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# Sri Lanka's Dysfunctional Criminal Justice System



Edited by  
Jasmine Joseph



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Asian Human Rights Commission 2007

ISBN 13: 978-962-8314-33-1

Published by  
Asian Human Rights Commission (AHRC)  
19th Floor, Go-Up Commercial Building  
998 Canton Road, Mongkok, Kowloon  
Hong Kong, China  
Telephone: +(852) 2698-6339  
Fax: +(852) 2698-6367  
E-mail: [ahrchk@ahrchk.net](mailto:ahrchk@ahrchk.net)  
Web: [www.ahrchk.net](http://www.ahrchk.net)

Printed by  
Clear-Cut Publishing & Printing Co.  
A1, 20/F, Fortune Factory Building  
40 Lee Chung Street, Chai Wan  
Hong Kong

The cover page photograph is of the funeral of the family, who were massacred at Delgoda on the 25<sup>th</sup> May, 2007. This family massacre, which included the killing of two children over an alleged land dispute, shocked the whole nation. The identity of the killers remains unknown. Although two persons were arrested they too were killed while in police custody supposedly, according to the police, while trying to escape, which is a common excuse used after deaths in custody. A mob brought from outside the area by a leading politician burned the family's house and those of the neighbours on either side, thereby destroying vital evidence. Many similar massacres of families have occurred in Sri Lanka recently.

*Photo courtesy of Ravaya, a weekly newspaper.*

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# Introduction

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**T**his book is set in the milieu of a dysfunctional legal system, in a failing, if not already failed state. It contains four articles written by Kishali Pinto Jayawardena and Basil Fernando. The focus of this book is Sri Lanka and its appalling legal system. These articles attempt to portray the picture of contemporary Sri Lanka from the stand points of the activist, the academic and the citizen.

Consecutively for two years, Sri Lanka has been ranked 25<sup>th</sup> in the failed state index.<sup>1</sup> Incidents of disappearances, extra judicial killings, endemic torture, a dysfunctional criminal investigation structure, and a disreputable legal system among other things have contributed to this disgraceful position of a nation. Philip Alston, in his report to the Economic and Social Council<sup>2</sup> of the United Nations mentions the existence of severe police brutality and impunity. Civil society groups have been relentlessly in voicing their concern in national and international fora on the deplorable human rights situation in Sri Lanka for a long time now.<sup>3</sup> The pearl of the Indian Ocean is now the teardrop of Asia.

Sri Lanka found its independence in 1948 after a long period of colonisation by the Portuguese, the Dutch and the British. The inception of the nation was as a Dominion in the Commonwealth of Nations, with a parliamentary form of government under the 1946 Soulbury Constitution. Sri Lanka adopted a new Constitution in 1972 establishing a unicameral National State Assembly. The Constitution underwent a severe overhaul in 1978 which tilted its power balance towards the Executive President and there was a further change in 2000. The dateline of its political history is also one of upheavals.

The legal system of Sri Lanka though a blend of many, the focal area of this book which is the criminal justice system, is based largely on the British principles. It has undergone drastic changes over the years. Analogous to the concentration of power on the Executive President, to an extent of being above the law in the Constitutional sphere, the police, paramilitary and military began to get extended powers, so also the judiciary in the Sri Lankan legal system. The changes were made on the grounds of insurgency, emergency and contingencies. These were made at the cost of civil liberties and human rights.

## A Dysfunctional State

The failed state concept in international law is based on territorial, political and functional aspects.<sup>4</sup> The general perception about a failed state is attached with factors such as: disintegration of state institutions and law and order, non functional governance and

deplorable human rights violations. The appalling human rights abuses could be seen as a result of the failure of the first two. The people in such a territory live sans governance, though there may be a government or perceived positions of power within the geographical location. The margin between a failed state and a dysfunctional state is often hazy.

To deem a nation as functional, one of the key criteria is the level of protection of human rights. Most nations are eager to vouch for respect of human rights within their territories. Human rights has developed its own politics in that countries manipulate the destiny of others on the footing of human rights. That war is fought for the protection of human rights, may sound like an anomaly though. The Rome statute, defines crimes against humanity as acts committed as a part of widespread or systematic attacks against any civilian population.<sup>5</sup> The definition gathers importance on the fact that humanitarian crisis is a fit reason for international intervention. Even trade sanctions could be based on the human rights performance.<sup>6</sup> A tally of the presence of the acts mentioned in Article 7 vis-à-vis contemporary Sri Lanka will prove where it stands on the human rights scale.

A state that functions is expected to have bodies and institutions that work within the framework of accepted principles of law and have a legal system where rule of law prevails. Such states may not be the epitome of human rights principles and practices but have a system for the establishment and enforcement of human rights, with forums for redress. A dysfunctional state on the other hand lacks institutions and processes for securing even the basic minimum of rights. There may exist a façade of government, but it is incapable of protecting rights, and at times becomes a perpetrator or protector of perpetrators.

The distinctive point is not, having a government or no government, but how people live within that geographical territory. The situation of human dignity is the key aspect. In a functional state, people largely have faith in the system and feel secure, whereas in a dysfunctional state they live in a state of fear from every quarter including the government itself. In a functional state people have forums to approach on violations, whereas in a dysfunctional state there is either none or the ones they have are ineffective. The next major test is the presence of the Constitution. The issue is how the rights embodied in the Constitution are treated and how much control the constitutional provisions exercise over the functioning of the state.<sup>7</sup> In most of the dysfunctional states, one may find a failed Constitution as well. The adjective, supreme law, for the Constitution is a misnomer in such states.

## **Legal System in a Dysfunctional State**

In a dysfunctional state, the major casualty will be the legal system. To qualify as a nation, within political connotation, it requires certain constituents. Nationalism, sovereignty, political legitimacy, citizenship and external recognition are some of them. The legal legitimacy of a country like Sri Lanka comes from the legal authority of principles, laws and processes which are clear and present in the form of a Constitution or authenticated by the Constitution. The implication of such legitimacy is a legal system based on accepted



principles of law. In modern nation-states, the cardinal principle of a legal system is the rule of law. The legitimacy of a nation prevails until it functions within the accepted norms and laws. This in no means suggest that laws should be static. Laws may change but it should be through a legitimate process and should be relatively stable.

The functions of a legal system in a country are manifold. Dispute resolution, punishing and dissuading wrongful conduct, checking abuse of power, facilitation of individual rights, policy making are some. The legal system is the bulwark of every society. Modern societies, therefore, inherits or develops a legal system that best suits its needs and aspirations. The complex history of the development of the legal system of Sri Lanka, having principles from Roman-Dutch law with an infusion of English law principles, made it a fusion of many. Legal historian, Tambiah Nadaraja remarks that "...the residuary general law of modern [Sri Lanka] is a new body of law, neither pure Civil Law nor pure Common Law ... [which is] forged on the anvil of contemporary life out of materials mainly derived from the Roman-Dutch and English Law..."<sup>8</sup>

The failure of the legal system of a nation will have far reaching effects starting from the basic legitimacy issue to the disruption of the day to day life of citizens. The legal system of Sri Lanka has been volatile from the very beginning. The hybrid system created more ambiguity than clarity. Delays in the administration of justice, deficient record maintenance, nepotism, corruption and lack of competence have marred the judiciary. Lack of focus for legal reform,<sup>9</sup> sidelining of Constitutional checks and balances,<sup>10</sup> sabotage of the Constitutional mandates,<sup>11</sup> and emergency legislations have taken their toll on the Sri Lankan legal system making it dysfunctional. The present scenario of the Sri Lankan legal system has been summarized by Kritzer as below:

Over the years, the successive governments in Sri Lanka have enacted more laws and regulations without making fundamental assessment as to the appropriateness of the existing laws, the perceived needs, and political direction for law reform ... Due to piecemeal and patchwork reforms, the statutory framework has become increasingly more complex and uncertain ... [A]d hoc solutions are imposed rather than the well-structured and balanced long- term responses ...<sup>12</sup>

This is about the structural format of law, whereas on the implementation aspect the picture is grimmer denoting a dysfunctional legal system.

The works in this book are a perception about the dysfunctional legal system of Sri Lanka. They point out the past, the present and ventilate worries about the future. The major concern expressed is about the failure of the rule of law. The fault line in the legal system by disregarding the principles of rule of law, it is argued in this book, has reduced the Sri Lankan legal system to a dysfunctional state. The second article in this book is a testimony of how life is in a dysfunctional state. It conducts an inquiry into the reasons and points out the future path. The first article is the demonstration of strategies to remedy the situation.

## **Attrition of Rule of Law**

Rule of law is one of the virtues of a legal system and is a benchmark.<sup>13</sup> It is considered as the pillar of democracy, human rights and economic development.<sup>14</sup> Observation of rule of law is the central notion that attributes legitimacy and secure trust and confidence in the government of a nation. Some nations have clearly incorporated adherence to rule of law as a part of its constitutional text.<sup>15</sup> Many others have integrated it as the basic principle of its legal system.

At the core of rule of law are few principles that; laws should be prospective, open and clear, laws should be relatively stable, fair trial, independence of judiciary, equal status to all before law, actions of the government to be based on law, discretion of the crime preventing agencies should not be perverted. The list is not exhaustive. With the discussion about the 'thick and thin rule of law'<sup>16</sup> the scope of this list is vast. Rule of law mandates that government shall rule by law and be ruled by it. This is a limiting function of the rule of law and as a corollary, the protector of individual freedom. Central to rule of law are some institutions; Legislature, Judiciary and Constitution.

A cross check of these institutions in Sri Lanka brings out an unpromising result. The concentration of power on the Executive President makes the legislature ineffective. The immunity of the President makes him beyond the reach of judiciary. A crippled judicial review makes the courts ineffective and in turn the Constitution is impaired. The situation of emergency makes the executive overtly powerful. The authors in this book asserts that if rule of law is about taming power, what Sri Lanka witness is the naked abuse of power concentrated in the hands of the executive.

An analysis of contemporary Sri Lanka, a propos rule of law, will be dismal. The heavy toll of this is on human rights. People are forced to live under unclear, unstable and sometimes retrospective laws. Fair trial is a mirage, independence of judiciary a casualty at the hands of brandishing executive. The immunity of the President places him above law. The case narratives in this book suggest that the crime prevention agencies are nothing but perverted. Law, here fails to be the limiting factor, but becomes the annihilator of rights, even by the judiciary.<sup>17</sup> Both Basil and Kishali by their works have reiterated the failure and portrayed the dismal future of Sri Lanka with the existing disregard for rule of law.

## **Vibe of the Legal Culture**

Every society has its legal culture.<sup>18</sup> It indicates the interface between people and law as well as legal institutions. Friedman articulates legal culture as a part of the general culture of the society: 'customs opinions ways of doing and thinking, which bend social forces toward or away from law and its particular ways.'<sup>19</sup> The legal culture of a society consists of attitudes, values, and opinions held in society, with regard to law and its various parts.<sup>20</sup> It is the legal culture that determines people's approach towards the legal system and institutions, when and why they use it or they don't.

Legal culture has two aspects, internal and external. The internal is formed by the legal professionals and the external is structured by commonplace people who interact directly or indirectly with law and its institutions. People develop notions about law and legal institutions through experiences and observations. This need not always be a conscientious effort. A functioning legal system is capable of instilling faith and a dysfunctional one the opposite. It is experiences that bend people towards or away from legal system.

The experience of an average citizen of Sri Lanka as depicted by the authors of this book is giving a vibe of a legal culture wherein people are alienated from the dysfunctional. The classic case is the position of Constitution in the society. Constitution still may be the supreme document of the nation in the legal vocabulary but its presence is not felt in the society. The erosion of the presence of the Constitution in a society will have far reaching adverse impact on the legal culture of a nation.

For an average person in a country like Sri Lanka the symbol of government and governance is the police. Police have a visible and powerful presence. It even could be the icon of law for many. In Sri Lanka, with endemic torture by the police, the image of police is disfigured by fear. This impression is not out place when 42.7% of the police officers agree that it is permissible to violate human rights to some extent while dealing with an accused and 59.2 % strongly and 24.2% somewhat agree that it is more important to protect society than to protect the human rights of the perpetrators of crime.<sup>21</sup> It is pointed out that “In addition [to] discriminatory treatment; inaction, arbitrary arrest and detention and other harassment is also routinely practised by the members of the Police Department”<sup>22</sup> The report of the Transparency International points out that the public perception about police have hit an all time low in Sri Lanka and it quotes the National Human Rights Commission’s opinion that withdrawal of support by the people to the police due to the loss of confidence in the police as the greatest obstacle in crime prevention.<sup>23</sup>

## **The Book**

The disquiet and angst of the general public in Sri Lanka is aired in this book. The first article is a study about the processes and strategies of preventing torture in Sri Lanka as it is titled. Past works of Basil Fernando has established the existence of insidious torture in Sri Lanka. For skeptics, the cases referred to by Kishali Jayawardena in her article corroborate the assumptive position taken by Basil. The perceived democracy in Sri Lanka is demystified by Basil suggesting that the challenge to democracy begins from the Constitution itself. The author bases this article on the experience of working with the Asian Human Rights Commission and its network organizations in Sri Lanka.

Author has taken certain definitive enquiry points. This article studies the practice of torture from human and institutional stand points and suggests reform measures. The pre-determined components like victim, perpetrator, police, prosecution, judiciary, constitutional bodies, the U.N and media are individually studied with reference to their

interface with torture. The analysis and evaluation is done with a futuristic vision to serve as roadmap for those who work on the same issues.

This article describes the components constituent parts while working on torture, explains the processes, documentation, and the strategies employed to tackle it. To cite an example, the treatment given to the component, perpetrator begins with the philosophy of importance knowing the adversary. It gives an inclusive understanding of who the perpetrator is and then places it in perspective. Further explains the processes of addressing the perpetrator, conducting of further enquiries, collecting documents from the perpetrator through legal methods, employment of legal professionals etc. The strategy of confronting the perpetrator with the documents generated and the study of documents to evolve schemes to address the issue gives the rationale behind the process employed.

The author sums up the descriptive part with his observation about each component and concludes by pointing out certain inherent short comings in the system which needs urgent consideration. Basil agrees on the necessity of developing a theoretical foundation to back up the volumes of information and experiences thus far for a meaningful discussion and way out and suggests that issue of torture should be connected with fundamental problems relating to the rule of law and the development of democratic institutions.

The second article by Kishali Pinto Jayawardane is a perspective from a practical stand point. The author studies and analyses the campaigns of past few years against torture. The failure of rule of law and subverted justice in Sri Lanka is her theme. The author traces the constitutional history to argue that the changes in the Constitution only helped abuse of human rights, non accountability and erosion of public confidence in governance. Kishali points out how a subverted Constitution could facilitate failure of justice. She juxtapose the hitherto thought stream of failure of constitutionalism to safeguard the ethnic minorities and the bankruptcy of the Constitution to ensure a multi-ethnic polity with the agenda of a discourse, centered around more primary questions about the failure of justice, human rights and in particular - the failure of law enforcement.

The author takes a controversial stand point that the discourses of politics and justice need to be separated, as they are distinct, though related. Stress the need to be away from the tautological generalizations of one influencing the other. Predominance is attributed to a discourse that is more akin to justice, which for her, is absent in Sri Lanka.

The argument is that the preoccupation on minority rights and the ethnic conflict 'only' has generated a parochial approach neglecting more significant inquiry about the fundamental problems of human rights of the citizens. Though seemingly ranking priorities, this by no means belittle the rights of the minorities.

The author attempts to debunk the conception of democracy as a great leveler and embodiment of justice. Highlight at a later point, how, despite laws, state become the commonplace violator and in what way the culture of violence is sustained. She sifts

through the constitutional oversight of deriding practices of governance and the despotism of successive political parties in power. Calls attention to the lack of social audit and pinpoints the futility of most of the commissions appointed to remedy and reform. Like Basil, Kishali also points out the betrayal of the Executive President of the well meant 17<sup>th</sup> amendment.

At a later stage, the author uses the documentation generated by the Asian Human Rights Commission and its partner organization to expose the failure of rule of law and other issues related to legal system of a nation. The article is concluded by taking a position that the reform process in Sri Lanka need to return to basics, of restoring legitimacy of justice system. This article is augmenting the premise taken by Basil in his first article about the dysfunctional legal system.

In the third article, Basil Fernando narrows down attention to police reform initiatives. Interestingly, the premise taken is that reform efforts call for a discourse of fundamental issues like the nature of political system within which policing system operates. After giving a historical understanding of the past commissions, discussion moves on to the more recent, the 17<sup>th</sup> amendment to the Constitution. Within the police system, the author highlights certain areas that require special attention within a reform process.

The conditions precedent for a reform programme is given in this work. Author argues that time had passed that cosmetic changes like introduction of forensic science could save the system and reiterates that the discussions about police reform should concentrate more on the factors that contribute to making systems dysfunctional. It is said that a system that is fundamentally flawed need reconstruction not refurbishment and he suggest that this demands a culture of rights and competence.

The last article in the series is consideration about the fate of legal systems constantly exposed to adverse conditions. This search is done in the backdrop of Sri Lanka. Clues from physical world are used to draw parallels in legal realm. Basil tries to establish how constant adverse actions by the governments is capable of endangering a legal system. He makes his case by pointing out the 'constitutional frauds' played by the Sri Lankan Governments and the deterioration of the significance of the document. The essay is concluded by stating the interconnection between different elements in society, law and institutions and how decay in one will eventually lead to a collapse of all others.

## **The Relevance of this Book**

The contents of the book are a gaze into the present-day situation of Sri Lanka. The contributors of the book is placing certain agenda for the future. Common in both is the call to go back to the fundamentals. The authors agree on the point that there is nothing left to salvage, but is to recreate.

In one article, the author look for developing a theoretical foundation to further meaningful discussions for prevention of torture and establishment of a legal culture with rule of law. In the other it is remarked that much niceties had already been done to theories and it time to concentrate on praxis. Neither suggests one in exclusion of the other. This outwardly contradicting positions but is the unifying place of activists, academics and the practitioners. To serve the ends of justice, the existing perceived distance between the three has to be bridged.

*Jasmine Joseph*

The West Bengal National University of Juridical Sciences  
Kolkata, India

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- 1 The nonprofit organization Fund for Peace and the Foreign Policy Magazine has been publishing a ranking of failed state based on certain indicia since 2005. Sri Lanka is ranked 25th in 2006 and 2007. The rank list is available at <<http://www.fundforpeace.org/programs/fsi/fsindex2006.php>>, <[http://www.foreignpolicy.com/story/cms.php?story\\_id=3865&page=7](http://www.foreignpolicy.com/story/cms.php?story_id=3865&page=7)>
  - 2 E/CN.4/2006/53/Add.5 27 March 2006
  - 3 See generally, Human Rights Watch, Amnesty International and Asian Human Rights Commission
  - 4 Daniel Thürer, *The Failed State and International Law*, at <<http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JQ6U>>
  - 5 Article 7- 1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or physical health.
  - 6 For example the U.S ban of imports in Burma and allied sanctions as a measure to promote democracy and human rights in Burma in 2003. For a discussion on the issue, see Carlos Manuel Viquez, 2003. ‘Trade Sanctions And Human Rights - Past, Present, And Future’, *Journal of International Economic Law*, 2003 vol. 6 (4) pp 797-839.
  - 7 For example, the immunity of the Executive President of Sri Lanka. The provision (Article 35) as well as judicial interpretation provide a blanket immunity for the actions of the President.
  - 8 As quoted in Herbert M. Kritzer ( ed.), *Legal Systems of the World A Political, Social and Cultural Encyclopedia*, Vol. IV (ABC- CLIO, 2002), pp. 1528-1529

- 9 Id., p. 1531
- 10 The blanket immunity of the Executive President and extremely restrictive judicial review could be cited as examples.
- 11 The non implementation of the 17th amendment which clearly directs for the constitution of certain apex bodies to serve the particular interest of the power centre is an indicator.
- 12 Supra note, 8 Id.
- 13 Joseph Raz, 'Rule of Law and its Virtue', in Robert L. Cunningham (ed.), *Liberty and the Rule of Law* (Texas A&M University Press, London, 1979), p.4. Raz considers rule of law as having a negative value, designed to minimize the harm to freedom and dignity which law may cause and affirms that it should not be the goal.
- 14 Randall Peerenboom, 'Varieties of Rule of Law An Introduction and Provisional Conclusion', in Randall Peerenboom (ed.), *Asian Discourses of Rule of Law Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S* (Routledge, 2004), pp. 1-56
- 15 Article 1(c) of the South African Constitution, Article 5 of the Constitution of Switzerland.
- 16 For a discussion, see, Cheryl Saunders and Katherine Le Roy, 'Perspectives on the Rule of Law', in Cheryl Saunders and Katherine Le Roy (eds.), *The Rule of Law* (The Federation Press, 2003), pp. 5-7, also see Randall Peerenboom, Supra note, 14. pp 2-12
- 17 The contempt proceeding against Mr. Antony Michael Immanuel Fernando by the Supreme Court of Sri Lanka – SCFR 55/2003,CCPR/C/83/D/1189. (Jurisprudence)
- 18 Legal Culture refers to the public knowledge of and attitudes and behaviour pattern towards law. See generally, Infra note, 19, pp 13 -32
- 19 Roger Cotterrell, 'The Concept of Legal Culture', in David Nelken (ed.), *Comparing Legal Cultures* (Darmouth, 1997) , p.15
- 20 Ibid.
- 21 Report of the Transparency International Sri Lanka, titled 'IN PURSUIT OF "ABSOLUTE INTEGRITY" Identifying Causes for Police Corruption in Sri Lanka', (2006), p 82, available at <[http://www.tisrilanka.org/ext\\_files/tislpeng.pdf](http://www.tisrilanka.org/ext_files/tislpeng.pdf)>
- 22 Ibid.
- 23 Id., p. 85





# 1

## **A Study about the Processes and Strategies of Prevention of Torture in Sri Lanka**

• *Basil Fernando*

### **Introduction**

This paper begins with a caveat about probable difficulties a reader from developed nations might encounter in understanding certain matters discussed herein.

