any other piece of legislation.
- 29. This extreme form of legal dualism is not sustainable, as it is well accepted in international law that a State party to a treaty may not invoke provisions of its domestic legislation as a justification for its failure to meet its treaty obligations. A legitimate expectation exists among Sri Lankans that, once the Government has ratified a human rights treaty, that treaty becomes applicable in Sri Lanka. The authorities have a duty to ensure that every person under its jurisdiction can enjoy and exercise the rights protected in these instruments and, if need be, seize the courts to enforce them, and that judicial decisions on such matters are respected and immediately implemented.
- 30. In this context, the Special Rapporteur wishes to stress that the decisions adopted by the United Nations treaty bodies, whose jurisdiction Sri Lanka has voluntarily accepted, should be enforced at the national level.

B. Strengthening the independence of the judiciary

- 31. The Constitution does not contain any provisions expressly recognizing the principle of the separation of powers and the importance of guaranteeing judicial independence. The judiciary has a crucial role to play in a democratic society based on the rule of law and fundamental human rights, including a role in upholding a system of checks and balances.
- 32. Many credible concerns relating to the independence, impartiality and competence of the judiciary were reported to the Special Rapporteur during her visit. There were periods during which

the executive regularly exerted strong pressure on judges in order to influence their decision-making or block their actions. For instance, immediately prior to and during the impeachment process of then Chief Justice Shirani Bandaranayake, attacks against judges, but also lawyers, dramatically increased and turned violent. That pressure seems to have largely eased under the new government and no recent direct attack has been reported to the Special Rapporteur.

- 33. Judges are reportedly often offered government or other political offices after retirement. This practice raises concerns regarding possible conflicts of interest and casts doubt on the independence and impartiality of judges who may be hoping to obtain such positions.
- 34. Overall, judicial independence seems to have been gradually eroded over several decades owing to the conflict and its aftermath, despite certain positive reforms and advancements. There was nevertheless a clear perception during the visit that, after the change of government in 2015, some judges had started affirming their independence. This can partly be explained by the fact that judges apparently feel more secure in their authority and more confident in the belief that they will be adequately protected should they face undue pressure. However, a number of concerns relating to the lack of sufficient structural safeguards for the independence of the judiciary and the courts remain.

Selection and appointment

- 35. During her visit, the Special Rapporteur spoke with many individuals who expressed concern about the selection and appointment of judges, in particular the lack of transparency of the procedures and the important role played by the President, which opens the door to political manipulation and interference. The Special Rapporteur notes with concern that, while the role of the Constitutional Council was meant to mitigate the President's influence, the majority of the Council's members are politicians.
- 36. It is unclear how the competence of candidates is evaluated and what criteria are applied in the process of selecting superior court judges. In particular, it is very problematic that the Constitutional Council has yet to write down the procedures for the different appointments in which it has a role to play, whether in terms of recommending candidates for appointment or approving selected candidates.

37. The Judicial Service Commission has set out the rules for recruiting judges to the lower judiciary. According to those rules, in order to enter the judiciary, candidates must have been practising law for a minimum of three years, pass a written examination and then be successful in an interview. Once appointed, they have to undergo mandatory training at the Judges' Institute. A credible source told the Special Rapporteur that in the past there had nevertheless been instances of appointments that did not follow the established procedure.

- 38. A strict and rigorous recruitment process based on objective criteria is essential to ensure the highest competence of the judiciary, to avoid arbitrariness and political manipulation and to improve transparency and legitimacy, thereby building the public's confidence in the independence and impartiality of the justice system.
- 39. The Judicial Service Commission, which is composed of only three members, all from the Supreme Court, exercises a great deal of power and has many responsibilities. Its independence, technical capabilities and legitimacy could be enhanced by enlarging its composition to include judges of other courts and tiers and other eminent experts, such as retired judges, lawyers or academics.

Promotions

40. There seems to be neither a proper system to evaluate the performance of judges of first instance courts, nor established criteria to support promotions, which gives too much discretion to the Judicial Service Commission and can result in arbitrary decisions. Under such circumstances, promotions can also serve as undue means of influencing the work of judges and, ultimately, their independence.

Transfers

41. According to the information provided during the visit, first instance court judges are required to transfer to a different jurisdiction every four years, sometimes earlier. While transfers after a certain number of years can contribute to judicial independence, they may also be — and have been — used as retaliation. Transparency will improve if the Judicial Service Commission sets up and makes public clear guidelines.

42. Transfers also have negative consequences on the management of cases and the timely delivery of justice. In the opinion of the Special Rapporteur, measures should be taken urgently to limit or at least mitigate such negative consequences. The interests of justice should prevail over a blind application of administrative provisions. Furthermore, support should be provided to facilitate family relocation in order to avoid negative repercussions on the lives of judges.

Conditions of work

- 43. Judges' salaries are relatively low and reportedly fail to attract the most qualified people. Moreover, the salary scale applied in the lower judiciary is the same as that applied to other public officers. It is essential that the remuneration of judges be adequate to lead a life that reflects the importance and dignity of their function. Judges' salaries should also be considered in their own context and not be assimilated to the salaries of other public servants whose functions are different and who can also hold other types of employment.
- 44. More resources are needed to allow judges to work in the best conditions. Adequate facilities, in particular workspaces and libraries, were mentioned as a priority by several judges.

Training

- 45. The Judges' Institute is in charge of the initial mandatory training of first instance court judges and offers a variety of on-the-job training programmes, including courses taught through video link. Some judges have the opportunity to travel abroad to pursue further studies or specialized training. Those opportunities should be provided on the grounds of objective criteria, including to junior judges, ensuring a consistent and transparent selection of candidates for specific training sessions.
- 46. The Judges' Institute should offer more and new training opportunities, including on international human rights law, gender perspectives and women's rights, international humanitarian law, international criminal law, emerging legal issues, new technological developments and technical matters such as the analysis of complex forensic evidence. More resources should be allocated to the Institute so as to establish a larger and improved library and better facilities. The Institute's governing authorities should also be advised by a board

composed of retired judges, academics and representatives from the Bar Association of Sri Lanka.

C. Judicial accountability

- 47. Judicial accountability goes hand in hand with judicial independence. Both are essential in a democratic society. While judges must enjoy certain privileges and immunities because of their function, they must also be accountable for their conduct if a system of checks and balances is to be maintained.
- 48. The judges of the superior courts can be removed from office by a decision of the President after an impeachment procedure before Parliament. The procedure, which is foreseen in the Constitution, is not regulated in any ordinary law and is implemented by Parliament through a standing order. The impeachment procedure is extremely politicized and characterized by a lack of transparency, by a lack of clarity in the proceedings and by a lack of respect for fundamental guarantees of due process and a fair trial, all of which undermine its legitimacy. Such politicization was exemplified by the impeachment of the Chief Justice in 2013. The Special Rapporteur also notes with concern that the following Chief Justice was removed from office by executive order after the change of government in 2015. This sets a dangerous precedent of executive interference in the independence of the judiciary.
- 49. First instance court judges are subject to the disciplinary control of the Judicial Service Commission; in the case of High Court judges, the Commission makes recommendations to the President. The procedures in place do not seem to provide sufficient guarantees against arbitrary disciplinary measures, which, during certain periods, have reportedly been used to exercise undue control and to retaliate against judges refusing to align themselves with the government.
- 50. The lack of a proper code of conduct is also worrying. Detailed guidance needs to be provided to judges on the infractions that will give rise to disciplinary procedures. Judges should be suspended or removed only for reasons of incapacity or for behaviour that renders them unfit

⁸ See http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews. aspx?NewsID =12909&LangID=E and http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID =12790&LangID=E.

to discharge their duties. Having such a code would not only facilitate disciplinary proceedings, but also contribute to increasing confidence in the judiciary.

51. All disciplinary procedures must respect fundamental human rights principles, including the principle of due process and the right to appeal a decision, and should be conducted in accordance with a law passed by Parliament, which should set up a special panel composed of independent and impartial individuals and should enumerate the specific causes triggering misconduct and the corresponding sanctions, which must be proportionate and adequate.

D. Attorney-General's department, investigations and prosecutions

- 52. The Attorney-General acts both as the chief legal adviser of the Government and the head public prosecutor; he or she is appointed by the President upon approval by the Constitutional Council. As the Council has not yet published its rules of procedure and evaluation criteria, the selection and appointment procedure lacks transparency. The appointment of State counsels, as well as their promotion and transfer, is the responsibility of the Public Service Commission, which consists of nine members appointed by the President on the recommendation of the Constitutional Council. Candidates must be attorneys-at-law and are selected after two rounds of interviews before two different boards.
- 53. The Attorney-General's department does not have investigative powers. All criminal investigations are conducted by members of the law enforcement forces, including police officers, who are also tasked with prosecuting individuals accused of crimes. These members of the law enforcement forces then report on progress made to the relevant magistrate court. State counsels are in charge of prosecutions for crimes to be tried before a high court. Proceedings before high courts can be initiated only by the Attorney-General's department.
- 54. Many concerns relating to the work of the department and of the police forces were brought to the attention of the Special Rapporteur. The low quality, lack of seriousness and slow pace of

⁹ See article 41.C of the Constitution.

many investigations were seen as being very problematic and as leading to serious violations of due process principles. Police officers are not adequately trained to carry out their delicate functions, and many lack even basic technical knowledge. Too many investigations still rely exclusively on confessions, including confessions extracted under torture or ill-treatment.

- 55. It often takes many years for the Attorney-General's department to issue indictments after it has received the investigation material, even in non-conflict-related and non-political cases. For instance, it took seven years for the department to file an indictment in a child abuse case. Such delays have far-reaching consequences for both victims and defendants, especially when the latter are held in pretrial detention, and are simply unacceptable.
- 56. According to credible sources, certain cases, in particular those implicating security forces, especially members of the military, and cases related to gross human rights violations and corruption become stalled or are simply not investigated. The Attorney¬General's department was also described as "rather lethargic" with regard to such sensitive cases. Moreover, in some cases, in particular those involving traumatic experiences for women or children such as rape and sexual violence, State counsels have displayed a shocking lack of sensitivity. They are in dire need of training, including specialized training in human rights. There is also no specific code of conduct for State counsels, who are bound by the same code of conduct as lawyers.
- 57. There is one State counsel in each provincial high court, but all procedures are centralized through the Attorney-General's department in Colombo, including those on deciding whether to indict or not. Efforts are reportedly under way to decentralize the work of the department, including by instating a new system of provincial supervision to ensure that prosecutorial matters are conducted properly without having to consult Colombo every time. Besides, the number of staff working in the Attorney-General's department is too low and contributes to the backlog of cases and delays in issuing indictments.
- 58. The Attorney-General's department acts as the representative of the State, which should by no means be equivalent to defending the government. However, there is a general perception that, first and foremost, the department defends the interests of the government, not the public's interest. This undermines the independence and credibility of the prosecution.