The general assumption is that persons from developed countries are habituated to the way of life in liberal democratic systems. The histories of development of such democracies may vary, but most developed countries have experience of liberal democracy for at least a few centuries. In contrast, the political system of Sri Lanka never was a liberal democracy as is the case with many other developing and under developed nations. It might not be absolutely right to say that in the political history of Sri Lanka, there never was any attempt to establish a liberal democratic polity, but they were short stints of a few decades. Even during these periods, the liberal democratic set ups were turbulent with many crucial challenges. The situation took a turn for the worst in 1978, when a constitution of an authoritarian model was imposed on the country.

This constitutional configuration has seriously undermined the institutional framework of liberal democracy. The chasm between democratic aspirations of the nation and the rulers' intentions make democratic discourse irrelevant under the present constitutional structure. Added to this, if not as a consequence, internal conflicts have developed in all parts of the country; the south, the north, and the east resulting in large scale disappearances and other forms of gross abuses of human rights.

In this milieu of internal clash, democratic discourse has been conveniently jettisoned and military rule and power became the vanguard. It is within such a context that this study about different aspects relating to the prevention of torture in Sri Lanka has been done. Here, expressions like the police, investigations, prosecutions, and the judiciary are

not accompanied by meanings attached to similar terminology in functioning liberal democracies, but as they exist in Sri Lanka. Understanding this difference is essential for grasping some of the matters discussed below.

## About the Paper

This paper is a study about the processes and strategies of torture prevention employed by the Asian Human Rights Commission (AHRC) and its network in the context of Sri Lanka. The experience of the AHRC, a voluntary organization working in the field of human rights, and a network of organizations in Sri Lanka is being reflected in this paper. The information generated and the knowledge acquired by the AHRC and the network is employed to analyze the problem, study the ramifications, draw conclusions and propose suggestions. This paper is a sketch of the experiences of working on the issue of torture in Sri Lanka. The endeavour is to study the strategies and work pattern adopted by the AHRC and the network groups to combat torture, some of which are specific to Sri Lanka.

## Framework of the Study

**Components:** The focus of work on the issue of torture is on two main components, human and institutional. It may be noted that, sometimes, the institution is nothing but the sum total of humans working within a system. The two major human components are the victims and the perpetrators of torture. The institutions are those charged with investigation, prosecution and adjudgment of torture incidents. The following is the list of components which are the targets of study in this paper.

- a. Victims of torture
- b. Alleged perpetrators of torture
- c. Criminal Investigation Department

*Explanation: Institutions that are required to investigate torture. The focus is on their role in the investigation of torture*

- d. The prosecuting branch

*Explanation: In Sri Lanka, the prosecuting branch is the Attorney General's Department*

- e. Judiciary

*Explanation: Judicial activities relating to torture take place at the Magistrates Courts, the High Courts (where trials under the Convention against Torture, Act No. 22 of 1994 are heard) and the Supreme Court where fundamental rights cases are taken up and where the issue of compensation against torture is decided. Actions can also be taken in civil courts regarding compensation on torture.*

- f. The Human Rights Commission of Sri Lanka (HRCSL) and the National Police Commission (NPC).

*Explanation: Both institutions are national in character*

- g. UN agencies such as the UN Rapporteur against Torture, the CAT Committee, UN Human Rights Committee and others

- h. Media and other avenues available for lobbying both locally and internationally

**Approach:** Each component is specifically studied in the larger canvass of prevention of torture. The regular work pattern of the AHRC and the network involves constant interaction with all the components mentioned earlier. The experiences and observations from this process are always documented, and data about each constituent, at times, is generated. Study and analysis of the components vis-à-vis strategy employed with each is carried out in this paper. The predominant work design employed with these components is maintenance of close contact with relevant persons and institutions together with constant scrutiny.

The documentation is the stepping stone for further actions, for instance: prosecution, judicial intervention, reporting to the U.N agencies and lobbying to fetch results both to the individual victims, and to make differences in the system.

## **Analysis of Components**

### **Victims of Torture**

Maintaining close links with torture victims is the foundation of our work and study. The predicament of each victim may vary, but there are certain essentials every victim might seek. The AHRC is working in tandem with six groups in Sri Lanka, which are located at various regions. They are the primary units where victims approach initially or who locates the victim in need of support. They receive victims, record complaints, assist the victims to lodge complaints with the authorities and in the courts, help with physical and psychological treatment, provide solidarity, extend community based witness protection, and offer humanitarian assistance. Based on the demands of the circumstance, they involve themselves and facilitate many more means to assist the victims in their struggle for legal redress and justice.

**The process:** Victim's experiences are reduced into writing by one of the members of the network, competent to interview and record statements. The persons who record testimonies are trained to look for the essential details as well as to check the veracity of the story by detailed interviews.

Statements are also recorded from witnesses to the incident or other persons aware of the incident and are willing to support the claims. Interviewers have skills to ponder the essentials that make a strong case. The fundamental information includes details of incidents, injuries, places and circumstances in which the incident occurred, details about the identities of perpetrators and whatever actions the victims may have already taken. These vital facts are taken down in the form of statement authenticated by the victim or witness as the case may be.

The next step in the process is to convert these statements into the form of duly signed affidavits. This is done either immediately or within a short time, depending on the availability human resources. To transform the statements of facts into legally amenable affidavits, the assistance and advice of lawyers are sought.

While these activities are in progress, we simultaneously employ the strategy of pressure building, lobbying and intervention from the AHRC centre. The initial information about the torture is communicated to the AHRC's Urgent Appeals (UA) desk in Hong Kong through email or fax within the shortest possible time. This information is then studied in Hong Kong by the UA desk, comprising of persons with specialized knowledge on Sri Lanka. If required, verifications regarding the information sent are done with the sender, as quickly as possible. When the UA desk is satisfied with the authenticity, accuracy and adequacy of the information, the case is prepared and issued as an Urgent Appeal. Such Urgent Appeal's are used to trigger interventions locally and by the United Nations (UN). The same information is also circulated to a much larger audience for lobbying purposes as well as to create perceptions on the issue of torture. This is an activity carried out routinely, round the clock, in the AHRC.

***The strategy:*** The statements reduced into writing are the basic material used by the members of the network for inquiries into the incidents of torture. The advantages of having a record for further work have helped the partners in network to recognize the importance of written statements in the process of torture documentation. The practice of documentation has more than mere statistical value. The persons engaged in these activities are aware that their work has many objectives; the primary one to assist the victims in the legal process, and the second to document torture and related matters for the purposes of inquiries into the issue of prevention of torture. Getting persons motivated to undertake both missions concurrently was a daunting task. Over a period, both skills as well as consciousness about the responsibility have improved.

The initial documents are about factual details of a case, later inputs are about the institutions with which the victims interact and the details of these transactions. Thus, we develop enormous amounts of documentation on what happens at police stations, courts, national institutions and other places where victims attend for legal redress.

On the personal link front, the duration of maintaining close contact with the victims, whose cases we have taken up and study, could vary from one to six years. But from a documentation point of view, a case never ends.

Personal contact is maintained by constant interactions. These interactions could be to meet the requirements of law such as appearances before various inquiring bodies and courts, or solidarity meetings to boost the morale of the victims and their family. Contacts also take place for the purposes of providing psychological or medical assistance.

The documentation is the base material for study and analysis. The documents ranging

from the initial story, to all those generated on the way down for several years, are constantly analyzed with a view to understand the multitude of aspects relating to prevention of torture in Sri Lanka. This analysis is constantly shared with local and international audiences. This is achieved by means of statements, articles, papers, shadow reports submitted to UN bodies and publication of periodicals and books.

### **Alleged Perpetrators of Torture**

Knowing your adversary is imperative for success in any combat. So it is in addressing the issue of torture. The AHRC closely observes and study the perpetrators of torture. We believe that understanding the perpetrator is equally important in fighting the perils of torture, as understanding the victim and the causes of torture. Perpetrators of torture do not exist in a vacuum. Therefore they ought to be studied in context. In state sponsored torture, it is all the more relevant. This requires profiling of the person and the system in which she/he functions. Consequently, the next component of focus is the perpetrators of torture.

***The process:*** The initial information about the perpetrators is gathered from the individual cases of torture. The victims and their families provide a certain amount of basic information about the perpetrator(s). The information thus received is used by the network groups to address the authorities about the incidents of torture and demand justice. The network often receives replies from official sources as a result of their interventions. Such communications usually include statements from the perpetrator(s) and may also contain copies of documents in their custody. More often than not the reason for such statements and documents is to deny allegations against them.

Victims and witnesses are further addressed with the content of the statement and documents from the perpetrator. This exercise is done to generate counter evidence to challenge the version of the perpetrators.

The documents from the perpetrators together with the information gathered by the interviewer from the victim and family help us to build the profile of perpetrator(s). In consultation with lawyers, we demand more documents from official sources and compile them for prosecution, study and analysis. These processes help us to generate a fair amount of material for cross checking and comparative study.

***The strategy:*** Though the content of the replies from official sources most often are in the tones of denial, it is critical material to understand how the system works. It also enlightens us about the structure and accountability pattern of the system or reveals the utter lack of the same.

Beyond this, in the long run, such documentation aides us to check the veracity of the official claims from victims and be resourceful for prosecution. The earlier mentioned practice of further communication with the victims about the official version helps us to

anticipate the strategies at the time of prosecution. More importantly, lawyers of victims get the opportunity to request further documents and in this process a great deal of material becomes available, not only regarding the particular case but also about the whole system. This also gives us the opportunity to compare materials collected about perpetrators in different cases.

The study of the perpetrators is not limited to the direct elements, *i.e.* those who have actually participated in the act of torture. It includes those who bear command responsibility by virtue of being in a superior position. This necessitates gathering documents like departmental orders and other materials concerning how superiors keep control over subordinate officers.

In the course of such studies, we gather a large amount of materials of consequence. They are generally about problems relating to command responsibility, internal critiques, documentation on government commissions and committees, and also testimonies of officers who are unhappy about the manner in which the system works.

### **Institutions Investigating Torture**

The alleged act of torture is expected to be inquired into for meeting the ends of justice. The agencies that investigate offences of torture are mainly four in Sri Lanka. The latest one is the Special Inquiry Unit (SIU). This is a specialised unit within the Criminal Investigation Department to inquire into incidents of torture. It is worth mentioning here that the SIU is an outcome of the interventions of the UN Rapporteur against Torture. The office of the UN Rapporteur sought explanations from the Government of Sri Lanka as a state party on cases of torture, most of which had been submitted by the AHRC network since 2002. As an upshot of this and many other interventions, the government mobilized this special unit to investigate allegations of torture under the CAT Act (Act No. 22 of 1994). It is officially claimed that so far over sixty cases have been filed in the High Courts of Sri Lanka regarding police torture against about one hundred officers.

Besides the SIU, investigations are also conducted by senior police officers in charge of specific areas. Often, these investigations are carried out at the area headquarters in different provinces or districts. The two national commissions, namely the Human Rights Commission and National Police Commission, are the other two institutions of relevance here. The process and strategy adopted with these two institutions will be separately dealt at a later point in this paper.

**The process:** The network groups get ample opportunity while they assist the victims to be in direct contact with institutions and officers that investigate torture cases. It was mentioned earlier that the SIU have filed over sixty cases in the High Courts of Sri Lanka. The procedure at the High Court starts with an indictment, which includes all the documentation that the prosecutor will rely upon during the trial. Logically, an indictment is a wealth of information. This includes, the statements collected from the victims and

witnesses, statements from alleged perpetrators and witnesses they rely on, medical reports from doctors, extracts of records from police books, sketches drawn by the police investigators and their investigative notes. In some cases there will also be DNA reports and other forensic reports. The network has collected a large number of indictments which form tremendous resource materials to study about practices of torture in Sri Lanka. Otherwise inaccessibility of many of these documents enhances its significance.

Thus far, the SIU has been about to file indictments in very few cases. This is indicative of the non availability of officers for investigations. These officers are senior in rank and position. The experiences of these persons are highly valuable. We document the experiences of these officers in a systematic manner, for which a research project has already been launched.

The police officers who conduct inquiries into torture, other than those attached with the SIU, is also our target of study. The network uses the opportunity they get while assisting the victim to gather information and generate ideas about the functioning of these officers. In this process we gather departmental circulars and other forms of instructions concerning various matters of discipline in the police and about the disciplinary process.

***The strategy:*** The study and analysis about persons and institutions inquiring into torture is of critical relevance. The strategy adopted to reach this end is twofold. The members of the network group generate data about the process of investigation and officers, through the interaction they have with these institutions and the personnel. Such information is the windfall they gain while working with the victim; it might not always be focused though highly relevant.

The strategy next is to employ a dedicated study about the work of these agencies. The research project earlier mentioned is designed for meeting as many officers as possible. The research team includes a retired senior police officer who would facilitate inquiries with the police officers. They interview the officers on the basis of questionnaires and interview schedules on a range of aspects of their work. Already many facets of investigations into torture have been revealed by this process.

### **The Prosecuting Branch**

The Attorney General's Department is in charge of prosecutions in Sri Lanka. Investigation and prosecution divisions work in mutual exclusivity in Sri Lanka. The Attorney General's office does not exercise any supervisory power over investigations of torture cases conducted by the police department or by the SIU. So is the case with any other criminal investigations by the police. This absence of a supervisory role has been criticized by various persons including some committees headed by officers of the Attorney General's Department itself.

The crucial decision, whether or not to prosecute, is made at the department of Attorney General. The files are expected to be studied and a decision to be made as to whether to drop or proceed with the charge on the basis of existence or otherwise of sufficient evidence. On the decision to proceed, the department drafts the charge sheets and prepares the indictment file, which is to be placed before the High Court.

Some observations may be worthwhile here. The Attorney General's powers to prosecute have so far not been used for prosecuting any officer above the rank of Inspector of Police. There had been glaring incidents where officers higher than that of 'Inspector' were accused of commission of torture. So far they are not indicted. A further remark is that the Attorney General's Department is yet to file an indictment on the basis of command responsibility. Liability on the basis of failures of higher officers is usually not dealt with as matters of criminal liability in Sri Lanka. In the case of Gerald Perera (For details, see *infra*, note 55), the Supreme Court found that the involved Inspector of Police had violated the victim's rights. Initially, this Inspector's name was included in the list of accused in the indictment filed at the High Court by the Attorney General's Department. However, his name was withdrawn by a senior counsel representing the Attorney General's Department on the basis that Inspector's responsibility was vicarious liability falling under the civil law, not amounting to criminal liability.

***The process:*** The network groups pursue cases with the Attorney General's Department often by official communications through the AHRC or by communications on particular cases via lawyers. The documents thus received form part of the treasury of information for analyzing the role of the prosecution branch.

The network engages in public campaigns when the department fails to launch prosecutions, mostly due to obvious reasons. Such campaigns and lobbying put pressure on the department to act, despite their initial negative stand. The experiences of such campaigns are also documented.

***The strategy:*** The basic purpose of engagement with the prosecution department is to put across the point of view of the victim. In the labyrinth of official process at the Attorney General's office, the interest of the victim is often affected. That apart, there are many considerations, political or otherwise that mars the claim of victim for justice through the prosecution wing. The holdup of files that occurs in this office is highly condemnable. This situation warrants close monitoring of the affairs of the prosecution branch.

This is done by constant communication with the concerned office. These communications are done by the AHRC and the network groups. Communication of intentions through mass action is also a strategy which has been thus far favourably employed.

By these involvements, the network is able to gather detailed information about the manner in which the department deals with indictments and prosecutions. Such information is documented and analyzed as part of the overall study on the prevention of torture.



## The Judiciary

Formal legal process relating to torture takes place mainly at three levels. It can be either at the Magistrate's Courts, the High Courts, where trials under the CAT Act takes place or at the Supreme Court where fundamental rights issues are taken up. The issue of compensation against torture is also decided by the Supreme Court.

In conjunction with these or by itself, civil courts could be approached with claims of compensation for torture under the civil jurisdiction. Furthermore, applications can be made to the Court of Appeal by way of Writ Applications on torture related matters.

The network has recourse to all these avenues, and more than hundred cases are pending before either of these courts. A case filed in any of the courts in Sri Lanka is likely to take several years for completion. Many of the cases, that the network has taken an active interest in pursuing, have gone beyond five years. The delay in the system of justice is one of the major problems that prevent proper remedies for human rights abuses including torture. The network is able to study the process of judiciary by a simple method of attending the cases.

**The process:** The ways of law can be bewildering. A victim may be attending more than one court for cases originating from the same incident, but for different offences or purposes. It could be to prosecute in one case and to defend another, which has been set up as a counter case by the police to set off the damage or as a pressure tactic. It could be explained thus. While the Attorney General's Department may file a case against police under the Torture Act, the police may file a fabricated case before the Magistrate's Courts against the victim of torture by making him an accused for theft, or assault on police or any such offences. The fall out being, at the High Court the torture victim appears on behalf of the prosecution to give evidence against the police. At the Magistrate's Court the police will be on the prosecution side trying a case against the torture victim. The victim is compelled to defend a fabricated case to save himself.

Each of these cases in the Magistrate's Court and the High Court are postponed many times. The usual duration of postponement is around two months. Thus, in each court, a person will have to appear at least 6 times during a year. Having cases for different reasons before the High Court as well as the Magistrate's Court would imply at least 12 appearances in a year.

Fundamental rights cases are heard before the Supreme Court of Sri Lanka. When these cases are being heard, the victim and/or his/her lawyers have to attend the court. This means a few visits to the Supreme Court as well, sometimes for as long as 6 years.

The information gathered by attending these court proceedings are of two kinds. On the one hand, there is knowledge gained about the nature of proceedings in each of these courts relating to torture. This involves, court procedures, trial procedures, issues relating

to evidence, issues relating to application of forensic science and all matters that relate to the adjudicating process that takes place in each court. The network closely monitors and documents every proceeding in the court. It could be by filing copies of documents produced in the court to entering one's own observation as to what transpired in the court that particular day and why it happened so. On the other hand, there are enormous amounts of documentary evidence collected by way of certified copies of court proceedings. These include complete files of trials from beginning to end; the files of applications and replies and other documents in fundamental rights cases and also judgments delivered by courts.

***The strategy:*** The observations gathered in this way are important materials for understanding the problems of judicial redress in Sri Lanka. These source materials of actual cases that are fought in courts are some of the primary materials which can provide an array of information.

The court proceedings give an insight about wider issues such as delays in court, witness protection, nature of legal profession and the problems that members of the legal profession face in court as well as the lack of access to legal redress. Direct observations gathered through the participation is a valuable source of information in the study of wide-ranging aspects relating to prevention of torture in Sri Lanka.

## **The Human Rights Commission Sri Lanka and the National Police Commission**

Two national institutions which are relevant to this study are the Human Rights Commission (HRCSL) and the National Police Commission (NPC). Torture victims can make complaints to the HRCSL as well as the NPC. The HRCSL is empowered to inquire into human rights violations. Members of the network as well as the Urgent Appeals desk in Hong Kong send letters on behalf of the victims to both of these national institutions on an almost daily basis.

The NPC was appointed in the year 2002. It was established by virtue of the 17<sup>th</sup> amendment to the Constitution with laudable intentions. The amendment provided for the appointment of certain national commissions with constitutional powers over appointments, promotions, dismissals and disciplinary control of employees to depoliticize important national institutions. The NPC, so appointed, enjoys all such powers over the police department except in relation to the office of Inspector General of Police. Article 155G 2 requires the NPC to establish a procedure for entertaining, investigating and redressing complaints against police personnel and the police service.

***The process:*** The network assists victims to file complaints and pursue proceedings in these institutions, especially the HRCSL. Attending these institutions, the network documents the proceedings therein. The network has accumulated valuable information, through direct involvement and also by collecting relevant documents about these national bodies.

***The strategy:*** Transform through engagement is the motto adopted by the AHRC with these institutions. Where ever possible, the network uses the process of these institutions which in turn reveals their strengths and shortcomings.

The constant engagement we have with these institutions and the materials gathered on them enabled the AHRC to write several articles and statements about the nature of these organizations. These commentaries on the HRCSL reveal the inherent nature of the institution with several fundamental flaws. The fault lies both in the law and functioning. The experiences of the torture victims with these establishments also reveal other problems regarding administrative matters and the limited competence of the officers of the HRCSL.

As for the NPC, the network has worked very closely with it up to the time when the commission functioned under commissioners elected in conformity with constitutional provisions. This was from 2003 to the end of 2005. During this time, on the basis of work by the network, the AHRC had submitted documents for the development of a public complaints procedure as required by the Constitution (Document titled "Procedural Implementation of Article 155 G (2)-17<sup>th</sup> Amendment" was submitted to the National Police Commission (NPC) in December 2005. A further discussion paper on the same

theme was also submitted to NPC. Both documents are available in, Basil Fernando, State of Human Rights 2005, Law Society and Trust, Sri Lanka, pp 119-158). This document submitted by the AHRC was partially adopted in January 2007. Since the beginning of 2006, the commissioner of the NPC has been appointed in contravention to the constitutional mandate. The legitimacy of the whole institution has been shaken due to the deliberate deviations from the constitutional spirit. The AHRC together with many others is engaged in prolonged lobbying and generation of public opinion to bring the 17<sup>th</sup> amendment to the Constitution back into operation. Copious number of articles and statements are written on this issue and the cause is pursued.