E. A justice system that reflects the diversity of society

- 59. Sri Lankan society is predominantly Sinhalese, with significant Tamil and Muslim minorities; in the Northern and Eastern Provinces, Tamils are in a majority position. Both Sinhala and Tamil are official languages. Yet, the diversity of the population is not reflected in the justice system: the overwhelming majority of staff of the judiciary, the Attorney General's department and the police forces are Sinhalese. This dominance reaches 100 per cent in many places throughout the country.
- 60. This situation raises the issue of language, as there are very few Tamil-speaking judges, State counsels and police officers. The majority of judicial proceedings are conducted in Sinhala, even in the Northern and Eastern Provinces. While court interpretation is sometimes available, its quality is said to be poor. A similar serious concern relates to the fact that police officers are rarely in a position to record complaints, collect evidence and carry out interrogations in Tamil, even in provinces with a Tamil majority, and have to resort to very poor transcriptions and translations into Sinhala. Sometimes, interpretation and translation services are not available, so statements in Tamil are simply not recorded. This puts into question the accuracy of the records and the quality and, most importantly, the legality of the investigations. The lack of interpretation and translation services also means that, very often, the accused do not understand their rights. In some cases, judgments are issued in Sinhala without being translated into Tamil and, as a result, lawyers and their clients do not understand the decision. These language problems ultimately have a dramatic impact on access to justice and respect for fair trial and due process guarantees for Tamil-speaking people, and need to be addressed urgently.
- 61. The representation of women in the legal professions should also be improved. Although close to one third of judges in the country are women, their number decreases the higher up in the hierarchy one looks.
- 62. Sri Lanka is a pluralistic society. Its justice system should be composed of people from all sectors and should be perceived as being fair and legitimate by all Sri Lankans. This will also ensure a more balanced and impartial perspective on the matters before the courts, eliminating barriers that have prevented some judges from addressing certain issues fairly.

F. Independence of lawyers

63. According to the Constitution and the Judicature Act, the Supreme Court is responsible for and makes rules on the admission, enrolment and discipline, including the suspension and removal, of attorneys-at-law. However, neither the Constitution nor the Judicature Act mention the independence of lawyers. Furthermore, it is not possible to seek remedy or appeal against decisions made by the Supreme Court, including disciplinary measures. Membership in the Bar Association of Sri Lanka, a non-statutory body, is optional.

- 64. The Bar Association has been, during certain periods, strongly divided along political lines. The politicization of the Association is a source of great concern. The fundamental role of such associations is to promote and protect the independence and the integrity of the legal profession and to safeguard the professional interests of lawyers.
- 65. The general environment in which lawyers work, including their sense of security, was said to have greatly improved with the change of government in 2015. Before that, lawyers defending former members of the Liberation Tigers of Tamil Eelam and persons accused of terrorism-related offences were regularly branded as traitors and their lives threatened. Any threats against the security of lawyers should be immediately and thoroughly investigated, and appropriate action taken. It was reported that the Criminal Investigation Division of the police had kept files on lawyers defending such "sensitive" cases. The Special Rapporteur calls on the authorities to immediately and seriously investigate such allegations and to take appropriate measures to guarantee the security and independence of lawyers in the future.

G. Right to a fair trial, due process of law and judicial delays

66. The Special Rapporteur expresses great concern about the serious issues affecting fair trial and due process guarantees — ranging from security legislation unduly restricting rights to dramatic judicial delays — reported during her visit.

¹⁰ See article 136 (1) (g) of the Constitution and articles 40-44 of the Judicature Act.

Access to a lawyer

- 67. Having prompt access to a lawyer is a precondition for the effective realization of the right to a fair trial and for securing other rights. It represents an important safeguard against arbitrary arrest or detention, unlawful deprivation of liberty and torture and other cruel, inhuman or degrading treatment or punishment.
- 68. Usually, people who have been arrested are given access to a lawyer only from the moment they are presented to a magistrate, normally within 24 hours of their arrest. In 2012, following an application on the violation of fundamental rights settled by the Supreme Court, the Inspector General of Police issued rules under the Police Ordinance acknowledging the right of a lawyer to represent his or her client at a police station and requiring police officers to facilitate such representation. In August 2016, a draft bill amending the Code of Criminal Procedure Act was presented; the amendment aimed to allow access to a lawyer only after the first statement of the person arrested had been recorded by the police. Fortunately, following complaints from the Bar Association, the Human Rights Commission and civil society, the amendment was withdrawn, thus avoiding a serious regression on the fundamental right to a fair trial.
- 69. Moreover, while lawyers reported that they had no problem gaining access to clients held in ordinary police stations or detention centres, they said they needed authorization, which could take months to obtain, to visit clients held at the Terrorism Investigation Division in Colombo and in certain detention centres, such as the one in Boosa, where people accused of terrorism-related crimes were often detained. Such restrictions are unacceptable. Suspects and detainees should have unhindered and regular access to their lawyers, regardless of the place of detention and the charges for which they are held.

Prevention of Terrorism Act

70. At the time of writing, the Prevention of Terrorism Act had not yet been repealed, despite repeated calls for the authorities to do so immediately, including from the Special Rapporteur and the

¹¹ See the Police (Appearances of Attorneys-at-Law at Police Stations) Rules, 2012.

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment at the end of their visit. The Act, adopted in 1979, imposes severe restrictions on courts' jurisdiction and authority to prevent abusive detention and torture and seriously undermines the fundamental right of defendants to a fair trial. The continuation of a normative framework that contributes to violations of fundamental human rights cannot be justified.