## **International Agencies - Specifically the UN**

The AHRC has been consistently using the scope of international agencies to address the issues relating to torture. The major among them are the UN agencies, which includes the UN Rapporteur against Torture, the CAT Committee and UN Human Rights Committee.

***The process:*** The AHRC is communicating with UN agencies such as the UN Rapporteur against Torture on an almost daily basis regarding cases of torture in Sri Lanka. This is done by way of detailed letters with information about cases to enable him to request responses from the state party. The study of the reports of the Rapporteur against Torture to the Human Rights Commission and UN Human Rights Council shows that since 2002, the Rapporteur has sought explanations from the government for more than thirty cases submitted by us each year.

Reports of the Rapporteur, which are published every year, show the actions taken by the Rapporteur and the responses of the government. In many instances the government has acknowledged that the allegations are accurate and that actions are being taken to investigate and/or prosecute the offenders.

The network has also made shadow reports to the CAT Committee and the Human Rights Committee. The network has also sent representatives to the meetings of review of these committees and sometimes have had occasion to give oral explanations in private sessions with the committee or to lobby the members on the basis of information submitted by the network.

The network also makes reports to other UN bodies such as the Rapporteur on Extra judicial killings, Special Representatives on Human Rights Defenders, Working Group on Disappearances and other UN agencies dealing with the rights of women and children.

The communications with these agencies and follow up actions provide a great deal of education in itself. The experience of working with and stimulating these institutions for actions is carefully documented by the network. By all these direct involvements, the network has gathered massive amounts of materials about the working of the UN agencies and the

manner in which the human rights movement can employ particular methods in the process of the prevention of torture.

**The strategy:** Using the available mechanism to the optimum is the principle employed. By communicating with the agencies and feeding them constantly with accurate information about the local situation, in contrast with the official versions, helps to build the larger case against torture. Filing of individual cases often serves a dual purpose, attention to particular cases and also as an exposure of a failing system within the country.

In the recommendations of these committees, one can find the efforts to pursue the information made available to them, and often they have made similar recommendations as those put forth by the AHRC on behalf of the network. It is a fact that the number of cases submitted by the AHRC on behalf of the network on police torture is much larger than those submitted by anyone else.

The AHRC and the Sri Lankan network are involved with a project to promote the Optional Protocol in four countries in Asia under a programme initiated by Rehabilitation and Research Centre for Torture Victims, Denmark. The volume of activities of this programme also brings out a large amount of information about problems relating to the prevention of torture.

## **Media and other Avenues for Local and International Lobbying**

The media could be a beneficial ally for furthering the cause of human rights. Presently, the scope of Information technology is immense and the AHRC makes use of it to a great extent.

**The process:** Through the AHRC, the network in Sri Lanka has access to an extensive network in Asia on the prohibition of torture. The AHRC has developed its own IT capacity that is capable of transmitting information on a routine basis to a massive audience in Sri Lanka and rest of the world. All major human rights groups in Europe and the USA receive information on torture related issues on a daily basis from the AHRC's IT network.

**The strategy:** Linking with people and institutions through the internet for the cause is the rule for us and so far it has worked well. Such a network not only disseminates information, it also brings in new information. When information is published constantly, we receive responses from persons who provide additional information to what the network already knows. Thus the media network in itself is a means of collecting information by way of linkages.

A media network could be a method of verification of information as well. When the information is publicized by the network it is received by newspapers far and wide and is often reproduced. The publication and reach of the information provides an opportunity to challenge the network if there is any flaw in the material published. The very fact that the information goes unchallenged after being well circulated indicates its veracity.

A media network with modern IT facilities is also a means of preserving documents and materials collected over the years on the issue of torture made available through various web sites of the AHRC. In the archives of these web sites, material collected through years have been preserved for the use of anyone engaged in the study of these issues.

The responses we receive constantly from many countries and universities throughout the world give us an indication of the extent to which reference is made to the material available in these web sites.

## **Some Observations from the Study**

The years of experience had been a great educator. Meticulous evaluation of the enormous amount of data, study and analysis of the system, institutions and the personnel has lead us to several conclusions and observations. Some salient aspects are summarized below.

### **1. Police Torture**

- 1.1. Police torture is endemic and routinely practiced at all police stations in Sri Lanka. The reason for torture, unlike common perception, is not just to extract information but for other reasons such as finding substitutes for unresolved crimes, showing results to superiors or for statistical purposes. Sadly, the habit of use of force on anyone under arrest is a major factor. The reasons could be frustration on the part of the police officer, impression that proper respect is not paid to him or for bribery, extortion and the like. In almost all cases the victims belong to the poorest groups with very few to nil influential social connections.
- 1.2. Often the officers in charge of the police, i.e. the highest post in a station, condone torture and directly participate in it. Almost always they try to cover up the incidents of torture when complaints emerge. The Departmental Orders have extensive rules to prevent torture, but these are largely ignored. The Departmental Orders provide for visits by Assistant Superintendents of Police (ASP) to police stations. However, there is significant evidence to show that these visits seldom take place as required. ASPs or Superintendents of Police who take strong views against torture found to be extremely rare.
- 1.3. The data available indicate a considerable collapse of the exercise of command responsibility, ranging from the Inspector General of Police (IGP) to the lower ranking officers. There are consistent remarks supported by observations on cases and comments by judiciary that the supervision exercised by the IGP and other high ranking officers to prevent torture is negligible. In fact, the Supreme Court has observed that the conduct of superior officers can give the inference that they ignore or condone torture.

## **2. The System of Investigation of Torture**

- 2.1. The system of investigation of torture within police seems to work only under heavy pressure, particularly international pressure such as official interventions by the UN Rapporteur against Torture. Complaints which are not accompanied with such pressure are regularly ignored.
- 2.2. If the investigation is referred to the SIU by intervention of the UN or due to intense local pressure, investigations are conducted competently and impartially, suggest the data. Experiences from many cases clearly witness that the SIU does have the capacity to conduct scrupulous investigations even against officers of the police. Apparently, investigations by SIU are not interfered with by higher ups.
- 2.3. The investigations by higher ranking police officers of the areas where incidents of torture are alleged to have taken place do not show the same type of competence and impartiality as the SIU inquiries. In many instances there are allegations that various forms of pressures are exercised on victims of torture to discourage them from pursuing complaints.
- 2.4. The HRCSL inquiries mostly lack competence. Institutionally it is bereft of proper powers for investigations. There are documentary evidences which reveal the admission of the HRCSL that “their inquiries do not amount to proper criminal investigations into torture.” There is also data available to show that there are enormous delays in the process of inquiries and often they employ various methods to discourage victims from pursuing their complaints. Case studies show that in many instances the HRCSL inquiring officers do not show an understanding of international norms and standards. This has an adverse affect on the manner in which they conduct inquiries.
- 2.5. The NPC has the mandate to inquire into allegations of torture from a disciplinary point of view. Often such inquiries are expected to be conducted through the local representative of the NPC. However, according to case studies, it is revealed that the NPC refer the matter to senior police authorities to conduct inquiries and submit reports. In January 2007, the NPC published a gazette extraordinary regarding the public complaints procedure against police officers. How this will function remains to be experienced.
- 2.6. Considerable delay is observed in the SIU inquiries as well. A matter has to be referred to SIU for it to commence an inquiry. Such reference is often done months after a complaint is lodged. The actual commencement then depends on the work load of the unit. Studies in some cases show a delay of one year or more before the final report is made to the Attorney General.

- 2.7. As compared to the number of complaints made, the number of inquiries conducted by the SIU is very low. This implies that a large amount of complaints on torture do not go through a proper process of investigation.

### **3. Prosecutions**

- 3.1. The filing of indictments and prosecutions is the responsibility of the Attorney General's Department. The information gathered in this study shows that out of the numerous complaints made by torture victims relatively very few are prosecuted.
- 3.2. Delay is endemic to the AG's Department as well. From the receipt of the investigation file, sometimes two years have taken, to file indictment at the High Court. Statements from the AG's Department indicate delay in admission at the court as the problem. The department attributes overall delay to lack of sufficient staff to deal with all files relating to crime of which torture cases are only a few. The absence of assignment to attend to the cases of torture on a priority basis is another impeding factor. Responses from the AG's Department suggest that they find no reason to give priority to cases of torture. The experiences gathered from cases as well as interviews with officers of the department do not show any concern for the prevention of torture as a policy influencing the handling of cases.
- 3.3. There is also data to show that there exists lack of understanding to lack of appreciation of the international law on torture by the AG's Department. This is evident from the instances of filing of charges on torture.
- 3.4. When charges are not filed with required precision, the accused can utilize the defects in the indictment as a means to circumvent responsibility and liability.
- 3.5. The study reveals that the AG's Department, as a matter of policy, do not want to prosecute any officers above the rank of Inspector of Police even if there is evidence of direct involvement of such officers in torture. Besides, it is also a matter of policy not to prosecute higher officers or even inspectors on the basis of command responsibility. There is a disparity in the way the AG's Department distinguishes vicarious liability of higher officers as a matter of civil law and the obligations under the ICCPR and CAT to deal with torture as a crime.
- 3.6. The information gathered by this study also points to a policy of prosecutions based on pressure rather than by way of normal routine based on legal obligation.
- 3.7. Delays in filing prosecutions seriously affect the victims and the witnesses. This is one of the primary factors that discourage the victims to pursue cases. On the information available from this study it is not unreasonable to conclude that while filing indictments under pressure the department encourages the retreat of victims and witnesses which eventually acts in favour of the alleged accused. In



this way while it appears that the department has done its duty to prosecute, the blame is indirectly shifted on the victims and the witnesses for the unsuccessful result.

- 3.8. Information collected through cases also shows that counsels representing the AG's Department do not make applications in court for speedy hearing of torture cases. Unofficial explanation is that such applications often do not result in being allowed and that the better course is to be prudent and not to press for speedy trials. Even in an instant where the UN Human Rights Committee has requested the state party to ensure that the trial is speeded up, counsel from the department refused to make any such application to the court.
- 3.9. Despite all the above, several cases demonstrate the exceptional ability of some of the counsels from the department while prosecuting torture cases. They do their job with competence and integrity. It has to be noted that such efforts are against all odds they face.

#### **4. Courts—Trials at the High Court**

- 4.1. So far there are two successful prosecutions in two separate High Courts and both have taken two to three years for completion. In one case, the accused officer escaped and fled allegedly out of the country by the time the verdict was rendered. There are several cases in which there were no successful prosecutions. There have been many instances in which the victims have come forward to state that they do not wish to proceed with the case. The study exposes that in some of these cases serious threats have been made to the victims or inducements such as money been offered. Some victims have tried to resist for some time but had succumbed to the pressures from their family and peers whose backing has been well employed by the accused officers.
- 4.2. In one well known torture case, the accused was killed about a week before he was to give his testimony in court. Investigations into the murder confirmed the involvement of the alleged perpetrators of the torture.
- 4.3. The High Courts now follow the practice of postponing further proceedings after recording evidence. This result in delay. Large number of cases is included in the trial roll for each day which make the time available for each case considerably brief. The earlier practice was for trials on serious offenses at High Courts to be conducted on a day to day basis ending within three or four days of commencement. Abandoning of this practice has brought considerable difficulties to the victims.
- 4.4. According to official figures the success rate in overall prosecutions is a meager four percent. This would be even less on torture cases due to the official position held by the accused and social, administrative and political sway in their favour.

- 4.5. Some judgments at the High Court illustrate considerable confusion on the part of the High Court judges about the understanding of law relating to torture. The exasperating fact is that this exists even in elementary matters. Some judges have held that causing of injuries by police officers on persons in their custody is not torture as the purpose of the assault was not to obtain confessions. In another case, a judge of the High Court even held that though the accused police officer has used excessive and unnecessary force causing extensive injuries, it still do not amount to torture.
- 4.6. The observation of torture victims and a number of lawyers is that prejudices still exist against the prosecution of police officers. It has also been observed that judges may be discouraged to arrive at convictions due to the mandatory seven years imprisonment, which is the prescribed punishment in law.
- 4.7. The sum total of the effect all these factors on victims of torture is that more sources exist to discourage the pursuit of complaints against torture than to encourage attempts to ensure liability of the offenders.

## **5. Courts—The Supreme Court**

- 5.1. Available data indicate that while complaints of torture are increasing, the number of cases filed at the Supreme Court by way of Fundamental Rights cases are on a steep decline. This drop is attributed mostly to the advice of lawyers and even human rights activists that success in such applications is fewer now than ever before.
- 5.2. The rejection of cases without issuing notice is quite high and usually no reasons are offered for such rejections.
- 5.3. In cases where charge of torture is proved, the amount of compensation granted by the Supreme Court has become ever more meager. While there were some attempts to set higher standards of compensation for torture few years ago, for example around US\$ 8,000 in serious cases, the quantum currently has been reduced to a paltry sum of \$100 to \$250. No reasoning is given for the decline in quantum. Though the objective of fundamental rights is not compensation alone, low quantum could discourage victims from filing cases. The dissuasion should be viewed in the backdrop of expenses of moving the Supreme Court. Low quantum also is used by the perpetrators and others to their advantage in trying to dissuade victims from pursuing cases.
- 5.4. The Supreme Court of Sri Lanka has made some attempts to incorporate international norms on human rights into domestic law through its judgments a few years ago. However, in recent years, the Supreme Court has taken a view that the ratification of the ICCPR is not binding on the courts in the country. It has

also taken an extreme stand that the signing of the Optional Protocol by the state may even be *ultra vires*. There is a wide gap between the law as laid out in the Supreme Court judgments and the international norms and standards.

- 5.5. The UN Human Rights Committee have expressed that it has noted violations of rights by the judgments of courts in Sri Lanka including that of the Supreme Court. However, none of the recommendations expressed by the Human Rights Committee are respected.
- 5.6. The Court of Appeal and the Supreme Court have gone to an extent that it held the constitutional provisions enabling the Executive President to be not liable for any action before court as absolute, even when she/he violates the constitution.

## **6. National Institutions**

- 6.1. As for national institutions such as the HRCSL and the NPC, the evidence gathered in this study lay bare that they are ineffective to provide any remedy against torture.

## **Some Conclusions**

- a. The basic institutions such as the police investigation system, prosecution system under the Attorney General's Department and the judiciary are fundamentally flawed. Therefore the contribution they make to the prevention of torture is minimal to none. Often the defects are of such a nature that it becomes an encouraging factor for adopting means of torture.
- b. At the moment, no reform process is envisaged by the government.
- c. Due to the existence of civil conflict, emergency and anti terrorism laws have been enforced which have a negative impact on the issue of the prevention of torture. The state obligation to reform the institutions is also hampered due to such laws.
- d. The burden of prevention of torture, at the moment, rests highly on civil society efforts. The capacity to lobby strongly is an essential component to get the state into action even marginally. Support for victims by civil society is the sole avenue to keep interest alive to seek redress through the exasperatingly prolonged process in courts beset with severe harassments. The absence of a proper legal process to provide witness protection, transfers that burden also on civil society and communities. Extensive information is available about the capacity and the willingness of civil society to face the brunt of all the impediments involved in providing support for torture victims and to keep up the discourse for the prevention of torture.

- e. There is considerable interest among the public at large to participate in the discussion on the issue of torture and about the severe restrictions on civil liberties. It is felt that avenues are limited. Both the state and private media are actively discouraged from giving serious attention to this problem. It is the responsibility of civil society groups involved with human rights to evolve their own capacity to communicate efficiently to keep this debate active. The experience of the network shows that this is possible despite extreme difficulties in the present circumstances.

## **Publication of the Experience**

Regular publication of the activities of the prevention of torture is being done by the AHRC, other publishers and the media. Initial publications of the AHRC had been through IT networks reaching a regular audience of a few thousand persons which in turn was picked up by both local as well as international media. Such publications have been done routinely on a day to day basis for several years. The resources so generated are available in the archives the AHRC's several websites.

The first report on torture was published, as an issue of the bi-monthly publication *Article 2*, in August 2002 (*Article 2* Vol. 1, No. 4). This report consisted of details of 22 cases and had analysed various factors that have contributed to torture. This report was followed in 2004 by another volume of *Article 2* which studied 33 more cases and also analysed legal and other issues relating to the prevention of torture. This was followed by a book of 300 pages, titled "X ray of the Policing System in Sri Lanka", which studied about 65 cases and contained a number of articles analysing the problems relating to the prevention of torture in Sri Lanka. In two shadow reports published in 2003 and 2005, submitted to the Human Rights Committee and the CAT Committee, a considerable amount of factual details regarding torture was tendered together with analyses and recommendations for the prevention of torture. Besides these, several articles in different journals have been published on matters relating to torture in Sri Lanka. Books have also been published in local Sinhala language. A few hundred newspaper articles have also been published.

Two extensive reports on torture related issues are available in the Annual Country Report published by the AHRC in 2005 and 2006.

## **Existing Literature on Prevention of Torture**

In the course of our studies we have tried to find resources from international publications for further understanding. Though we could find some, there was a dearth of relevant materials.

- a. There is want of literature on institutional causes that encourage or lead to torture.

Studies on endemic torture that takes place regularly at police stations, due to the very nature of the criminal justice systems, in countries where liberal democratic systems have not been established to any credible degree is scarce.

- b. Many studies are made on the assumption that credible investigations, prosecutions and judicial systems exist to investigate and prosecute torture, while some errant officers or some authoritarian governments have at times allowed torture. However, torture as it exists in Sri Lanka for the most part does not fall under this category.
- c. Recommendations of the CAT Committee and the Human Rights Committee, including direct observations in the sessions of these committees, which were available for this study, shows that so far the recommendations of these committees have not been detailed enough to address the institutional problems that obstructs the prevention of torture. Often such recommendations are too generalized and are not respected by Sri Lanka as a state party. The recommendations of the Human Rights Committee in 2003 and the committee decision made under the optional protocol have not been respected even scantily. The CAT Committee recommendations of 2005 have also not been honoured. Making recommendations effective would require a better understanding on the part of these UN bodies about the violations which arise out of the institutional defects within the rule of law system itself.

## **The Challenge**

The challenge that this study raises for anyone working in the area of prevention of torture or to any international experts who wish to contribute is the need to develop a theoretical framework to deal with the problems of prevention of torture. It should be connected with fundamental problems relating to the rule of law and the development of democratic institutions.

# 2

## **A 'Praxis' Perspective on Subverted Justice and the Breakdown of Rule of Law in Sri Lanka**

• *Kishali Pinto Jayawardena* \*

### **1. Introduction**

At each historical juncture, the framers of Sri Lanka's post independence constitutional documents suffered from a deep rooted distrust of giving practical effect to the rule of law and the idea of justice. The 1972 'autochthonous' Constitution<sup>1</sup> subordinated the judiciary and only superficially embodied a Bill of Rights while declining to grant the Supreme Court, explicit jurisdiction over the determination of violations. Thereafter, the 1978 Constitution<sup>2</sup> entrenched the concept of the all powerful Executive President whose actions were virtually above the law, besides (in a most absurd paradox), omitting the right to life and inflicting a constitutional rights chapter with procedural restrictions that diminished the protection of those very rights.<sup>3</sup>

This deviously subversive rationale outlined each and every measure ostensibly agreed to in the name of constitutional democracy, whether it was the enactment of laws setting up to monitor abuse of human rights, curb police indiscipline or the implementation of a constitutional amendment meant to restore public confidence in the governance process. The familiar adage of 'giving with one hand and taking with the other' took on terrible meaning in the gradual but relentless destruction of Sri Lanka's political, constitutional and legal systems.

From this core political objective of subversion of the rule of law, sprang a rabidly intolerant response to legitimate dissent; the constitutional documents of 1972 and 1978

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\* Lawyer/legal consultant, media columnist and author.

were used to deny justice to both the majority Sinhalese and the minority Tamils and Muslims. The failure of the justice system and the breakdown of the ordinary law enforcement process impacted on all communities, resulting in the deaths, enforced disappearances, physical and mental torture of thousands during the past three decades. Ominously, this phenomenon was manifested not only during active conflict but also in times of relatively normal functioning. The very foundations of the liberal democratic polity, such as protection of human rights, independence of the judiciary, a democratic electoral system and the concept of separation of powers were used as weapons to twist the constitutional process to suit political exigencies and to strike at the heart of the public's understanding of the rule of law.

However, in trying to analyse this problem, much effort has been expended on problems of constitutional theory and the niceties of one system as against another (*viz.*: a parliamentary system as against a presidential system, a proportional representation electoral system as against a first-past-the-post electoral system or a unitary state as against a federal state). Such efforts are premised on the assumption that Sri Lanka's democratic institutions are in proper working order and that what is required is merely to decide on suitable models of governance.

This paper departs from the above premise in unequivocal terms; it reiterates the failure of the democratic process in a most profound sense and systematically dissects the centrality of the breakdown of the justice system within this context. The point, albeit controversial, is re-iterated; the ongoing conflict in the North/East is the effect rather than the cause of a destructively cyclic perpetuation of coercive violence. Granted, the brutality of the Sri Lankan State has been practiced against minorities with the ultimate consequence of alienating them and abandoning them to the ferocious mercies of separatist forces that are not propelled by a liberation ideology but only by a thirst for totalitarian power.

Fact remains that such brutality has been practiced also against the majority community to devastating effect. The redressing of the brutal nature of the State must therefore be seen as a problem common to all ethnicities. This indeed is the approach that the Asian Human Rights Commission (AHRC) and its partner organizations in Sri Lanka have followed in their work. The theme of the failure of justice is pragmatically manifest in their campaigns and case studies.

The paper critically questions past thinking wherein the authority of the constitutional order has been situated primarily around the failure of constitutionalism to provide for the needs of ethnic minorities and to ensure the multi-ethnic character of the polity. While conceding the importance of these intertwining themes, it contends strongly that this struggle should have been centered round broader and primary questions of the failure of justice and of human rights in general and the failure of law enforcement in particular. In doing so, the paper re-iterates the following rationale;

*A discourse on justice is separate from a discourse on politics. This does not mean that the two are*

*unrelated – only that they are distinct. And for the discourse in justice to influence the political discourse in a country, thereby breaking its tautological nature, there must first exist something akin to a discourse on justice. However, sadly such a discourse is quite absent in Sri Lanka.*<sup>4</sup>

The limited approach taken, of focusing only on minority rights and the 'ethnic conflict', it is argued, has detracted from a more profound exploration of fundamental problems of protecting life and liberty confronting all Sri Lankans today. In direct relevance to the peace process for example, this has resulted in downplaying of the critical question of human rights protection for civilians consequent to the 2002 Oslo brokered ceasefire agreement with the putting into place of credible monitors rather than 'political facilitators/mediators'<sup>5</sup> which deprived the entire exercise of that vital element of public 'ownership' and legitimacy.

The research does not focus exclusively on theory but instead, takes the 'praxis'<sup>6</sup> approach by exploring the above premise through the diverse findings that have emerged from sustained and pro-active campaigns against the endemic prevalence of torture, carried out by and associate organizations during the past several years. Informed and driven by the determination of the victims and grassroots activists, this has been a singularly successful approach to learning that has distinguished itself by reflecting felt needs of the people as opposed to arid theories.

## **2. The 'schizophrenic' Sri Lankan State and the Gradual Breakdown of the Rule of Law.**

The assumption that traditional democratic legacies carry with them all the formulae for building equitable and just societies is common in South Asia. This rationale is underpinned not only by the perception that the state is the key arbiter in ensuring the rights of citizens but that its role is at once, both non-conflictual and benevolent. So also, (and as a matter of natural logic), are asserted to be the institutions that it constructs.

In the immediate post-colonial era, such naiveté was natural and perhaps necessary for the emergence of new national identities. The state was perceived as having certain essential responsibilities of defining territorial integrity, looking after the welfare of the people and enacting laws and regulations in order to maintain order and good government within the territory. It was thus that the state derived its legitimacy to speak on behalf of all its citizens against external influences, friendly or aggressive and justify the right to use force in order to safeguard its own existence. The notion that the state existed for the common good prevailed almost to the point of automatic acquiescence of all its actions. Belief in the normative power of constitutions was an essential part of this formidable authority. Inherited British traditions of parliamentary democracy asserted the power of transformative reform through constitutional institutions and constitutionalism as the ideal condition of democracy.



This was however, soon realised to be a misplaced faith. As communities fragmented, there began the search as to how best the state and institutions of the state could be reconstructed. But the subsequent discourse of correction continued to operate within the old parameters that defined the state as being central to any form of reform. Thus, the focus shifted to issues such as a justiciable bill of rights, an independent judiciary, a multi party system and competitive electoral processes. This shift was however accompanied by a sense of overwhelming despair arising from the failure of constitutions in many societies to uphold human rights or democratic values and the appalling disparity between constitutional theory and constitutional practices. The tension between these two was palpable.

Insofar as Sri Lanka is concerned, a number of instruments, both constitutional<sup>7</sup> and statutory<sup>8</sup> purport to protect the rights of its citizens. However, on the other hand, the State itself remains the chief violator of these rights either by way of commission or by omission. The Constitution has not become a living law and the aspiration of equality and equity based on social justice remains unrealised.

The modern Sri Lankan state therefore possesses a schizophrenic personality as far as the protection of human rights is concerned. It combines the ability to unleash violence and execute an internal war with a remarkably duplicitous capacity to superficially affirm commitment to the democratic process as the following analysis would make clear.

### **2.1.A Culture of Violence**

Social and political violence encompassing a continuing war in the North and East and two youth insurrections has transfixed the country's human development during the past three decades. Sri Lanka has a long record of violent conflicts. The youth rebellion of the Janatha Vimukthi Peramuna (JVP) in the seventies, methodically crushed by the then United Front Government, was only a foretaste of worse things to come.

With the entering of the opposition United National Party (UNP)<sup>9</sup> into government in 1977 and the centralization of powers in an elected Executive President, a new culture of political violence set in. Violence was practiced to systematically wipe out all opposition to the government. Not only did the UNP reorganise its trade unions to act as thugs to incite and carry out violence, certain politicians were allowed to have their own private armies and mobilize large crowds and mobs to wreak violence without impunity. Para military organisations set up during this period, supposedly to help the armed forces and police fight the Liberation Tigers of Tamil Eelam (LTTE) fighting for a separate state in the North/East, also expanded the UNP's armed sphere of influence.

The violent politics of this era culminated in the re-emergence of the JVP in the late 1980's. The JVP intended to capture state power and establish a socialist state, but was suppressed by the State in an equally violent fashion. The violence thus unleashed only subsided in 1991 after the leader of the JVP was arrested and summarily executed by the

army. At this point of time, the ongoing ethnic conflict in the North-East lent a continuing brutal dimension to this pervasive violence and Sri Lanka ranked as having the second highest count of disappeared persons (an estimated 12,000) in the world, next to Iraq.

It was in this background that the 1994 general elections were held. The Peoples Alliance (PA) government came to power in 1994 on the promise of ushering in new political ethos in the country. But the resumption of the war against the LTTE and the defensiveness generated by a constant struggle to maintain a moral high ground against the “*dushanaya*” and “*beeshanaya*” (corrupt and violent) record of its predecessor, the UNP, quickly propelled the PA into a morass of its own making. In the background of much of the violent political apparatus still remaining intact as far as the JVP and the UNP were concerned, there was precedence and a certain seemingly legitimate space for PA politicians, to engage in political violence. This ‘politics of violence’ has continued thereafter with succeeding alliances of one or the other major parties capturing political power

The law itself was commonly used as an instrument of repression. The Public Security Ordinance (PSO) No 25 of 1947 as amended and in the Prevention of Terrorism Act (PTA) of 1979 as amended have governed the country for the better part of the past decades and virtually replaced the ordinary penal laws and criminal procedure/evidence statutes.

These emergency laws gave wide powers of arrest and detention to the police and the armed forces. Other powers included the absence of minimum or any safeguards relating to conditions of detention, admissibility of police confessions to senior police officers and relaxing of the normal procedure in relation to deaths in custody in respect of inquests, postmortem examinations, disposal of bodies and judicial inquiry. The Criminal Procedure Code which required a suspect to be produced before a Magistrate within 24 hours of his arrest and the Evidence Ordinance which prohibited the making of confessions to police officers were completely overridden by the emergency laws. These laws were used to fight Tamil separatism in the country as well as control Sinhalese extremism. Their abuse led to deaths, extra judicial killings and enforced disappearances in thousands and aggravated overall brutalisation of Sri Lankan society.

### **3. Failure to Question the Subversion of the Justice System and Defeat of Constitutional Oversight of the Governance Process**

The inability, by a majority of domestic as well as international non-governmental organizations to view the failure of justice as underpinning human rights activism in Sri Lanka has had a direct impact on the perpetuation of a culture of violence. A specific feature of the pervasive breakdown of the rule of law in Sri Lanka is the problematic failure of the justice system to bring to book, the perpetrators who commit abuses, whether in times of ordinary law and order or in periods of emergency.

This failure of justice system is evident at all levels, from the highest to the lowest courts and deserves close scrutiny by virtue of the central theme in this paper; that the failure of the justice system has been a factor in the deterioration of constitutional governance, including proper law enforcement, resulting consequently in pervasive violence. In this context, the phrase 'the justice system' infers much more than theoretical judicial pronouncements; rather, it is used to span the entire gamut of the legal system from prosecutions to decisions and thence to practical implementation of those decisions. Safeguarding of the independence of the judiciary as well as preservation of the credibility of the prosecutorial system is exceedingly vital to this discussion.

### **3.1.Subordination of the Rule of Law to 'Rule by Politics'**

The gradual politicization of Sri Lanka's judiciary and the subordination of the rule of law to 'rule by politics,' referred to in the introduction to this paper, are important as it frames this analysis. The absolute inability of 'civil society' non-governmental organizations based in Colombo to mount a vigorous campaign regarding the blatant politicization of Sri Lanka's Supreme Court from 1999 onwards was a particular consequence of the inability to posit the failure of justice as central to their work and, in some measure also, pointed to the political choices that these organizations made.

Some context is necessary to this critique. The question of the independence of Sri Lanka's judiciary is not a novel dilemma that has arisen in recent times. Soon after independence, attempts were made by the political establishment to reduce its independence but met with valiant resistance by the judges. When the separation of powers articulated by the Independence Constitution was sought to be overset by legislation attempting to give the Minister of Justice authority in the appointment of judicial officers, the Supreme Court responded by declaring the legislation invalid.<sup>10</sup> Further attempts to fetter the independence of the judiciary were also outlawed.<sup>11</sup> The Court was, in these early stages, conscious of the need to safeguard the rights of the minorities.<sup>12</sup>

Predictable political outrage at this perceived flouting of its authority resulted in the sweeping aside of the Independence Constitution by the 1972 constitutional document. The subordination of the judiciary was one immediate consequence thereof.<sup>13</sup> The 1972 Constitution abolished judicial review, established a Constitutional Court with the limited power to scrutinize bills, and this, too, in 24 hours when the bill was certified as being urgent in the national interest and allowed the declaration of a state of emergency to be passed without a debate. Fundamental Rights were included in the Constitution but made impotent by open ended restrictions and no specific enforcement procedure.<sup>14</sup>

The change in political leadership brought about the current second Republican Constitution in 1978, which theoretically protected the role of the Supreme Court as the highest and final superior court. The Court was given special jurisdiction in respect of election petitions, appeals, constitutional matters, fundamental rights (now made justiciable) and breach of the privileges of Parliament. The appointment of judges of the superior

courts was by an elected President “by warrant under his hand.”<sup>15</sup> In practice however, the spirit of authoritarian disregard for the independence of the judiciary continued. A constitutional clause which specified that all judges of the appellate courts shall, on the commencement of the new Constitution, cease to hold office was soon used by the President to radically “reconstitute” the higher courts.<sup>16</sup>

Police officers found responsible for the violation of fundamental rights were not only promoted, but the damages and costs were paid from the Government exchequer. Procedural difficulties in judicial officers taking the oath of allegiance under the Sixth Amendment resulted in the police locking and barring the Supreme Court and the Court of Appeal and refusing entry to judges who reported for work. Following unpopular decisions, judges’ houses were stoned and vulgar abuse was shouted at them by thugs.<sup>17</sup>

In the wake of the sustained political barrage, decreased efforts by the judiciary to protect the rights of the people was not surprising. In 1982, when the UNP government flouted honoured electoral traditions and substituted a referendum for the general election that was then due, the Supreme Court upheld the decision of the Government. In the subsequent Thirteenth Amendment case, the Court again refused to engage in a debate on the substantive merits and demerits of devolution while approving the amendments on the technical basis that they did not violate the unitary nature of the state.<sup>18</sup>

From about the 1990’s however, judicial restraint of politicians, state agents and particularly officers in custodial authority such as police officers and prisons officers was far more substantive. This was in part due to a widespread public acknowledgement that the abuses of the past could not be tolerated further and part due to the efforts of some liberal judges on the Bench at that time. Working within the limited confines of a constitutional document that did not permit public interest litigation,<sup>19</sup> did not allow challenge of legislative acts,<sup>20</sup> did not allow judicial review of even unconstitutional laws if they were enacted before 1978<sup>21</sup> and did not include the right to life,<sup>22</sup> the judiciary did as much as it could. Importantly, the vicarious liability of officers in authority who did not intervene when their subordinates violate rights was specifically affirmed.<sup>23</sup>

Insofar as abuses of power under emergency was concerned, the Supreme Court’s response was far more sensitive than in the past; it relaxed procedural rules that prescribed strict compliance with the manner in which a petition must be filed in court and thus allowed hundreds of persons detained under emergency to file fundamental rights petitions.<sup>24</sup> The power of the defence authorities to arrest and detain using emergency regulations and provisions of the PTA was also restrained and the Court went on to disregard an ouster clause in the Public Security Ordinance (under which emergency regulations are issued) to strike down the validity of a regulation itself.<sup>25</sup>

This judicial ‘activism’ resulted in a hostile reaction from the political regime; the Supreme Court and those perceived to be ‘liberal’ judges came under scathing criticism from government ministers and indeed, then President Chandrika Kumaratunge herself.

In 1999, with the appointment of Chief Justice S.N Silva who had close personal connections to President Kumaratunge, the Court became characterized not only by a withdrawal in articulating restraint on government actions but indeed, by a positive upholding of powers of the government against citizens and by distinct arbitrariness in its functioning.<sup>26</sup> Benches were constituted by the Chief Justice without any consideration for seniority,<sup>27</sup> but only with a view to 'packing' the bench with favourites<sup>28</sup> who would be amenable to whatever decision that was desired by the political establishment. The flood of fundamental rights applications progressively decreased;<sup>29</sup> whatever isolated 'rights friendly' judgments that were delivered awarded only small amounts of compensation. Settlements in fundamental rights cases were evidenced by judicial coercion of lawyers and/or petitioners.

The Court declared itself not bound by views of monitoring bodies established under international human rights treaties entered into by the executive,<sup>30</sup> thus giving the formal stamp to an informal process whereby, for years, the Government had been ignoring the Views of the Human Rights Committee.<sup>31</sup>

Public confidence in the ability of judges to act as a last measure against government authoritarianism has decreased. All this took place without significant protest from the Colombo based non-governmental community, excluding a few seminars held by one or two organizations.

At the level of the lower courts, the capacity to function independently from government was predictably affected. Transfers, disciplinary control and dismissal of lower court judges which are handled by the Judicial Services Commission (JSC) were made at the whim and fancy of the JSC,<sup>32</sup> most often at the nod of the Chief Justice. The negative impact that this had on the credibility and internal discipline of the judicial service is incalculable.<sup>33</sup>

### **3.2. Failure of Civilian Oversight Mechanisms and Constitutional Governance**

Any effort to remedy a politically influenced approach to governance has had a short lifespan in Sri Lanka and/or has been thoroughly ineffective. The collective fate that befell two important commissions; the Bribery and Corruption Commission and the National Human Rights Commission evidenced this in no uncertain terms. The first was set up by a law unanimously passed in Parliament in 1994<sup>34</sup>, however it has been wholly ineffective, holding only insignificant and lower ranking public officials in its net while stupendous frauds and corrupt acts by heads of institutions and politicians have been bypassed. During long periods of its existence, it has been almost non-functional due to its infiltration by political elements, the infighting of its officials and efforts by successive governments to use it for their own political ends.

The National Human Rights Commission (NHRC),<sup>35</sup> on the other hand, was established through a law that was significantly flawed in many respects; it allows the body to engage only in conciliation and mediation with the end result that its directions are substantively

ignored by not only the police hierarchy but also other government departments and officials,<sup>36</sup> its members are not stipulated to be full time, thus resulting in their giving only part time commitment to the work, Section 31 of the Act confers powers on “the Minister” to make regulations regarding implementation, including conducting investigations<sup>37</sup> and the Commission is not empowered to approach courts directly as petitioners in instances of grave human rights violations or even refer such questions to the appropriate court.<sup>38</sup>

Though some Commission officers have been engaged in useful work in, at least documenting human rights violations particularly from the conflict areas and in bringing their persuasive efforts to bear on illegal arrests and detentions, the efficacy of the body as a whole has never been great due to the inherent limitations in its mandate. Specific deficiencies in its functioning will be highlighted in the course of consideration of the particular cases forming part of campaigns as discussed below.

The lack of legitimacy in the NHRC has been further aggravated in recent times by the unconstitutional nature of the appointments of its currently sitting members, who have been appointed by Presidential fiat ignoring a specific constitutional amendment which specified that the appointments be approved by a 10-member Constitutional Council (CC).<sup>39</sup> The 17<sup>th</sup> Amendment also established two new monitoring bodies; namely the Elections Commission<sup>40</sup> and the National Police Commission (NPC). The CC was, in fact, in existence only for a relatively short period, from March 2002 to March 2005. The terms of office of its six appointed members expired in March 2005. But the vacancies arising therein were not filled, which resulted in the lapsing of the CC itself.<sup>41</sup>

The incumbent President, Mahinda Rajapakse, then made his own appointments to the commissions, including the NHRC and NPC, predominating with his supporters and personal friends. At the time of writing this paper, the unconstitutionally appointed Commissions remain. Though a Parliamentary Select Committee has been appointed to examine as how the 17<sup>th</sup> Amendment may be ‘rectified’ in its substance, this Committee has been sitting for the past many months with no visible result.

The constitutional ‘experiment’ of the 17<sup>th</sup> Amendment illustrates the huge resistance that is manifested from the political establishment in regard to any attempts to de-politicise the governance process. Early on, the relatively feeble attempts of the National Police Commission (NPC) to discipline the police and restore the service to some measure of independent functioning met with blatant antagonism from politicians. Frontline ministers remarked that the ‘independence of the NPC’ was not needed and maintained amazingly that the Inspector General of Police (IGP) should be involved in the decision making processes of the NPC. Public hostility was evidenced between the IGP and the NPC where the former considered that the creation of the NPC had imposed an unwarranted fetter on his powers.

The response from the non-governmental community in regard to the political subversion of the constitutional process was again muted. Though some protests were

evidenced at the start, (perhaps to an extent that was more than at other times, including the refusal of some former members of the NHRC to be re-appointed on the basis that this would be conforming to an unconstitutional process), these protests did not gather momentum as a collectively outraged reaction and were, moreover, confined only to that time at which the unconstitutional appointments took place.

#### **4. Exposing the Failure of the Rule of Law: A Practical Analysis of the Campaigns of and its Partners**

The approach followed in this instance was a full frontal critique of the justice system, focused on a plethora of cases which took the victims through the whole process by providing them not only with legal help but also physical protection and counseling in order to provide a conducive environment for their rehabilitation. A significant factor was that these cases were from parts of the country not affected by the war. This was a deliberate choice<sup>42</sup> in order to examine the pervasive nature of the problem in a manner that de-links it from the conflict.

Two positive consequences could be inferred from the outset as a result of these campaigns. In the first instance, the 'victims' of torture became transformed from the 'powerless' to the 'powerful' purely by articulating their grievances in a collective manner. This process became instructive as a best practice example in regard to activist interventions. Secondly, a normally unresponsive media became part of the campaign, engaging in the daily reporting of torture.

*Torture by the police is now almost daily reported in newspapers, television, radio and other media. Public actions have been held against torturers. Heavy pressure has been placed upon defective state institutions. The judiciary is under attack for its failure to deal effectively with the problem.*<sup>43</sup>

Some specific facets of this phenomenon will be examined now. While the case studies referred to in this regard are those engaged in by and its partners, principles and perspectives emanating from case law of the Supreme Court and High Court will also be adverted to, where necessary.

##### **4.1. The Endemic Nature of the Problem of Police Abuse**

*The vast majority of custodial deaths in Sri Lanka are caused not by rogue police but by ordinary officers taking part in an established routine.*<sup>44</sup>

Philip Alston, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.

The 'safe' assumption harboured by most Sri Lankans that the practice of torture remains confined to a particular segment of the societal undesirables; terrorists or hard

core criminals as the case may be is now comprehensively debunked to all intents and purposes. Instead, police brutality has been practiced against diverse individuals; a labourer assaulted with batons and sticks while in army detention<sup>45</sup> the cleaner of a van assaulted after being blindfolded<sup>46</sup> an attorney-at-law pulled out of his car and assaulted<sup>47</sup> another attorney-at-law who was a bystander at a protest demonstration (and not a participant) shot at close range<sup>48</sup> and an alleged army deserter tortured to the extent that he died in police custody.<sup>49</sup>

However, as the case studies engaged in by indicates, torture is most evidenced against the poor and the marginalized; the most gruesome torture could be practiced against a teenager accused of stealing a bunch of bananas<sup>50</sup> or some such petty theft. The actual criminals and the underworld characters are allowed to escape with the nexus between senior/junior police officials/politicians and the underworld linchpins being too strong to allow their apprehension.

As reflected in the observation by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions above, the studies also expose the fact that torture is not resorted to by a few 'rogue' policemen but is widespread due to many factors; the lack of good investigative training, public pressure to apprehend suspects and the general feeling that torture is not a condemned practice but is implicitly allowed and even expressly ordered by senior police officials despite laws and regulations prescribing otherwise.

One specific feature that emerges from these case studies is the brutality manifested in use of torture. In one case taken up by<sup>51</sup> Koralaliyanage Palitha Tissa Kumara from Halawala, Mathugama, was a respected local artisan of that area, engaged in painting and carvings for the past thirteen years, for which he had been awarded a gold medal by the Hotels Corporation as well as certificates from the Housing Development Authority and the National Apprentice Board. This thirty one year old father of two sons had been returning home from the southern city of Galle where had had undertaken carving work in early February 2004, when he was suddenly arrested by the Wellipenna Police simply because he had given food to a person who allegedly committed some serious crimes.