71. If any specific legislation is to be adopted to replace the Act — and the Special Rapporteur is not convinced of that necessity — it must be in line with international human rights law and standards, in particular safeguards against arbitrary arrest and detention, unfair trials and torture.¹²

Judicial delays

- 72. The Special Rapporteur was, on many occasions, told of judicial delays that were nothing short of dramatic. Criminal proceedings could drag on for 10 to 15 years, even in cases that were not politically sensitive. For instance, a lawyer mentioned being involved in a trial for rape that had recently been completed after 15 years. There were also examples of civil cases that had been pending for more than 30 years. Divorce matters could take eight or more years to be resolved. Such delays clearly amount to a denial of justice, which especially affects the lives of victims, their families and persons deprived of their liberty.
- 73. Cases were regularly postponed, including owing to the transfer of judges, and judges were not held accountable for the delays they incurred. Besides, it would seem that there was an insufficient number of judges in the country to allow them to tend adequately to their workload. The Attorney-General's department also largely contributed to judicial delays.
- 74. Such a severe situation can only be addressed with the adoption of a comprehensive set of measures, designed and

¹² See, in particular, the recommendations contained in the reports of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (for example, A/HRC/16/51 and A/HRC/22/52 and Corr.1).

¹³ There are 335 judges for a population of over 22 million people.

implemented in consultation with all stakeholders, in particular with judges, staff of the Attorney-General's department and lawyers. The Judicial Service Commission reportedly issued new circulars, to be enforced on 1 November 2016, on expediting old cases. In that context, the Special Rapporteur notes the concerns expressed by the Bar Association about the practicability of implementing those circulars in a letter addressed to the Commission on 24 October 2016. ¹⁴

75. Establishing family courts throughout the country could contribute to reducing the workload of district courts. Increasing the use of mediation, including by making it mandatory in certain types of cases, could also decrease the number of cases reaching the courts. Such steps should be accompanied by measures to improve the quality of mediation, in particular the legal training and integrity of board members.

Plea bargaining

76. The Special Rapporteur was told that judges frequently pushed defendants to plead guilty. Defendants were made to believe they could get a lighter sentence by pleading guilty, which was not always the case, and that their sentence would be shorter than the time they would spend in pretrial detention. When defendants plead guilty, judges can expedite their case and improve their statistics. The Special Rapporteur is alarmed by this practice, which seems to demonstrate a disregard for the interests of justice.

Impartiality in sentencing

77. Concerns regarding the lack of guidelines on sentencing were reported to the Special Rapporteur. Judges should decide their cases on the grounds of the facts and of the evidence produced and in the light of the law in force at the time of the facts.

Publicity

78. Only the superior courts publish their judgments on their respective websites. The publication of all court judgments and decisions should be mandatory and automatically done, as a means to reinforce the credibility of the judiciary and build public trust.

¹⁴ Available at www.basl.lk.

Contempt of court

79. Contempt of court, a measure enshrined in the Constitution, was said to have often been abused in the past to impose sanctions *inaudita altera parte*, rather than for its intended purpose, which is to preserve the authority and dignity of judges and courts and prevent the undermining of public confidence in the administration of justice. Contempt of court should be used restrictively and not as a tool to hinder legitimate criticism of judicial organs in a democratic context.

H. Access to justice, protection of victims and witnesses and impunity

80. Access to justice constitutes the means for realizing and restoring rights and is also a fundamental human right in itself. Providing access to justice for all is explicitly included in Sustainable Development Goal 16. To realize that right, the barriers currently faced by many Sri Lankans in reaching the courts, including the limited number of judges, judicial delays and issues related to language, should be urgently recognized and measures should be taken to remove them.

Legal Aid Commission

81. In a country lacking public defence services, the Legal Aid Commission is at the forefront of efforts to provide access to justice for all in Sri Lanka. The Commission is a governmental institution with more than 400 legal officers on staff that was established in 1978 to provide legal advice to and represent people, in both criminal and civil matters, without sufficient financial means. There are 76 legal aid centres throughout the country. The majority of the cases the Commission deals with are related to divorce and labour matters. There is also a special unit that represents victims in cases of human rights violations. The Commission is also involved in outreach activities to inform people about their rights.

Fundamental rights jurisdiction

82. The Supreme Court has the authority to receive applications from persons seeking remedy for the infringement by executive or

¹⁵ See Legal Aid Law (No. 27 of 1978).

administrative action of any of the fundamental rights enshrined in the Constitution. ¹⁶ If it finds that a violation has occurred, the Court can order compensation and make recommendations, but its decisions cannot be appealed. While this is an important avenue for lodging complaints for violations of fundamental rights, it fails to reach the most vulnerable. Indeed, many victims cannot afford to travel to Colombo and hire a local lawyer to file the application, while some others fear reprisals if they were to do so. There are also language barriers and a time limit of one month, which can prove insurmountable. Some police officers have allegedly offered money to victims or their families agreeing not to file a complaint. Moreover, according to the Chief Justice, there is a backlog of approximately 3,000 applications.

Human Rights Commission

83. In 2015, new and highly credible and competent commissioners were appointed to head the Human Rights Commission. The Commission can receive and investigate complaints of human rights violations and make recommendations thereon. While it is an important mechanism that should be further strengthened, especially as it is gaining the public's trust, the Commission can only supplement the work of the courts, not replace it.

Victim and witness protection

- 84. In general, judicial proceedings, in particular criminal proceedings, do not consider the victim. All judicial actors should have the victim in mind in all aspects of their work. The lack of a proper legal framework for victim and witness protection has long been identified as a critical issue in the country and as a factor that has contributed to a high level of impunity.
- 85. On 7 March 2015, Parliament finally adopted the Assistance to and Protection of Victims of Crime and Witnesses Act (No. 4 of 2015), which had been promised by the new government. The Act, which is based on a bill that was prepared in 2007, has been widely criticized; in particular, serious concerns have been expressed about the independence of its operating body, which is located within the

¹⁶ See articles 17 and 126 of the Constitution.

institutional hierarchy of the police despite the fact that security forces have been identified as responsible in a number of serious human rights violations and abuses, including in the majority of torture-related cases (see CAT/C/LKA/CO/5, para. 17). The Government's commitment to reviewing the Act¹⁷ has not yet concretized and the establishment of a victim and witness protection division is going ahead as originally planned.