After his arrest, Tissa Kumara was subjected to severe assault by a sub-inspector attached to the Wellipenna police station. Thereafter, with extraordinary brutality, that same police officer had brought a tuberculosis patient who was in the same police station, to spit into Tissa Kumara's mouth, telling him that he too would die within two months of the same disease. After that, he was put into the remand prison on fabricated charges of possession of a grenade and for robbery. After fears of being inflicted with tuberculosis arose following a severe cough and blood in his saliva, Tissa Kumara was put in a solitary cell. Food was passed through to him by a narrow opening in the door as the prison authorities were nervous of contamination.

His wife made frenzied appeals to the various monitoring bodies in Colombo, including the National Human Rights Commission (NPC) and the National Police Commission



(NPC) but her husband continued to lack proper medical treatment. Tissa Kumara's case was distinguishable in its extreme perversion from the ordinary cases of police brutality being reported.

#### **4.2. Militarisation of Law-Enforcement Agencies**

The failure of the law enforcement process has been a persistent and central feature of the failure of the justice system in Sri Lanka. The precise extent of corruption within the police ranks, police brutality, lack of investigative skills, inefficient and time consuming procedures in dealing with complaints of torture,<sup>52</sup> and the virtual militarization of the police service accustomed to using emergency powers for long decades is clear.

The study refers to two discernible patterns of torture, firstly where torture is resorted to for interrogation purposes and secondly where it is apparent as a pure abuse of power.<sup>53</sup> Into the first category of cases falls the denial of all of the commonly accepted rights available under the normal criminal procedure laws<sup>54</sup> such as the right to be given reasons for the arrest and the right to be speedily brought before a magistrate.

In this regard, the trauma of persons mistakenly arrested by the police and tortured in the belief that they are criminals, is common<sup>55</sup> as is the arbitrary arresting and torturing of individuals possessed of a criminal record purely as a convenient cover for crimes lacking a suspect. Palitha Tissa Kumara's case (detailed before) and the case of Lalith Rajapakse who was severely beaten on 19 and 20 April 2002 by officers from the Kandana Police Station and remained in a coma for 3 weeks<sup>56</sup> are two latter examples. Numerous judgments of the Supreme Court have held that even a hardened criminal cannot be tortured with impunity. In the *Wewelage Rani Fernando Case*, (where it was contended that the deceased had stolen two bunches of bananas), the court observed that this allegation of theft should not have detracted from the duty to afford to the deceased, the protection of his constitutional rights of personal liberty. Thus;

*...[T]he petitioner may be a hard-core criminal whose tribe deserve no sympathy but if constitutional guarantees are to have any meaning or value in our democratic set-up, it is essential that he be not denied the protection guaranteed by our Constitution.<sup>57</sup>*

However, these judgments have not had any effect on the law enforcement machinery.

The *Madiliyawatte Jayalathge Thilakarathna Jayalath case* in which the first conviction under the Anti-Torture Act, the absence of due process at all stages of the investigative process was well illustrated. The case involved the alleged theft of four gems from the office of a gem dealer who alleged that the victim, a business acquaintance and a broker, was responsible. The victim stoutly denied that he had stolen the gems but was threatened by the gem dealer that, if the gems were not handed over, he would get the police to assault him. Some time later, while traveling to Colombo in the bus, the victim was arrested and taken to the Wellawatte police station where he was mercilessly assaulted with a plumbing

pipe by the accused police officer, then attached to the crime division as an acting officer in charge. Thereafter, he was kept in the police station for two days. It was only after the members of his family had protested asking why he was not produced before court, that he was taken before a magistrate. He did not make any complaint of assault to the magistrate or the officer in charge of the Wellawatte police station. When asked why, he said that there had been 'no point' in doing so. The medical evidence showed injuries on the victim, which had been caused by a blunt weapon, including the fracture of his hand.

The accused police officer contended that the victim had been arrested on suspicion of being involved in the theft of gems and had hurt himself attempting to run away at the time of arrest. Somewhat more interestingly, it also turned out that the gem dealer, who had lodged the complaint, later found the gems and had informed the police that his allegations against the victim had been unfounded. In assessing these facts, the Colombo High Court<sup>58</sup> determined that the prosecution had established beyond reasonable doubt that the accused had assaulted the victim in order to obtain a confession from him, which he had done in his official capacity as a police officer and therefore, a public officer. The absconding accused was convicted to the minimum seven years rigorous imprisonment (RI) and payment of a fine of Rs. 10,000, in default of which, a further two years of RI was ordered.

The case illustrated the various points at which the system fails to work in Sri Lanka. At the most fundamental level, immediate deficiencies in the law enforcement process are apparent where basic investigation skills and training is replaced by brute force on the part of not only junior but also senior police officials. This is buttressed by the impunity that law enforcement officers can claim for their actions, a continuing legacy of extraordinary emergency laws which, at one point, gave them virtual powers of life and death. The element of supervision that should normally be operative at the chain of command is also rendered completely nugatory by this breakdown in the systems of policing.

*In all these cases, what the police officers are, in fact, doing is producing substitute suspects for crimes that they have not resolved. In some instances, the police may be aware of the identity of the real culprits who were allowed to 'escape' after undue influence. In these cases, it is even more essential for the police to find substitutes. Producing substitutes creates the impression-among the department as well as the public-that the police are efficient and crimes are being solved. This paves the way to financial rewards and promotions.<sup>59</sup>*

The second category of cases includes infliction of torture as a sheer abuse of power, with many concrete examples to illustrate this point. Saman Priyankara<sup>60</sup> for example, was illegally detained on January 5, 2004 and severely tortured by the policemen attached to the Matala police station. Boiling water was poured down his right leg from the hip downwards, severely burning him. The perpetrator sub inspector of police (acting on the instigation of Priyankara's neighbour), claimed that he was going to make sure that the victim would not be able to have a normal sex life anymore. Afterwards he was given some ointment to apply on his wounds but was warned not to report the incident to anyone and not to take any treatment at the hospital.

In many cases, torture has been practiced as a result of a legitimate query by a citizen. For example, Saman Jayasuriya,<sup>61</sup> was driving a van with two others when his vehicle was stopped by two policemen in civilian clothes who asked for his license and insurance. In response, he asked for their identity and was instead, pulled out and assaulted. He managed to escape, but a contingent of policemen from the Kadugannawa police station visited his residence and mercilessly assaulted him in the presence of his wife. He was the arrested and taken to the police station with his son.

Another well known instance concerned the alleged death of a restaurant manager, H. Quintus Perera for refusing to sell liquor on a religious holiday (the Poya Day).<sup>62</sup> These cases illustrate the most heinous depths to which law enforcement has degenerated; namely the illegal punishment of individuals for trying to uphold the law by brutalized law enforcement officials who have long since, lost any respect and adherence to their office.

### **4.3. Maintenance of a Culture of Impunity**

A specific feature of the culture of impunity is the blatant disregard with which implicated police officers falsify official documents, including the Information Book. In one case where the court found that Grave Crimes Information Book and the Register/ Investigation Book had been altered with impunity and utter disregard for the law, the view was taken that it was unsafe for a Court to accept a certified copy of any statement or notes recorded by the police without comparing it with the original.

*It is a lamentable fact that the police who are supposed to protect the ordinary citizens of this country have become violators of the law. We may ask with Juvenal, 'quis custodiet ipsos custodiet?' Who is to guard the guards themselves?*<sup>63</sup>

Even where police officers (junior as well as senior) have been identified as personally responsible for acts of torture by the courts of law, no internal departmental action has been taken against them. Directions of the Supreme Court to the police hierarchy to initiate disciplinary action against erring police officers are blatantly ignored.<sup>64</sup> Official resistance to these pronouncements by the Court has always been high and the police department has, in fact, set up funds to provide for lawyers to appear for the accused police officers as well as to pay the sums of compensation due personally from the implicated officers.

The National Police Commission (NPC) was the first serious legislative attempt to restore discipline in the police force. It comprises of a body of seven persons whose security of tenure is explicitly provided for.<sup>65</sup> Its powers are two fold. Firstly, it is vested with the powers of appointment, promotion, transfer, disciplinary control and dismissal of all officers other than the Inspector General.<sup>66</sup> Secondly, and most vitally, the 17<sup>th</sup> Amendment stipulates mandatorily that the NPC “shall establish procedures to entertain and investigate public complaints and complaints from any aggrieved person made against a police officer or the police service...”<sup>67</sup>

However, the NPC, during its first term of existence, did not fulfill its constitutional expectations to any great extent, though it does deserve credit for its decision to interdict police officers indicted in terms of the Anti-Torture Act and its prevention of police officers being arbitrarily transferred during the pre-election period. Most importantly, it failed to take significant steps beyond a few preliminary discussions with members of civil society, to implement the Public Complaints Procedures as constitutionally mandated.<sup>68</sup>

#### **4.4. Ineffective Prosecutions**

The politicization of the judiciary was accompanied by a corresponding decrease of public confidence in the office of the chief law officer of the land; the Attorney General (AG). Its record of strong prosecutions for grievous human rights abuses has not been marked. Indeed, in all the decades of enforced disappearances and extra judicial killings, there have been two successful prosecutions, namely the rape and killing of a Tamil schoolgirl and thereafter, the murder of her mother, brother and friend who went in search of her, by Sinhalese army soldiers in the North in 1996 (the *Krishanthi Kumaraswamy* case) and the enforced disappearance of twenty five Sinhalese schoolchildren (though the numbers that were abducted and never found were much larger) by Sinhalese army soldiers in 1990, acting in collusion with the school principal motivated by a private vengeance (the *Embilipitiya* case). This well illustrates the duality of the failure of the prosecutorial and justice process in respect of extraordinary crimes, irrespective of ethnicities.

Undeniably the record of successful prosecutions in respect of grave crimes<sup>69</sup> as well as in regard to 'ordinary' torture cases has been extremely unsatisfactory.<sup>70</sup> From the time that the Anti-Torture Act was enacted into law in 1994, no convictions for torture resulted up to 2004. Thereafter, two convictions were made by the High Court, but this remedy continues to be inefficacious due to long delays in filing indictments, filing faulty indictments and delays in the substantive trial proceedings.

According to the Attorney General's department, while a few (five) cases indicted under the Anti-Torture Act have resulted in acquittals, the vast majority of cases are still pending.<sup>71</sup> Though some indictments have been sent to the relevant High Courts almost two years to the date, they have yet to be served on the accused and the reason given for this has been the severe backlog of cases in many high courts.<sup>72</sup> On its own part, the Department, which is responsible for the issuance of the indictments, is accused of delay.<sup>73</sup>

However, in many cases, it was found that despite evidence of grievous torture being disclosed, prosecutions are not ensured. For example, in the *Nandini Herath* case, indictment was not filed under the Anti-Torture Act but the police merely pressed charges for simple hurt.<sup>74</sup> In *Jagath Kumara's case*<sup>75</sup> (where he was arrested, detained and tortured by the Payagala police station officers in June 200 and died at the Welikada prison thereafter), though the information and relative files were handed over to the Attorney General, no prosecution was the result. *Yogalingam Vijitha's case* is also instructive in this regard.<sup>76</sup> The

Supreme Court ordered compensation and costs to be paid to a Tamil woman who had been arrested, detained and sexually tortured. The Court<sup>77</sup> stated as follows;

*As observed 'the facts of this case have revealed disturbing features regarding third degree methods adopted by certain police officers on suspects held in police custody. Such methods can only be described as barbaric, savage and inhuman. They are most revolting and offend one's sense of human decency and dignity particularly at the present time when every endeavor is being made to promote and protect human rights.*

Though it was directed that the culpable officers be prosecuted, this was not done.<sup>78</sup>

A primary problem in this regard is that prosecutors depend solely on police investigations for the establishing of a *prima facie* case on which indictment is issued. In many cases, good investigations are simply not forthcoming by police officers who are essentially, investigating their own colleagues.

#### 4.5. Exposing Deficiencies in the Nature of Litigation at the Supreme Court

Even at a point when fundamental rights litigation was at its zenith, the gap between judgments and their implementation was immense. Judgment upon judgment was delivered by the Supreme Court finding torture to have been committed by officers in custodial authority but none were implemented in order that these officers would be disciplined or prosecuted.<sup>79</sup>

At the least, these officers were not even removed from their positions or interdicted with catastrophic effect as seen in one particularly poignant instance of *Gerald Perera's case*,<sup>80</sup> The rights petition that he filed was upheld by the Supreme Court. However, no disciplinary action was taken as recommended against the responsible police officers who continued serving in their posts. A year later, as he was due to testify in the case instituted in the High Court under the Torture Act against the police officers who had tortured him, he was shot and killed at point blank range by some of those very same police officers. The murder trial is ongoing.

With the gradual politicization of the Supreme Court examined early on in this paper, an increased arbitrariness on the part of some judges was evidenced in response to fundamental rights petitions. In one particular case, the Court, by the order of the Chief Justice, sentenced a lay litigant to one year rigorous imprisonment on the basis that he had talked too loudly in court and filed numerous motions in support of his application. Despite the manifest injustice of this sentencing, no perceptible outrage was shown by non-governmental organizations, including those specifically working with the legal system and it was left to a few domestic lawyers to take up the cause of the arbitrarily sentenced litigant, Tony Fernando with the single support of the AHRC. The UN Human Rights Committee later found Fernando's rights against arbitrary detention to have been violated.<sup>81</sup>

Another distinct feature in recent times has been judicial inconsistency in granting of compensation to victims of torture in fundamental rights cases. Earlier, such sums had been considerable, indicating that the Court wished that the imposing of these amounts would have a deterrent impact. In *Silva vs. Iddamalgoda*<sup>82</sup>, an alleged army deserter arrested by the police, died whilst in remand custody. The Court gave relief to his widow on the basis that she and her minor child were entitled to the compensation that the deceased would have received, but for his death. A sum of SLR 700,000 was directed to be payable by the State and SLR 50,000 each by the two errant police officers personally.

In one case<sup>83</sup> where death was due to assault by prison officials rather than by the police, the State was directed to pay a sum of SLR 925,000 while each of the three prison officials were directed to pay SLR 25,000, amounting to one million in equal shares. In awarding this considerable sum as compensation and costs, the Court took into account the fact that the deceased was a father of three minor children. The treatment meted out to him while he was at the Negombo prison, which “painted a gruesome picture where a hapless prisoner was brutally tortured and left alone, tied to an iron door, to draw his least breath,” was a contributory factor to the high award.

While these two cases involved the ultimate death of the victim, in *Gerald Perera's case*<sup>84</sup> which concerned severe torture, the Court granted the sum of SLR 800,000 as compensation and costs for the violation of the petitioner's rights, payable both by the police officers found to be responsible for the violations and the State. Additionally, the Court granted the petitioner's claim to reimbursement by the State of his medical expenses, including treatment obtained at a private hospital due to the gross torture that he suffered, despite the contention of the respondents that the charges were exorbitant and treatment could have been obtained at a state hospital. At that time of his killing by the very police officers who were responsible for torturing him, a major portion of the medical re-imburements had yet not been paid to him.

As contrasted to these awards, smaller amounts of compensation is being awarded in recent cases as exemplified in *Tissa Kumara's case* as well as in some others.<sup>85</sup> In the case of *BA Surange Wijewardene*<sup>86</sup>, the amount awarded was a paltry SLR 15,000, split between the three respondents while in *D.A. Nimal Silva Gunaratne v Kodituwakketi*<sup>87</sup>, the petitioner was given only a nominal sum of SLR 50,000 and SLR 20,000 as costs despite the loss of one eye as a result of torture as well as the finding that his right to freedom from arbitrary arrest and detention had been violated. In *Erandaka and Anor vs Halwela, OIC, Police Station, Hakmana*<sup>88</sup> where the petitioners were assaulted while in prison as evidenced by the medical records, payment of compensation in the sum of SLR 25,000 by the State was awarded to each of the two petitioners, in the absence of the identification of the particular prison officers responsible for the assault.

#### **4.6. Inadequate Magisterial Supervision**

In *Madiliyawatte Jayalathge Thilakarathna Jayalath*<sup>89</sup>, a particular feature remarked upon by the High Court was the paucity of magisterial supervision of the victim of torture

when he had been produced before the judicial officer and specifically, the failure to question the suspect as to whether he had been tortured. This is a common problem in Sri Lanka. A recent judgment of the Court articulates this breakdown of the element of magisterial supervision in the detention process.

In *Weerawansa v Attorney General*<sup>90</sup>, remand orders by the Magistrate, Harbour Court, made under the ordinary law were held to be in violation of the Petitioner's rights in that several such orders of remand had been made even though the Magistrate or the acting Magistrate did not visit or communicate with him. This was ruled to offend a basic constitutional safeguard in Article 13(2), that judge and suspect must be brought face to face before liberty is curtailed, which safeguard was not an obligation that could be circumvented by producing reports from the police. An earlier view<sup>91</sup> that remand orders, where they concern a patent want of jurisdiction, cannot be safeguarded under the cover of being 'judicial acts' with consequent immunity from fundamental rights challenge, was agreed with.

#### **4.7. Complicity of Politicians in Abuses**

The unconcern and indeed, the complicity of politicians in regard to the occurrence of torture is also interesting. In *Nandini Herath's case*, for example, the Minister of Women's Affairs at the time that Nandini was tortured, who lived close to her house, at all times, only defended the accused police officers.<sup>92</sup>

#### **4.8 Turning upon their own kind**

Instances of police officers or military persons being themselves the targets of violence by their fellow officers is not uncommon. In V.K Swarnarekha's case, a healthy thirty year old police woman was 'disappeared' in 1993 and there was suspected complicity of the police. However, the case was hushed up and there were no inquiries by the CID. There is also the case of a naval officer, Elmo de Silva being illegally detained and tortured in January 2001 when he tried to remonstrate with the police officers of the Ja-ela police station for using bad language to his wife and cousin when they had gone to visit his wife's uncle who was in custody.<sup>93</sup>

#### **4.9 Corruption of medical officers and collusion of NHRC officers with police torturers**

In the case of *Garlin Kankanamge Sanjeeva*<sup>94</sup> whom the police claimed, committed suicide inside the police station, the medical report pertaining to his death was seriously impugned by the family. The Chamila Bandara case is a further excellent example. Whilst being a minor, he was tortured from 20<sup>th</sup> to 28<sup>th</sup> July 2003 at Ankumbura Police Station, ostensibly on grounds that he had committed a petty crime. He was hung by his thumbs and the Officer in Charge (OIC) hit him on his legs and the soles of his feet with wicket stumps used for cricket.<sup>95</sup>

This young boy was not produced before a Junior Medical Officer, for examination despite being admitted to the Kandy hospital for treatment. It was only, after being re-admitted to the Peradeniya Hospital, that Chamila was given a proper medical examination, as a result of which, doctors declared the impairment of the use of his left arm. The second stage in this saga came when his case was reported to the district area co-ordinator of the National Human Rights Commission (NHRC) who, going by only the police version, concluded that there had been no mistreatment. Desperate by this collusion of the NHRC officer with the implicated police officers, his family appealed to and its local partners. It was primarily as a result of this pressure that investigations were re-opened into Chamila Bandara's case by the National Human Rights Commission and the matter was handed over to a one man inquiry committee. Meanwhile, the members of his family were threatened by the police officers named as those responsible and Chamila himself had to go into hiding.

While this was ongoing, his case was taken by the AHRC before the United Nations Human Rights Committee at its seventy ninth session when it considered Sri Lanka's combined fourth and fifth Periodic Reports under the International Covenant on Civil and Political Rights (ICCPR). Chamila himself gave testimony before the members of the UN Committee.<sup>96</sup> Chamila Bandara's grievance was ultimately vindicated by the report of the one man inquiry committee of the NHRC which concluded that the young boy had, in fact, been tortured, as a result of which, his rights under Article 11, Article 12(1) and Article 13(1) and (2) had been violated.

The Officer In Charge of the Ankumbura police and other police officers serving under his command were found responsible. The final recommendation of the inquiry committee was that a copy of the inquiry report be sent to the IGP who should send severe warning to the individual police officers that any further instances of abuse on their part would result in a termination of their services.<sup>97</sup> Like in the case of similar directions by the Supreme Court, this too has been of no practical value in bringing about disciplinary action against the culpable police officers.

In addition, his case exemplifies a further problematic development at the stage of fundamental rights litigation. Individual Supreme Court judges now prefer to lay bye fundamental rights hearings in instances where a parallel High Court trial is taking place, ostensibly on the basis that the finding of the Court might influence the attitude of the High Court. For example, in *Chamila Bandara's case*, this is precisely what happened and the matter is now indefinitely laid bye.<sup>98</sup> This attitude continues to be taken despite the protestations of lawyers appearing for the victims that the inevitable laws delays attending the trial will also render the Supreme Court remedy, redundant and that, in any event, the two judicial proceedings are different and should be proceeded with differently.

#### **4.10. Impossibility of Ensuring Justice without Witness Protection**

Responsibility for the absence of a witness protection scheme speaks to the responsibility of the Department itself and the commitment of the State to ensuring justice. The extent



to which this has been a factor in crippling the criminal justice process<sup>99</sup> is clear. *Chamila Bandara* (cited above), together with his family members were threatened by the OIC of the Ankubura Police and, in consequence had to remain many years in hiding.

Similar patterns of intimidation are apparent in a large number of cases; *Lalith Rajapakse* learnt that there was a plot to poison him after he made the initial complaint against the respondent police officers and had to go into hiding. In the case of *Gerald Perera*, he was, in fact, killed after numerous threats by the police officers who had tortured him proved to be unsuccessful in coercing him to withdraw the litigation that he was engaged in.

## 5. Conclusion

There is no doubt that the failure of effective law enforcement is a central question in Sri Lanka today. A number of measures that should be taken to redress this failure have been outlined by the AHRC, including revision of the prosecutorial and investigative process and the initiation of an effective witness protection system.<sup>100</sup> A special police unit empowered to entertain complaints and immediately commence investigations is a necessity, not only in 'special cases' of torture (where international pressure is brought to bear on state authorities) but rather, in all cases.

Ideally, an office of a Special Prosecutor having the appropriate independence of office with independent investigative staff should be established.<sup>101</sup> The investigative/prosecutorial machinery set in place should follow special procedures in relation to investigating and prosecuting complaints by women victims of torture. Such an office would also better co-ordinate the present procedures in respect of examining urgent appeals by victims of torture instead of committees of government officials which is presently the case. has also urged the application of the doctrine of command responsibility, the use of developed forensic investigations and a detailed list of specific suggestions<sup>102</sup> relating to arrest and production in court<sup>103</sup> speedy investigations and filing of indictment under the Anti-Torture Act and initiation of community protection mechanisms.

The intensification of the conflict and the increasing breakdown of law and order in all parts of the country have led to incidents of disappearances, extra judicial killings in recent months, thereby creating a climate that is highly conducive to human rights abuses. This has been further enabled by the return to rule by emergency regulations conferring extraordinary powers of arrests and detentions on the forces which have had inimical effect in controlling and preventing practices of torture.

Thus, the essential crisis in Sri Lanka still remains the non-implementation of the rule of law. The shift from a central focus on this question to nebulous, (though highly profitable), ventures in peace and conflict resolution on the part of the country's non-governmental community has been unfortunate; it has wasted time and effort in processes that were doomed from the start precisely due to its flawed conceptualization. More

importantly, it has allowed sometimes insidious and sometimes sledgehammer attacks on constitutional institutions and indeed, the very Constitution to take place with scarcely a murmur; the result has been a calamitous breakdown of the governance process.

In this situation, talk of constitutional solutions to solve the 'ethnic problem' has been limited to rhetoric and political maneuvering; where constitutional provisions are blatantly abused by the political establishment in respect of governing the South, can there be any hope in such a Constitution providing any solution for the intractable war in the North/East?

The studies engaged in by and its partner activist networks in Sri Lanka, which have been examined in this paper, show the overriding importance of returning the reform process back to the basics of restoring the legitimacy of the justice system and in particular, the law enforcement process. This should, indeed, be the central focus of our work.

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- 1 The Independence Constitution in 1947 established the judicature as a body distinctly separate from the executive and the legislature and safeguarded minority rights in Section 29(2). But affronted by what it saw as an unwarranted bridling of their authority, the leftist United Front government which formed the government in 1970, deciding on an autochthonous or disastrously 'home grown' formula, specified that the legislature, (the National State Assembly) was the sole and supreme repository of power. All other institutions, including the judiciary, had to give way. Regardless of whichever government came into power then on, political expediency determined the course of constitutional and political events in Sri Lanka.
  - 2 The present constitution, available at <<http://www.priu.gov.lk/Cons/1978Constitution/Introduction.htm>>
  - 3 These developments were in sharp contrast to, for example, neighbouring post colonial India's commitment to the democratic norm and in particular, the constitutional environment where the right to life was recognised in many of its ramifications, including all the ingredients that go to make the quality of life, not just physical existence. The growth of public interest litigation was spurred by a receptive constitutional framework.
  - 4 Basil Fernando, '*The Tale of Two Massacres; The Relevance of Embilipitiya and Bindunuwewa to Conflict Resolution in Sri Lanka*', in Law and Society Trust Review, Vol. 15 Issue 212, June 2005
  - 5 As is currently the case with the Nordic backed Sri Lanka Monitoring Mission, (SLMM) which has, by now lost public support to a great extent
  - 6 The Chambers Dictionary explains 'praxis' as the practice or practical side of an art or science, distinguished from its theoretical side
  - 7 The Supreme Court has exclusive jurisdiction to hear and determine complaints of violation of fundamental rights (except the right to life) by executive or administrative action. Article 13(1) stipulates arrest only according to 'procedure established by law' and the giving of reasons for the arrest. Article 13(2) states that every detained person must be subjected to judicial supervision and that further detention must only be upon judicial order. Article 13(3) is to the effect that 'any person charged with an offence shall be entitled to be heard in person or by an attorney-at-law, at a fair trial by a competent court' while Article 13(4) prohibits the punishment of death except by order of a competent court. Article 11 states that 'No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'
  - 8 Sri Lanka has enacted domestic legislation to give effect to the UN Convention against Torture. Section 2 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act No 22 of 1994 (hereafter the Anti-Torture Act) makes torture, or the attempt to commit, or the aiding and abetting in committing, or conspiring to commit

torture, an offence. A person found guilty after trial by the High Court is punishable with imprisonment for a term not less than seven years and not exceeding ten years and a fine not less than Rs10,000 and not exceeding Rs 50,000.

- 9 Sri Lanka has always been governed by either the Sri Lankan Freedom Party (SLFP, a core constituent of the 1970 United Front government as well as of the modern Peoples Alliance) or the United National Party (UNP), often as coalition of other parties, mainly the SLFP with leftist parties and the UNP with minority parties. But these lines often being blurred contingent on expedient power politics.
- 10 *Senadheera Vs The Bribery Commissioner* 63 NLR 313
- 11 *Queen Vs Liyanage* (1966) 68, NLR 265, *Bribery Commissioner Vs Ranasinghe* (1964) 66 NLR 73
- 12 In *Bribery Commissioner Vs Ranasinghe*, *ibid.*, later affirmed by the Privy Council in *Kodeeswaran Vs The Attorney General* (1969 72 NLR 337) it was pointed out that section 29(2) of the Independence Constitution represented the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which *inter se* they accepted the Constitution and are therefore unalterable under the Constitution.
- 13 In place of the earlier independent Judicial Service Commission, a politically subverted Judicial Services Advisory Board (JSAB) and an ineffective Judicial Services Disciplinary Board (JSDB) was established. The JSAB had no right to appoint minor judges but only to recommend their appointment to the Cabinet. (Articles 126 and 127 of the 1972 Constitution)
- 14 Only one case alleging violation of fundamental rights was filed during this time in the District Court, *Ariyapala Guneratne Vs The Peoples Bank*, 1986 SLLR 338
- 15 Article 107. As in the two previous Constitutions, the security and tenure of the judges were guaranteed and judges of the superior courts held office during good behaviour and could be removed only after address of Parliament on grounds of proved misbehaviour or incapacity and that the full particulars of such allegations should be set out, vide Article 107 (2). The JSAB and the JSDB were replaced by a Judicial Service Commission (JSC) vested with the same powers. The JSC consisted of the Chief Justice and two other judges of the Supreme Court, named by the President, who could be removed only for cause assigned, vide Article 112.
- 16 Seven out of the nineteen judges holding office were not re-appointed, thus reducing their guaranteed tenure.
- 17 The attempted impeachment of then Chief Justice Neville Samarakoon allegedly due to criticism of the government by him during the course of a speech at a school prize giving ceremony was another black mark of this time. The Select Committee appointed to investigate his conduct (divided according to party affiliations), found no “proved misbehaviour” which could justify the Chief Justice’s removal but viewed his conduct as a serious breach of convention.
- 18 SC Application Nos 7-47/87 (Spl) and SD 1&2/87(Presidential Reference).
- 19 Article 126(2) gives the right to move court only to a person alleging the infringement of any right ‘relating to such person’, or an attorney at law on his behalf. Bona fide public interest groups, unlike in the Indian constitutional context, cannot come before court on behalf of a victim.
- 20 Only executive and administrative challenge is permitted. Judicial or legislative acts are not challengeable.
- 21 Article 16(1) of the Constitution. Article 121 of the Constitution provides that bills must be challenged within one week of their being placed on the Order Paper of Parliament. Even though there is a constitutional requirement to publish the bills in the gazette at least seven days before it is placed on the Order Paper of Parliament, vide Article 78 (1), the gazettes are not easily obtainable and offensive bills go unchallenged. In any event, this scrutiny is also brushed aside when the Cabinet certifies a bill as being urgent in the national interest. Here, the bill is referred directly by the President to the Supreme Court for its constitutionality and citizens have no formal right of challenge, vide Article 122.

- 22 It was only in 2003 that the Court inferred a positive right to life from the constitutional right not to be punished with death or imprisonment except by court order under Article 13(4). See, *Perera Vs Iddamalagoda* 2003 [2] SriLR, 63, per judgment of Justice Mark Fernando and the *Wewelage Rani Fernando case*, SC(FR) No 700/2002, SCM 26/07/2004, per judgment of Justice Shiranee A. Bandaranayake. These two cases are also authority for the proposition that a dependant has the right to come before court on a rights petition when a family member dies as a result of police torture. It took the Court more than twenty five years to affirm these core rights as being implied from the existent constitutional provisions.
- 23 Per Justice MDH Fernando in *Perera vs. Iddamalagoda (ibid)*, *Sanjeewa vs Suraweera*, 2003 [1] SriLR, 317, *Wewelage Rani Fernando (ibid)*, *Banda v. Gajanayake*, 2002 [1] SriLR 365, in the context of emergency regulations, *AM Vijitha Alagiawannawe vs LPG. Lalith Prema, Reserve Police Constable and Others* (SC (FR) No 33/2003 SCM 30.11.2004. *Deshapriya v. Weerakoon* SC 42/2002 SCM 8.8.2003. The principle asserted was that participation, authorization, complicity and/or knowledge is not compulsory for responsibility to be found on the part of a superior officer. This could arise purely on dereliction of duties. This principle was judicially stretched to encompass even an instance where an officer-in-charge of a police station fails to promptly record the statement of the Petitioner regarding his assault and to embark on an investigation in respect of the same.
- 24 *In re Perera* , SC 1/90; Supreme Court Minutes (“SCMP”) 18.9.1990.
- 25 *Joseph Perera Vs The Attorney General* (1992) 1 Sri LR 199, 230, *Shanthi Chandrasekeram Vs D.B. Wijetunge and Others* (1992) 2 Sri L.R. 293, *Channa Peiris Vs AG* (1994) 1 SLR 1 at p 51 and *Sunil Rodrigo Vs De Silva* (1997) 3 SLR 265 where the Court upheld the right of a detainee under emergency to be speedily produced before a magistrate and to have legal representation.
- 26 See, report by the United Nations Special Rapporteur on the Independence of the Judiciary in April 2003 to the UN Commission on Human Rights, (E/CN.4/2003/65/Add.1 25, February 2003) and several relevant press releases of the Special Rapporteur. See also, releases dated 27 February 2003 and 28 May 2003. Also Report of the International Bar Association, 2001 “Sri Lanka: Failing to protect the Rule of Law and the Independence of the Judiciary.”
- 27 The Chief Justice has absolute power to constitute benches to hear cases in the Supreme Court. One notable casualty of this practice was the then seniormost judge, Justice Mark Fernando who had, in fact, been bypassed for promotion in 1999 by President Chandrika Kumaratunge in favour of then Attorney General, S.N Silva. Thereafter, Justice Fernando was not assigned to sit on any bench hearing important constitutional matters despite court tradition to the contrary, given his seniority. He retired two years prematurely on the basis that he could no longer fulfil the expectations on which he had assumed judicial office.
- 28 In one instance in particular, involving three fundamental rights petitions filed against his own appointment, the Chief Justice constituted a Divisional Bench consisting of the most junior judges rather than the most senior, indicating a clear contempt for convention and precedent.
- 29 See, the State of Human Rights in Eleven Asian Nations-2006, Asian Human Rights Commission, in the chapter on Sri Lanka, at page 288. See among others, case of B.A.S. Surange Wijewardene (SC(FR) 533/2002, SCM 27.5.2005, where the compensation given was only SLR 15,000 divided between three respondents and the case of Palitha Tissa Kumara (SC(FR) 211/2004) where despite a finding of extensive torture, the compensation awarded was only SLR 25,000.
- 30 See the highly critiqued judgment by a divisional bench of the Court in the *Singarasa case*, (SCM 15.09.2006, judgment of Chief Justice Sarath Silva), ruling that Sri Lanka's accession to the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) was unconstitutional. This has posed direct obstacles to ongoing campaigns to pressurise the Sri Lankan Government to ratify the Optional Protocol to the Convention against Torture (CAT).
- 31 The United Nations Human Rights Committee has, up to date, delivered six Communication of Views against the Sri Lankan State in terms of the Protocol to ICCPR, namely *Fernando*

*Vs Sri Lanka* Case No 189/2003, Adoption of Views on 31, March, 2005), *Sarma Vs Sri Lanka* No 950/2000, Adoption of Views on 31 July 2003, *Jayawardene Vs Sri Lanka*, Case No 916/2000 Adoption of Views on 26 July 2002, *Ivan v Sri Lanka*, Case No 909/2000, Adoption of Views on 26 August 2004, *Sinbarasa Vs Sri Lanka*, Case No. 1033/2004 Adoption of Views on 23 August 2004 and *Rajapakse Vs Sri Lanka* Case No 1250/2004, Adoption of Views on 26 July 2006. However, there has been no implementation of these Views up to date. In some cases, such as in *Fernando* which involved a violation of ICCPR 9(1) as a result of the arbitrary sentencing for contempt by the Supreme Court, the government has replied to the Committee saying that it could not implement the Views since it would be construed as an interference with the judiciary.

- 32 Supra, note 26 , Report of the International Bar Association, 2001 “Sri Lanka: Failing to protect the Rule of Law and the Independence of the Judiciary
- 33 Interview by former Supreme Court Justice CV Wigneswaran, one of the most respected judges of the Court, to the *Sunday Leader*, (13.3.2005), consequent upon his retirement.
- 34 Act, No 19 of 1994
- 35 Act, No 21 of 1996, hereafter the NHRC Act
- 36 The requirement, for example, that the NHRC should be informed of any arrest and detention taking place under the Prevention of Terrorism Act, No 49 of 1979, vide Section 28(1) of the NHRC Act, is not adhered to. Indeed, the very requirement that any person with the authority of the Commission may enter into any place of detention 9Section 28(2) of the NHRC Act is defeated by police practice that had in fact, been formalized by a police circular which allows officials on the NHRC to inspect (with prior notice) only the cells of police stations themselves but not the entire precincts of the station including the toilets and the kitchen, where, most often, torture takes place.
- 37 This provision violates the Paris Principles in that “[a]n effective national institution will have drafted its own rules of procedure and these rules should not be subject to external modification.”
- 38 Relevant rules that would have permitted the NHRC to refer cases to the appropriate court as mandated by Section 14(3)(b) have not been yet prescribed by the Supreme Court.
- 39 Five individuals of high integrity and standing in public life and with no political affiliations, (out of which, three members represented the minorities), had to be nominated jointly to the CC by the Prime Minister and the Leader of the Opposition. One member had to be nominated by the smaller parties in the House, which did not belong to either the party of the Prime Minister or the Leader of the Opposition. In addition, the President had the authority to appoint a person of his or her own choice. The rest of the CC comprised the Leader of the Opposition, the Prime Minister and the Speaker of the House *ex officio*.
- 40 The Elections Commission was not constituted at all due to the President Chandrika Kumaratunge refusing to appoint the nominee of the CC as its chairman.
- 41 Though names of five nominated members were agreed upon by the Prime Minister and the Leader of the Opposition and communicated to the President for appointment as constitutionally required in late 2005, these appointments were not made. The deliberate delay on the part of the smaller political parties in parliament to agree by majority vote on the one remaining member to the CC was cited as the ostensible reason for the CC not being brought into being. The many representations made to the President by civil society groups that the one vacancy in the CC should not prevent the appointment of the members nominated already and that the consequent functioning of the body was essential to the good administration of the country, were to no avail.
- 42 AHRC, A Special Report on Torture, *article 2*, Vo1.1, No 4 August 2002, at page 2.
- 43 AHRC Second Special Report on Torture, *article 2*, Vo1 3. No 1, August 2002, at page 2.
- 44 Mission to Sri Lanka, 28 November – 6 December 2005, LST Review, Vol. 16, Issue 221 March 2006. He called on government officials to accept that disrupting this pattern of custodial torture is a necessary step not only in ensuring the human rights of those arrested

but also of retaining public trust and confidence.

- 45 *Konesalingam Vs Major Muthalif and Others*, S.C. (FR) No. 555/2001, SCM. 10th February, 2003.
- 46 *Shanmugarajah Vs Dilruk, S.I., Vavuniya*, S.C. (FR) No. 47/2002, SCM. 10th February, 2003
- 47 *Adhikary and Adhikary Vs Amerasinghe and Others*, S.C. (FR) No. 251/2002, SCM. 14th February, 2003
- 48 *Senasinghe Vs Karunatileke and Others*, S.C. (FR) No. 431/2000, SCM 17th March, 2003.
- 49 *Silva Vs. Iddamalgoda*, 2003 [2] SriLR, 63
- 50 Both in the *Chamila Bandara case* (AHRC UA -35-2003) and the *Wewelage Rani Fernando case*, (SC(FR) No 700/2002, SCM 26/07/2004) the police arrest was on the basis that the arrestee had stolen some bunches of bananas. The first petitioner, while being a minor was brutally tortured by the police while the second arrestee was brutally tortured by prison officials resulting in his death.
- 51 AHRC Urgent Appeals (UA-18-2004).
- 52 Complaints of torture recorded at police stations are first referred to the Assistant Superintendent of Police (ASP) or Superintendent of Police (SP) of the relevant area. If they are entertained, the legal division of the police refers them to the IGP who refers them thereafter to the Special Investigations Unit (SIU). The SIU (which is in charge of investigating all complaints against police officers (including fraud) and is currently completely under staffed) is directly under the command of the IGP. The IGP may also instruct the Criminal Investigations Department (CID) or another special unit of the police to conduct further investigations but this is exceptional. For years, domestic and international activist groups have been calling for an independent investigative and prosecutorial office to inquire into such complaints that invariably involve law enforcement officers themselves and which cannot be effectively inquired into by their fellow police officers particularly as postings at the SIU are transferable.
- 53 AHRC Third Special Report on Torture; An X-Ray of the Sri Lankan policing system and torture of the poor, at page 6
- 54 Section 23(1) of the Code of Criminal Procedure Act, No 15 of 1979 incorporates accepted procedures in relation to arrest, including the stipulation that the person making the arrest must inform the arrestee of the nature of the charge or allegation upon which the arrest is made. This provision of the Code in practice today reflects similar principles in the old Criminal Procedure Code to which it succeeded.
- 55 The case of Gerald Perera is an example. A law abiding employee of the Ceylon dockyard was arrested by the police under mistaken identity, considering him to be a known criminal by the name of "Gerald." He was tortured so severely that he suffered renal failure. The Fundamental Rights petition that he filed was upheld by Court, *Sanjeewa Vs Suraweera*, 2003 [1] SLR, 317.
- 56 AHRC UA-19-2002. He had been accused of involvement in two petty theft cases even though no one had filed any complaints against him and there was no proof to implicate him.
- 57 The case law is specific in this respect; see, *Amal Sudath Silva Vs Kodituwakku* [1987] 2 Sri LR, 119, *Senthilnayagam Vs Seneviratne* [1981] 2 Sri LR 187, *Dissanayake Vs Superintendent, Mahara Prisons*, [199] 2 Sri LR, 247, *Premalal de Silva Vs Inspector Rodrigo* [1991] 2 Sri LR 307, *Pellawattige (AAL) for Piyasena Vs OIC, Wadduwa* SC Application No 433/93 SCM 31.08.1994. In *Silva Vs Iddamalgoda*, 2003 [2] SriLR, 63, a specific argument that an alleged bad record of the petitioner should be held against him was dismissed by Court pointing not only to the presumption of innocence but also that by the respondent's actions in depriving the petitioner of life, he lost the opportunity to redeem the alleged bad record.
- 58 HC 9775/99, order of S. Sriskandarajah J.
- 59 AHRC Third Special Report on Torture; An X-Ray of the Sri Lankan policing system and torture of the poor, at page 7