86. In many cases, victims live in close proximity to their abuser and are therefore particularly vulnerable and afraid. In some regions, especially in the north of the country, the military continues to exercise control over people's lives. If someone reaches out to the local courts or travels to Colombo to file a complaint, the military knows about it. The climate of fear is still palpable. Victim and witness protection will continue to be a determining issue in the context of common crimes, abuses and violations committed by members of the security forces, as well as in the context of transitional justice mechanisms that have been created, such as the Office of Missing Persons, or that will be established, such as a truth-seeking mechanism or specialized court.

Persisting impunity

87. The failure to hold perpetrators accountable for gross human rights violations, serious violations of humanitarian law and international crimes in Sri Lanka has long been documented. Furthermore, while the conflict lasted, there was virtual impunity for any abuse committed by the police or the security forces. Impunity is so widespread that it has become a normal occurrence, thereby contributing to shattering the public's confidence in its judiciary. Since the change of government, some positive steps seem to have been taken, as five new cases were reportedly being investigated at the time of the visit (in all five cases, the military intelligence apparatus was allegedly involved). In a now famous case before the High Court in Jaffna, a military officer was condemned to 25 years in prison for rape. While that case is still an exception, it gives hope that justice can be done.

¹⁷ See, for example, Human Rights Council resolution 30/1, para. 9.

I. Transitional justice

- 88. Over the years, Sri Lanka has established a large number of ad hoc commissions to inquire into politically sensitive crimes, shed light on past atrocities and deal with lessons learned. However, these commissions, whose reports have rarely been made public, have not brought the results and changes hoped and have even, by their very existence, jeopardized the development or reinforcement of competent and independent institutions.
- 89. The authorities should be commended for having committed themselves to embarking on a difficult journey to set up transitional justice mechanisms to deal with its past in a comprehensive way.
- 90. Transitional justice mechanisms are important for building a sustainable future for the country and all its communities, and for preventing the recurrence of violations. The justice component of the transitional justice process must be independent, impartial, credible and effective. During her visit, the Special Rapporteur observed that many people did not trust that their justice system would deliver justice, not even in non-sensitive cases. The capacity of the police, State counsels and judges to independently and professionally deal with extremely complex cases involving serious violations of international human rights law and international humanitarian law, as well as international crimes, has yet to be built.
- 91. Attention should be paid simultaneously to transitional justice measures, in particular the special judicial mechanism, and to the objective of strengthening the independence of the country's "regular" justice system. Reforming the administration of justice in the light of international norms and standards regarding its independence, including possible vetting processes of current or future judges, will improve the functioning of the justice system for all and contribute to guaranteeing the non-recurrence of past atrocities.
- 92. There is, however, a perception that law-making processes lack transparency. Civil society organizations and others have expressed serious concern in relation to deficiencies of good governance in legislative processes. For example, while the legislation to establish the Office of Missing Persons was adopted by Parliament in August 2016, six months later it had not yet been published in the official gazette. Information received suggests that new amendments are being discussed

in relation to the already adopted legislation; however, no information has yet been provided publicly on that matter. The Special Rapporteur cautions that when law-making is done through irregular processes, rumours and suspicions flourish, easily feeding into narratives that are counterproductive to democratic reform.

J. Constitutional reform

93. The National State Assembly has launched a process to review the Constitution, which presents an opportunity that should not be missed to confer constitutional status to provisions safeguarding the independence and impartiality of the administration of justice, thereby contributing to reinforcing the independence and impartiality of the justice sector as a whole. It is also important to highlight that, in a transitional justice context, constitutional reform contributes to guaranteeing the non-recurrence of serious human rights violations and other atrocities.

94. The six subcommittees set up by Parliament to look into particular matters issued their reports in November 2016. Overall, the amendments suggested in the report of the Subcommittee on the Judiciary seem positive. The Special Rapporteur welcomes in particular the proposition to establish a constitutional court, since the current constitutional review jurisdiction of the Supreme Court is clearly inadequate. In that context, she calls on the Government to consider introducing an effective individual complaints procedure in relation to human rights violations. Looking ahead, the Special Rapporteur stresses that more efforts are needed to grasp the complexity of the issues at stake and calls for a more comprehensive and detailed review of the Subcommittee's report. At the time of writing, it was unclear what the next steps in the process would be. To give legitimacy to the constitutional reform process, it is essential to keep the public continuously informed about the next steps. Regarding the reforms related to the administration of justice, wide consultations with the legal community should be held, to allow members of that community to make substantive comments.

V. Conclusions

95. Sri Lanka is at a critical moment in its history. While the armed conflict ended in 2009, after more than 25 years many of the structures of a nation at war remain in place. The fabric of Sri Lankan

society was left ravaged and the justice sector still needs to tend to its deepest wounds.

- 96. In general, the administration of justice should be more transparent, decentralized and democratic. The country needs to conduct a strict exercise of introspection, so as to improve the independence, quality and credibility of its judiciary, the Attorney-General's department and the police forces. A significant change in the attitude and sensitivity of many members of the legal professions, in particular the judiciary, towards reforms and human rights will be necessary. Guidance on how to go about strengthening the independence, impartiality and competence of those involved in the administration of justice can be found in the present report, but also in an important number of international and regional instruments, including the Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government endorsed in 2003.
- 97. While the democratic gains of the past two years must be welcomed, it is important to recognize that much more could and should have been done to manifest a commitment to genuine reform, in particular in the justice sector, and to create meaningful and participatory transitional justice mechanisms. More tangible reforms are expected and necessary before the country can be considered to be on a stable and sustainable path towards democracy and to be governed by the rule of law. It is important to accelerate the process of positive change within a comprehensive and inclusive framework, otherwise the momentum for such reform could be lost.
- 98. Building a justice system that all sectors of society will trust and be able to rely on to defend and enforce their rights will take time. Bold steps need to be taken, as a sign of the authorities' commitment to address the atrocities of the past and, above all, the structures that allowed such atrocities to happen. It is important to remember that justice must not merely be done, but must also be seen to be done.