- 60 AHRC-UA 07-2004
- 61 AHRC-UA 31-2004 (1 April 2004).
- 62 AHRC-UA 132-2004 (5 October 2004).
- 63 *Kemasiri Kumara Caldera 's case*, S.C. (F.R.) 343/99, SCM 6/11/2001.
- 64 See, *Sanjeewa Vs Suraweera*, supra note 55, *Silva Vs Iddamalgodu*, supra note 57, as well as *Dayaratne's Case*, (SC (FR) 337/2003 SCM 17.5.2004) where a senior attorney was severely assaulted for attempting to remonstrate with the police over the arrest of a neighbour's son, are some recent examples.
- 65 Vide 17th Amendment, Article 155A.
- 66 Vide 17th Amendment, Article 155G(1)(a).
- 67 Vide 17th Amendment, Article 155G (2). Italics added.
- 68 Though a Public Complaints Procedure was put into place by the second NPC, its legitimacy was negated by the fact that the members of this body were unconstitutionally appointed by the President as was discussed previously.
- 69 The rate is 4% see the State of Human Rights in Eleven Asian Nations-2006, Asian Human Rights Commission, in the chapter on Sri Lanka, at page 288.
- 70 In its reports to the UNHRC and to CAT, (UN Human Rights Committee (CCPR/CO/79/LKA) Human Rights Committee, seventy ninth session, November 2003 and Committee Against Torture (CAT/C/LKA/CO/1/CRP.2. 7-25 November 2005), the State referred to a special unit [Prosecution of Torture Perpetrators Unit (PTP Unit)] in the Attorney General's Department. Closer scrutiny reveals that there is no separate Unit dealing with torture cases and the Unit is only an administrative convenience with neither specially assigned staff nor separate premises. The torture cases are distributed among 4 - 5 State Counsels, who also handle other criminal cases. The AG does not seem to monitor investigations conducted by the SIU. Neither is the progress of an investigation reported to the AG.
- 71 Condensed from information afforded by the Attorney General's Department during interviews by researchers with its officers during 2004 for the preparation of a joint report to the 2005 CAT sessions by the Law and Society Trust and the Asian Human Rights Commission (AHRC).
- 72 Ibid.
- 73 The common unacceptable defence being that this is because most torture cases reported is from the North and the East and the conflict impedes expeditious proceedings. The recent situation of issuance of indictment consequent to the renewal of conflict in the North/East from 2006 onwards has not yet been ascertained.
- 74 AHRC, A Special Report on Torture, *Article 2*, Vo1.1, No 4, August 2002, at pages 14 and 15.
- 75 Id., at page 18 – situation existent as at August 2002.
- 76 S.C. (FR) No. 186/2001, SCM 23.8.2002
- 77 Citing Athukorala J in *Sudath Silva Vs Kodituwakku* 1987 2 SLR 119
- 78 Vide letter written by the co-ordinator of the urgent appeals programme of to then Minister of the Interior dated 9 September 2002, asking that the relevant police officers be indicted. – quoted at AHRC Special Report on Torture, *Article 2*, Vo1.1, No 4, August 2002, at page 52
- 79 The number of credible complaints of torture and cruel, inhuman and degrading treatment whilst in police custody shows no decline.” per observation of Justice Mark Fernando in *Sanjeewa vs Suraweera*, 2003 [1] SLR, 317. This is one of the many cases which recommended that disciplinary action be taken against the relevant police officers but was not adhered to.
- 80 Ibid.
- 81 *Fernando vs Sri Lanka* Case No 189/2003, Adoption of Views on 31, March, 2005)
- 82 Supra note 57
- 83 *Wewelage Rani Fernando*, supra note

- 84 *Sanjeewa vs Suraweera*, supra note, 55.
- 85 See, the State of Human Rights in Eleven Asian Nations-2006, Asian Human Rights Commission, in the chapter on Sri Lanka, at page 288
- 86 Ibid.
- 87 Ibid.
- 88 [2004] 1 Sri LR, 268. Also, *Adhikary and Adhikary vs. Amarasinghe and Others*, S.C. (FR) No. 251/2002, SCM 14th February, 2003), another recent case again involving a police assault on a lawyer where the Court ordered Rs. 20,000/- as compensation and Rs. 5,000/- as costs to be paid by the State.
- 89 Supra note. . . . .
- 90 (2000) 1 SLR 387
- 91 *Farook Vs Raymond* (1996) 1SLR, 217
- 92 AHRC, Article 2, Special Report on Torture, Article 2, Vo1.1, No 4, August 2002 at page 15
- 93 AHRC, A Special Report on Torture, *article 2*, Vo1.1, No 4, August 2002, at page 18 *Ekanayake Vs. Weeraawasam*, S.C. (FR) No. 34/2002, SCM 17th March, 2003 concerned the case of a a reserve police constable subjected to assault by a reserve sub inspector.
- 94 AHRC UA-41-2003
- 95 AHRC UA-35-2003. The same manner of torture was inflicted upon Galappathy Guruge Gresha De Silva (AHRC, *Article 2*, Volume1, Number 4, August 2002, p. 24).
- 96 It is notable that the representative of the State before the UNHRC specifically denied that torture had occurred when the case was brought to his attention by the UNHRC, more or less alleging that the allegations had been fabricated.
- 97 It later transpired that the one medical report adverse to Chamila Bandara, the victim, (which contradicted the other reports finding physical injuries compatible with the nature of the torture described by the victim), was written out by a doctor who had not seen or examined Chamila Bandara.
- 98 SCFR 484/2003
- 99 The need for such a scheme has been acknowledged by the then Attorney General himself, Mr. K.C. Kamalabayson who made the following observation in an address of December 2, 2003: "Another important feature that requires consideration is the need for an efficient witness protection scheme that would ensure that witnesses are not intimidated and threatened. No doubt this would involve heavy expenses for the State and amendments to the law. I will only pose a simple question. Is it more important in a civilized society to build roads to match with international standards spending literally millions of dollars rather than to have a peaceful and law abiding society where the rule of law prevails?" in remarks made during the 13th Kanchana Abhayapala Memorial Lecture as reported by in *The Right to Speak Loudly*, Asian Legal Resource Centre, 2004. Also, '*The authorities should diligently enquire into all cases of suspected intimidation of witnesses and establish a witness protection program in order to put an end to the climate of fear that plagues the investigation and prosecution of such cases*' Concluding Observation No 9 of the UN Human Rights Committee (CCPR/CO/79/LKA) Human Rights Committee, seventy ninth session, November 2003.
- 100 AHRC Third Special Report on Torture; An X-Ray of the Sri Lankan policing system and torture of the poor, at page 9
- 101 There is precedent for this in Sri Lanka in that the Office of the Public Prosecutor was first established in 1973 but was done away with after 1978. The manner in which this office was permitted to function was however, not free from political control.
- 102 AHRC Third Special Report on Torture; An X-Ray of the Sri Lankan policing system and torture of the poor, at page 12
- 103 Ibid. One useful recommendation is that suspects should be produced only before courts and not in the residences of magistrates given the practice that this manner of judicial scrutiny is often defeated by the judicial officer not even being shown the suspect.



# 3

## **Sri Lanka: Police Reform Initiatives within a Dysfunctional System**

• *Basil Feranand*

### **Introduction**

A peculiar feature that emerged through the study of the problems relating to the policing system in Sri Lanka is that the government sources, through various commissions, have identified the same problems which have been substantiated by independent sources.

That the system has become dysfunctional is a common finding. About the manifestation of such dysfunctionality there is no controversy. That a radical change is needed is also commonly acknowledged. However, in terms of any initiatives for change the issue of policing is not considered a priority by the government and even independent sources appear reluctant to make any determined effort in this direction. There also seems to be an underlying fear that any significant attempt to deal with the dysfunctional nature of the system may have adverse consequences on the country's political system and social life as a whole.

Such reform seems to be regarded as too formidable a task that no one is really willing to venture into. Besides this, there is also apparently an underlying fear that initiatives to change the habits that have entered into the system and the incumbents of the system may cause such retaliation that the political leadership does not feel competent to deal with. It is not the factual elements regarding the failed political system of Sri Lanka that creates controversy, but as to whether these problems can, or should be addressed. The suggestion made in this paper is that it is this overall problem of how to deal with these issues that needs attention, rather than diagnosis of the various aspects of the ailments that affect policing in Sri Lanka.

## **The premise**

Attempts to reform policing have been initiated in Sri Lanka more than once. Still the situation remains critical. The hypothesis taken in this article is that reform of dysfunctional policing system requires a discourse of more fundamental issues such as the nature of the political system within which policing has to take place.

This article speaks of policing only in areas outside the conflict zone of Sri Lanka in the north and the east. In many parts of the north and east large areas are outside the writ of the Sri Lankan police service. In some parts rebels claim to have their own police and judiciary. Such rebels include not only the LTTE but also some armed groups that are opposed to the LTTE. This work does not address the policing issues relating to these areas. It deals with those areas of the country within which the police system still operates under the ordinary law and legal procedures.

## **Studies on the policing system**

The Asian Human Rights Commission has closely studied the issues relating to policing in Sri Lanka for over ten years now. Some of the publications based on these studies are: Article 2, Vol. 1, No. 4,<sup>1</sup> Article 2, Vol. 3 No. 1,<sup>2</sup> a book entitled *An X ray of the Sri Lankan policing system & torture of the poor*,<sup>3</sup> and several reports submitted as shadow reports to UN agencies. Much of the material produced is available on the internet.<sup>4</sup>

There is no significant police reform initiative taking place in Sri Lanka at the moment. Previously there had been some commissions appointed by former governments which produced reports analyzing the problems facing the policing system and which made many recommendations for change. Given the drastic nature of the political and social changes that have taken place in the country, the contents of these reports may seem somewhat obsolete by now. However, for the purpose of record as well as to provide some reference to the historical roots of the present day policing system some mention of these reports may be useful.

## **A historical perspective**

The first of these reports is known as the Soertsz Commission Report which derived its name from the chairperson of the Commission, Justice Francis J. Soertsz and this report was submitted in December 1946. The title of the report was 'Sri Lanka police service – suggestions for improving its efficiency and effectiveness.' This was published as a sessional paper and covers such topics as the composition of the force; the conditions of the service and selection of officers for promotion and transfer; procedure for investigations of complaints made by the public against the police; the powers and duties of the police, especially in relation to preliminary investigations of offenses, the arrest and custody of the accused and suspected persons; the institutions of prosecutions in court and the expeditious conduct thereof; amendment of the police ordinance and of other

existing legislation for giving effect to the recommendations of the commission and a final chapter entitled 'miscellaneous' which covered such topics as Port Police, public prosecutor, criminal investigations department and political police.

Another commission report was published by the government publication bureau in October 1970 and this was named the Basnayake Commission. This commission's mandate was to cover the following issues: The nature and the scope of the functions of the Police Force, and the measures that should be taken to secure the maximum efficiency of the Police Force for the purpose of maintaining law and order, and to secure a greater measure of Public co-operation and confidence; the measures that should be taken to reorganize the Police Force, having regard to Ceylon's status as a independent country; the structure and composition of the Police Force, the methods of recruitment and training of personnel for the Police Force, the terms and conditions of service (other than basic rates of pay) and the selection of officers for promotion and transfer; the procedure that should be adopted for the investigation of complaints made by the public against members of the Police Force, especially in relation to –

- (i) the preliminary investigation of offences,
- (ii) the apprehension and custody of accused or suspected persons, and
- (iii) the institution of prosecutions in the Courts and the expeditious conduct thereof; the adequacy of the security and safeguards provided hitherto to members of the Police against risk to life and bodily injury involved in the performance of their duties, and the adequacy of the compensation hitherto payable where injuries were sustained, or where death resulted from any injury sustained, in the course of their duties; any amendments to the Police Ordinance and to other existing legislation which may be necessary for giving effect to our recommendations on the matters aforesaid or for securing the objects and purposes of such recommendations; and any other matter connected with, or incidental to the matters specified above in respect of which we may receive representations; and to make such recommendations as we may consider necessary as a result of our inquiries in respect of the aforesaid matters.

The report of a further commission was published in 1995 which is generally known as the Justice D.G. Jayalath Commission Report, the mandate of which was to examine and report on the following matters: The structure and composition of the Police Force; the methods of recruitment and training of personnel for the Police Force; the selection of officers for promotions and transfer; the nature and scope of functions of the Police Force and the measures that should be taken to secure the maximum efficiency of the Police Force for the purpose of maintain law and order; the measure that should be adopted to encourage better relation with the general public; the establishment of a Permanent Police Commission to administer recruitment, promotions and disciplinary control in the Police Service; any other amendments to the Police Ordinance and to other existing legislation which may be necessary for giving effect to the recommendations on the matters aforesaid or for securing the objects and purpose of such recommendations.

## **Some general observations on the previous studies**

Already in 1946 a serious crisis in the policing system was perceived and by 1970 much graver problems had surfaced. Then by 1995 a completely new set of problems had arisen due to larger politicization of the system and the introduction of paramilitary elements as policing units such as the Special Taskforce. None of the recommendations of the above commissions were put into effect.

## **The 17<sup>th</sup> Amendment to the Constitution- October 2001**

Perhaps the 17<sup>th</sup> Amendment was the most significant attempt made so far to recognize the serious problems in the Sri Lankan policing system together with several other public institutions. The central problem that this amendment tried to address was the politicization of the public services. This amendment provided for the appointment of a Constitutional Council who would have the obligation to appoint the commissioners for several commissions including the National Police Commission (NPC).<sup>5</sup> The NPC had the powers of appointment, promotion, transfer and disciplinary control of all police officers except for the Inspector General of Police. It also had the duty to establish a public complaints procedure. The first commission came to be appointed in November 2002 and by the end of the term of the first batch of commissioners the Constitutional Council had ceased to exist so that it was not possible to appoint the new commissioners. Ever since, there have been no appointments to the commission, by the procedure prescribed by the Constitution. In 2006 the Executive President made appointments to the commission bypassing the provisions of the constitution. As the NPC derived its authority from the constitution itself, the appointment of its members bypassing the constitution has raised questions about its legitimacy.

## **Identification of areas needing reform**

At the moment there are no reform programmes being undertaken by the police. However, there are many areas that have been identified by some senior police officers, international experts, as well as the public as major areas that need to be addressed in any serious attempt at reform. These are, the elimination of criminal elements from within the policing system; to reestablish command responsibility within the police hierarchy; the establishment of a credible system of criminal investigations; the elimination of torture as the most commonly used method of criminal investigation; the training of police in the more sophisticated methodologies of investigations including forensic training; measures to ensure police attendance in courts and compliance with court orders; the establishment of a proper system of disciplinary control within the police and the establishment of a credible public complaints procedure.

## **The elimination of criminal elements from within the policing system**

The Inspector General of Police himself recently identified the criminal elements within the police together with soldiers and deserters as being among the culprits for some of the very grave crimes in the country such as abductions, disappearances and murder which increased sharply at the end of 2006 and continuing into 2007.

**COLOMBO**, - Sri Lanka's police admitted Tuesday that its own security personnel have been involved in kidnappings for ransom and vowed to crack down on mounting abductions and killings of civilians. Police Inspector General Victor Perera said a "large number" of police officers and troops had been arrested on charges of abduction and extortion.<sup>6</sup>

The former Inspector General of Police who retired in 2006 also pointed out the criminal elements within the policing system.

.....While the IGP, referring to the Auditor General's latest report on the Police Department, is quoted as saying:

"...that corrupt officers were liable to be blacklisted, taking into account the corruption and fraud cases pending against them."

In the same article he went on to say:

"One of the shocking revelations highlighted in the AG's report was where certain senior officers had swindled thousands of rupees in the police cash reward scheme. Cash rewards of Rs. 1,500 were regularly paid to individuals or groups of police officers for outstanding service in the field but reportedly, the audit report highlighted occasions where the figures were altered to read Rs. 15,000."

And the IGP went on to remark that:

"...the audit report on individual police stations were so serious that if action was to be taken, then most officers would be liable to be sacked."<sup>7</sup>

In the aftermath of the assassination of the High Court judge, Ambepitiya, J, by a drug lord, there was much public criticism about high ranking police officers being linked with drug dealers and underworld figures.<sup>8</sup> However, perhaps it was the assassination of Inspector of Police (IP) Douglas Nimal and his wife that brought the most acute criticism against the police connivance with drug dealers. IP Douglas Nimal who was investigating several drug related crimes was arrested on false charges and later released by the Attorney General. He complained that some persons, including high ranking police officers, had implicated him in order to obstruct his investigations. He was murdered shortly after his release while traveling to pursue his complaints.

Dealing with the internal situation of the serious involvement of police officers in crime should be one of the primary aims of any police reform. A reform that leaves out this aspect is very likely to receive very little public attention, support or credibility. Perhaps the example of Hong Kong where a similar situation was successfully addressed through an agency outside the policing system itself, the Independent Commission Against Corruption (ICAC) should be seriously studied.

## **To reestablish command responsibility within the police hierarchy<sup>9</sup>**

The loss of command responsibility has been discussed from many points of view. One common point of reference is the politicization of the police by which is meant the politicians playing a direct role in the command responsibilities of the organisation. The debate on the 17<sup>th</sup> Amendment to the Constitution mentioned above was entirely on this theme. Political influence over the police is perceived to have extended to all aspects of the administration and often it is alleged that it also influences criminal investigations. The influence on the administration is on the selection of persons by way of recruitment as well as promotions purely on the basis of connections to individual politicians or a political party.

This also often affects transfers where one of the common fears is people being transferred to far away places or conflict zones as punishments for non-compliance with the demands of political elements.

The interference into investigations is that either due to direct interference or indirect forms of influence statements are not recorded or investigations are not proceeded with. There are instances when in the midst of sensitive investigations the investigating officers are transferred from their positions. Over a period of time many officers also learn “to read what will be approved and not approved by their political masters.” This behaviour can be so ingrained that they will avoid some investigations altogether, for example into cases such as extrajudicial killings, abductions, disappearances and the like.

Due to political interference often subordinate officers can become even more powerful than their superior officers. On the other hand when subordinate officers perceived that their superior officers behave in a manner to unduly cooperate with politicians the moral authority that such officers have is also lost. The instances are many when politicians deliberately undermine the high ranking officers in a way to get them to toe the line.

Under the Department Orders the specific duties of supervision are assigned to superior officers. An officer in charge at a police station has very specific duties regarding all the officers linked to a police station. An Assistant Superintendent of Police has duties to attend all police stations regularly at short intervals to read all the books maintained at the station as well as to be personally present at the crime scene in the event of investigations into serious crimes, were some of the requirements prescribed in the Departmental Orders.

In recent times there is a widespread complaint that this supervision often does not take place.

One of the factors that undermines the command structure of the police was the involvement of the police in gross human rights abuses during the periods when emergency laws and anti terrorism laws prevailed. In the post independence period, in the early decades such situations were few and sometimes the officers who engaged in such acts were disciplined. However, when various insurgencies broke in police officers together with military officers were used to eliminate insurgents which meant that they were allowed to abduct persons, keep people in illegal detention, to torture them and even to kill them and dispose of their bodies. The generally estimated number of such killings at the hands of the police and the military in 1971 when a minor rebellion led by a small group of persons was crushed ferociously by the Sri Lankan government is around ten thousand. No official inquiries have been held into this event. In the second phase of a rebellion by the same group, the JVP between 1987 and 1991 an official figure of around thirty thousand persons disappeared mostly in the south. Commissions were appointed to inquire into the periods in which disappearances were described as abductions followed by assassinations and the disposal of the bodies. These were also done by the police and the military personnel aided by paramilitary groups.

From the point of view of maintaining command this meant a tremendous lowering of standards and the loss of internal guidelines for the maintenance of hierarchical relationships and codes of conduct. These periods have also destroyed the morale of the law enforcement agency.

## **The establishment of a credible system of criminal investigations**

One of the most commonly expressed criticisms regarding policing in Sri Lanka by persons from within the system itself, by local and internal critics including some UN agencies is that in recent years the Sri Lankan police have not resolved any of the major crimes that have taken place in the country.

These crimes includes massacres such as the extrajudicial killings of the 17 aide workers in Muttur; killings by the military as well as insurgent groups (LTTE and other armed groups opposed to the LTTE); killings of journalists and other activists including human rights activists; large scale abductions and disappearances<sup>10</sup> throughout the country including in the capital Colombo. There are also of allegations about large scale corruption.

The reasons attributed to the weakening of the capacity of the Sri Lankan police to conduct credible investigations into crimes and gross violations of human rights is the lack of protection for the investigating officers, which arises from factors such as the politicization of the system as well as internal divisions within the policing system itself which can create serious physical risks for investigators; the increase of violence by terrorist elements and military elements in which investigations are prevented by the physical force

of alleged terrorist and military; the increase of links between criminals and the police (this was referred to earlier); the enormous increase of corruption throughout the country including within the political establishment; the breakdown of the judicial supervision of the investigating process and the lack of higher demand for credible criminal investigations maintained by the judiciary<sup>11</sup>; disruption of the system of command responsibility (this was also commented upon earlier); the lack of forensic facilities and training<sup>12</sup>; the development of nationalist sentiments which try to undermine the legal norms and standards with regard to crime. Added to these problems is the abandonment of the 17<sup>th</sup> Amendment by which even some limited interventions were made possible by the National Police Commission to intervene in order to deal with some of the problems mentioned above. The shocking impact of the absence of criminal investigations was revealed by Mr. Michael Birnbaum QC, on behalf of the ICJ who said,

“...to dispel serious concerns about whether the justice system is now able to carry out independent and credible investigations into who was responsible for these killings and to mount effective prosecutions.”<sup>13</sup>

## **The elimination of torture as the most commonly used method of criminal investigations**

“...Torture is often a short cut to getting information, and as a result it is systematic and widespread... We are not talking about isolated cases of rogue policemen: we are talking about the routine use of torture as a method of investigation. It requires fundamental structural changes to the police force to eradicate these practices.”<sup>14</sup>

“I had the privilege of addressing about 100 Inspectors on ‘Investigations techniques to minimize violation of human rights’ at a police department programme conducted by the United Nations Development Programme (UNDP) in early June this year. When I asked these officers their opinion of human rights, especially the aspect of torture, their observations were that they had to resort to the use of force to solve cases due to the following reasons:

- Sense of shame and loss of face if they fail to solve the case by recovering the weapon of the offence or the fruits of the crime, where there were several eyewitnesses testifying against the suspect.
- Lack of resources – personnel/vehicles, equipment etc. to pursue investigations;
- The period of custody of 24 hours being insufficient.
- Pressure from superiors to solve the cases, with the implications that the consequences of non-compliance or failure to successfully complete investigations within the time limit would result in unfavourable reports to their personnel file or other strictures, which would adversely affect their career prospects.