VI. Recommendations

99. The recommendations below should be read in conjunction with the recommendations contained in the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/34/54/Add.2).

100. Urgent measures should be adopted by the authorities to give effect to all the rights protected in international human rights treaties that have been ratified and are therefore in force. The authorities should also enforce the decisions adopted by the United Nations treaty bodies whose jurisdiction it has voluntarily accepted.

- 101. The chapter on fundamental rights of the Constitution should be thoroughly reviewed to ensure that civil, cultural, economic, political and social human rights are protected, in line with the international human rights obligations of the State.
- 102. The Constitution should clearly and expressly recognize the fundamental principle of the separation of powers, establish checks and balances and guarantee the independence of the judiciary and the courts, as well as of the legal profession.
- 103. The composition of the Constitutional Council should balance the number of active politicians with representation from civil society, the Bar Association and academia so as to avoid the politicization of the appointment processes.
- 104. The Constitutional Council should set out and publish its rules of procedures, including the criteria used to evaluate candidates' suitability for a given position, which should be scrupulously and consistently applied.
- 105. The selection and appointment of judges of both superior and first instance courts should be transparent at all stages and follow clear recruitment criteria, including technical requirements. Proper evaluation systems should also be established and published.
- 106. Serious considerations should be given to broadening the composition of the Judicial Service Commission, in particular by including judges of other courts and tiers and other experts, such as retired judges, lawyers and members of academia.
- 107. Decisions on promotions should be reached following a fair and transparent evaluation procedure based on objective factors, in particular the merits, integrity, experience and seniority of the candidates; these factors and procedures should be made public.

- 108. The Judicial Service Commission should review and clarify its policy regarding the transfer of first instance court judges. In particular, it should look into the seriously negative impact that such transfers can have on the timely delivery of justice, and set up and publicize objective criteria, which should take into account the specific expertise of judges.
- 109. Judges should be remunerated with due regard for the responsibilities, the nature and the dignity of their office; their salary scale should be different from the one used for other public officers.
- 110. Special measures should be urgently taken to redress the discrepancies in terms of available material resources between the different courts; particular attention should be paid to courts located in the Northern and Eastern Provinces.
- 111. Any impeachment procedure should be regulated by a law passed by Parliament, which should provide for a judicial determination of the merits of the causes triggering the removal procedure, and the findings of alleged misconduct. Legislation should explicitly stipulate what constitutes misbehaviour, in line with the international standards set out in the Basic Principles on the Independence of the Judiciary and the Bangalore Principles of Judicial Conduct. The final decision should lie in the hands of an independent and impartial panel or appellate tribunal, which should decide on the existence of misbehaviour in the given case. So as to avoid any selectivity in the composition of that panel, it may be decided that, when retiring, judges are automatically enrolled to serve as members of the impeachment panel or appellate tribunal.
- 112. All disciplinary proceedings should be conducted in a way that respects due process and allows for an independent review of the decisions made. The specific causes triggering misconduct and the corresponding sanctions, which must be proportionate and adequate, as well as the procedures to follow, should be established in law. The creation of a special disciplinary panel, whose independence and impartiality must be ensured, should be seriously considered.
- 113. A code of conduct for judges, in line with international standards such as the Bangalore Principles of Judicial Conduct, should be adopted in consultation with members of the judiciary; its drafting should be entrusted to an independent panel composed of both retired and sitting judges, lawyers and academic experts.

114. The appointment of the Attorney-General should be clearly set out in law and include objective selection criteria to ensure the transparency of the procedure and the credibility and independence of the office.

- 115. The process for appointing State counsels should be reviewed to increase its transparency and impartiality and should include objective evaluation criteria.
- 116. The legality of investigations should be closely monitored through effective judicial oversight.
- 117. The Attorney-General should issue clear and proper guidelines for the investigation of crimes and the prosecution of perpetrators, including victim-oriented protocols that respect women's and children's rights. Specific guidelines should be developed for the effective investigation of gross violations of international human rights law and serious violations of international humanitarian law and for the prosecution of perpetrators of such crimes.
- 118. The Attorney-General's department should be supervising the investigation of crimes tried before the high courts.
- 119. Both police officers and State counsels should be adequately trained to discharge their functions; training sessions should include specialized training in human rights, including on integrating gender perspectives into their work, as well as technical training.
- 120. A specific code of conduct for State counsels, in line with international standards such as the Guidelines on the Role of Prosecutors, should be urgently developed.
- 121. Urgent measures should be taken to reduce delays in the investigation of crimes and the indictment of alleged offenders.
- 122. Measures to decentralize the work of the Attorney-General's department should be encouraged and be taken in consultation with all parties involved in criminal prosecutions.
- 123. Serious consideration should be given to reviewing the roles and powers of the Attorney-General with a view to reinforcing the independence of that office and reducing conflicts of interest.

- 124. An independent special office should be established to handle the prosecution of State officials.
- 125. Urgent measures should be taken to allow people from different sectors of society to be part of the justice system and to have access to it; those measures could include the following: reviewing recruitment, selection and appointment procedures, including evaluation criteria; making language requirements mandatory for certain positions; considering language abilities when filling positions in mostly Tamil-speaking areas; identifying barriers preventing minorities from reaching positions in the justice system and devising strategies to overcome them; and ensuring adequate access to secondary and university education.
- 126. Qualified and high-quality interpretation and translation services should be made available in every court and at all stages of judicial proceedings; police forces should also have access to quality interpretation and translation.
- 127. Sri Lanka should set up and implement a plan of action to improve women's representation in all legal professions, ensuring in particular the equal representation of women at all levels of the justice system.
- 128. The independence of lawyers, and the vital role lawyers play in upholding the rule of law and promoting and protecting human rights, should be recognized in law.
- 129. The procedures for the admission, enrolment and discipline of attorneys-at-law should be revised in consultation with lawyers and representatives of the Bar Association, which should oversee the authorization to practise law and the enforcement of disciplinary measures. Any decision should be reviewed by an independent court. Disciplinary proceedings, including disbarment, should provide for all guarantees of fairness and due process, including the right to an independent review.
- 130. Any threats to or attacks against lawyers, or any improper interference in their work, should be promptly investigated and sanctioned. The authorities should also ensure the security of lawyers and their families.
- 131. All those participating in the justice system must be adequately educated and trained. Education and training on human

rights should be mandatory. There should also be opportunities for continuing education and on-the-job training.

- 132. Law curricula should include mandatory courses on international human rights law, including gender perspectives and women's rights, international humanitarian law and international criminal law.
- 133. Legislation should be urgently amended to allow every person arrested or detained to have access to a lawyer of his or her choice from the moment of arrest and every person arrested or detained should be immediately informed of that right and of the avenues available in case he or she cannot afford to pay for a lawyer. The right to have access to a lawyer from the moment of arrest should also be enshrined in the Constitution.
- 134. The Prevention of Terrorism Act should be immediately repealed; any replacing legislation, if at all necessary, should fully respect international human rights law and standards.
- 135. The authorities should study the backlog of tribunals and analyse the causes of judicial delays to design a comprehensive plan to improve the efficiency of the administration of justice without encroaching on the interests of justice. The design and implementation of any measures should be done in consultation with all stakeholders, in particular, judges, lawyers and State counsels.
- 136. The practice of plea bargaining should be clearly regulated in legislation. Defendants should never be pressured into pleading guilty and should be informed in a language they understand of all the consequences and implications of pleading guilty.
- 137. Legislation should be enacted to define a clear and precise scope and application for the offence of contempt of court, identifying behaviours constituting contempt of court and setting up a procedure to deal with such cases.
- 138. The Supreme Court should also sit in other parts of the country, including in the Northern and Eastern Provinces, to facilitate access to justice and raise the awareness of judges to the specific situation of people in regions outside of the capital, and contribute to building trust in the justice system.

- 139. The authorities must adopt special measures to ensure that persons in particularly vulnerable situations, such as children, people living in remote areas and victims of sexual violence, have meaningful access to the justice system and other complaint procedures; such measures include the provision of qualified legal aid.
- 140. The work of the Legal Aid Commission should be duly acknowledged and supported, including through the allocation of additional resources.
- 141. The high courts should be entrusted with the power to receive applications related to violations of fundamental rights; the time limit to file an application should be extended and an appeal procedure set up.
- 142. The Human Rights Commission must be supported at the highest levels and receive additional human and financial resources in order to strengthen and expand its activities, reform its methods of work and adequately train its staff.
- 143. The victim and witness protection mechanism should be urgently reviewed and its independence strengthened so as to provide meaningful protection.
- 144. Comprehensive measures should be urgently adopted to address impunity. Those measures should not be limited to the transitional justice context but should be aimed at the whole justice chain.
- 145. The authorities should take concrete measures to implement Human Rights Council resolution 30/1 and the recommendations contained in the report of the Office of the United Nations High Commissioner for Human Rights on its investigation on Sri Lanka, in particular those related to fighting impunity and ratifying the Rome Statute of the International Criminal Court.
- 146. The independence, impartiality, competence and credibility of the special judicial mechanism envisaged as part of the different transitional justice measures, including the prosecution and investigation sides of the mechanism, should be ensured.
- 147. The constitutional reform process should be continued in a transparent manner; relevant stakeholders should remain involved and the public should be kept informed at all stages.

APPENDIX 3

30 May 2017

A Statement by the Asian Human Rights Commission

SRI LANKA: A letter to the public from a retired judge

I am writing this to the public as a judge who has presided over the affairs of the public for 16 years as a Magistrate and as a District Court Judge. For all those 16 years, my record has been impeccable.

I want to bring to the notice of the public that, due to a certain judgment I gave as a District Court Judge in a civil dispute, which I did to the best of my ability and purely on the basis of the principles of law and justice - all of which I was appointed to uphold -, I have come to a very serious difficulty.

The judgment in this case, which I gave in favour of the defendant, seems to have offended one of the witnesses, who happens to be a Senior Legal Counsel and, to my knowledge, a relative of the former Chief Justice Mohan Peiris. The day I delivered the judgment, it was reported to me by court staff that this gentleman had openly said that he will see to it 'that I will lose my position as a Judge'.

A month or so later, I was called upon by the Chief Justice and he demanded that I resign from my position. I told him that no charge had been made against me and that there had been no inquiry, and that therefore the proper procedure would be to conduct such an inquiry into any claims before making an appropriate decision. In response, I was talked down to in humiliating language and threatened with losing my position.

Several months later, I was called upon by the Bribery Commission and was asked to submit details of all my income and assets. I did that immediately, by way of affidavits, and also provided the necessary references. To this date, the Bribery Commission has not informed me that any of the information I have so provided is incorrect or inadequate.

I understand that this inquiry was begun on the basis of an anonymous complaint. I do not know the name or any other details of the complainant, and therefore, I am unable to say what may have motivated such a person and what my relationship to that person could be.