.....And when I asked them whether I was incorrect in saying that in almost all the instances of torture in police custody, the victims were the poor, the destitute and the defenceless, they sheepishly admitted it was so.”<sup>15</sup>

Sri Lanka enacted a law incorporating the Convention against Torture and Cruel and Inhuman Treatment Act (Act No. 22 of 1994). In terms of this act torture or cruel and inhuman treatment is punishable with a mandatory sentence of seven years of rigorous imprisonment and a fine of not less than Rs. 10,000/= . Over 50 cases have been filed and there are already two convictions. However, due to the long delay in the filing of these cases followed by long delays in the courts many victims come under severe pressure and many abandon pursuit of their case. The delay in adjudication and the absence of a witness protection programme defeats the purpose of Act No. 22 of 1994. Besides this the other factors regarding the dysfunctional nature of the policing system negates the possibilities of even positive legislation such as this act.

## **The training of police in the more sophisticated methodologies of investigations including forensic training**

While there are some attempts with the assistance given by organisations such as SIDA there have been some improvements in the education of some officers on forensic issues. However, there has not been any systematic attempt to replace the earlier model of obtaining oral evidence through torture by the introduction of new methodologies of investigation. The core of the problem is that within a system that has become dysfunctional due to the reasons described above training and even the introduction of new knowledge and technology is of little use. Often there is talk about improved forensic education as the solution to the crisis faced by the police force. However, this can be valid only when much more serious problems which affect the entire organisation are addressed.

The significant role played by the Police Force in the administration of criminal justice makes it an integral component of any strategy aimed at curbing crime. Therefore it is important that the Police Force be geared to perform at its maximum potential. The Police reforms proposed herein are intended to achieve progressive changes in Policing practice and provide a framework for improving standards, reliability, consistency and responsiveness within the Police Force.

In this regard Senior DIG Chandra Fernando was invited by the Committee to discuss and help identify the several problems, which appear to mitigate against the capacity of the Police Force to provide an efficient service with regards to the implementation of criminal justice.

This discussion highlighted the need for a reform programme aimed at improving the performance of the Police Force making it more flexible through diversity and workforce modernization, increasing its capacity, providing better conditions, training and development and investing in communications, IT, forensics and best practice.<sup>16</sup>

a) Lack of material resources: The lack of technological support and equipment in the context of modern investigative techniques.

The Committee believes that the drive for better performance goes hand in hand with the need to provide new resources, tools and technology to the Police. However, the primitive nature of investigative techniques presently used by the Police i.e. outdated fingerprinting technology and the lack of rudimentary investigative equipment such as Polygraph machines (lie detectors) in Sri Lanka, highlight the urgent need to invest in equipment relating to IT and forensics.

Therein the Committee strongly recommends that scientific and technological support for criminal investigations be significantly improved in order to facilitate a meaningful effort in curbing crime.<sup>17</sup>

## **Measures to ensure police attendance in courts and compliance with court orders**

One of the revealing factors about the nature of the policing system in Sri Lanka is a finding by the same committee which submitted its final report in April 2004 and identified the failure of the police to comply with court orders to attend court as one of the major reasons for the delays in courts. The committee made the following recommendation:

The Committee makes the following additional recommendations pertaining to the Police in the context of advancing best practice:

a) Compulsory attendance: The Committee recognises the need to introduce administrative measures requiring Police Officers to attend Court on a compulsory basis, in view of the frequency with which Police Officers obtain leave and abstaining from Court sighting inappropriate grounds, which has been observed to result in unnecessary disruption of Court proceedings in the recent past.

In this regard the Committee recommends that the Ministry of Justice advise the Judicial Service Commission (“JSC”) and the judges Institute to educate Judicial Officers on the necessity to take prompt and appropriate action against Police Officers who default on appearances on inappropriate grounds.<sup>18</sup>

The recognition of this factor is significant in that it shows a breakdown of the link between the courts and the police. Under the present circumstances it is difficult for the magistrates to give the necessary orders to the police relating to investigations and the matters relating to the basic rights of citizens. This breakdown may be traced back to times of the beginning of the insurgencies in 1971. Ever since the police have used the excuse of having to attend to other duties such as the security functions or for providing security for politicians as matters that need to be given higher consideration than attendance in court. The police hierarchy has done very little to correct this situation despite of a

government appointed committee having recognized this as one of the fundamental aspects affecting the administration of justice.

## **The establishment of a proper system of disciplinary control within the police and the establishment of a credible public complaints procedure**

It is also admitted that the disciplinary process within the police is quite primitive and the safeguards for complainants is very limited. The National Police Commission has itself pointed out that despite of large numbers of complaints received against police officers the number actions taken against them are very few. The 17<sup>th</sup> Amendment to the Constitution itself recognized the need for the establishment of a public complaint procedure. The article 155G requires that such procedure should be established. In January 2007 by a Gazzetted notification the National Police Commission announced such a procedure. However, still the system of the conduct of investigations has not been changed.

The problem of police discipline is linked to the more fundamental problems of a dysfunctional system and cannot be dealt with in isolation purely by instructions to improve discipline.

## **The conditions needed for police reform**

A question that has been raised by many persons during the course of the last ten years of the Asian Human Rights Commission's study on Sri Lankan policing is that whether a system such as the one existing in Sri Lanka can be reformed at all. Such concerns are expressed by senior criminal lawyers, judges and other intellectuals including some policemen themselves. When speaking privately most policemen admit that there is something gravely wrong with the system and that there is no serious discourse at all about putting this right.

All these conversations remind us of the great fall of Humpty Dumpty that not all the king's men and all of the king's horses could not put Humpty Dumpty together again.

Therefore discussions about police reform should concentrate more on the factors that contribute to making systems dysfunctional rather than minor aspects of reforms such as the introduction of forensic science and the like.

## **The need for a change discourse on police reforms**

The type of crisis that the Sri Lankan policing system faces is a part of a larger political and societal crisis. The salient question is as to what type of policing the state as well as civil society wants to have. So long as the state fears the development of an efficient policing system as a threat to the way the state exists in the country at the moment the

implicit answer to that question is that the state has allowed the system to become dysfunctional. An efficient policing system will threaten the existing pattern of misrule abuse of power and corruption.

As long as the state and society cannot arrive at an agreement to eliminate these factors the talk of police reform will remain of little practical value. The real problems are the issues of the nature of the state and the role that the policing system has to play within such a system.

It is respectfully submitted that mere discussions on the introduction of forensic science or the improvement of training and the improvement of discipline of the police will contribute little to the understanding of the magnitude of the problem or the finding of solutions.

A regional and international discourse on the dysfunctional policing system, the causes of such dysfunctionality and the overall approach to deal with it will contribute more to solving not only the problems of policing but also of some of the basic problems of the rule of law and democracy. The experiment made by Hong Kong with the Independent Commission against Corruption in 1974 is a relevant experience in studying a more fundamental type of police reform that while reforming the policing system also contributes to overcome some of the basic problems affecting the political system within a country.

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1 Please see: <http://www.article2.org/mainfile.php/0104/>

2 Please see: <http://www.article2.org/mainfile.php/0301/>

3 Published by the Asian Human Rights Commission, (September 2005), edited by Basil Fernando & Shyamali Puvimanasinghe

4 Please refer to the following web sites: [www.ahrchk.net](http://www.ahrchk.net), [www.alrc.net](http://www.alrc.net) & <http://www.article2.org/>

5 The mission statement of the NPC as shown in its website at [www.npc.gov.lk](http://www.npc.gov.lk) reads as follows: Our Mission: Transforming the Sri Lankan Police into a truly modern elite force with emphasis on respect for rule of law, professionalism, transparency, and responsiveness to public aspirations.

6 March 6, 2007 (AFP)

7 Daily Mirror – March 7, 2006

8 Justice Ambepitiya was assassinated on November 21, 2005 and later an alleged drug lord and some of his accomplices were convicted for the killing. While there were several allegations against some senior police officers in the press during this period no official inquiry was conducted into the matter.

9 For a detailed statement on the collapse of command responsibility please see Chapter 15 of *An X ray of the Sri Lankan policing system and torture of the poor* published by the Asian Human Rights Commission, (September 2005), edited by Basil Fernando & Shyamali Puvimanasinghe.

10 The Human Rights Commission of Sri Lanka has mentioned over 100 such abductions and disappearances since September 2006.

- 11 The Sri Lankan judiciary has not intervened in dealing with the failures of the criminal investigations in the way the Indian Supreme Court has done in its judgement on the Best Bakery case (Zahira Habibulla H Sheikh and Anr. PETITIONER, State of Gujarat and Ors. RESPONDENT, CASE NO.: Appeal (crl.) 446-449 of 2004). The court in its judgement found that "... the justice delivery system was being taken for a ride and literally allowed to be abused, misused and mutilated by subterfuge." The court blamed "the investigation ... [was] perfunctory and anything but impartial, without any definite object of finding out the truth to book those who were responsible for the crime. The public prosecutor appears to have acted more as a defence counsel ... The Court is turn appeared to be a silent spectator, mute to the manipulations and ... indifferent to [the] sacrilege being committed to justice. The role of the State Government ... [suggests] that there was no seriousness ... in assailing the trial court's judgment." The Supreme Court stated "crimes are public wrongs [in which] ... it is not just the accused who has must be fairly dealt with." Faced with "political patronage ... muscle and money power," the Court has an obligation to get to the truth. The hesitation of the witnesses was directly traceable to money, muscle and politics. In this situation, courts had to take a "participatory role" and were not mere "tape recorders." In ordering a re-trial, the Court was not punishing the accused but giving truth a second chance.....
- 12 See the Absence of forensic facilities by Dr. Clifford Perera, Department of Forensic Medicine, Faculty of Medicine Galle, Sri Lanka at Chapter 16 of *An X ray of the Sri Lankan policing system and torture of the poor*.
- 13 Please refer to the AHRC statement at the following link: <http://www.ahrchk.net/statements/mainfile.php/2007statements/950/>
- 14 Dr. Radhika Coomaraswamy, in an interview with Lorna McGregor of REDRESS quoted in the ALRC alternative report to the second periodic report of Sri Lanka to the Committee against Torture – September 2005
- 15 Please refer to Chapter 4 of *An X ray of the Sri Lankan policing system and torture of the poor*.
- 16 Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigation and Courts. This committee was appointed to submit a report to the government on the eradication of laws delays. The committee consisted of the following: Mr. C.R. de Silva P.C. (Chairman) Solicitor General, Mr. Ranji Abeysuriya P.C. Attorney-at-Law, Mr. N.S. Rajapakse High Court Judge, Mr. M.N. Burhan Magistrate, Mr. Dappula de Livera Senior State Counsel.
- 17 Ibid
- 18 Ibid

# 4

## **Legal Systems Exposed to Adverse Circumstances Become Endangered and Extinct**

• *Basil Feranand*

Everything is related to everything else, is regarded as the first law of ecology by environmentalist Barry Commoner. A legal system of a nation is connected to multitude of factors in a society. This connection could be straight or circuitous. Social, political and legal institutions and practices of a society are linked, capable of influencing each other. There, a single action can have multidimensional consequences, beneficial or detrimental.

The hypothesis of this article is that when a legal system is exposed to extremely adverse conditions and such conditions continue to last for a considerable period, the very existence of such systems may be endangered. Unless extraordinary measures are taken to reverse the process, it may become extinct.

The premise of this paper is that natural resources and societal developments achieved in earlier times can be wiped out by the adverse actions of human beings in the course of history. Nature illustrates this principle. It is an accepted fact now that global warming is the price we pay for indiscriminate exploitation of nature and inconsiderate technological development. Global warming is predicted to cause colossal natural disasters. The recession of the Dead Sea has been the subject of concern and much is talked today about the death of the Dead Sea. It is said that the premier cause of the recession of Dead Sea is the diversion of rivers by neighbouring countries for development purposes, reducing the amount of water that used to flow into it.

Another such resource considered lost is the Aral Sea which is located between the Uzbekistan and Kazakhstan. Following the Russian revolution, attempts were made to increase cotton production for export purposes and to this end irrigation channels were created, which diverted water flowing to this land locked sea. The results were the drying up of the sea and the spread of pollution which was the result of the chemicals used for production. It flowed into the rivers and were deposited on the river beds. When the rivers dried up these chemicals were carried by the winds to far away places, causing damage to agriculture and other environmental problems.

Similar catastrophes are replicated in societies. In this essay is concentrated on the dangers caused to legal systems by adverse actions taken by various governments at different times. Such adverse actions could be arbitrary changes of constitutions, suspension of civil liberties through various emergencies and anti terrorism laws, state sponsored violence by way of disappearances, extrajudicial killings, torture, sending prisoners to exile, prolonged civil wars and the like. The dangers, such actions pose to the entire legal system and particularly the impact on criminal justice system, is examined here.

Replacement of a constitution is the most adopted method to displace a legal system. The new Constitution would be designed such as to free the vested interests from the entrenchments, checks and balances of the earlier constitution. More often than not, it is experienced that a ruler who came into power by election would purge the powers and privileges of parliament, the judiciary and other democratic institutions to restrain their legitimate powers and actions. The case of a military dictator or an authoritarian ruler goes without saying. Such actions let the executive directed by a person or a few, rise above other institutions and be "free". Here the other organs of the government become dormant, non existent or tools in the hands of the ruler/executive.

The perils of the continuance of such a situation for a long time are the diminishing knowledge about the working of democratic institutions and constitutional government by the people. They will be forced to forget about the avenues of judiciary and parliament as recourse of legal redress. For the people, non effective institutions will not be a choice of legal remedy, and the resultant non use of these avenues will make them vanish slowly, creating a vicious circle difficult to break.

Displacement of constitutional law also affects public law. The citizen's right to challenge government actions can be restrained by various types of immunities that the executive arrogates to himself. Complete or partial removal of judicial review is one of the strategies used to prevail over democratic norms. Constitutional changes can also bring in restraints on the operation of writ jurisdiction of courts. The constitutional provisions may remove the power of the courts to intervene in matters in which the courts were otherwise able to intervene. Such actions will also diminish the peoples' faith in the judiciary that should be able to restrain the abuse of power by the executive. Absolute power reformulates the constitution to liberate the executive and set it to a course where it can be its own master. Such a situation redefines abuse of power, making whatever it does, legitimate.

Politically speaking, it is an extremely ridiculous situation, when one group or another in a country, for example, a military group, declares that the constitution has been suspended. Such declaration is of severe magnitude. The Constitution is the basis of laws and the legal system and is the supreme law of the land. When the paramount law of the country is suspended, the entire law of the country will be overhanging. It is the military rule or dictatorship that prevails. When the entire legal system is suspended the impending question is the basis of authority of the military or dictatorship to rule and from where their power emanates. The answer is obvious; it is sheer muscle and gun power. On such takeovers, much propaganda will be carried out to give the appearance of a decent, harmless

and necessary coup. However, the real impact of such a situation is that the people are brought under the naked power of the gun and the unrestrained power of individuals who can decide and do whatever they wish.

What would be the impact of this on the population that is watching this exercise? What value will they attach to a constitution whether it is the displaced constitution or the one that may be enacted in the future? The very idea of a paramount law that stands above everyone is lost, and when this situation continues, it can be gone for a very long time. Such loss affects the sense of law in the affected population as well as in the future generations.

Suspension of a constitution may be in part also; even then it produces similar effect of complete suspension. Suspension or repeal of the constitution may be affected for bringing in emergency laws or anti terrorism laws. In essence, special emergency or anti terrorism laws mean, removal of the restraints available within the ordinary laws against arrests, detention and fair trial. The elimination of such restraints paves way to torture, extrajudicial killings and forced disappearances. Often, such emergency or anti terrorism laws also do away with the judicial intervention into inquiries of suspicious deaths. The power of burial without reference to the judiciary virtually makes it possible to carry out extrajudicial killings and to dispose of bodies without leaving any trace for future criminal investigations. Such emergency and anti terrorism laws can also make habeas corpus applications futile. Thus, all basic aspects of criminal justice within a democratic and a rule of law system can be taken away with just a few clauses of emergency regulations and the absence of constitutional protection.

The implication of such special laws would be an overarching executive that controls the everyday life of the citizens. The judiciary will be made ineffective wiping away the defenses available against such executive and all that could be expected will be its mercy. Rights will have to be forgotten as there is no avenue to claim them. In such state of affairs people will be slipped into a mindset of ill faith in judiciary and the value of judicial officers will diminish. The role of the judiciary will be marginal and people will begin to perceive the officers of judiciary and offices there under as unimportant and powerless as they are incapable of carrying out the legal functions expected of them in a system of democracy and rule of law.

Where the government, elected or otherwise, brings substantive limitations on personal freedoms and laws of arrest, detention and fair trial by way of draconian special laws, the section of criminal investigation wing within the criminal justice system suffers the most. In a system operating under democracy and rule of law, it is the criminal investigation branch that does the most primary function which activates the other sections of the criminal justice system. It is the investigating branch that investigates crimes including abuse of human rights and who has the task of uncovering what had actually taken place. It is this investigating branch that gathers the factual information, which is the base material on which all the evidence is built. Without the initial work of the investigating branch neither the prosecutors nor the judiciary can effectively function. It is also not possible for the government and the public to form proper opinions of what has taken place when criminal investigations do not take place appropriately.



When either a military group occupies power or the military gains more power under the emergency rules and anti terrorism laws, there develop conflicts between civilian policing systems and the military system in the country. When the two works parallel, the outcome would be restrictions over the civilian police as the military assumes more power. There develops all sorts of undercurrents in which the military exercises its dominance over the civilian police. Under these circumstances there is often the complaint that the habits of civilian policing are being lost and that the police become militarized to some extent.

The influence and control of the military over civilian policing is even worse when allegations of abuse of power and the commission of gross abuse of human rights are leveled against the military or those who are working in collaboration with the military. The civilian police will be asked to investigate such military abuses. The civilian police under these circumstances is crippled without legal powers to carry out effective investigations into such abuses. Daring investigators are likely to face serious threats to their lives and liberty, as experience witness. The same state which authorizes the abuse of power by the military cannot provide the protection needed for investigators to probe into crimes. Under such circumstances civilian police undergo a sudden transformation in which it begins to restrain itself in order not to interfere into areas which are in conflict with the military powers. Again under these circumstances the criminal investigating capacity of the civilian police suffers immensely.

Criminal investigations involve many faculties and constant training and updating of techniques. Practices of criminal investigation are sometimes formed through years of training and hard work. For adopting the strategies and methods developed worldwide, training and educational programmes have to be convened. Usually the police force being a cadre organization, learn and develop habits from their seniors either being prompted or imbibing them. It is through the continuity of practice that durable habits of investigation become entrenched within the investigating branch of the state. Police investigation has to keep the delicate balance between bringing culprits to books and to respect the rights of the persons involved in the process. This difficult equilibrium is reached only by an orientation towards respect for rights and constant development of skills. It is here the direction and supervision of the superior officers becomes significant. The relationship between superiors and subordinates are kept up through various forms of report writing, analysis and assessments. Both the superior offices and the subordinates have to learn many practices which ensure discipline in order to make a system of supervision effective.

The intermission or relegation of power of the civilian police by the government and suspension of laws in favour of special laws makes discontinuity in the investigation system. The skills they learned will be lost and constant up gradation would be non existent. Over a certain period of time when the rules of responsibility for dealing with all crimes is removed, when only selected investigations are allowed, and even worse when the investigations are carried out not to discover the facts but to cover up situations, a criminal investigation branch goes through a metamorphosis. Once such a transformation takes place, it is not possible instantly to bring it back to a normal situation even through the introduction of a new democratic constitution or the removal of emergency and anti terrorism laws. It will take a long period to reestablish professional approach and attitude in criminal investigations.

**T**he conclusion of the above discussion is very clear. Whatever might be built over a long period of time to establish the authority of courts, the capacity of criminal investigators and the functioning of a justice system, it can be lost by adverse actions as mentioned above and if such actions are continuing for a long period, the whole system may become extinct. The names and titles, such as judges, criminal investigators, prosecutors and the like may remain the same. However, the substance of their power and capacity is so transformed that the system which they represented will exist no more. When that takes place these names and title holders themselves are aware of their diminished status. Worse is that the entire population also realise the title holder's devalued standing. Internally, the mentalities of the bureaucracy as well as the people go through a transmutation. Only the façade of justice remains.

When the justice system goes through such a fundamental transformation it affects all areas of life including the functioning of vital institution such as parliament. One of the most common myths in recent times is that having a parliament would establish democracy by itself. However, when parliaments cannot rely on the support of a viable justice system, or have power to sustain one, as needed within a system of democracy and rule of law, the institution parliament itself becomes ineffective and often befall as a mockery. One may witness today many authoritarian systems, which while maintaining parliaments, do not attribute any real power to them. When a strong justice system does not support the parliament in protecting it from the control of the executive there is very little that a parliament can do to protect itself. This is because in a democracy these institutions are complimentary. Thus, despite of the existence of parliaments a group of persons gathered as military leaders or even civilian leaders can effectively take all the control and all effective powers of ruling.

Within those circumstances a justice system would be challenged weakened and extinct altogether.





ASIAN HUMAN RIGHTS COMMISSION

19/F, Go-Up Commercial Building  
998 Canton Road, Mongkok  
Kowloon, Hong Kong  
Tel: (852) 2698 6339  
Fax: (852) 2698 6367

ISBN 978-962-8314-33-1



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