With the beginning of the inquiry, the incremental salary increases given to me in my position as a judge were stopped. I wrote to the Judicial Services Commission giving them all the details, and also wrote to the Bribery Commission and asked them for an inquiry and an immediate exoneration. This was important to me for many reasons. My position, which could have been elevated to the High Court, was affected by this inquiry and, therefore, I had to retire without the usual promotions that were due to me as to any other Judge in the service.

I constantly requested the Bribery Commission and the Judicial Services Commission to bring this matter to an end, either by way of declaring me exonerated, which I know and believe is my due, or otherwise to indict me so that I will be able to prove my innocence in a court of law.

After five years of pleading without any positive result, I filed a Fundamental Rights Application before the Supreme Court of Sri Lanka, and asked for an inquiry on the basis of Article 126 of the Sri Lankan Constitution. This, after all, is the final resort that any citizen, be he a judge or any other person, has.

I was fully aware of the risks involved in filing a fundamental rights case. I knew that it could have dangerous results. I am aware of many people who have been exposed to serious threats and violence by the respondents in some of these cases. In one case, while a fundamental rights petition filed by a young man was being heard, he, his father and his mother were all made to disappear.

My case was called by the Supreme Court on a few occasions. The Respondents purposefully sought dates to obtain advice from the Attorney General.

No objections to my Petition have been filed and none of the facts that I have relied upon have been contradicted by my opponents.

Several months later, I heard that an indictment had been filed against me, although it has not yet been served on me. I don't know what the charges could be. All that I know is that some charges are reported to have been filed.

My position is that this has been done for one purpose: as a counter action against the Fundamental Rights application that I have filed in the Supreme Court

I believe that the Respondents want to use this indictment in order either to get me to withdraw the Fundamental Rights application that I have made or to delay the hearing of the Fundamental Rights application on the basis that there is a criminal action against me and that the criminal action should be heard first before the Fundamental Rights application.

There is no legal basis at all to delay the Fundamental Rights application simply because a criminal action is pending. In law, the two are very separate types of actions and the matters that the courts have to decide are based on different legal criteria.

One issue is about whether a fundamental rights violation has taken place and the other is about whether a crime has been committed.

I am aware of several judgements that were delivered while criminal actions were pending. If need be, I could give the details of such judgments. However, I am aware that, particularly at the time when Chief Justice Sarath Silva was presiding, there were many cases that were postponed until a criminal trial was held and a few such cases have been pending in the Supreme Court for over ten years because criminal actions, once started, are subjected to the normal delays that are a part of our legal system, and that includes the delays in the appeals and the re-trials. Again, I am able to give details of such cases if it is required.

Therefore, my plea to all, to the judiciary as well as to the public, is to ensure that I will have the benefit of a speedy trial and a speedy hearing of the Fundamental Rights application.

The Fundamental Rights application should be heard irrespective of any issues that may arise in the criminal case, and the criminal case itself should be heard as speedily as possible. I am aware that the greatest trap that an innocent man could be placed in is to have a fabricated criminal charge filed against him. It makes him a victim of a lengthy trial for may many years to come. It could be ten years or even more, judging by many cases, which I am able to cite.

Therefore, I am bringing to the notice of the public that I, having myself been a judge, have been exposed to one of the gravest problems that any citizen could be exposed to.

I am also letting the public know that when the criminal case is before the courts I will demand a trial by a jury, which is one way of ensuring a day-to-day trial, and that will speed up the trial process.

As a citizen and a judge with a long record of service, I must tell you that there are some things that I am unable to fight:

A. I am unable to fight prolonged delays in a criminal trial
This is a way to destroy a man, his family and everything he stands
for, and to irreparably stain his reputation.

I will be helpless in this situation and the denial of justice in this manner is something that, even as a former judge, I know I am simply unable to fight.

B. I also want to inform the public that, from what the law says about equality of arms, I am not in a position to match the powerful people who are trying to victimise me.

Therefore, my plea to the judiciary, the judges who were my fellow colleagues in these long years, to the legal profession and the Bar association, and to the public in general, is this: please do not ignore this as one individual's problem; this is a problem that affects the very nature of the justice system we have and the way injustice is perpetrated through our system.

I would therefore urge all of you to ensure that the criminal trial that has been initiated against me be held as speedily as possible in the coming few months and that the Fundamental Rights application that I have filed should be heard without any kind of obstruction based on the criminal trial or otherwise.

While I am making this plea for myself, I am also aware that the outcome could be of great use to the public in general.

It is time that we fight against the abuse of the justice system to perpetrate injustice.

Yours truly,

B.F.R.Somasighe former District Court Judge and Magistrate

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TORTURE: AN ENTRENCHED PART OF

CRUEL, INHUMAN & DEGRADING

LEGAL SYSTEMS



It is important to understand the gravity and nature of the wrongs people suffer under dysfunctional legal systems. For example, in one of the cases, a man went to the Supreme Court to complain about being tortured by the police. The court, having examined the facts, allowed him leave to proceed with the case. The alleged perpetrators were taken to court to answer the allegations. During this time, as the police had filed a fabricated case against him, the man was required to go to the police station on certain days to sign in as a bail requirement. As he was afraid to go, he asked his mother to accompany him. One day, they did not return from their visit to the police station. Having waited for many hours, his father, a vegetable seller, went to the police station looking for him. He did not return either.

All three are counted among the large number of people who suffered enforced disappearance during that period. The court noted these incidents when they made their final judgment on the original complaint of torture. The court also held that the police officers had in fact committed torture. Despite the court order, the police officers continued to work in their positions and, later, even received promotions. Despite the disappearances being noted by the Supreme Court itself, no action was taken to investigate them.



